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## TOWARDS ACTION AND IN PURSUIT OF SCOFFLAWS:

### SHIFTING THE FRAMEWORK OF PANDEMIC PUBLIC HEALTH PUNISHMENT FROM THEORY TO PRAGMATISM

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#### I. INTRODUCTION

Face masks have a storied history in the United States. In the 17<sup>th</sup> century, plague doctors donned sinister beaked masks, which likely spelled death.<sup>1</sup> By the late 1800s, physicians

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<sup>1</sup> Catherine Carstairs, *A Brief History of Masks from the 17<sup>th</sup>-Century Plague to the Ongoing Coronavirus Pandemic*, THE CONVERSATION (July 27, 2020), <https://theconversation.com/a-brief-history-of-masks->

studying theories of disease transmission via respiratory droplets paved the way for the modern medical mask we see today.<sup>2</sup> As technology has evolved, mask-wearing has become a reliable tool to prevent disease spread, particularly for healthcare workers.<sup>3</sup> This, of course, applies in a broader public health context as well, just look at countries like Japan and South Korea which have used face masks to fight infectious disease spread since the 1900s.<sup>4</sup> Where disease spread becomes sufficiently dire, governments implemented emergency mask mandates to promote widespread use—such was the case during the 1918 influenza pandemic.<sup>5</sup> However, if we compare the U.S. during the 1918 pandemic and the COVID-19 pandemic, we see that the use of mask mandates is a tale of two cities, both temporally and spatially.

Temporally, mask mandates during the 1918 pandemic are similar to mask mandates during the COVID-19 pandemic in the sense that there was a great spatial dissimilarity among jurisdictions. In addition, in 1918, some promoted mask-wearing as a patriotic civic duty, but non-compliance led health departments to pass mandates which were, in turn, met with

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from-the-17th-century-plague-to-the-ongoing-coronavirus-pandemic-142959; Kaitlyn Tiffany, *Dressed for the Plague. No, Not This One.*, THE ATLANTIC (Dec. 14, 2020), <https://www.theatlantic.com/technology/archive/2020/12/pandemic-cosplay-tumblr-plaguecore/617369/>.

<sup>2</sup> *Uncovering the History of Medical Face Masks in the Time of COVID-19*, CLINICAL ONCOLOGY NEWS (Mar. 31, 2021), <https://www.clinicaloncology.com/COVID-19/Article/03-21/Uncovering-the-History-of-Medical-Face-Masks-In-the-Time-of-COVID-19/62804>.

<sup>3</sup> Bruno J. Strasser & Thomas Schlich, *A History of the Medical Mask and the Rise of Throwaway Culture*, 396 LANCET 19-20 (2020).

<sup>4</sup> Heewon Kim & Hyungsub Choi, *COVID-19 and the Reenactment of Mass Masking in South Korea*, 43 HIST. PHIL. LIFE SCI. 44 (2021).

<sup>5</sup> Bayliss Wagner, *Fact Check: During Spanish Flu Epidemic, Refusal to Wear a Mask Led to Jail Time for Some*, USA TODAY (Dec. 17, 2021, 6:19 PM),

<https://www.usatoday.com/story/news/factcheck/2021/12/17/fact-check-during-spanish-flu-mask-slackers-faced-jail-time/8929102002/>.

mass protests and outcries of infringement on civil liberties.<sup>6</sup> Individuals refused to wear the masks, and businesses refused to turn away unmasked customers.<sup>7</sup> Other health officials opted against mandates altogether.<sup>8</sup>

This divide in both the public approach and private sentiment has been essentially replicated today. Despite the presence of therapeutics (and eventually viable vaccines<sup>9</sup>), most public health officials have spoken in favor of not only using masks to deter the spread of COVID-19 but also to mandate their usage in certain conditions, particularly in response to highly infectious variants.<sup>10</sup> The result for some has been compliance, and for others, nostalgic defiance based on individual liberties.<sup>11</sup> History has repeated itself; our government officials and the general populace are divided, raising the question of what is the proper role of public health action and of government punishment during a pandemic.

The goals of public health are many. Primary is the protection of the health of populations rather than that of

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<sup>6</sup> J. Alexander Navarro, *Mask Resistance During a Pandemic Isn't New – in 1918 Many Americans Were 'Slackers'*, U. MICH. HEALTH BLOG (Oct. 29, 2020 8:43 PM), <https://healthblog.uofmhealth.org/wellness-prevention/mask-resistance-during-a-pandemic-isnt-new-1918-many-americans-were-slackers>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Different COVID-19 Vaccines*, CENTERS FOR DISEASE CONTROL & PREVENTION (June 24, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines.html>.

<sup>10</sup> Rebekah E. Gee & Vin Gupta, *Mask Mandates: A Public Health Framework for Enforcement*, HEALTH AFFAIRS FOREFRONT (Oct. 5, 2020), <https://www.healthaffairs.org/doi/10.1377/forefront.20201002.655610/full/>; Selena Simmons-Duffin, *As Omicron Spreads, Health Experts Push for Mask Mandates. But Few States Have One*, NPR (Dec. 16, 2021, 5:01 AM), <https://www.npr.org/sections/health-shots/2021/12/16/1064668750/state-mask-mandates-omicron>.

<sup>11</sup> Emily Stewart, *Anti-maskers Explain Themselves*, VOX (Aug. 7, 2020, 7:40 AM), <https://www.vox.com/the-goods/2020/8/7/21357400/anti-mask-protest-rallies-donald-trump-covid-19> (“[s]ome of the people I spoke with drew the line, specifically, at government mandates. It’s one thing for a private business to require customers to wear a mask, they said, but another thing for a state government to do it.”).

individuals.<sup>12</sup> This concept is not limited to just disease prevention, as public health also extends to promoting or deterring certain behaviors, reducing the impact of natural disasters, and increasing access to health services.<sup>13</sup> In addition, public health has increasingly emphasized equity in its implementation.<sup>14</sup> Whereas healthcare is most often associated with principles of individual autonomy (think informed consent and confidentiality),<sup>15</sup> public health's population-wide focus entails a "pervasive utilitarian component."<sup>16</sup> Many even consider public health to be "rooted in utilitarian ethics."<sup>17</sup>

Broadly speaking, the field of public health has largely been able to meet its stated and philosophical goals and has significantly contributed to the massive increase in U.S. life expectancy.<sup>18</sup> Additionally, barring recent pushback concerning religious rights during the COVID-19 pandemic, challenges to public health interventions have largely been unsuccessful.<sup>19</sup>

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<sup>12</sup> See *Public What is Public Health*, CDC FOUNDATION, <https://www.cdcfoundation.org/what-public-health> (last visited Aug. 31, 2021).

<sup>13</sup> See Peter Bloland et al., *The Role of Public Health Institutions in Global Health System Strengthening Efforts: The US CDC's Perspective*, 9 PLOS MED. 1 (2012).

<sup>14</sup> Kathryn MacKay, *Utility and Justice in Public Health*, 40 J. PUB. HEALTH e413 (2017).

<sup>15</sup> See Carlo Petrini, *Theoretical Models and Operational Frameworks in Public Health Ethics*, 7 INT'L J. ENVIRON. RES. PUB. HEALTH 189, 191 (2019).

<sup>16</sup> *Id.*

<sup>17</sup> See *Utilitarianism in Public Health*, INSTITUT NATIONAL DE SANTÉPUBLIQUE QUÉBEC (Jan. 2016), [http://www.ncchpp.ca/docs/2016\\_Ethics\\_Utilitarianism\\_En.pdf](http://www.ncchpp.ca/docs/2016_Ethics_Utilitarianism_En.pdf).

<sup>18</sup> Eileen M. Crimmins, *Lifespan and Healthspan: Past, Present, and Promise*, 55 GERONTOLOGIST 901, 902 (2015).

<sup>19</sup> See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11 (1904) (upholding the state's mandatory vaccination law as a legitimate exercise of the state's police power designed to protect the public health); see also; *ABATE of Georgia v. Georgia*, 264 F.3d 1315 (11th Cir. 2001) (upholding state law requiring motorcyclists to wear motorcycles as a legitimate exercise of the state's police power designed to protect the public health); but see *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). The court's decision in *Roman Catholic Diocese of Brooklyn* is especially troubling because it threatens to usurp *Jacobson*,

However, trust is waning in our public health system. One reason may be that even before the pandemic, healthcare dominated in terms of public attention and funding, essentially stealing the spotlight.<sup>20</sup> Perhaps the absence of good news equates to no good outcomes or results. Even so, public health agencies like the Centers for Disease Control and Prevention (CDC), Food and Drug Administration (FDA), and National Institutes of Health (NIH) all saw approval rates drop after being thrust into the limelight by the COVID-19 pandemic.<sup>21</sup> This should come as no surprise, given the conflicting messages about the severity of the pandemic and requisite public health measures from the U.S.'s top public health officials.<sup>22</sup> Rebel states then fueled the subversion of a cohesive pandemic response.<sup>23</sup>

In terms of actual response, jurisdictions both across the U.S. and internationally took radically different layered approaches to combat the spread of the disease.<sup>24</sup> Most, for

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which has acted as the foundation of public health interventions since its decision. See Wendy E. Parmet, *Roman Catholic Diocese of Brooklyn v. Cuomo – The Supreme Court and Pandemic Controls*, 384 N. ENGL. J. MED. 199-201 (2021).

<sup>20</sup> See George Annas, *Achieving the Goals of Public Health*, BOSTON U. SCH. PUB. HEALTH (Mar. 9, 2018), <https://www.bu.edu/sph/news/articles/2018/achieving-the-goals-of-public-health/>.

<sup>21</sup> See Ralph Ellis, *Poll Shows Low Trust in U.S. Public Health Systems*, WEBMD (May 14, 2021), <https://www.webmd.com/lung/news/20210514/poll-shows-low-trust-in-u-s-public-health-systems>.

<sup>22</sup> Denise Chow, *CDC's Messaging Problem Highlights Pandemic's Uncertain Future*, NBC NEWS (Apr. 6, 2021, 5:31 PM), <https://www.nbcnews.com/science/science-news/cdcs-messaging-problem-highlights-pandemics-uncertain-future-rcna602>.

<sup>23</sup> See, e.g., Mary Ellen Klas, *DeSantis Sues Federal Government for Requiring Contractors to Follow Vaccine Protocol*, MIAMI HERALD (Oct. 29, 2021), <https://www.miamiherald.com/news/politics-government/article255351076.html>.

<sup>24</sup> See Kamran Rahman & Alice Miranda Ollstein, *How States Are Responding to Coronavirus, in 7 Maps*, POLITICO, <https://www.politico.com/news/2020/03/24/coronavirus-state-response-maps-146144>. South Korea, for example, focused on uniform containment and mitigation strategies and remained in place until

instance, enacted some sort of restriction on bars and restaurants—this could mean restaurants were closed entirely except for takeout or delivery, or that some limited on-site service was still available.<sup>25</sup> Bans on gatherings of various sizes were also implemented, ranging from groups of fifty or more to as little as ten or more.<sup>26</sup> These complex approaches with multiple varying factors make a direct comparison for efficacy difficult, as the “swiss-cheese” model of pandemic defense suggests that no single method is perfect and inevitably has “holes.”<sup>27</sup> Holes in one city’s cheese, for instance, may be very different than their neighboring city or state. This leaves epidemiologists and public health experts with the difficult task of determining the efficacy of any one public health intervention.<sup>28</sup>

The discussion often verges towards (and stops at) whether public health initiatives should be implemented at all. The question then is, *should* we implement a mask mandate? Less attention is paid to the enforcement mechanism behind interventions like mask mandates: civil or criminal punishment,

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infection rates neared zero, as opposed to the U.S. which began to ease restrictions after “flattening the curve.” See Gisele Galoustian, *COVID-19: How South Korea Prevailed While the United States Failed*, SCIENCE DAILY (Aug. 20, 2020),

<https://www.sciencedaily.com/releases/2020/08/200820102431.htm>.

<sup>25</sup> Kamran Rahman & Alice Miranda Ollstein, *How states are responding to coronavirus, in 7 maps*, POLITICO (Mar. 25, 2020, 12:14 PM), <https://www.politico.com/news/2020/03/24/coronavirus-state-response-maps-146144>.

<sup>26</sup> *Id.*

<sup>27</sup> See Siobhan Roberts, *The Swiss Cheese Model of Pandemic Defense*, N.Y. TIMES (Dec. 5, 2020), <https://www.nytimes.com/2020/12/05/health/coronavirus-swiss-cheese-infection-mackay.html>.

<sup>28</sup> See Elizabeth Waters et al., *Evaluating the Effectiveness of Public Health Interventions: The Role and Activities of the Cochrane Collaboration*, 60 J. EPIDEMIAL COMM. HEALTH 285, 288 (2006) (“Public health interventions are often difficult to synthesize because of the complexity of the characteristics of the intervention, the study population(s), the outcomes measured, or other methodological issues ... Furthermore, complexity is introduced because the effectiveness of the interventions may be modified by the context in which it operates.”).

or the lack thereof. Say, for example, a city health commissioner, let's call her Masako, implements a mask mandate in her city to stop the spread of an infectious disease, which is proven effective in preventing transmission.<sup>29</sup> Assume all else held equal that the mandate does as intended and significantly reduces the spread of the disease, thereby reducing hospitalizations, illness, harm, and death; at the same time, the cost is minor discomfort from wearing a mask in crowded public areas. A traditional utilitarian calculation would suggest this action is morally permissible, if not morally obligatory.

Consider the same scenario with a slight alteration, Masako instead implements a mask mandate in the same city with the same intended goals; however, noncompliance with the mandate results in a \$5000 fine and one year in the county jail.<sup>30</sup> Say an elderly person goes to the grocery store and forgets to bring their mask. Is such a punishment appropriate in this circumstance? Is this secondary component to the public health intervention in accord with the philosophical roots and goals of public health? Would a lesser or no punishment be better in theory?<sup>31</sup> In practice?

From a top-down view, jurisdictional approaches to public health punishment for mask mandates in the United States – at least during the earlier stages of the pandemic – can be lumped into two general categories: “permissive” (meaning

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<sup>29</sup> See John T. Brooks & Jay C. Butler, *Effectiveness of Mask Wearing to Control Community Spread of SARS-CoV-2*, 325 JAMA 998-999 (2021) (“Community mask wearing substantially reduces transmission of severe acute respiratory syndrome coronavirus 2 ... in 2 ways. First, masks prevent infected persons from exposing others . . . Second, masks protected uninfected wearers . . . [by] form[ing] a barrier to large respiratory droplets that could land on exposed mucous membranes . . .”).

<sup>30</sup> See, e.g., Lois Parshley, *America's Slow, Painful Shift to Enforcing Mask Mandates*, VOX (Aug. 5, 2020, 7:45 AM), <https://www.vox.com/2020/8/4/21354325/coronavirus-face-mask-mandate-enforcement> (“In Boulder County, if you refuse to wear a mask in [defiance of the relevant guidelines], you face up to a \$5,000 fine and one year in jail.”).

<sup>31</sup> Omitted from this discussion is the concept of enforcement discretion. Discretion to not enforce is meaningless where in the same instance, there is the discretion to enforce ruthlessly and indiscriminately.

governing bodies imposed few restrictions, if any, on *individual behavior*) and “restrictive” (meaning governing bodies imposed more restrictions on *individual behavior*) government responses. Permissive jurisdictions seemed to provide limited fines for businesses, instituted no penalties, or outright attempted to bar government officials from implementing penalties or mandates at all. Florida and Oklahoma are illustrative of this approach because both had mask recommendations but no mandates or related penalties.<sup>32</sup> Compare this with restrictive jurisdictions like New York City, which threatened fines up to \$1,000, and Los Angeles, which also included a potential six-month jail sentence.<sup>33</sup> Does either of these categorical approaches fit our public health goals in practice?

We may (and should) ask: was it *right* to punish the public for non-compliance with public health interventions? This question naturally leads to another equally important question: what types of punishment should we use if we decide to punish? Do these considerations change in the context of an emergency like a pandemic? In retrospect, both the permissive and restrictive approaches that were applied were based on too pure a theory and failed to consider how the tenets of their approaches must change during a public health emergency – the result was a failure to prioritize population health and equity adequately. The permissive approach mistook government omissions as moral innocence and erroneously

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<sup>32</sup> See Andy Markowitz, *State-by-State Guide to Face Mask Requirements*, AARP (June 27, 2022), <https://www.aarp.org/health/healthy-living/info-2020/states-mask-mandates-coronavirus.html>.

