THE NATURAL LAW ETHICS OF PUBLIC HEALTH LOCKDOWNS

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Contemporary ethical reflections on responses to public health crises center on the deontological, utilitarian, and principlist traditions, but not the more ancient tradition of natural law. Yet, as an alternative to the usual framing of public health moral dilemmas as a conflict between individual liberty and collective interests, or trade-offs in the maximization of the greatest health of the greatest number, natural law ethics deserves a hearing for focusing on human fulfilment instantiated in the irreducible human goods. The irreducible goods such as life and health, friendship and community, excellence and satisfaction in work and play, knowledge of the truth, experience of the beauty, and practical reasonableness, each features its own domain for people to flourish in, distinct from and incommensurable with all the other goods. This Article is the first to bring this neoclassical natural law ethical framework to bear on the morality of public health lockdowns—a previously unthinkable, blunt, but consequential emergency measure that originated with the Chinese government's initial response in January 2020 to Wuhan's COVID-19 outbreak, but subsequently spread to all inhabited continents, putting billions of people under mandatory quarantine over prolonged periods. This Article affirms that public health lockdowns are not intrinsically immoral, insofar as they meet several conditions required by the fundamental precepts of natural law.

INTRODUCTION

In its contemporary form, the public health lockdown might be said to be an invention of the Chinese government,[1] when it imposed the unthinkable confinement of more than 50 million people in Hubei Province, the first recorded epicenter of the Coronavirus Disease 2019 (COVID-19) pandemic, in January 2020.[2] Many countries, including European and North American

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1. *See* Daisy Cheung & Eric C. Ip, *COVID-19 Lockdowns: A Public Mental Health Ethics Perspective*, 12 ASIAN BIOETHICS REV. 503 (2020).

2. Alexandra L. Phelan, Rebecca Katz & Lawrence O. Gostin, *The Novel Coronavirus Originating in Wuhan, China: Challenges for Global Health Governance*, 323 JAMA 709, 709 (2020).

democracies, had followed suit, imposing general lockdowns on over 4.5 billion people worldwide, that is, almost 60% of the global population.[3] As of September of 2020, at least eighty-two jurisdictions had resorted to lockdown measures out of no less than 186 that resorted to some form of restriction on the freedom of movement.[4] This Article contributes to the nascent literature on the ethics of public health lockdowns.[5] There are multifarious frameworks without which the field of public health ethics would degenerate into fragmented intuitions about health, freedom, and the common good.[6] These frameworks can be deployed to evaluate lockdowns, though not without controversy.[7] This Article will nonetheless expressly take as its framework that of natural law, one of the most enduring traditions in moral philosophy,[8] which is conspicuously absent from virtually all contemporary ethical debates on public health, notwithstanding its importance in shaping the historical development of Western medical law and bioethics.[9]

Contemporary lockdowns turned out to become the "quintessential symbol of COVID-19,"[10] a disease that causes symptomatic patients to experience fever, tiredness, a dry cough, and some of whom, especially those who are elderly, even have difficulty breathing.[11] General lockdowns have been enforced with varying rigor from place to place, but at a minimum they are definable as "restrictive mass quarantines,"[12] that is, government-mandated home-confinement with prohibition of all non-essential travel to towns, cities, provinces, and entire nations,[13] in a sweeping "all-or-nothing" manner:[14]

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3. *See* Jerome Amir Singh et al., *The Impact of the COVID-19 Pandemic Response on Other Health Research*, 98 BULL. WORLD HEALTH ORG. 625, 626 (2020).

4. *See* Emeline Han et al., *Lessons Learnt from Easing COVID-19 Restrictions: An Analysis of Countries and Regions in Asia Pacific and Europe*, 396 LANCET 1525, 1525 (2020).

5. *See* Stephen John, *The Ethics of Lockdown: Communication, Consequences, and the Separateness of Persons*, 30 KENNEDY INST. ETHICS J. 265 (2020).

6. *See* Stephen Holland, *Public Health Ethics: What It Is and How to Do it*, *in* PUBLIC HEALTH ETHICS AND PRACTICE 33 (Stephen Peckham & Alison Hann eds., 2010).

7. *See* John, *supra* note 5, at 285.

8. *See* Jacqueline Laing, *Natural Law Reasoning in Applied Ethics*, *in* THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE 216 (George Duke & Robert P. George eds., 2017).

9. *See* ALFONSO GÓMEZ-LOBO WITH JOHN KEOWN, BIOETHICS AND THE HUMAN GOODS: AN INTRODUCTION TO NATURAL LAW BIOETHICS xxi (2015).

10. RICHARD HORTON, THE COVID-19 CATASTROPHE: WHAT'S GONE WRONG AND HOW TO STOP IT HAPPENING AGAIN 30 (2d ed. 2021).

11. *See* MEERA SENTHILINGAM, OUTBREAKS AND EPIDEMICS: BATTLING INFECTION FROM MEASLES TO CORONAVIRUS xiii (2020).

12. Deeksha Pandey et al., *Psychological Impact of Mass Quarantine on Population During Pandemics—The COVID-19 Lock-Down (COLD) Study*, 15(10) PLOS ONE e0240501, 2 (2020).