<sup>33</sup> See Marisa Peñaloza, *New York City Imposes Fines of Up to \$1,000 For Those Who Refuse to Wear Face Masks*, NPR (Sept. 30, 2020, 1:46 PM), [https://www.npr.org/sections/coronavirus-live-updates/2020/09/30/918704017/new-york-city-imposes-fines-of-up-to-1-000-for-those-who-refuse-to-wear-face-mas#:~:text=Movies-,New%20York%20City%20Imposes%20Fines%20Of%20Up%20To%20%241%2C000%20For,it%2C%22%20the%20mayor%20said;DakotaSmith,L.A.wants%20to%20impose%20tougher%20enforcement%20for%20mask%20violators,L.A.TIMES\(Jan.13,2021,5:55PM\),](https://www.npr.org/sections/coronavirus-live-updates/2020/09/30/918704017/new-york-city-imposes-fines-of-up-to-1-000-for-those-who-refuse-to-wear-face-mas#:~:text=Movies-,New%20York%20City%20Imposes%20Fines%20Of%20Up%20To%20%241%2C000%20For,it%2C%22%20the%20mayor%20said;DakotaSmith,L.A.wants%20to%20impose%20tougher%20enforcement%20for%20mask%20violators,L.A.TIMES(Jan.13,2021,5:55PM),) <https://www.latimes.com/california/story/2021-01-13/tougher-mask-enforcement-proposed-los-angeles#:~:text=Under%20Mayor%20Eric%20Garcetti's%20%E2%80%9C%20Safer,or%20six%20months%20in%20jail.>



promoted libertarian values of autonomy and freedom over population health, stifling necessary pandemic response. The restrictive approach, alternatively, prioritized action to promote public health interventions but implemented overly harsh punishments that stand to perpetuate and exacerbate inequitable outcomes.

To realign the application of pandemic public health punishment in the United States with the fundamental goals of public health, the decision-making framework of public health must take a more pragmatic approach. In other words, it must recognize the exigency of a pandemic and shift the balance of values (like emergency medicine) to prioritize population health and equity. Part I of this article will identify exemplars of permissive and restrictive in both national and international jurisdictions. Part II will explicate the philosophical theory underpinning public health normalcy and juxtapose this with the apparent theories that best explain the permissive and restrictive jurisdictions. Part III will analyze the failures of both approaches and identify a needed value shift in public health ethics during crises. Lastly, Part IV will demonstrate a more pragmatic approach, drawing on foreign examples to illustrate how we can apply principles from both theories in a way that more closely aligns with public health goals.

## II. A CONTINUUM OF MASK MANDATE PUNISHMENTS

In the early 1900s, Prohibitionist-elite Delcevere King held a contest that ultimately coined the term “scofflaws” to describe those who drank in protest of Prohibition.<sup>34</sup> Even after Prohibition faded into history, the term scofflaw remained, and its meaning expanded.<sup>35</sup> Now, it generally refers to any who “habitually flouts or violates the law.”<sup>36</sup> While scofflaws evading minor, inconsequential laws presents some issue,<sup>37</sup> the

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<sup>34</sup> *Scofflaw*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/scofflaw> (last visited Oct. 7, 2021).

<sup>35</sup> *Id.*

<sup>36</sup> *What Are Scofflaws*, PUBLICATION COACH & GRAY-GRANT COMMS. (Jan. 23, 2013), <https://www.publicationcoach.com/scofflaws/>.

<sup>37</sup> A good example of a modern scofflaw is out-of-state motorists that avoid highway tolls. It is not uncommon for there to be no mechanism

threat is significantly greater in the public health sphere. Driven by, among other things, “deeply entrenched ideals of individual freedom,” public health non-compliance plagued the influenza pandemic of 1918.<sup>38</sup>

Scofflaws were abounding during the COVID-19 pandemic, echoing similar rhetoric of individual freedom. Near the end of 2020, nearly twenty percent of U.S. citizens reportedly did not wear masks to stop the spread of COVID-19.<sup>39</sup> This scofflaw attitude has persisted despite overwhelming evidence of the efficacy of masks as a disease spread prevention measure.<sup>40</sup> In a twisted sense, however, scofflaws have been simultaneously absent in other parts of the country. The refusal to wear a mask alone did not necessarily make one a public health scofflaw; the existence of some legal requirement to wear a mask is a prerequisite, and some jurisdictions did not impose such a requirement.

#### A. PERMISSIVE APPROACHES TO MASK MANDATE PUNISHMENTS

Permissive jurisdictions are self-evident. Categorically, cities and states in this wing had little to no requirements regarding mask-wearing or disparate punishment schemes that had little to no impact on the general populace. The *most*

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by which the tolling state can withhold a license or registration renewal, conditional on payment of the toll. See Elaine S. Povich, *Out-of-State Toll Scofflaws Vex State Authorities*, PEW (Sept. 7, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/09/07/out-of-state-toll-scofflaws-vex-state-authorities>.

<sup>38</sup> Navarro, *supra* note 6.

<sup>39</sup> Edward D. Vargas & Gabriel R. Sanchez, *American Individualism Is an Obstacle to Wider Mask Wearing in the US*, BROOKINGS (Aug. 31, 2020), <https://www.brookings.edu/blog/up-front/2020/08/31/american-individualism-is-an-obstacle-to-wider-mask-wearing-in-the-us/>.

<sup>40</sup> See Russell Falcon, *Do Face Masks Work? Here Are 49 Scientific Studies That Explain Why They Do*, KXAN (Aug. 7, 2021, 1:48 PM CDT), <https://www.kxan.com/news/coronavirus/do-face-masks-work-here-are-49-scientific-studies-that-explain-why-they-do/> (providing forty-nine studies supporting the efficacy of wearing face masks as a disease spread prevention measure).

*permissive* were those that banned or attempted to ban themselves and/or localities from implementing mandates and requisite punishments, such as Florida, which attempted to prohibit municipalities from implementing any mandate or imposing punishments.<sup>41</sup> Subsequently, Florida attempted to ban schools from imposing mask mandates, but the Florida courts later struck this down.<sup>42</sup>

Texas and North Dakota followed suit. Texas Governor Greg Abbot signed an executive order which barred mandates for vaccinations and mask-wearing across the entire state.<sup>43</sup> In addition, the order prohibited local governments from imposing face mask mandates under any circumstance.<sup>44</sup> Oklahoma's legislature made a similar attempt, seeking to ban public schools from imposing mask mandates unless the governor declared a state of emergency.<sup>45</sup> North Dakota's legislature took a similar approach, passing a bill prohibiting

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<sup>41</sup> Fla. Exec. Order No. 21-102 §3 (May 3, 2021) (available at [https://www.flgov.com/wp-content/uploads/orders/2021/EO\\_21-102.pdf](https://www.flgov.com/wp-content/uploads/orders/2021/EO_21-102.pdf)).

<sup>42</sup> Alison Durkee, *Florida's Mask Mandate Ban Now Officially Blocked – But State Will Still Try to Punish Schools*, FORBES (Sept. 2, 2021, 6:52 PM), <https://www.forbes.com/sites/alisondurkee/2021/09/02/florida-still-plans-to-punish-schools-for-mandating-masks-even-after-judge-said-it-was-illegal/?sh=353bbb221bca>.

<sup>43</sup> Dave Montgomery, *Gov. Greg Abbott Bars Mandates for Vaccinations and Masks in Texas*, N.Y. TIMES (July 31, 2021), <https://www.nytimes.com/2021/07/31/world/greg-abbott-mask-vaccine-mandate.html>.

<sup>44</sup> Tex. Exec. Order No. GA-38 (July 29, 2021) (available at [https://gov.texas.gov/uploads/files/press/EO-GA-38\\_continued\\_response\\_to\\_the\\_COVID-19\\_disaster\\_IMAGE\\_07-29-2021.pdf](https://gov.texas.gov/uploads/files/press/EO-GA-38_continued_response_to_the_COVID-19_disaster_IMAGE_07-29-2021.pdf)).

<sup>45</sup> Dillon Richards, *Bill Author Says He Stands by Law that Bans Oklahoma Schools from Requiring Masks*, KOCO5 NEWS, <https://www.koco.com/article/bill-author-says-he-stands-by-law-that-bans-oklahoma-schools-from-requiring-masks/37383814> (last updated Aug. 24, 2021); Barbara Hoberock, *Law Banning Mask Mandates at Schools to Be Put On Hold, Oklahoma Judge Rules*, TULSA WORLD (Sept. 1, 2021), [https://tulsaworld.com/news/local/education/law-banning-mask-mandates-at-schools-to-be-put-on-hold-oklahoma-judge-rules/article\\_4fd37408-0b35-11ec-a421-9b1637503868.html](https://tulsaworld.com/news/local/education/law-banning-mask-mandates-at-schools-to-be-put-on-hold-oklahoma-judge-rules/article_4fd37408-0b35-11ec-a421-9b1637503868.html).

state officials from mandating face masks.<sup>46</sup> While Governor Doug Burgum vetoed the bill, a supermajority of the North Dakotan House overrode his veto quickly;<sup>47</sup> subsequently, the Senate vetoed the bill, where one Senator emphasized the importance of individual liberty: “[w]e make the policy Mr. President . . . [a]nd we don’t circumvent the process by the stroke of the pen, stealing the individual liberty and freedom from our constituents.”<sup>48</sup>

*Very permissive* jurisdictions “opted out,” choosing to impose no mandate or punishment. Alaska, for example, did not have a statewide mask mandate at all and thus had no corresponding punishment for not wearing a mask.<sup>49</sup> Instead, the government relied on a voluntary system: “[t]he state does not require the use of masks by the public, however[,] health and science experts recommended that you wear a mask in public.”<sup>50</sup> Idaho, Missouri, Nebraska, and South Dakota took a similar approach.<sup>51</sup>

*Moderately permissive* jurisdictions are those that prescribed passive “mandates,” where there was no enforcement mechanism or punishment for noncompliance. Raleigh, North Carolina, for example, created an emergency proclamation that required masks but explicitly declared that

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<sup>46</sup> *North Dakota House Overrides Veto of Mask Mandate Bill*, U.S. NEWS & WORLD REP. (Apr. 22, 2021), <https://www.usnews.com/news/best-states/north-dakota/articles/2021-04-22/north-dakota-house-overrides-veto-of-mask-mandate-bill>.

<sup>47</sup> *Id.*

<sup>48</sup> Maddie Biertempfel, *ND Senate Overrides Veto of Bill Banning Statewide Mask Mandates*, KX NEWS (Apr. 22, 2021, 9:14 PM), <https://www.kxnet.com/news/top-stories/nd-senate-overrides-veto-of-bill-banning-statewide-mask-mandates/>.

<sup>49</sup> *State-level Mask Requirements in Response to the Coronavirus (COVID-19) Pandemic, 2020-2021*, BALLOTPEDIA, [https://ballotpedia.org/State-level\\_mask\\_requirements\\_in\\_response\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic,\\_2020-2021](https://ballotpedia.org/State-level_mask_requirements_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021) (last visited Oct. 7, 2021).

<sup>50</sup> *State of Alaska: COVID-19 (Coronavirus) Information*, AK., <https://covid19.alaska.gov/#:~:text=The%20state%20does%20not%20require,wherever%20social%20distancing%20is%20challenging> (last visited Oct. 7, 2021).

<sup>51</sup> *State-level Mask Requirements In Response to the Coronavirus (COVID-19) Pandemic*, *supra* note 49.

compliance was to be voluntary and carry no punishment.<sup>52</sup> Instead, law enforcement was instructed to promote education and to seek voluntary compliance from the public.<sup>53</sup> Indiana similarly created a face mask mandate for those inside businesses, public buildings, or other indoor public spaces (including public transportation) but had no corresponding fine for failure to comply.<sup>54</sup> Instead, the order stated it would seek enforcement through “education about the importance of wearing face coverings and dispelling myths and misconceptions” about their use.<sup>55</sup> Indiana originally was slated to provide a \$1,000 fine for noncompliance, but it dropped the fine after vocal objections from both law enforcement and conservative legislators.<sup>56</sup>

Finally, some jurisdictions were *fairly permissive*, bordering on restrictive. These jurisdictions imposed punishments that only affected businesses and business owners, not individuals.<sup>57</sup> Louisiana’s mask mandate, for example, provided that businesses were responsible for requiring patrons to wear masks.<sup>58</sup> Failure to comply would result in citations to the business.<sup>59</sup> On the other hand, Illinois’s mandate made no mention of any punishment, just that the

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<sup>52</sup> *Proclamation to Require Face Coverings Indoors*, RALEIGH, N.C. (June 9, 2022), <https://raleighnc.gov/SupportPages/proclamation-require-face-coverings-indoors>.

<sup>53</sup> *Id.*

<sup>54</sup> Ind. Exec. Order No. 20-37 (July 24, 2020) (available at <https://www.in.gov/gov/files/Executive%20Order%2020-37%20Face%20Covering%20Requirement.pdf>).

<sup>55</sup> *Id.* at § (5).

<sup>56</sup> *Indiana Governor Drops Mask Violator Penalty After Criticism*, 5 CHICAGO (July 24, 2020), <https://www.nbcchicago.com/news/local/indiana-governor-drops-mask-violator-penalty-after-criticism/2311029/>.

<sup>57</sup> This grouping is included under permissive rather than restrictive because the targeting of businesses is less intrinsically paternalistic than restricting all individuals. While this is more than nothing, such punishments are not enough to be restrictive as defined in this article.

<sup>58</sup> La. Exec. Order No. 89 JBE 2020 (July 11, 2020) (available at <https://gov.louisiana.gov/assets/Proclamations/2020/89-JBE-2020.pdf>).

<sup>59</sup> *Id.* at (4)(D).

mandate could be enforced.<sup>60</sup> However, due to compliance issues and increasing positive cases, a rule shifted the burden to businesses to enforce the mandate—penalties for failing to enforce the mandate ranged between \$75 and \$2,500.<sup>61</sup> Essentially, the governor found it acceptable to sanction the behavior of businesses but not the behavior of individuals who failed to comply.<sup>62</sup>

Beyond the U.S., Sweden stood alone among peer nations that took a largely permissive stance. Swedish health officials did not include mask mandates nor punishments as part of their disease response strategy and could be categorized as *fairly permissive*.<sup>63</sup> In comparison, some localities attempted to ban masks altogether, but eventually, what resulted was an extremely specific and convoluted mask recommendation.<sup>64</sup> For example, some localities suggested masks for those born during or before 2004 riding public transit during morning and evening rush hours if they did not have an assigned seat.<sup>65</sup>

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<sup>60</sup> Ill. Exec. Order No. 2020-32 (Apr. 30, 2020) (available at <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx#:~:text=Any%20individual%20who%20is%20over,a%20six%20foot%20social%20distance>).

<sup>61</sup> Jamie Munks et al., *Gov. J.B. Pritzker Issues Rule to Penalize Businesses That Don't Enforce Mask Requirements With Fines Up to \$2,500*, CHICAGO TRIBUNE (Aug. 7, 2020, 2:21 PM), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-illinois-pritzker-guidelines-20200807-q22uwbrb2basbmqn44ftw5enzm-story.html>.

<sup>62</sup> Brad Weisenstein, *Pritzker Gets Ok to Treat Businesses as Criminals for Failing to Enforce His COVID-19 Mask Order*, ILL. POLICY (Aug. 11, 2020), <https://www.illinoispolicy.org/pritzker-gets-ok-to-treat-businesses-as-criminals-for-failing-to-enforce-his-covid-19-mask-order/>.

<sup>63</sup> Sinéad Baker, *No-lockdown Sweden Broke With Most of the World and Didn't Require Face Masks. Those Who Wear Them Say They're Treated With Suspicion and Abuse*, BUSINESS INSIDER (June 5, 2021, 5:15 AM), <https://www.businessinsider.com/sweden-coronavirus-face-mask-wearers-describe-suspicion-abuse-2021-6>.

<sup>64</sup> Jessica Gow, *COVID: Why are Swedish Towns Banning Masks?*, THE CONVERSATION (Feb. 8, 2021, 6:20 AM), <https://theconversation.com/covid-why-are-swedish-towns-banning-masks-153681>.

<sup>65</sup> *Id.*

Unsurprisingly, even health officials were found to be noncompliant with the recommendation upon implementation.<sup>66</sup>

## B. RESTRICTIVE APPROACHES TO MASK MANDATE PUNISHMENTS

On the other hand, restrictive jurisdictions took (unsurprisingly) the opposite approach and imposed some form of punishment in all instances. To further categorize within the restrictive wing, for the purposes of this section, minimal fines will be defined as any monetary fine less than \$100, moderate from \$100 to \$1000, and severe as any fine over \$1000.

The *least restrictive* jurisdictions instituted only minimal fines for public health noncompliance. One such example is Omaha, Nebraska, which unanimously instituted a mask mandate after merely three hours of public comment on the proposal.<sup>67</sup> The mandate provides for what most would consider reasonable exemptions, such as for medical or mental health conditions, or those eating, and imposes a fine of \$25 on any violator.<sup>68</sup>

Among the *fairly restrictive* jurisdictions that imposed only moderate fines are Arkansas and Oregon. Arkansas's mask mandate included all indoor environments with non-household members where social distancing was impossible. However, Arkansas provided ample exemptions from the rule, which included voting or engaging in religious worship.<sup>69</sup> First-time violators of the requirement were set to receive a verbal or written warning; in contrast, those under eighteen could only

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<sup>66</sup> *Id.*

<sup>67</sup> Becca Costello, *Omaha City Council Passes Mask Mandate, Rule Takes Effect Immediately*, NEB. PUB. MEDIA (Aug. 11, 2020, 6:05 PM), <https://nebraskapublicmedia.org/en/news/news-articles/omaha-city-council-passes-mask-mandate-rule-takes-effect-immediately/>.

<sup>68</sup> *Id.*

<sup>69</sup> Ark. Exec. Order No. 20-43 (July 16, 2020) (available at [https://governor.arkansas.gov/images/uploads/executiveOrders/EO\\_20-43.pdf?utm\\_source=Tourism+Industry&utm\\_campaign=4ac470296c-EMAIL\\_CAMPAIGN\\_2019\\_07\\_15\\_02\\_21\\_COPY\\_01&utm\\_medium=email&utm\\_term=0\\_06bc8d03da-4ac470296c-174474189](https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-43.pdf?utm_source=Tourism+Industry&utm_campaign=4ac470296c-EMAIL_CAMPAIGN_2019_07_15_02_21_COPY_01&utm_medium=email&utm_term=0_06bc8d03da-4ac470296c-174474189)).

receive such a warning.<sup>70</sup> Further, confinement or jail time was specifically proscribed.<sup>71</sup> However, adults who engaged in numerous violations could be subject to a fine between \$100 and \$500.<sup>72</sup> Likewise, Oregon's second mask mandate threatened a fine of up to \$500 per violation.<sup>73</sup> *Moderately restrictive* jurisdictions imposed both a moderate fine and a short jail sentence. Washington State, for example, imposed a mask mandate in Yakima County, threatening criminal penalties of up to \$100 and up to ninety days in the county jail for noncompliance.<sup>74</sup>

Many restrictive jurisdictions fell into the *most restrictive* category and imposed either a severe fine, a long jail sentence, or both. For example, Oregon's first mask mandate threatened a maximum penalty of up to \$1,250 and thirty days in jail.<sup>75</sup> Mississippi and New Orleans, Louisiana implemented nearly identical punishments of \$500 fines and up to six months in jail.<sup>76</sup> San Diego raised this to a \$1,000 fine alongside a potential

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<sup>70</sup> *Id.* at (3)(a)-(b).

<sup>71</sup> *Id.* at (3)(c).

<sup>72</sup> *Id.* at (2).

<sup>73</sup> Oregon Health Authority, COVID-19 Rule No. 333-019-1025, <https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=280702>.

<sup>74</sup> Wa. Exec. Order No. 20-60 (June 24, 2020) (available at [https://www.governor.wa.gov/sites/default/files/proc\\_20-60.pdf](https://www.governor.wa.gov/sites/default/files/proc_20-60.pdf)); *Masks and Face Coverings FAQ*, WA. ST. DEP'T HEALTH, <https://www.doh.wa.gov/Emergencies/COVID19/ClothFaceCoveringsandMasks/ClothFaceCoveringsandMasksFAQ#heading94117> (last visited Oct. 8, 2021).

<sup>75</sup> Dirk VanderHart, *Oregon's Mask Rules Expanding to Crowded Outdoor Spaces as COVID Cases Spike*, OPB (July, 13, 2020, 2:00 PM), <https://www.opb.org/news/article/oregon-coronavirus-covid-19-face-mask-rules/>.

<sup>76</sup> Miss. Exec. Order No. 1516 (Aug. 4, 2020) (available at <https://www.sos.ms.gov/content/executiveorders/ExecutiveOrders/1516.pdf>); Patrick Magee, *Full Details of Tate Reeves' Executive Order on COVID Rules in 13 Mississippi Counties*, SUNHERALD (July 15, 2020, 2:44 PM), <https://www.sunherald.com/news/coronavirus/article244149852.html> (updated July 15, 2020); *Coronavirus: Current Guidelines*, CITY OF NEW ORLEANS, <https://ready.nola.gov/incident/coronavirus/safe-reopening/> (last visited Oct. 8, 2021).



six-month jail sentence.<sup>77</sup> Kansas imposed civil fines of up to \$2,500.<sup>78</sup> Similarly, the federal government, namely through the Transportation Security Administration (TSA), provided for a fine scheme that rose with subsequent offenses. Initial fines started between \$500 and \$1,000, while subsequent violations ranged from \$1,000 to \$3,000 per offense.<sup>79</sup> Leading the pack was Maryland, where failure to comply with mask mandates could potentially result in a \$5,000 fine and up to one year in jail for a single violation.<sup>80</sup>

Internationally, a small sampling shows that many countries used mask mandates and penalties for their COVID-19 response and would fall into the restrictive wing. South Korea, for instance, fined public health scofflaws approximately \$100 per violation of mask ordinances.<sup>81</sup> Israel and France charged offenders roughly \$150.<sup>82</sup> Among the most restrictive

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<sup>77</sup> Gabrielle Olya, *NYC's New Mask Fine Adds to America's COVID-19 Confusion*, GOBANKINGRATES (Oct. 10, 2020), <https://www.gobankingrates.com/money/economy/wear-mask-pay-fine-cities-charging/>.

<sup>78</sup> *Id.*; Jonathan Shorman & Jason Tidd, *The Kansas Mask Order Begins Friday. Here's What Could Happen if You Refuse to Wear One*, WICHITA EAGLE (July 1, 2020), <https://www.kansas.com/news/politics-government/article243931352.html>.

<sup>79</sup> David Shepardson, *U.S. Doubling Fines for Travelers Not Wearing Masks*, REUTERS (Sept. 9, 2021, 5:46 PM), <https://www.reuters.com/world/us/us-doubling-fines-travelers-not-wearing-masks-2021-09-09/>.

<sup>80</sup> Donna Engle, *Legal Matters: Failure to Wear a Mask, or to Follow Any Executive Order, a Punishable Offense*, CARROLL COUNTY TIMES (Sept. 13, 2020, 5:30 AM), <https://www.baltimoresun.com/maryland/carroll/lifestyles/cc-legal-matters-091320-20200913-jds7gjkvtjdcnmcq4hkarqnmz-story.html>.

<sup>81</sup> *COVID-19 Information*, U.S. EMBASSY & CONSULATE IN REP. OF KOREA, <https://kr.usembassy.gov/022420-covid-19-information/> (last visited Oct. 8, 2021).

<sup>82</sup> Dov Liber, *Israel's Second Lockdown Seems to be Working Better Than Its First*, WALL ST. J. (Nov. 1, 2020, 8:00 AM), <https://www.wsj.com/articles/israels-second-lockdown-seems-to-be-working-better-than-its-first-11604235601>; Justine Wise, *France Introduces Fines for People Who Fail to Wear Mask in Indoor Public Spaces*, THE HILL (July 7, 2020, 8:54 AM),

were Taiwan and Germany. Both had fines that could range as high as \$5,000 USD for individual violations.<sup>83</sup> These jurisdictions show that internationally there was a similar spread of severity of punishment when compared to jurisdictions in the U.S., and more opted to impose punishment than not. However, one key difference between domestic and international restrictive approaches is that none of the international examples surveyed here used jail time as a method of punishment; international jurisdictions used only monetary fines to deter anti-mask scofflaws.

### III. BY WHAT MORAL FRAMEWORK?

Public health generally focuses on maximizing utility in the form of population health.<sup>84</sup> In terms of actual response, on one side of the spectrum, we saw an emphasis on individual freedom and liberty (evoking deontological notions of libertarianism), and on the other side were value considerations beyond simple utility maximization, such as just desert principles. Much of the literature and discussion surrounding these ideas have presumed this as a purely political divide. However, if we accept the assertions of either approach at face value, bracketing political concerns, is the difference in approaches found in the decision-making framework itself? By evaluating each approach in the abstract, we can extract the principles that underlie each method.<sup>85</sup> The inquiry then is not

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<https://thehill.com/policy/international/508067-france-introduces-fines-for-people-who-fail-to-wear-mask-in-indoor>.

<sup>83</sup> George Liao, *Taiwan's Mask Mandate Looms, with Heavy Fines for Violators*, TAIWAN NEWS (Nov. 30, 2020, 6:06 PM), <https://www.taiwannews.com.tw/en/news/4065892>; Fred Pleitgen & Nadine Schmidt, *Germans Face Fines of Up to \$5,000 as Wearing a Face Mask Becomes Mandatory*, CNN (Apr. 27, 2020, 2:17 PM) <https://www.cnn.com/2020/04/27/europe/germany-face-mask-mandatory-grm-intl/index.html>.

<sup>84</sup> Petrini, *supra* note 15.

<sup>85</sup> Allan Bäck, *The Concept of Abstraction*, SOCIETY FOR ANCIENT GREEK PHIL. NEWSLETTER (Mar. 24, 2006), <https://orb.binghamton.edu/cgi/viewcontent.cgi?article=1375&context=sagp>; STEPHEN O'SULLIVAN & PHILIP A. PECORINO, ETHICS: AN ONLINE TEXTBOOK (2002) (ebook) (available at

whether a particular judgment is ethical but rather which ethical principles were implemented and under what general ethical theory those principles are derived.<sup>86</sup> The following begins with what is considered the baseline philosophy of public health and then attempts to explore what ethical theories seem to inform the permissive and restrictive approaches.

#### A. PUBLIC HEALTH NORMALCY

From the government's perspective, public health is premised on a concern with the health of the entire population irrespective of individual outcomes,<sup>87</sup> thereby encompassing a strong utilitarian component.<sup>88</sup> Why? Increasing population health is consequentialist in nature.<sup>89</sup> As a consequentialist theory, one that derives its justifications from the consequences produced by an action rather than the nature of the action itself, utilitarianism seems well suited to meet these goals.<sup>90</sup>

Utilitarianism stresses the importance of utility; the *right* action among a set of options is that which produces more utility.<sup>91</sup> While utility does not have a strict definition, it can generally be thought of as things that people desire: pleasure, the absence of suffering, the satisfaction of preferences and interests, and the like.<sup>92</sup> Thus, under the normative framework of utilitarianism, we ought to do that which creates more utility. The right action is then determined by engaging in a utilitarian calculus, weighing the benefits and harms of a given course of

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[https://www.qcc.cuny.edu/SocialSciences/pPecorino/ETHICS\\_TEXT/Chapter\\_1\\_Introduction/Three\\_Levels\\_of\\_Abstraction.htm](https://www.qcc.cuny.edu/SocialSciences/pPecorino/ETHICS_TEXT/Chapter_1_Introduction/Three_Levels_of_Abstraction.htm)).

<sup>86</sup> STEPHEN O'SULLIVAN & PHILIP A. PECORINO, *ETHICS: AN ONLINE TEXTBOOK* (2002) (ebook) (available at [https://www.qcc.cuny.edu/SocialSciences/pPecorino/ETHICS\\_TEXT/Chapter\\_1\\_Introduction/Three\\_Levels\\_of\\_Abstraction.htm](https://www.qcc.cuny.edu/SocialSciences/pPecorino/ETHICS_TEXT/Chapter_1_Introduction/Three_Levels_of_Abstraction.htm)).

<sup>87</sup> David R. Buchanan, *Autonomy, Paternalism, and Justice: Ethical Priorities in Public Health*, 98 AM. J. PUB. HEALTH 15-21 (2008); Carlo Petrini, *Theoretical Models and Operational Frameworks in Public Health Ethics*, 7 INT. J. ENVIRON. RES. & PUB. HEALTH 189-202 (2010).

<sup>88</sup> *Utilitarianism in Public Health*, *supra* note 17.

<sup>89</sup> *Id.* at 7.

<sup>90</sup> Petrini, *supra* note 15, at 192.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

action.<sup>93</sup> Here, two paths to utility arise, dividing utilitarianism into Act and Rule utilitarianism.<sup>94</sup> Act utilitarianism applies the utilitarian calculus on a case-by-case basis to specific actions, while Rule utilitarianism applies the calculus to a generally applicable rule, and actions that conform to such a rule are considered right or justified.<sup>95</sup>

One can also think of utilitarianism as a maximizing theory; the *right* action (of an unlimited number of choices) is that which creates the most utility over that which only creates some utility.<sup>96</sup> It may then follow that for public health, promoting population health would be best served under a maximalist framework of utilitarianism, and it would be morally *right* to act in a way (through preventative measures) that would save one million lives instead of saving just one hundred thousand.<sup>97</sup>

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<sup>93</sup> One of the difficulties with utilitarian calculus is “assign[ing] values to the benefits and harms resulting from ... actions and compar[ing] them with the benefits and harms that might result from other actions.” See *Calculating Consequences: The Utilitarian Approach to Ethics*, MARKKULA CTR. FOR APPLIED ETHICS (Aug. 1, 2014), <https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/calculating-consequences-the-utilitarian-approach/>. In practice, utilitarian calculi are used quite frequently, often under the moniker “cost-benefit analysis” (CBA). *Cost-Benefit Analysis*, CTR. EFFECTIVE GOVT., <https://www.foreffectivegov.org/node/3470> (last visited Sept. 7, 2021).

<sup>94</sup> Stephen Nathanson, *Act and Rule Utilitarianism*, INTERNET ENCYCLOPEDIA OF PHIL., <https://iep.utm.edu/util-a-r/#H2> (last visited Dec. 19, 2021).

<sup>95</sup> *Id.*

<sup>96</sup> Petrini, *supra* note 15, at 192.

<sup>97</sup> This, of course, assumes that with all else held equal, the individual lives that comprise the one million are equal in value to the individual lives of the one hundred thousand. When comparing statistical lives, or those “that will predictably be lost to known risk factors in the future unless we intervene, but whose identities it is impossible for us to know, at least at present,” this assumption is simple. However, as Johann Frick points out, this question may differ when comparing statistical lives to identified lives, or people whose identities we currently know and can save through treatments instead of prevention. Consequentialist (and utilitarian) theory leans towards valuing both identical and statistical lives equally, more easily leading

Consider the following simplified application of Act utilitarianism to public health. Say, in the interest of population health, our public health commissioner, Masako, implements a tobacco tax. One negative consequence—negative in the sense that it reduces utility—is that tobacco products are more expensive. This would increase the money needed to purchase cigarettes, moderately decrease the opportunities for enjoyment for tobacco smokers, and take away money from other potential purchases. However, such a tax would decrease the likelihood of smokers getting various cancers,<sup>98</sup> decrease second-hand smoke exposure,<sup>99</sup> and thereby reduce medical expenditures associated with treatment for tobacco-induced cancer and other diseases.<sup>100</sup> This calculus would seem to favor implementing the tobacco tax; thus, it should be *right* to do so.

Critics characterize consequentialist theories and utilitarianism as systems that use individuals as a means to an end.<sup>101</sup> This criticism perhaps too simplistically ignores the

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to the conclusion to value the lives of the many over the few. See Johann Frick, *Treatment Versus Prevention in the Fight Against HIV/AIDS and the Problem of Identified Versus Statistical Lives*, 183-84, in IDENTIFIED VERSUS STATISTICAL LIVES: AN INTERDISCIPLINARY PERSPECTIVE (I. Glenn Cohen, Norman Daniels, & Nir Eyal, eds., 2015).

<sup>98</sup> See generally Erin P. Balogh, *Reducing Tobacco-Related Cancer Incidence and Mortality: Summary of An Institute of Medicine Workshop*, 19 ONCOLOGIST 21 (2014).

<sup>99</sup> See generally *Secondhand Smoke (SHS) Facts*, CTRS. DISEASE CONTROL & PREVENTION (Jan. 5, 2021),

[https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/secondhand\\_smoke/general\\_facts/index.htm#:~:text=The%20decline%20in%20secondhand%20smoke,smoke%20is%20likely%20due%20to%3A&text=Decreasing%20cigarette%20smoking%20rates,in%20many%20states%20and%20localities.](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/general_facts/index.htm#:~:text=The%20decline%20in%20secondhand%20smoke,smoke%20is%20likely%20due%20to%3A&text=Decreasing%20cigarette%20smoking%20rates,in%20many%20states%20and%20localities.)

<sup>100</sup> See generally Elizabeth Fernandez, *Health Care Costs Drop Quickly After Smokers Quit*, CTR. TOBACCO CONTROL RES. & EDU. (May 10, 2016), <https://tobacco.ucsf.edu/health-care-costs-drop-quickly-after-smokers-quit#:~:text=A%20new%20national%20analysis%20by,total%20national%20health%20care%20costs.>

<sup>101</sup> Julian Savulescu, Ingmar Persson, & Dominic Wilkinson, *Utilitarianism and the Pandemic*, 34 BIOETHICS 620, 621 (2020).

positive role that utilitarianism has played in the modern era.<sup>102</sup> Furthermore, it disregards how well-suited utilitarianism is to meet public health goals due to its ability to justify limited, necessary infringements on individual preferences and liberties in the form of public health interventions.<sup>103</sup> However, public health does not follow a pure utilitarian framework. Using such a system could lead to significant issues; strict adherence could result in an ethical framework that makes decisions regardless of whether population health is maximized by lies, manipulation, or coercion.<sup>104</sup> This is a system most would want to avoid. More notably, utilitarianism can and often does come into direct conflict with other values that are generally accepted and are important in our pluralistic society, such as justice, fairness, and honesty.<sup>105</sup>

From an operational standpoint, implementing a pure-utilitarian framework can be quite difficult.<sup>106</sup> First, one must

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<sup>102</sup> *Id.* Modern public health is built on the back of advances in sanitation in England under the leadership of Edwin Chadwick and Southwood Smith, who was heavily influenced by the works of Jeremy Bentham. GEORGE ROSEN, A HISTORY OF PUBLIC HEALTH: REVISED EXPANDED EDITION 93 (Johns Hopkins U. Press 2015).

<sup>103</sup> Olivier Bellefleur & Michael Keeling, *Utilitarianism in Public Health*, INST. NAT'L DE SANTÉ PUBLIQUE QUÉBEC, 1 (Jan. 2016), [http://www.ncchpp.ca/docs/2016\\_Ethics\\_Utilitarianism\\_En.pdf](http://www.ncchpp.ca/docs/2016_Ethics_Utilitarianism_En.pdf). It appears that part of the hysteria against utilitarianism is grounded in the idea that the few will be sacrificed to save the many. However, this is not a necessary choice or outcome of utilitarianism, even in the abstract. Assuming that the same level of success could be achieved in reducing virus transmission by mandating every individual wear a mask as quarantining every individual, utilitarianism *could* justify either, but it would likely, in the abstract and in application (barring other factors), call for the mask mandate over the mass quarantine. The total utility would be greater since the same “goodness” is achieved with a lesser infringement.

<sup>104</sup> *Calculating Consequences: The Utilitarian Approach to Ethics*, MARKKULA CTR. FOR APPLIED ETHICS AT SANTA CLARA UNIV. (Aug. 1, 2014), <https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/calculating-consequences-the-utilitarian-approach/>.

<sup>105</sup> Petrini, *supra* note 15, at 192.

<sup>106</sup> *Id.*

consider, how is utility to be measured?<sup>107</sup> What is the metric for “population health” we should use? Is it lifespan? Is that better than incidences of disease? Do we use both? How do we weigh lifespan versus incidences of disease, and does the severity of disease incidents matter? These subjective value calculations are inherently difficult to quantify and apply objectively across broad populations, and no single standard can likely be applied to measure “utility.”<sup>108</sup> Further, a pure utilitarian framework may pose a threat to equity and exacerbate the existing inequities in the public health system in the United States.<sup>109</sup> Broad, population-based metrics may unfairly discriminate based on age or disabilities and raises difficult questions of balancing efficiency against equity.<sup>110</sup>

Public health ethics, during times of normalcy, can be more accurately described as not purely utilitarian but utilitarian with deontological constraints,<sup>111</sup> and these constraints stand for the proposition that there are certain things we absolutely must not do to humans (from a moral perspective), even if the consequentialist outcome would be positive.<sup>112</sup> While an outright ban could achieve the public health interest in curbing tobacco use and related costs more expeditiously, these deontological values would normally discourage such action. Deontological constraints on the “pursuit of good” can help overcome the moral concerns of

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<sup>107</sup> Determining an appropriate measurement for population health is difficult. One metric created to try and more accurately capture population health is the quality-adjusted life year (QALY). See GREG BOGNAR & IWAO HIROSE, *THE ETHICS OF HEALTH CARE RATIONING* 41-51 (2014).

<sup>108</sup> Petrini, *supra* note 15, at 192.

<sup>109</sup> Ruth Faden, Justin Bernstein, & Sirine Shebaya, *Public Health Ethics*, STANFORD ENCYCLOPEDIA OF PHIL. (July 8, 2020) <https://plato.stanford.edu/entries/publichealth-ethics/>.

<sup>110</sup> *Id.*

<sup>111</sup> ANDREW W. SIEGAL & MARIA W. MERRITT, AN OVERVIEW OF CONCEPTUAL FOUNDATIONS, ETHICAL TENSIONS, AND ETHICAL FRAMEWORKS IN PUBLIC HEALTH, in *THE OXFORD HANDBOOK OF PUBLIC HEALTH ETHICS* 1 (2019).

<sup>112</sup> See Larry Alexander, *Deontological Constraints in a Consequentialist World: A Comment on Law, Economics, and Morality*, 3 JERUSALEM REV. L. STUDIES 75, 75 (2011).

justice, fairness, and honesty of utilitarianism.<sup>113</sup> Public health officials, now more than ever, are giving value to notions of individual rights normally seen in healthcare.<sup>114</sup> This tension between population health and individual rights arises from a clash of private and public interests—private interests push back against the perceived paternalism of the state while public interests seek to utilize paternalistic powers to promote the good for all.<sup>115</sup>

While many resist the idea of utilitarian calculi and are unwilling to concede the importance of individual interests, utilitarian values continue to have a central role in public health practice.<sup>116</sup> This is because public health intervention, by its very nature, necessarily must selectively infringe on individual rights in certain circumstances to promote population health.<sup>117</sup> Thus, it makes more sense to describe public health normalcy as a utilitarian system that may infringe on individuals to promote population health but is limited by deontological constraints that prevent unnecessary and overly burdensome infringements by government actors.<sup>118</sup>

## B. LIBERTARIAN DEONTOLOGY

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<sup>113</sup> *Id.* at 2.

<sup>114</sup> Marc J. Roberts & Michael R. Reich, *Ethical Analysis in Public Health*, 359 LANCET 1055, 1056 (2002). This approach to public health ethics can be traced to a recent movement started by Jonathan Mann and those influenced by his works. See Jonathan M. Mann, *Medicine and Public Health, Ethics and Human Rights*, 27 HASTINGS CTR. REP. 6, 10 (1997); Stephen P. Marks, *Jonathan Mann's Legacy to the 21<sup>st</sup> Century: The Human Rights Imperative for Public Health*, 29 J.L. MED. & ETHICS 131, 132 (2001); S. R. Leeder, *Ethics and Public Health*, 34 INTERNAL MED. J. 435, 437-38 (2004).

<sup>115</sup> Petrini, *supra* note 15, at 191.

<sup>116</sup> Roberts & Reich, *supra* note 114.

<sup>117</sup> *Utilitarianism in Public Health*, NAT'L COLLABORATING CENTRE FOR HEALTHY PUB. POL'Y (Jan. 2016), [http://www.nchpp.ca/docs/2016\\_Ethics\\_Utilitarianism\\_En.pdf](http://www.nchpp.ca/docs/2016_Ethics_Utilitarianism_En.pdf).

<sup>118</sup> ANDREW W. SIEGAL & MARIA W. MERRITT, AN OVERVIEW OF CONCEPTUAL FOUNDATIONS, ETHICAL TENSIONS, AND ETHICAL FRAMEWORKS IN PUBLIC HEALTH, in THE OXFORD HANDBOOK OF PUBLIC HEALTH ETHICS 3 (2019).



While utilitarianism determines the goodness of an action by the amount of utility produced, deontology looks to the nature of the act itself.<sup>119</sup> An action may be morally justified regardless of whether a “good” or “bad” outcome results for society.<sup>120</sup> As discussed, deontology is often raised in opposition to utilitarianism, leading to its natural limitation of utilitarian extremes in public health normalcy.<sup>121</sup> At the beginning of the COVID-19 pandemic, the Civil Rights Office of the Department of Health and Human Services stated, “Our civil rights laws protect the equal dignity of every human life from ruthless utilitarianism.”<sup>122</sup> This exemplifies the tension between the two theories<sup>123</sup> and raises the same concerns about individual autonomy seen in permissive jurisdictions.

Deontology is rooted in the works of Immanuel Kant, who specifically argued that humans were not to be the means to another’s end.<sup>124</sup> Kant’s deontology emphasized individual rights as “paramount,” an idea most appealing to modern libertarians.<sup>125</sup> Despite this connection, the present conception of libertarianism is more often traced to the works of political philosophers like John Locke and John Stuart Mill.<sup>126</sup> Today, libertarians often argue for negative rights that guarantee one’s ability to live and act freely without infringement from the state.<sup>127</sup> This freedom of course has limits – one may freely act,

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<sup>119</sup> Jharna Mandal et al., *Utilitarian and Deontological Ethics in Medicine*, 6 TROPICAL PARASITOLOGY 5, 7 (2016).

<sup>120</sup> *Id.*

<sup>121</sup> Petrini, *supra* note 15, at 189-202.

<sup>122</sup> Julian Savulescu et al., *Utilitarianism and the Pandemic*, 34 BIOETHICS 620, 632 (2020).

<sup>123</sup> Mandal, *supra* note 119 (explaining how “deontological idealists,” such as doctors, are “driven to utilitarian approach by public health professionals, hospital managers, and politicians (utilitarian ideologists)”).

<sup>124</sup> Roberts & Reich, *supra* note 114.

<sup>125</sup> *Id.*; HOWARD WILLIAMS, KANT AND LIBERTARIANISM, in KANT UND DIE PHILOSOPHIE IN WELTBÜRGERLICHER ABSICHT (2013).

<sup>126</sup> HOWARD WILLIAMS, KANT AND LIBERTARIANISM, in KANT UND DIE PHILOSOPHIE IN WELTBÜRGERLICHER ABSICHT (2013); Bas van der Vossen, *Libertarianism*, THE STANFORD ENCYCLOPEDIA OF PHIL. (Spring 2019), <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=libertarianism>.

<sup>127</sup> Roberts & Reich, *supra* note 114.

so long as they refrain from individual violations of the rights of others.<sup>128</sup> This would be the only justification for State infringement: to prevent individual infringements.<sup>129</sup> A pure libertarian approach would likely reject policies that infringe on one's autonomy, "even if those policies would maximize population health."<sup>130</sup>

The modern conception of libertarianism is an especially important outgrowth of deontic theory. Values such as individual freedom and autonomy are given great weight and tend to dominate in value balancing; the State's role is defined solely to protect these values.<sup>131</sup> Robert Nozick is one of the most influential voices in shaping present-day libertarian theory. In his book *Anarchy, State, and Utopia*, Nozick refers to a concept called the "minimal state," wherein the state is only justified in protecting individuals from force, theft, and fraud and to enforce contracts – all other expressions of state power are unjustified violations of one's natural rights.<sup>132</sup> Similar to deontological limitations on individuals, Nozick refers to "side constraints" as limitations on an individual's actions towards others.<sup>133</sup> Side constraints are indicative of the principle that "individuals are not inviolable."<sup>134</sup> Despite the lack of inviolability, Nozick ardently seeks to protect individuals from state action by making pointed critiques of utilitarianism and alluding to the danger of a "utility monster" that threatens individual rights by hoarding enormous gains of utility from sacrificing the rights of individuals.<sup>135</sup>

The libertarian moral rights that Nozick speaks of – also called "state of nature rights" – provide the foundation for limiting state interventions.<sup>136</sup> The basic tenet is this: the state

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<sup>128</sup> Jody S. Kraus, *Legal Determinacy and Moral Justification*, 48 WILLIAM & MARY L. REV. 1773, 1776 (2007).

<sup>129</sup> *Id.* at 1776-77.

<sup>130</sup> SIEGEL & MERRITT, *supra* note 118.

<sup>131</sup> Petrini, *supra* note 15, at 193.

<sup>132</sup> ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* ix (1974).

<sup>133</sup> *Id.* at 29.

<sup>134</sup> *Id.* at 31.

<sup>135</sup> *Id.* at 41.

<sup>136</sup> Eric Mack, *Robert Nozick's Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHIL. (Apr. 21, 2022), <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=nozick-political>.

cannot take certain actions, regardless of whether the result is the betterment of society.<sup>137</sup> Taken to its extreme, some have argued this principle can justify the proscription of government taxation in the face of imminent and utter destruction, so long as that destruction is the result of a morally neutral agent or occurrence.<sup>138</sup> The State cannot take such actions because to do so would intrude on what Nozick and Locke refer to as a “moral space” around individuals.<sup>139</sup> Absent consent, an individual’s moral space can only be impinged by their own action.<sup>140</sup>

One positive implementation of libertarianism that aptly demonstrates its core principles is its application to the issue of racial justice.<sup>141</sup> Jerry Kang notes that a utilitarian argument could promote corporate diversity,<sup>142</sup> but the true crux of the argument for diversity in the workplace (or opposing racial discrimination) is the idea that discrimination against an individual based on their race is an illegitimate

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<sup>137</sup> As an example: “As Nozick understands [natural moral rights,] it forbids *A*’s (unprovoked) killing of *B* even if *A* can prevent *W* from killing *X*, *Y*, and *Z* only by killing *B*. Although it *may* in some sense be *less bad* for *B* to be killed than for *X*, *Y*, and *Z* to be killed, *A* remains bound not to kill *B*. *A* may not prevent the wrong that *W* will do in killing *X*, *Y*, and *Z* by killing *B*. For Nozick, rights express the moral inviolability of individuals[ ] and *B* would not be morally inviolable – nor would any of us be – were *B* open to use by *A* even for the purpose of preventing the violation of the right of *X*, *Y*, and *Z*. Not even the minimization of the violation of the right against being killed can justify the violation of that right.” *Id.*

<sup>138</sup> “[T]here’s a good case to be made that taxing people to protect the Earth from an asteroid ... is an illegitimate function of government from a moral perspective. I think it’s O.K. to violate people’s rights (e.g. through taxation) if the result is that you protect people’s rights to some greater extent (e.g. through police, courts, the military). But it’s not obvious to me that the Earth being hit by an asteroid ... violates anyone’s rights; if that’s so, then I’m not sure I can justify preventing it through taxation.” Sasha Volokh, *Asteroid defense and libertarianism*, VOLOKH CONSPIRACY (Feb. 15, 2011, 10:17 AM), <https://volokh.com/2011/02/15/asteroid-defense-and-libertarianism/>.

<sup>139</sup> ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 57-58 (1974).

<sup>140</sup> *Id.*

<sup>141</sup> Jerry Kang, *Race.Net Neutrality*, 6 J. TELECOMM. & HIGH TECH. L. 1, 7 (2007).

<sup>142</sup> *Id.*

infringement on that individual's moral space.<sup>143</sup> Thus, libertarian principles would conclude that one "should not discriminate against [another] simply because of [their] ethnic background."<sup>144</sup> Moreover, the elevation of libertarian deontic values further protects against acting on deceptive stereotypes.<sup>145</sup> Utilitarian calculi could justify discriminatory behavior against ethnic minorities in airport screenings, for example, based on "accurate assessments of base rate probabilities," but a libertarian argument would deem this immoral notwithstanding this 'statistical truth.'<sup>146</sup>

In the realm of public health, libertarian values have been at the root of resistance to vaccine mandates based on individual freedoms – the HPV vaccine has been one arena for such debate.<sup>147</sup> Should vaccination against the human papillomavirus (which causes cervical and pharyngeal cancer) be mandated? The discussion pits population health against personal autonomy.<sup>148</sup> Stressing the inviolability of autonomy, the argument follows that so long as an individual is not actively and consciously harming others, they should be able to

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<sup>143</sup> *Id.*

<sup>144</sup> Kang examines Japanese internment camps as an example. Such a utilitarian justification, in his view, justified the internment of Japanese citizens in the U.S. where "military leaders ... concluded that [Japanese people] constitute[d] a military threat of espionage and sabotage." *Id.* at 12.

<sup>145</sup> *Id.*

<sup>146</sup> Similarly, it may "make more sense" for restaurant servers to provide sub-standard service to Black patrons given statistical evidence that they tip less. But we still should fight against such discrimination. *Id.*

<sup>147</sup> Robert I. Field & Arthur L. Caplan, *A Proposed Ethical Framework for Vaccine Mandates: Competing Values and the Case of HPV*, 18 KENNEDY INST. ETHICS J. 111-124 (2008). More recently, the argument has spearheaded the resistance against the COVID-19 vaccine. Primarily Republicans are citing liberty and autonomy as reasons why they do not believe in vaccine mandates. See Alana Wise, *The Political Fight Over Vaccine Mandates Deepens Despite Their Effectiveness*, NPR (Oct. 17, 2021, 7:00 AM), <https://www.npr.org/2021/10/17/1046598351/the-political-fight-over-vaccine-mandates-deepens-despite-their-effectiveness>.

<sup>148</sup> Robert I. Field & Arthur L. Caplan, *A Proposed Ethical Framework for Vaccine Mandates: Competing Values and the Case of HPV*, 18 KENNEDY INST. ETHICS J. 111-124 (2008).

conduct themselves without government influence; this is the “essential element of liberty.”<sup>149</sup> Unwarranted government intervention is the wrongful imposition of paternalism.<sup>150</sup> Thus, government regulation, which poses an inherent risk to liberty by constraining individual choice, is the most intrusive approach to public health and should not be used to mandate vaccination against HPV.<sup>151</sup> The fight for women’s reproductive rights raises similar concerns. Where a woman’s decision regarding her reproductive health affects only herself, would it not be wrong for the government or a third party to prevent her from making such a decision? Suppose taxation to stop an earth-shattering meteor is morally impermissible. In that case, it should follow that access to contraception and other equally important reproductive healthcare services like abortion should receive the same deferential treatment.<sup>152</sup>

These values of individual freedom, autonomy, and the restraint of government action are pervasive throughout jurisdictions that took a permissive approach to mask mandate punishments. Louisiana and Illinois, for example, only punished businesses for failing to uphold mask mandates.<sup>153</sup>

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 114.

<sup>151</sup> Richard K. Zimmerman, *Ethical Analysis of HPV Vaccine Policy Options*, 24 VACCINE 4812 (2006). It should be noted that the autonomy argument for HPV vaccines is difficult given that most vaccine recipients are minors. We may posit that minors are less autonomous, at least in the eyes of the law, and such paternalism is perhaps easier to impose than it would be on an adult. It may even be argued that diminished autonomy requires paternalism.

<sup>152</sup> The modern Libertarian party’s official stance on abortion is that of non-intervention. See *Libertarians: Abortion Is a Matter For Individual Conscience, Not Public Decree*, LIBERTARIAN PARTY (May 17, 2019), <https://www.lp.org/libertarians-abortion-is-a-matter-for-individual-conscience-not-public-decree/>. For a thought-provoking discussion on the deontic philosophy of abortion rights while granting the fetus the status of a person, see Judith Jarvis Thomson, *A Defense of Abortion*, in INTERVENTION AND REFLECTION: BASIC ISSUES IN MEDICAL ETHICS (Ronald Munson, ed., 1996).

<sup>153</sup> La. Exec. Order No. 89 JBE 2020 (July 11, 2020); Jamie Munks, Rick Pearson, & Lauren Zumbach, *Gov. J.B. Pritzker Issues Rule to Penalize Businesses That Don’t Enforce Mask Requirements With Fines Up to \$2,500*, CHICAGO TRIBUNE (Aug. 7, 2020),

This can be seen as the weakest application of libertarian principles. The moral space espoused by Locke and Nozick is being intruded upon by the state; still, perhaps by choosing to operate a business subject to state regulation, the owners have elicited some notion of consent.

Raleigh, North Carolina, and Indiana had “permissive” mandates where no threat of punishment was attached.<sup>154</sup> The “mandates” sought to increase strictly voluntary compliance, which is closer to libertarian principles like autonomy. This evokes the idea of Nozick’s minimal state, but some element of state coercion is still present. While these may be paper laws in effect, state regulation is an inherent risk to liberty; thus, even without a real positive punishment being imposed, the legislation itself can be seen as coercive and threatening to individual autonomy.<sup>155</sup> This inherently squeezes the moral space around individuals. *Very permissive* jurisdictions, on the other hand, lacked any action. This is a stronger view of the minimal state – where this is no justification, there should be no state intervention. This shows a strong protection for individual autonomy and liberty.

The *most permissive* jurisdictions that banned or attempted to ban localities from implementing mandates and punishments are the closest to pure libertarianism. This approach is emblematic of holding individual rights and liberty as paramount.<sup>156</sup> It embodies the greatest guarantee of individual freedom and autonomy; by tying its own hands, the state effectively prevents “unjust” infringement of individual liberties. Even if punishments for mask mandates would maximize population health, this clearly rejects those policies in favor of liberty.<sup>157</sup> The state is even ceding ground beyond one’s

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<https://www.chicagotribune.com/coronavirus/ct-coronavirus-illinois-pritzker-guidelines-20200807-q22uwbrb2basbmqn44ftw5enzm-story.html>.

<sup>154</sup> Ind. Exec. Order No. 20-37 (July 24, 2020); *Proclamation to Require Face Coverings Indoors*, RALEIGH, N.C.

<https://raleighnc.gov/SupportPages/proclamation-require-face-coverings-indoors> (last updated Sept. 28, 2021).

<sup>155</sup> Zimmerman, *supra* note 151.

<sup>156</sup> Roberts & Reich, *supra* note 114.

<sup>157</sup> SIEGEL & MERRITT, *supra* note 118.

moral space, preventing itself from crossing that demarcated line.

An important point to recognize is that these responses may represent a merely opportunistic and simple implementation of libertarianism. Deontology and libertarianism, as philosophical theories, are incredibly rich and complex and could realistically support a multitude of policy outcomes. However, despite the capaciousness of these theories, this simple and opportunistic libertarianism is what seems to have been relied upon and applied in practice.

### C. RETRIBUTIVISM: THOROUGHGOING, RESPONSE, AND PARTIAL

Initially, the jurisdictional responses that make up the restrictive wing may appear to be more utilitarian in nature. Where the permissive wing sought to omit state action, the restrictive wing took a strong approach to public health punishment and implemented penalties ranging from small to large-scale fines and, in some cases, lengthy jail sentences. This approach could be reasonably interpreted as serving the utilitarian goals of public health—through a utilitarian calculus; it may seem reasonable to punish anti-maskers for noncompliance if that punishment promotes public health by reducing the spread of disease. However, differences in utility calculations do not seem to paint the whole picture. Public outcry, pointed rhetoric, and resentment appear to color the response, echoing the sentiment of “just deserts” and pushing a narrative that perhaps public health scofflaws “deserve” to be punished for noncompliance qua noncompliance.<sup>158</sup> These

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<sup>158</sup> See, e.g., Danny Westneat, *Make Them Pay? The Unvaccinated Have Already Cost Up to \$850 Million in Washington State*, SEATTLE TIMES (Oct. 2, 2021, 12:19 PM), <https://www.seattletimes.com/seattle-news/health/make-them-pay-the-unvaccinated-have-already-cost-up-to-850-million-in-washington-state/>; Tara McKelvey, *Coronavirus: Why Are Americans So Angry About Masks?*, BBC NEWS (July 20, 2020), <https://www.bbc.com/news/world-us-canada-53477121> (“In the midst of the pandemic .... [some] are enraged by the way that people flout the mask mandates. . . [t]he conflict over masks is tense, volatile, and deeply personal.”).

punishments, especially the harshest, evoke some notion of retributivism in addition to utility calculations.

Strict retributivism is often associated with something akin to revenge, depicting one lashing out in a blind rage in response to another who causes them harm.<sup>159</sup> However, it has been argued for years that retributivism can serve as the foundation for a structured and fair or just punishment system.<sup>160</sup> Foundationally, the theory relies on the idea that “punishing the deserving is intrinsically good.”<sup>161</sup> The imposition of punishment itself on wrongdoers is morally good and permissible when deserved.<sup>162</sup> It is important to note that in the context of public health, the “deserving” under a retributive framework refers to those that break the law, penalizing *behavior* and not one’s status of being sick. Public health has historically made this distinction between ill and maladaptive behavior.<sup>163</sup> Here, the “deserving” are the public health scofflaws that skirt mask mandates.

Kant echoes this intrinsic goodness view of retributivism and adds that, fundamentally, retributivism asks whether one can be punished and, if the answer is yes, how much of one’s history and prior actions are to be accounted for in determining what punishment is just?<sup>164</sup> This leads to the two central claims of retributivism which form the retributivist principle: (1) a legal offense is both necessary and sufficient to punish a person, and (2) a punishment must be just, which requires it to be proportional to the crime committed.<sup>165</sup> This conception of retributivism is often called “thoroughgoing retributivism,” and the retributivist principle acts as the general justification for punishment.<sup>166</sup>

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<sup>159</sup> Robert A. Pugsley, *Retributivism: A Just Basis for Criminal Sentences*, 7 HOFSTRA L. REV. 379, 397 (1979).

<sup>160</sup> *Id.* at 381.

<sup>161</sup> Leora Dahan Katz, *Response Retributivism: Defending the Duty to Punish*, L. & PHIL. (forthcoming 2020).

<sup>162</sup> *Id.*

<sup>163</sup> *City of Newark v. J.S.*, 652 A.2d 265, 275 (N.J. Super. Ct. Law Div. 1993).

<sup>164</sup> Don E. Scheid, *Kant’s Retributivism*, 93 ETHICS 262 (1983).

<sup>165</sup> *Id.* at 263.

<sup>166</sup> To reiterate more succinctly, the retributivist principle dictates that “[a]ll and only those who commit legal offenses may justly receive



Like libertarianism, a core assumption of retributivism is autonomy and free will; proportional punishment is a derivative of one's responsibility for their actions.<sup>167</sup> Inherent in this view is the idea that all individuals are agents with the requisite capacity to make a meaningful and reasoned choice.<sup>168</sup> Retribution theory is instinctively very popular—it may feel intuitive that the government should punish someone for choosing to commit a wrong. Robert Pugsley thus characterizes retributivism as a “just societal response” and claims it increases the well-being of community members.<sup>169</sup>

New philosophical theorists have pushed to stretch the mold of retributivist theory to fit more modern values in response to claims that it is “barbaric.”<sup>170</sup> Leora Katz, for example, argues for what she calls *response retributivism*, which expands the traditional retributivist principle to require the imposition of punishment by those with the means to punish, using almost a protective lens.<sup>171</sup> Assuming one is in an “appropriate relationship” with a wrongdoer, such as a state to a citizen of that state, the failure to impose punishment—what Katz refers to as “reject[ing] the devaluation inherent in the culpable action of the wrongdoer”—is itself wrongful conduct.<sup>172</sup>

Katz explains that all people and entities, including respondents—those in a relationship with a primary wrongdoer—are obligated to respect the moral worth of others; this is the same duty that the primary wrongdoer, person X, has towards others.<sup>173</sup> However, in order for the respondent to

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punishments so long as the punishments are in proportion to the seriousness of the respective crimes.” *Id.*

<sup>167</sup> Robert A. Pugsley, *Retributivism: A Just Basis for Criminal Sentences*, 7 HOFSTRA L. REV. 379, 398 (1979).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Alec Walen, *Retributive Justice*, STANFORD ENCYCLOPEDIA OF PHIL. (Summer 2021), <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=justice-retributive> (“[S]ome critics think the view that it is intrinsically good to inflict suffering is ‘barbaric’ ... or ‘morally repugnant.’”).

<sup>171</sup> Leora Dahan Katz, *Response Retributivism: Defending the Duty to Punish*, 40 L. & PHIL. 13 (2020).

<sup>172</sup> *Id.* at 13.

<sup>173</sup> *Id.*

fulfill their obligation to respect the moral worth of others, response retributivism requires two things: (1) a person (or respondent) must refrain from a primary violation of another's moral worth and rights, and (2) a person (or respondent) must also act in ways that are consistent with respecting the moral worth of others.<sup>174</sup> Under the second prong, the failure to appropriately respond to primary violations committed by person X, according to Katz, is "constitutive of failing to respect the moral worth of others as required."<sup>175</sup> Failing prong two is, in essence, morally equivalent to failing prong one.

Consider the duty not to kill. X should not kill Y because to do so would be a primary violation of the moral worth of Y; therefore, we can say that X has a moral duty not to kill Y.<sup>176</sup> This duty not to kill Y creates a secondary duty to respond to another appropriately's primary violation of Y's moral worth.<sup>177</sup> Thus, if Z violates the moral worth of Y, this triggers the secondary duty for X to respond to Z's wrongful conduct.<sup>178</sup> While one must respond according to their secondary duties, Katz explains that the response must "sufficiently reject the devaluation inherent" in the wrongful conduct, meaning X's response to Z's wrongdoing must sufficiently devalue the wrongful conduct that Z committed against Y's moral worth.<sup>179</sup> What constitutes a sufficient rejection of the inherent devaluation of wrongful conduct requires one to engage in a process akin to a just deserts calculation.<sup>180</sup>

Perhaps more applicable here is a third retributive theory – partial retribution. Whereas thoroughgoing retribution clings solely to the retributivist principle as a justifying aim, partial retribution uses an additional forward-

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 14.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 15.

<sup>179</sup> Katz uses the example of sexual abuse of a child to illustrate this point. In some cases, an act so severe cannot be meaningfully devalued without some significant burden or deprivation. In the case of sexual abuse of a minor, "merely wagging a finger would seem to fail to take the wrongdoing seriously." *Id.* at 16.

<sup>180</sup> Elements examined typically include the seriousness of the offense, the extent to which devaluation of moral rights has occurred, and societal norms. *Id.* at 23-24.

looking, pluralistic justification of punishment.<sup>181</sup> While it is still inherently “good” to proportionally punish a wrongdoer by virtue of their wrongdoing alone, partial retribution ties in consequentialist notions of utility.<sup>182</sup> Under this theory, crime control may be the ultimate goal of a punishment system, but the punishment of an individual can also be justified solely by their wrongdoing, which must also be in proportion to the crime committed.<sup>183</sup>

Consider the following scenario raising the pluralistic concerns of partial retributivism. Our public health commissioner, Masako, has just implemented a public health mandate: the population shall not do X, which is understood to increase the risk of death by Y amount. The main purpose of this mandate would be, for example, to slow the spread of a communicable disease and to promote population health. However, in an individual capacity, (proportional) punishment should be imposed for those that defy the mandate because the illegal activity in and of itself is a sufficient reason to justify punishment, whether it furthers that utilitarian goal or not. In terms of what punishment to impose, a pure utilitarian justifying aim could, perhaps, promote a 99-year jail sentence to capitalize on maximum population deterrence; however, the retributive just deserts principle would limit such punishment to be proportional to the wrong committed.<sup>184</sup>

Turning to the restrictive jurisdictional approaches, thoroughgoing retribution applies the retributivist principle to justify punishment.<sup>185</sup> All restrictive jurisdictions enacted some law requiring individuals to wear a mask in certain settings; scofflaws who failed or refused to comply, having committed a legal offense, can be punished under this pervasive principle alone. The proportionality element poses a very difficult question, weighing the harm caused and perhaps the subjective

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<sup>181</sup> Berman refers to partial retributivism as “instrumentalism.” Mitchell Berman, *Two Kinds of Retributivism*, 2-8 (UNIV. TEXAS SCH. L., Public Law and Legal Theory Research Paper Series No. 171, 2010).

<sup>182</sup> *Id.*; Don E. Scheid, *Kant’s Retributivism*, 93 ETHICS 262, 264 (1983).

<sup>183</sup> Igor Primoratz, *On Partial Retributivism*, 71 ARCHIVES PHIL. L. & SOCIAL PHIL. 373 (1985).

<sup>184</sup> In this sense, the retributive principles act as a check on the “utility monster” feared by deontological theorists. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 41 (1974).

<sup>185</sup> Don E. Scheid, *Kant’s Retributivism*, 93 ETHICS 262, 263 (1983).

experience of the individual, which may allude to the differing approaches.<sup>186</sup> For example, Omaha, Nebraska's punishment of \$25 may suggest lawmakers viewed such malfeasance as trivial or that subjective harm from punishment may have been great.<sup>187</sup> However, more severe punishments such as Maryland's \$5,000 fine and up to one year in jail may reflect an opposite calculation—low subjective harm and characterizing the violation as causing extreme harm.<sup>188</sup>

Katz's response to retributivism provides an alternative route for essentially the same outcome. As the imposer of punishment, the government sits in the "appropriate relationship" to scofflaws and thus has an obligation to sufficiently devalue a scofflaw's harming of another's moral worth.<sup>189</sup> The harm here can be theorized as purposeful or reckless exposure of disease transmission to others; this is especially pertinent since asymptomatic cases were a significant concern with COVID-19.<sup>190</sup> The requisite government body would thus have a moral obligation to sufficiently devalue an anti-mask scofflaw's flouting of a mask mandate. Using essentially the same just deserts theory of punishment as thoroughgoing retributivism, the subjective calculations likely follow the same calculation and result.

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<sup>186</sup> Adam Kolber argues that subjective experience is a crucial component of this calculation. "Retributivists who fail to consider variation in offenders' actual or anticipated experiences of punishment are not measuring punishment properly and are therefore punishing disproportionately." Alec Walen, *Retributive Justice*, STANFORD ENCYCLOPEDIA OF PHIL. (Summer 2021), <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=justice-retributive>.

<sup>187</sup> Becca Costello, *Omaha City Council Passes Mask Mandate, Rule Takes Effect Immediately*, NEB. PUB. MEDIA (Aug. 11, 2020, 6:05 PM), <https://nebraskapublicmedia.org/en/news/news-articles/omaha-city-council-passes-mask-mandate-rule-takes-effect-immediately/>.

<sup>188</sup> Donna Engle, *Legal Matters: Failure to wear a mask, or to follow any executive order, a punishable offense*, CARROLL COUNTY TIMES (Sept. 13, 2020, 5:30 AM), <https://www.baltimoresun.com/maryland/carroll/lifestyles/cc-legal-matters-091320-20200913-jds7gjkvtjdcnmcq4hkarqznm-story.html>.

<sup>189</sup> Katz, *supra* note 171.

<sup>190</sup> Pratha Sah et al., *Asymptomatic SARS-CoV-2 Infection: A Systematic Review and Meta-analysis*, 118 PROCEEDINGS NAT'L AC. SCIS. 1-12 (2021).

Partial retributivism likely serves as the best explanation for the variation among restrictive jurisdictions. Grounded in the context of a public health crisis, it reasonably follows that the overarching goal of these punishments is to prevent the spread of disease, a squarely utilitarian goal in this pluralistic theory.<sup>191</sup> However, the retributivist principle still applies, suggesting that legal malfeasance alone is sufficient for imposing proportional punishment. Utilitarian goals during a public health crisis may shed light on why some jurisdictions used significantly harsher punishments, such as Oregon, Mississippi, or Maryland.<sup>192</sup> During a public health crisis, legal malfeasance represents a greater harm than traditional scofflaw activity; this can represent a greater detriment to the population as a whole and may require some greater penalty in turn.

Furthermore, lawmakers may consider and factor in pluralistic values like deterrence. For example, the threat of a \$5,000 fine and up to one year in jail may act as a strong deterrent against other public health scofflaws. Whether this works is one question, but whether this is an appropriate approach for public health punishment is another. As with libertarianism, the scope of retributive is vast; however, as applied, some form of partial retribution appears to best explain the response of restrictive jurisdictions.<sup>193</sup>

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<sup>191</sup> Mitchell Berman, *Two Kinds of Retributivism*, 8 (UNIV. TEXAS SCH. L., Public Law & Legal Theory Research Paper Series No. 171, 2010).

<sup>192</sup> Dirk VanderHart, *Oregon's Mask Rules Expanding to Crowded Outdoor Spaces as COVID Cases Spike*, OPB (July, 13, 2020, 2:00 PM), <https://www.opb.org/news/article/oregon-coronavirus-covid-19-face-mask-rules/>; Miss. Exec. Order No. 1516 (Aug. 4, 2020); Donna Engle, *Legal Matters: Failure to Wear a Mask, or to Follow Any Executive Order, a Punishable Offense*, CARROLL COUNTY TIMES (Sept. 13, 2020, 5:30 AM), <https://www.baltimoresun.com/maryland/carroll/lifestyles/cc-legal-matters-091320-20200913-jds7gjkvtjdcnmcq4hkqrqznm-story.html>.

<sup>193</sup> One difficult question that remains is drawing causal connections from mask mandate scofflaws to victims—can we justify punishing for seemingly victimless crimes? There are two possible responses. First, we can say there need not be a victim to proscribe behavior. Second, if we require some tangible harm as a prerequisite to proscription (drawing on the Harm Principle), we can conceive of a

#### IV. SHIFTING EMERGENCY PRIORITIES

A global pandemic significantly shifts the landscape for public health decision-making. Exigency is inherent. It stands to reason that perhaps the framework that would govern decision-making during times of normalcy may not necessarily be appropriate as different values emerge and take priority. In some fashion, emergency medicine already recalculates and

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sufficient harm still. Liability can exist under a duty of easy rescue theory. Feinberg posited that certain failures to act are (legally) culpable omissions. Patricia Smith says that Feinberg was essentially arguing for the punishment of “negligent omissions,” which are distinct from general omissions. See Patricia Smith, *Feinberg and the Failure to Act*, 11 L. THEORY 237, 238 (2005). Purposeful omissions would of course be more culpable, intuitively. This duty to rescue arises from a duty to society, not individuals, and the benefit is unevenly distributed to individuals in need. Arthur Ripstein, *Three Duties to Rescue; Moral, Civil, and Criminal*, 19 L. & PHIL. 751, 774-75 (2000). The concept for mask mandates and public health is similar. During a pandemic, individuals are at risk to varying degrees. Catching the disease can mean death. The “easy rescue” here is to wear a mask. This costs little to nothing to the mask-wearing individual and such a duty is derived from a duty to protect the public health generally, as opposed to individuals you pass on the street. However, the shirking of mask mandate laws must still cause some cognizable harm. That harm is harm to statistical lives. Statistical lives are those that will likely be lost due to known risk factors, absent some intervention (like public health), and which hold equivalent moral value—requiring some action in their aid—to known victims (identified lives). See Johann Frick, *Treatment Versus Prevention in the Fight Against HIV/AIDS and the Problem of Identified Versus Statistical Lives*, in IDENTIFIED VERSUS STATISTICAL LIVES: AN INTERDISCIPLINARY PERSPECTIVE (Glenn Cohen et al., eds., 2015). Public health noncompliance for transmissible diseases, particularly during a pandemic, contributes in some X amount to the statistical risk to the populace. This all but guarantees some unknown number of deaths. The absence of knowledge of who that is, however, should not preclude legal culpability. It is just harm that is shrouded. Thus, the act (not wearing a mask), should be seen as a culpable omission (during an emergency like a pandemic) that does cause harm. Such harmful behavior can be proscribed and subsequently punished for noncompliance, perhaps justified then under a retributivist model.

revalues its priorities during emergencies.<sup>194</sup> Public health, similarly, requires such a shift.

Professor Satoshi Kodama of Kyoto University in Japan provides an illuminating discussion on public health priorities during times of exigency. Public health has, in recent history, turned its attention away from infectious diseases in favor of chronic diseases.<sup>195</sup> Yet, new infectious diseases continue to rise; the emergence or re-emergence of deadly pathogens like SARS, Influenza, and COVID-19 necessitates action.<sup>196</sup> But the current bioethical model—which dominates in healthcare—is difficult to apply to population-level threats; values like independence and autonomy run against restrictions of individual freedom that are necessary to protect public health.<sup>197</sup> While “good grounds” are needed to suppress individual freedom, doing so brings us closer to the “greater good,” an inherently utilitarian notion.<sup>198</sup> Kodama points to the Osaka Medical Association’s disaster medical guidelines as an example, which state (in Bentham-like language<sup>199</sup>) that the goal is “the best for the greatest number of victims.”<sup>200</sup>

Domestic disaster policy recommendations have echoed similar notions, calling for reallocating healthcare resources to save the most lives.<sup>201</sup> Laura Vearrier and Carrie M. Henderson

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<sup>194</sup> Laura Vearrier & Carrie M. Henderson, *Utilitarian Principlism as a Framework for Crisis Healthcare Ethics*, 33 HEALTHCARE ETHICS COMMITTEE FORUM 45 (2021).

<sup>195</sup> UKIHSS, *The Ethics of Pandemic [Part 1]*, YOUTUBE (July 4, 2020), <https://www.youtube.com/watch?v=UL14YIKEglc> (the first of a five-part video series on public health ethical considerations during a pandemic by Satoshi Kodama, Associate Professor of Ethics at Kyoto University Graduate School of Letters).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> According to Bentham, the goal underpinning all legislation should be the “greatest happiness of the greatest number.” Brian Duignan, *Jeremy Bentham: British Philosopher and Economist*, BRITANNICA (June 2, 2022), <https://www.britannica.com/biography/Jeremy-Bentham>.

<sup>200</sup> UKIHSS, *The Ethics of Pandemic [Part 3]*, YOUTUBE (July 4, 2020), <https://www.youtube.com/watch?v=UL14YIKEglc>.

<sup>201</sup> For example, Ezekiel J. Emanuel and others called for the prioritization of PPE, ventilators, and other valuable, scarce

break down this value change more explicitly.<sup>202</sup> While, during times of normalcy, the “physician’s primary duty is to the patient,” crises create a shift from deontological theory to utilitarian, where individual interests are outweighed by population health.<sup>203</sup> Autonomy still retains some modicum of importance, but it is grounded within the context of the crisis – thus, necessity requires the limitation of autonomy in the name of population health.<sup>204</sup>

The common theme between Kodama’s analysis of disaster medicine in Japan and Vearrier’s and Henderson’s examination of emergency healthcare ethics in the U.S. is an essence of pragmatism. Both recognize that priorities and approaches must change during an emergency to meet the situation’s needs.<sup>205</sup> This is where the permissive and restrictive approaches previously identified principally fail. Neither approach appears to consider the need for a recalculation of values. More importantly, neither properly addresses the realistic difficulties and flaws in their purely theoretical application. Fundamentally, both approaches were based on too *pure* a theory. Like emergency medicine, public health must apply a more pragmatic framework that is adaptable and conscious of theory’s shortcomings in a vacuum.

The libertarian permissive approach prioritized autonomy above all else. Pandemics necessitate action and

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healthcare resources for healthcare workers. “If physicians and nurses are incapacitated, all patients – not just those with Covid-19 – will suffer greater mortality and years of life lost.” Ezekiel J. Emanuel et al., *Fair Allocation of Scarce Medical Resources in the Time of Covid-19*, 382 N. ENG. J. MED. 2049, 2052 (2020).

<sup>202</sup> Laura Vearrier & Carrie M. Henderson, *Utilitarian Principlism as a Framework for Crisis Healthcare Ethics*, 33 HEALTHCARE ETHICS COMMITTEE FORUM 45 (2021).

<sup>203</sup> *Id.* at 46.

<sup>204</sup> *Id.* at 49.

<sup>205</sup> UKIHSS, *The Ethics of Pandemic [Part 1]*, YOUTUBE (July 4, 2020), <https://www.youtube.com/watch?v=UL14YIKEglc>; Laura Vearrier & Carrie M. Henderson, *Utilitarian Principlism as a Framework for Crisis Healthcare Ethics*, 33 HEALTHCARE ETHICS COMMITTEE FORUM 45, 49 (2021).



require the limitation of autonomy during a crisis,<sup>206</sup> yet the libertarian approach does the exact opposite. Nozick's idealistic "minimal state" stands against state action unless it falls into a prescribed category.<sup>207</sup> The "minimal state" may act to prevent force,<sup>208</sup> however, any personal responsibility or liability that could potentially attach to the reckless or negligent spread of COVID-19 is subsumed as passive and reframed as omission instead of commission, thus precluding state action.<sup>209</sup> This approach mistakes meaningful harm for moral innocence and otherwise prevents state infringement of personal autonomy, fundamentally undermining social solidarity.<sup>210</sup> While "moral harms" against inalienable individual rights are protected, tangible physical harm is allowed to fall across the population. An approach based on such a theory is simply contrary to the general aims of public health and even more so during an emergency.

The partial retributivist restrictive approach, in contrast to the libertarian permissive approach, emphasized strong action and, in certain cases, extreme consequences. Clearly, this approach did not prioritize autonomy since it implemented utilitarian-justified public health punishments. However, two distinct critiques come to light. First is that of practicality: the

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<sup>206</sup> UKIHSS, *The Ethics of Pandemic [Part 1]*, YOUTUBE (July 4, 2020), <https://www.youtube.com/watch?v=UL14YIKEglc>; Laura Vearrier & Carrie M. Henderson, *Utilitarian Principlism as a Framework for Crisis Healthcare Ethics*, 33 HEALTHCARE ETHICS COMMITTEE FORUM 45, 51 (2021).

<sup>207</sup> NOZICK, *supra* note 132.

<sup>208</sup> *Id.*

<sup>209</sup> Whereas, in opposition, utilitarianism considers omissions as equivalent to commissions. Julian Savulescu et al., *Utilitarianism and the Pandemic*, 23 BIOETHICS 620, 624-25 (2020).

<sup>210</sup> Chinmayee Mishra & Navaneeta Rath, *Social Solidarity During A Pandemic: Through and Beyond Durkheimian Lens*, 2 SOCIAL SCIS. & HUMANITIES OPEN 1 (2020) ("Social solidarity not only involves collective responsibility for the promotion of the well-being of members of the group and community at large but also emphasizes taking care of the needs and interests of the underprivileged members of the group.").

calculation of just deserts is convoluted, complex, and likely impossible to implement in a consistent and meaningful way.<sup>211</sup>

While action is needed to stop the spread of infectious diseases, there is great difficulty in determining causal connections in disease spread, making desert calculations more subjective in implementation.<sup>212</sup> To what degree do we factor in the actions of “victims” infected? Should we calculate culpability? Are all mask mandate violators equally culpable? What about those who cannot afford a mask, compared to those who willingly and defiantly violate the mandates? With the myriad of considerations needed for just deserts, it is no surprise to see such wildly different results among the restrictive wing of jurisdictions.<sup>213</sup> Appealing to Loki’s Wager is insufficient on its own to dispel the partial retributivist approach.<sup>214</sup> Still, it is important to recognize that in one case or

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<sup>211</sup> See, e.g., Adam J. Kolber, *The Time-Frame Challenge to Retributivism, OF ONE-EYED AND TOOTHLESS MISCREANTS: MAKING THE PUNISHMENT FIT THE CRIME?* (Michael Tonry ed., 2020) (“Retributivists must choose a time frame in which to analyze desert, but the choice puts them in an unenviable position. The whole-life view is impractical to the point of absurdity, while the current-crime view is theoretically unsound. . . . [T]o uphold the retributivist justification, they must select a time frame and explain why the choice is neither theoretically unsound nor hopelessly impractical.”).

<sup>212</sup> UKIHSS, *The Ethics of Pandemic [Part 5]*, YOUTUBE (July 4, 2020), <https://www.youtube.com/watch?v=UL14YIKEglc>.

<sup>213</sup> Becca Costello, *Omaha City Council Passes Mask Mandate, Rule Takes Effect Immediately*, NEB. PUB. MEDIA (Aug. 11, 2020, 6:05 PM), <https://nebraskapublicmedia.org/en/news/news-articles/omaha-city-council-passes-mask-mandate-rule-takes-effect-immediately/>; Donna Engle, *Legal Matters: Failure to Wear A Mask, or to Follow Any Executive Order, A Punishable Offense*, CARROLL COUNTY TIMES (Sept. 13, 2020, 5:30 AM), <https://www.baltimoresun.com/maryland/carroll/lifestyles/cc-legal-matters-091320-20200913-jds7gjkvtjdcnmcq4hkharqznim-story.html>.

<sup>214</sup> Loki’s Wager is a logical fallacy with nomenclative roots in Norse mythology. The Norse trickster god, in a bet with dwarves, wagered his own head. Upon losing, Loki readily offered up his head on the condition that the dwarves had no right to any part of his neck. Unable to decide where the head ended and the neck began, the dwarves allowed Loki to keep his head despite losing the bet. The essential

another, violators are either under-penalized or over-penalized for their malfeasance at the whim of subjective calculations.

Second, and perhaps more important than the practicality issue, is that of effect and equity. Kodama notes that whatever is prescribed to solve the problem cannot be worse than what is sought to be prevented.<sup>215</sup> The enactment of punishment may be “good” to avoid paper laws, but certain methods of punishment unnecessarily create additional harm or exacerbate existing harms. For example, several jurisdictions threatened jail time as punishment for violating mask mandates.<sup>216</sup> However, putting someone in jail for refusing to wear a mask, and forcing them into a situation where COVID-19 concerns are significantly worse than in the public,<sup>217</sup> would appear to run counter to the utility goal of partial retribution that seeks to promote public health. If we can meaningfully punish someone to improve compliance without resorting to a

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premise is that it is a fallacy to refuse to discuss a concept, or to dismiss it, based on vagueness or uncertainty alone. Thus, although there is some level of ambiguity in just desert calculations, this does not mean they are useless altogether. *Loki's Wager*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Loki%27s\\_Wager](https://en.wikipedia.org/wiki/Loki%27s_Wager) (last visited Nov. 20, 2021).

<sup>215</sup> UKIHSS, *The Ethics of Pandemic [Part 5]*, YOUTUBE (July 4, 2020), <https://www.youtube.com/watch?v=UL14YIKEglc>.

<sup>216</sup> Dirk VanderHart, *Oregon's mask rules expanding to crowded outdoor spaces as COVID cases spike*, OPB (July 13, 2020, 2 PM), <https://www.opb.org/news/article/oregon-coronavirus-covid-19-face-mask-rules/>; Miss. Exec. Order No. 1516 (Aug. 4, 2020); Donna Engle, *Legal Matters: Failure to Wear a Mask, or to Follow Any Executive Order, a Punishable Offense*, CARROLL COUNTY TIMES (Sept. 13, 2020), <https://www.baltimoresun.com/maryland/carroll/lifestyles/cc-legal-matters-091320-20200913-jds7gjkvtjdcnmcq4hkharqnzim-story.html>.

<sup>217</sup> Peter Eisler et al., *Across U.S., COVID-19 Takes a Hidden Toll Behind Bars*, REUTERS (May 18, 2020, 11:00 AM), <https://www.reuters.com/investigates/special-report/health-coronavirus-usa-jails/> (“[Brewer] requested a doctor to check his lungs, he said, but nurses only gave him Tylenol, cough medicine, and instructions to stay hydrated. Brewer was released on April 3 and his daughter took him straight to an urgent care clinic. The doctor said he had COVID-19 symptoms – no tests were available – and told him to quarantine for 14 days, Brewer said.”).

punishment as harsh as imprisonment, would this not result in more utility?

Similarly, “neutral decision-making” exacerbates existing inequities when “applied in already systematically unequal populations.”<sup>218</sup> The U.S. prison system is an exemplar of systematic inequality. Restrictive jurisdiction penalty schemes utilized fines and jail time without regard to one’s status, despite the fact that it is well known that the U.S. penal system’s high rate of imprisonment disproportionately impacts low-income and minority populations.<sup>219</sup> Moreover, implementing this same program results in a disproportionate exposure to infectious diseases for these groups.<sup>220</sup> This again seems to be a suboptimal way of controlling disease spread and maximizing utility.

The relatively flat rate fine system, and unlimited discretion, pose a similar equity issue. Monetary penalties disproportionately impact the poor, leading to higher levels of debt and incarceration.<sup>221</sup> Knowing that the COVID-19 pandemic has disproportionately impacted poor and minority groups,<sup>222</sup> it is a fundamental failure to prop up a “neutral”

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<sup>218</sup> Laura Vearrier & Carrie M. Henderson, *Utilitarian Principlism as a Framework for Crisis Healthcare Ethics*, 33 HEALTHCARE ETHICS COMMITTEE FORUM 45, 56 (2021).

<sup>219</sup> Tara O’Neill Hayes & Margaret Barnhorst, *Incarceration and Poverty in the United States*, AM. ACTION FORUM (June 30, 2020), <https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states/>.

<sup>220</sup> See Michael Massoglia & William Alex Pridemore, *Incarceration and Health*, 41 ANNUAL REV. SOCIOLOGY 291-310 (2015) (“The disproportionate exposure to infectious diseases for inmates occurs in the context of a prison environment with efficient conditions for disease transmission: overcrowding; poor ventilation; poor nutrition; shared hygiene facilities; . . . delayed diagnosis; lack of expertise in infection control; prohibitions against effective harm reduction techniques . . .”).

<sup>221</sup> *Fines, Fees, and Bail: Payments in Criminal Justice System That Disproportionately Impact the Poor*, COUNCIL ECON. ADVISERS (Dec. 2015), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf).

<sup>222</sup> *Double Jeopardy: COVID-19 and Behavioral Health Disparities for Black and Latino Communities in the U.S.*, SUBSTANCE ABUSE & MENTAL

system that exacerbates these inequities. Perhaps the partial retributivist approach is “better” in some regards than the libertarian approach based on utilitarian metrics like case rates and deaths,<sup>223</sup> but both suffer from the foundational failure of being too rigidly theoretical.

## V. A PRAGMATIC RECONCILIATION

Choosing between the libertarian and partial retributivist approaches to public health punishment at a meta-ethical level would result in a stalemate. The moral nihilist may conclude that neither theory is *correct* because moral values are subjective—good (and bad) is a shapeless concept with no universal truth.<sup>224</sup> Alternatively, advocates of either approach operate on fundamentally different values that are equally insurmountable to the other. But to end the analysis here would result in an unsatisfactory conclusion. Law and policy are a constant game of finding the right fit, and such decisions are not as easy as Robert Southey would make us believe.<sup>225</sup> Instead of choosing the “right” philosophical framework for public health punishment, this article aims to provide a pragmatic reconciliation between these theories—a proverbial fourth bed.

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HEALTH SERVS. ADMIN.,

<https://www.samhsa.gov/sites/default/files/covid19-behavioral-health-disparities-black-latino-communities.pdf> (last visited Oct. 16, 2021) (“Recent news reports indicate that the pandemic disproportionately impacts communities of color, compounding longstanding racial disparities.”); Brian Root & Lena Simet, *United States, Pandemic Impact on People in Poverty*, HUM. RIGHTS WATCH (Mar. 2, 2021, 6:00 AM), <https://www.hrw.org/news/2021/03/02/united-states-pandemic-impact-people-poverty> (“Despite the worst economic contraction since the Great Depression, the collective wealth of the US’ 651 billionaires has jumped by over \$1 trillion since the beginning of the pandemic, a 36 percent leap.”).

<sup>223</sup> See, e.g., Donna K. Ginther & Carlos Zambrana, *Association of Mask Mandates and COVID-19 Case Rates, Hospitalizations, and Deaths in Kansas*, 4 JAMA NETWORK OPEN 1, 3 (2021).

<sup>224</sup> Alan Pratt, *Nihilism*, INTERNET ENCYCLOPEDIA OF PHIL., <https://iep.utm.edu/nihilism/> (last visited Oct. 19, 2021).

<sup>225</sup> Southey’s work is more commonly known today as the classic fairy tale Goldilocks and the Three Bears. ROBERT SOUTHEY, *THE STORY OF THE THREE BEARS* (1837).

A pandemic is a situation with inherent exigency. The shift from patient-centric medicine to emergency triage medicine suggests that there is a needed shift in thinking and values in response to such exigency.<sup>226</sup> Like healthcare, in times of emergency, public health punishment must adapt and embrace values different from those that dominate during normalcy. Several principles are inherent in this shift.

First, action must be prioritized over inaction. Unlike libertarianism, which distinguishes commission from omission—categorizing the latter as morally innocent—,<sup>227</sup> a pragmatic pandemic framework cannot make such a distinction. To hold otherwise would allow the transmission of disease and harm to fall upon the public.<sup>228</sup>

Second, jurisdictions must limit considerations of individual liberty and autonomy. Liberty values are not to be erased; they act as important protections against invidious discrimination.<sup>229</sup> However, approaches must appropriately limit liberty values when they stand against necessary public health action. For instance, the libertarian approach taken by permissive jurisdictions raised the importance of individual

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<sup>226</sup> UKIHSS, *The Ethics of Pandemic [Part 1]*, YOUTUBE (July 4, 2020), <https://www.youtube.com/watch?v=UL14YIKEglc>; Laura Vearrier & Carrie M. Henderson, *Utilitarian Principlism as a Framework for Crisis Healthcare Ethics*, 33 HEALTHCARE ETHICS COMMITTEE FORUM 45, 51 (2021).

<sup>227</sup> See *supra* Part II.B.; Hugh LaFollette, *Why Libertarianism Is Mistaken*, JUSTICE AND ECONOMIC DISTRIBUTION (John Arthur & William Shaw, eds., 1979) (“[O]ccasionally, the libertarian will claim that ... [a]ctive harms are always wrong while omissions (failures to act) are never wrong.... Violations of negative rights are active harms while omissions never violate negative rights.”).

<sup>228</sup> Such an omission here would be to fail to create a meaningful mask mandate. See Dhaval et al., *Association between COVID-19 outcomes and mask mandates, adherence, and attitudes*, PLOS ONE (June 23, 2021), <http://doi.org/10.1371/journal.pone.0252315> (“[M]ask mandates are associated with a statistically significant decrease in new cases, ... deaths, ... and the proportion of hospital admissions ... up to 30 days after the introduction of mask mandates both at the state and county level.”).

<sup>229</sup> Jerry Kang, *Race.Net Neutrality*, 6 J. TELECOMM. & HIGH TECH. L. 1, 7 (2007).

liberty to the point where it constricted the state's ability to prevent disease spread effectively.<sup>230</sup>

Third, population health must be elevated. When infectious diseases threaten population health, it is the lives of those threatened and at-risk (statistical lives<sup>231</sup>) that must take priority.<sup>232</sup> This requires the prioritization of population health over that of individual liberties.

In many ways, the three principles above present a *purser* utilitarian approach than either the permissive or restrictive approaches took.<sup>233</sup> However, this falls into the same pitfall of being too theoretical, and utilitarianism is not bereft of criticism. For instance, critics suggest that utilitarianism fails to contemplate justice considerations.<sup>234</sup> Individual notions of justice still hold considerable importance during a pandemic, especially with implementing public health punishment that

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<sup>230</sup> See *supra* Section II.B.; Donna K. Ginther & Carlos Zambrana, *Association of Mask Mandates and COVID-19 Case Rates, Hospitalizations, and Deaths in Kansas*, 4 JAMA NETWORK OPEN 1, 3 (2021) (finding that jurisdictions with mask mandates had lower rates of cases and deaths than those without).

<sup>231</sup> Johann Frick, *Treatment Versus Prevention in the Fight Against HIV/AIDS and the Problem of Identified Versus Statistical Lives*, 183-84, IDENTIFIED VERSUS STATISTICAL LIVES: AN INTERDISCIPLINARY PERSPECTIVE (I. Glenn Cohen et al., eds., 2015).

<sup>232</sup> See UKIHSS, *The Ethics of Pandemic [Part 1]*, YOUTUBE (July 4, 2020), <https://www.youtube.com/watch?v=UL14YIKEgIc>; Laura Vearrier & Carrie M. Henderson, *Utilitarian Principlism as a Framework for Crisis Healthcare Ethics*, 33 HEALTHCARE ETHICS COMMITTEE FORUM 45, 49 (2021).

<sup>233</sup> These are the types of values emphasized by Kodama, Vearrier, and Henderson. See UKIHSS, *The Ethics of Pandemic [Part 1]*, YOUTUBE (July 4, 2020), <https://www.youtube.com/watch?v=UL14YIKEgIc>; Laura Vearrier & Carrie M. Henderson, *Utilitarian Principlism as a Framework for Crisis Healthcare Ethics*, 33 HEALTHCARE ETHICS COMMITTEE FORUM 45, 51 (2021).

<sup>234</sup> Sometimes the "greatest benefit" approach is simply unjust. Utilitarian-like justifications have been used, in albeit extreme ways, to defend, for example, South African Apartheid. South African whites claimed that everyone would be better off under white rule. *Calculating Consequences: The Utilitarian Approach to Ethics*, SANTA CLARA UNIV. MARKKULA CTR. FOR APPLIED ETHICS (Aug. 1, 2014), <https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/calculating-consequences-the-utilitarian-approach/>.

applies to populations broadly. Utilitarian “neutrality,” taken to the extreme, presents a troubling question: where lives are at stake, are they all “equal” in our utility calculation?<sup>235</sup> The gut reaction for most would be yes. At face value, neutrality for population-level decisions seems fair. This notion parallels John Rawls’ theory on the veil of ignorance.<sup>236</sup> According to Rawls, “we should sit behind a veil of ignorance” that shields decision-makers from the unique situations of the people that are affected by such decisions—in doing so, we can avoid our biases and have a more just outcome.<sup>237</sup>

However, as applied to public health emergencies, utilitarian neutrality (or the veil of ignorance) runs contrary to public health’s concerns of equity.<sup>238</sup> Kodama demonstrates this principle by looking at ventilator allocation during a pandemic.<sup>239</sup> If survival rate is the sole neutral metric that is used to determine the allocation of a limited supply of ventilators—which would seem rational on its face—the young and healthy would be prioritized for treatment since their likelihood of survival would, on average, be much higher than an elderly person with health complications.<sup>240</sup> Neutrality would prioritize the young and let the old die. As a result, this approach creates a paradox: the goodness of neutrality creates an intuitively bad outcome, so is it actually good?

In addition to the three principles above, the neutrality issue highlights the need to contextualize decision-making—the lens of public health officials must be attuned to the disproportionate effects of pandemics on those suffering from existing inequities. Equity is beginning to surface as a

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<sup>235</sup> Stephen Nathanson, *Act and Rule Utilitarianism*, INTERNET ENCYCLOPEDIA OF PHIL., <https://iep.utm.edu/util-a-r/>.

<sup>236</sup> Rawls’s veil of ignorance derives from deontological theory. *Veil of Ignorance*, UNIV. TEXAS: ETHICS UNWRAPPED (2018), <https://ethicsunwrapped.utexas.edu/glossary/veil-of-ignorance>.

<sup>237</sup> “By being ignorant of our circumstances, we can more objectively consider how societies should operate.” *Id.*

<sup>238</sup> Kathryn MacKay, *Utility and Justice in Public Health*, 40 J. PUB. HEALTH e413 (2017).

<sup>239</sup> See UKIHSS, *The Ethics of Pandemic [Part 3]*, YOUTUBE (July 4, 2020), <https://www.youtube.com/watch?v=UL14YIKEglc>.

<sup>240</sup> *Id.*



fundamental component of public health.<sup>241</sup> The HHS defines health equity as “the attainment of the highest level of health for all people” and stresses that health equity can only be achieved through “societal efforts [that] address avoidable inequities, historical and contemporary injustices and the elimination of health and healthcare disparities.”<sup>242</sup> This view of health equity is inherently utilitarian in nature, but it consciously disregards neutrality (and the veil of ignorance) to account for the existing inequities that work against disadvantaged groups. Equity is even more important during a pandemic,<sup>243</sup> and as with the three utilitarian-like principles described above, it must be elevated in importance during times of crisis, especially when jurisdictions punish public health noncompliance.

The application of the mask mandate punishments described in Part I of this article best illustrates this framework. The deontological approach unduly restricted state action—thus, a shift to a more utilitarian framework would promote state punishment for noncompliance with mask mandates. Equity also requires this imposition of punishment for willful wrongdoing. The failure to act has led to increasingly disproportionate effects on minority populations,<sup>244</sup> a culpable omission.

The partial retributive approach, alternatively, imposed punishment known (to a degree) to work in promoting

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<sup>241</sup> Leandris C. Liburd et al., *Addressing Health Equity in Public Health Practice: Frameworks, Promising Strategies, and Measurement Considerations*, 41 ANN. REV. PUB. HEALTH 417, 418 (2020).

<sup>242</sup> *Id.*

<sup>243</sup> Katrina M. Plamondon, *Equity at A Time of Pandemic*, 37 HEALTH PROMOTION INT’L 1, 1 (2021) (“Equity at a time of pandemic is at once more attainable and more vulnerable than ever.”).

<sup>244</sup> *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. DISEASE CTRL. & PREVENTION (Jan. 25, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>. (“[The COVID-19 pandemic] has highlighted that health equity is still not a reality as COVID-19 has unequally affected many racial and ethnic minorities groups, putting them more at risk of getting sick and dying from COVID-19.”).

compliance and public health overall.<sup>245</sup> The imposition or threat of punishment should create an uptick in compliance which will benefit population health; accordingly, this is the approach that most countries followed.<sup>246</sup> However, the restrictive jurisdictions laid too heavy a hand in their punishments in ways that also harmed equity. Where punishment is imposed for public health, incarceration cannot result. Imprisonment already disproportionately impacts the poor.<sup>247</sup> Additionally, from a purely public health standpoint, COVID-19 overran prison populations and created environments that facilitated disease transmission—putting someone in jail as punishment for public health noncompliance simply detracts from the goal of public health.<sup>248</sup> Eric Reinhart and Daniel Chen well document this inherent contradiction.<sup>249</sup> Not only does incarceration promote disease spread within the prison population (Reinhart and Chen look to Chicago’s Cook County jail as an example which previously hosted the largest

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<sup>245</sup> Wei Lyu & George L. Wehby, *Community Use of Face Masks and COVID-19: Evidence From A Natural Experiment of State Mandates In the US*, 39 HEALTH AFFAIRS 1419, 1424 (2020) (“The study provides evidence that US states mandating the use of face masks in public had a greater decline in daily COVID-19 growth rates after issuing these mandates compared with states that did not issue mandates.”). In a similar sense, we have seen before and during the pandemic that vaccine mandates also increase compliance. See Robin McKnight, *Do Stricter Immunization Laws Increase Vaccination Rates?*, NAT’L BUR. ECON. RES. (July 2019), <https://www.nber.org/bh/do-stricter-immunization-laws-increase-vaccination-rates>; Eric Levenson, *Mandates are boosting vaccination rates, but not without a tradeoff*, CNN (Sept. 29, 2021, 4:39 PM), <https://www.cnn.com/2021/09/29/us/vaccine-mandate-health-care/index.html>.

<sup>246</sup> Except for Sweden. See sources *supra* notes 75-78.

<sup>247</sup> *The Relationship between Poverty & Mass Incarceration*, CTR. FOR COMM. CHANGE, [https://www.masslegalservices.org/system/files/library/The\\_Relationship\\_between\\_Poverty\\_and\\_Mass\\_Incarceration.pdf](https://www.masslegalservices.org/system/files/library/The_Relationship_between_Poverty_and_Mass_Incarceration.pdf).

<sup>248</sup> *The Most Significant Criminal Justice Policy Changes From the COVID-19 Pandemic*, PRISON POL’Y INITIATIVE (Oct. 12, 2021), <https://www.prisonpolicy.org/virus/virusresponse.html>.

<sup>249</sup> Eric Reinhart & Daniel L. Chen, *Incarceration and Its Disseminations: COVID-19 Pandemic Lessons From Chicago’s Cook County Jail*, 39 HEALTH AFFAIRS 1412 (2020).

COVID-19 outbreak in the U.S.), but quick-release systems work on cycling that same spread risk back into the general community.<sup>250</sup> This should cause any lawmaker to strongly question the role of incarceration in public health punishment, in addition to the plethora of well-documented, negative consequences that result from incarceration, especially for people of color.<sup>251</sup> However, while this argument raises an all-too-familiar concern over the carceral logic of punishment as related to public health,<sup>252</sup> this should not lead us to reject the concept of any punishment in the public health context. Non-carceral solutions remain a viable option when properly tailored.

Flat rate fines may appear preferable to incarceration, but they are also incompatible with pandemic public health values, as they tend, like incarceration, to disproportionately

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<sup>250</sup> *Id.* at 1416.

<sup>251</sup> See e.g., Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 COL. HUM. RIGHTS L. REV. 985, 990 (2020) (explaining how the death penalty has been weaponized primarily against the most “disfavored members of society: the poor, those with mental illness, and Black people”).

<sup>252</sup> *Wong Wai v. Williamson*, 103 F.1 (N.D. Cal. 1900) In *Wong Wai*, a Chinese citizen sought to enjoin the city of San Francisco from enforcing a rule that “prohibited Chinese residents from traveling outside the city without proof of that they had been inoculated with the ‘Haffkine Prophylactic,’ which was thought to provide immunization against bubonic plague.” The court held that such racial targeting from a public health ordinance (which raises similar concerns to the woes of today’s prison industrial complex and Black Americans) which implicated a different form of imprisonment – restricting travel outside the city – was plainly in contravention to the “well-established principles [of] public health,” as well as the Constitution and several international treaties. See BARRY R. FURROW ET AL., *HEALTH LAW: CASES, MATERIALS AND PROBLEMS* 1538-39 (West Academic, 8th ed., 2018); see also Joan B. Trauner, *The Chinese as Medical Scapegoats in San Francisco, 1870-1905*, 57 CAL. HISTORY 70, 79 (“Next, federal health officials attempted to create a detention camp for the quarantine of Asiatics... However, on June 7, the circuit court refused to allow implementation of the detention plan. Similarly, on June 15, the court ordered the quarantine of Chinatown lifted.”).

affect poor and underprivileged groups.<sup>253</sup> A more equitable solution would be the use of proportion of wealth fines (PWFs).<sup>254</sup> All jurisdictions in the U.S. that used fines to punish noncompliance with mask mandates used “fixed fines,” predetermined amounts imposed “equally” on all scofflaws.<sup>255</sup> Applied generally, small fixed fines may lack deterrence; however, large fixed fines become impossible to collect from poorer people and can push those same people towards worse life outcomes, like jail.<sup>256</sup> This notion of equal punishment is an illusion. The impact is anything but equal.

PWFs, however, are a fairer alternative that calculates the amount of an offender’s fine as a percentage of their income or wealth.<sup>257</sup> Based on the European concept that fines should “have [a] roughly similar impact (in terms of economic sting) on persons with differing financial resources who are convicted of the same offense,” PWFs are specifically designed to ward against the disproportionately high impact on low-income individuals, and the disproportionately low impact on high-income individuals.<sup>258</sup> Countries like Finland use PWFs for issues like speeding, where wealth would typically quash the deterrent effect of a “normal” speeding fine. In some cases, ambitious roadsters have been fined upwards of \$100,000 for

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<sup>253</sup> *Fines, Fees, and Bail: Payments in Criminal Justice System That Disproportionately Impact the Poor*, COUNCIL ECON. ADVISERS (Dec. 2015),

[https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf).

<sup>254</sup> PWFs are more commonly referred to as “structured” or “day” fines. HOW TO USE STRUCTURED FINES (DAY FINES) AS AN INTERMEDIATE SANCTION, BUREAU OF JUSTICE ASSISTANCE 1 (Nov. 1996), available at <http://www.ojp.gov/pdffiles/156242.pdf>.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 1-2.

<sup>257</sup> Typically, the calculation uses the daily income of the defendant, hence the term “day” fine. *Id.* at 1.

<sup>258</sup> *Id.* For someone who makes sixty dollars a day (approximately eight hours of work at the national minimum wage of \$7.25 an hour, before taxes) a \$500 fine would be catastrophic – over a week of pay is wiped out. Coupled with the need to work due to financial hardships and difficulties acquiring a sufficient supply of masks, the result is little deterrence and significant harm. However, for someone who makes \$200,000 a year (roughly \$750 a day before taxes), such a penalty is negligible, and deterrence remains low.

speeding.<sup>259</sup> Thus, using PWFs would retain the deterrent effect of public health punishment without disproportionately impacting the poor, while simultaneously imposing meaningful punishment on those who are financially capable of complying but who choose not to.

But this raises another issue – the autonomy to comply. Punishment during a pandemic should be seen as a last resort.<sup>260</sup> The true goal is to have full compliance, after all.<sup>261</sup> However, given the disparities that predate the pandemic, consistent compliance with mask mandates may be more difficult for the nation's poor and minority communities.<sup>262</sup> If

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<sup>259</sup> Joe Pinsker, *Finland, Home of the \$103,000 Speeding Ticket*, ATLANTIC (Mar. 12, 2015),

<http://www.theatlantic.com/business/archive/2015>.

<sup>260</sup> Betsy Pearl et al., *The Enforcement of COVID-19 Stay-at-Home Orders*, CTR. AM. PROGRESS (Apr. 2, 2020),

<https://americanprogress.org/article/enforcement-covid-19-stay-home-orders/> (“Most policymakers recognize that [public health mandates] are a vital tool for protecting public health ... [but] these orders are reigniting long-standing concerns about ‘charge stacking.’ ... As the pandemic intensifies, officials ... should only use the criminal justice process as a last resort.”).

<sup>261</sup> *City of Newark v. J.S.*, 652 A.2d 265, 275 (N.J. Super. Ct. Law Div. 1993) (“Good public health practice considers human rights so there is no conflict. Since coercion is a difficult and expensive means to enforce behaviors, voluntary compliance is the public health goal. Compliance is more likely when authorities demonstrate sensitivity to human rights.”).

<sup>262</sup> See Adam Cancryn & Rachel Rouben, *Biden Administration Sending Masks to Poor Communities*, POLITICO (Feb. 24, 2021), <https://www.politico.com/news/2021/02/24/biden-administration-sending-americans-masks-471335>

(“The Biden administration is planning to distribute millions of free face masks across the country to organizations serving people with low incomes. . . . ‘It allows people who are not able to in some situations find or afford a mask, to get a mask, and is part of our equity strategy.’”). For mask mandates, there are two issues: local shortages of supply, and a lack of individual means to buy a sufficient number of masks. In developing countries, these issues have resulted in a lower rate of mask usage. See Gudina Terefe Tucho & Diribe Makonene Kumsa, *Universal Use of Face Masks and Related Challenges During COVID-19 in Developing Countries*, 14 RISK MANAGEMENT & HEALTHCARE POL’Y 511, 514-15 (2021) (describing the difficulty in supplying enough masks in

the goal is compliance, and punishment is a last resort, this compels some level of support towards compliance in the first place. It is contradictory to punish those who likely did not have the means to comply when there has been no meaningful attempt to assist with compliance. For mask mandates, this may look like universal distribution of free masks.<sup>263</sup> Other countries did just this, supplying masks for households and thereby providing everyone with the tools to comply with any mandate. Japan, for example, sent two face masks to each household.<sup>264</sup> This effort received some backlash as it essentially ignored the needs of families greater than two; however, it is still significantly more than anything the U.S. did on a national level.<sup>265</sup>

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developing countries and how “[p]oor people with subsistent income cannot afford frequent changing of their face masks” because they must “prioritize their basic needs for food and other life-supporting materials where COVID-19 prevention would be the second choice”). The U.S. is not a developing country. However, the horrific wealth discrepancy between rich and poor neighborhoods in the U.S. have led to some to call for policymakers to treat America’s poorest neighborhoods as if they were developing countries. See Emily Badger, *Why We Need to Treat America’s Poorest Neighborhoods Like Developing Countries*, BLOOMBERG CITYLAB (July 15, 2013, 7:53 AM), <https://www.bloomberg.com/news/articles/2013-07-15/why-we-need-to-treat-america-s-poorest-neighborhoods-like-developing-countries> (“We need to think about the differences between adjacent neighborhoods the way we currently think about the differences between America and Haiti. To Fleming, this may mean importing strategies into U.S. cities that have worked in developing countries. . .”). Perhaps the same thinking should apply to mask availability.

<sup>263</sup> Rebekah E. Gee & Vin Gupta, *Mask Mandates: A Public Health Framework for Enforcement*, HEALTHAFFAIRS (Oct. 5, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20201002.655610/full/>.

<sup>264</sup> Emiko Jozuka & Junko Ogura, *Anger as Japanese Prime Minister Offers Two Cloth Masks Per Family While Refusing to Declare Coronavirus Emergency*, CNN (Apr. 2, 2020, 11:46 PM), <https://www.cnn.com/2020/04/02/asia/japan-coronavirus-shinzo-abe-masks-hnk-intl/index.html> (last updated Apr. 2, 2020).

<sup>265</sup> See Bruce Y. Lee, *USPS Covid-19 Coronavirus Plan to Send Every Household Face Masks: Why the White House Stopped It*, FORBES (Sept. 18, 2020, 11:55 PM),

South Korea and Japan's approach to quarantine supplies is a better role model here. Public health mandates in South Korea threatened incredibly harsh punishment—government officials instituted a “1-strike out policy,” which carried a maximum fine of up to 10 million Korean Won (over \$8,000 USD) for violations of quarantine.<sup>266</sup> However, compliance was made easy. These same officials sent every affected household boxes that contained “food, water, masks, toothbrushes, a thermometer, hand-[sanitizing] gel, and ... even a guide for how to self-quarantine with instructions for accessing emergency funds from the government.”<sup>267</sup> Everything needed for compliance, and more, was provided. Japan took a substantially similar approach, providing more than enough supplies for those subject to quarantine to comply with the public health measure comfortably.<sup>268</sup> Under such a scheme, noncompliance becomes a culpable action that truly justifies state punishment. If we are to punish for non-compliance with public health interventions during a pandemic, it should be the duty of the government to first provide the means for compliance. Thus, at the bare minimum, a mask mandate and resulting punishment should be preceded by universal mask distribution.

## VI. CONCLUSION

Philosophy certainly has a place at the legal table. Philosopher John Campbell has said that lawyering is “thinking

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<https://www.forbes.com/sites/brucelee/2020/09/18/usps-covid-19-coronavirus-plan-to-send-every-household-face-masks-how-the-white-house-stopped-it/>.

<sup>266</sup> Sukhyun Ryu et al., *Self-Quarantine Noncompliance During the COVID-19 Pandemic in South Korea*, DISASTER MED. & PUB. HEALTH PREPAREDNESS, 1 (2020).

<sup>267</sup> Marie Genries, *Food, Water and Masks: South Korea's COVID-19 Quarantine Kits*, OBSERVERS (May 3, 2020), <https://observers.france24.com/en/20200305-south-korea-coronavirus-COVID-19-kits-masks>.

<sup>268</sup> See Emma Mayer, *Care Packages Sent by Tokyo to Quarantining Citizens Spur Debate Over U.S. COVID Outreach*, NEWSWEEK (Jan. 10, 2022, 12:35 PM), <https://www.newsweek.com/care-packages-sent-tokyo-quarantining-citizens-spurs-debate-over-us-covid-outreach-1667520>.

in fast motion,” philosophy is “thinking in slow motion,” and both deal with “rational and logical thought”<sup>269</sup>—they are complements in decision-making. Awareness of one’s philosophical framework can guide our actions through uncharted territory. As we have seen, implementing public health punishment during the COVID-19 pandemic showed that leadership focused too exclusively on stagnant theory. Too theoretical an approach leads to outcomes that ignore the realities and deficiencies of existing systems.

The framework for public health punishment during a pandemic must make a pragmatic shift; that is what this article seeks to provide. Pandemic public health must move towards utilitarian-like values that are grounded in public health inequities. Jurisdictions must prioritize action, autonomy values must be limited, and population health must take priority. Punishment imposed should seek to avoid any preexisting disparities. The result is a more practical public health response that delivers fairer outcomes, protection of individual liberties, and a reduction in overall suffering. As the emergency fades, maybe then we can turn our attention again to the pressing issues of first- and second-order theorizing.<sup>270</sup> Until then, public health decision-makers must remain grounded.

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<sup>269</sup> “David Hills, a philosopher at Stanford, famously said that philosophy is ‘the ungainly attempt to tackle questions that come naturally to children, using methods that come naturally to lawyers.’” Brian Leiter, *Why Philosophy Has Been Central to Legal Education for More Than a Century*, HUFFPOST (Mar. 22, 2014), [https://www.huffpost.com/entry/why-philosophy-of-law-has\\_b\\_4606305](https://www.huffpost.com/entry/why-philosophy-of-law-has_b_4606305).

<sup>270</sup> Kevin M. DeLapp, *Metaethics*, INTERNET ENCYCLOPEDIA OF PHIL., <https://iep.utm.edu/metaethi/> (last visited Dec. 20, 2021) (describing metaethics as “second-order” theorizing as compared to so-called “first-order” theorizing of normative theory).