13. *See* Jennifer Dhont et al., *Conducting Research in Radiation Oncology Remotely During the COVID-19 Pandemic: Coping with Isolation*, 24 CLINICAL & TRANSLATIONAL RADIATION ONCOLOGY 53 (2020).

14. *See* Stephen Thomson & Eric C. Ip, *COVID-19 Emergency Measures and the Impending Authoritarian Pandemic*, 7(1) J.L. & BIOSCI. lsaa064, 1 (2020).

"instructions to stay at home; restrictions on travel; closing schools and universities; mandates to stop sociali[z]ing; shutting hospitality and entertainment venues, non-essential shops, close contact services (such as hairdressers) and sports facilities and gyms; limiting numbers of people attending weddings and funerals; and curfews."[15] In March 2020, an Italian columnist could write that in his country, "[e]verything is shut: no schools, no meetings, no parties, no movies, no plays, no sporting events. No bars and no restaurants. No shops open, except food stores and pharmacies."[16] Although lockdowns differ from country to country, they universally involve "significant restrictions on central human capabilities—including citizens' ability to work, socialize, exercise democratic rights, and access education—in the name of protecting population health."[17] It is critical to evaluate the justifiability, not just the material costs and benefits of lockdowns, before their prevalent and harsh use since 2020[18] should be normalized as a precedent guiding governments as to how to react to new infectious diseases, which regularly emerge every few years.

Contemporary ethical reflections on public responses to pandemics and other health crises center on the deontological, utilitarian, and principlist traditions. The natural law perspective deserves a hearing. In the following, I take on the never previously attempted task of constructing a framework of natural law public health ethics that understands irreducible basic human goods, including but not limited to life and health as dimensions constitutive of individual and communal human fulfilment.[19] These goods are typically taken for granted, transcending what people deem to be their own wants and desires:[20] we recognize as good whatever protects our bodily integrity and as evil whatever causes bodily disintegration. I then bring this framework to bear on the morality of public health lockdowns imposed onto defined territorial units, be it a town, a province, or an entire country. Towards the end of this Article, I identify conditions that any general lockdown must meet to be morally justified.

I. NATURAL LAW FOUNDATIONS OF PUBLIC HEALTH ETHICS

Contrary to common stereotypes, contemporary natural law ethics does not depend on theistic metaphysics,[21] nor hold that what is natural is necessarily

15. HORTON, *supra* note 10, at 30–31.

16. Beppe Severgnini, *My Lockdown Diary, From a Small, Old Town in Italy*, N.Y TIMES (Mar. 12, 2020), https://www.nytimes.com/2020/03/12/opinion/italy-coronavirus-shut-down.html.

17. John, *supra* note 5, at 265.

18. *See* Joseph Bernstein, *Not the Last Word: How Necessary COVID-19 Lockdowns Can Go Too Far*, 478 CLINICAL ORTHOPAEDICS RELATED RSCH. 1719, 1719 (2020).

19. *See* Robert P. George & Christopher O. Tollefsen, *The Natural Law Foundations of Medical Law*, *in* PHILOSOPHICAL FOUNDATIONS OF MEDICAL LAW 46, 47 (Andelka M. Phillips et al. eds., 2019).

20. *See* Patrick Lee & Robert P. George, *The Nature and Basis of Human Dignity*, 21 RATIO JURIS 173, 187 (2008).

21. *See* DAVID BRAYBROOKE, NATURAL LAW MODERNIZED 37 (2001).

good.[22] Natural law is understood as an objective precept about human reason[23] that directs us to choose the human goods[24] that best lead to happiness. These propositions were not invented or legislated by human beings at some defining historical moment. They may even contradict what we subjectively believe to be good for us.[25] Natural law is "natural" in the sense that human beings are by nature rational and social animals; natural law is *not* a moral *ought* derivative of the *is* of human nature, as is generally believed.[26]

The neoclassical natural law framework[27] begins with the First Principle of Practical Reason: "good is to be done and pursued, and evil avoided."[28] This rules out pointlessness in freely chosen human actions, identifying ultimate reasons for action—the basic human goods—that are irreducible and incommensurable justifications for rational human action, such as life and health, friendship and community, excellence and satisfaction in work and play, experience of beauty, knowledge of the truth, and practical reasonableness.[29] Neither arises from, is completely contained within, or is a perfect substitute for the other.[30] Rawls' "primary goods," *viz.* "liberty and opportunity, income and wealth, and the social bases of self-respect"[31] are ironically what basic human goods are not, for as instrumental goods, they cannot furnish ultimate reasons

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22. *See* Jānis (John) Ozoliņš, *Natural Law and the Sanctity of Human Life*, *in* FOUNDATIONS OF HEALTHCARE ETHICS: THEORY TO PRACTICE 120, 124 (Jānis T. Ozoliņš & Joanne Grainger eds., 2015).

23. *See* Ana Marta González, *Natural Law as a Limiting Concept: A Reading of Thomas Aquinas*, *in* CONTEMPORARY PERSPECTIVES ON NATURAL LAW: NATURAL LAW AS A LIMITING CONCEPT 11, 24 (Ana Marta González ed., 2008).

24. *See* William E. May, *Bioethics and Human Life*, *in* NATURAL LAW AND CONTEMPORARY PUBLIC POLICY 41, 41 (David F. Forte ed., 1998).

25. *See* ALFONSO GÓMEZ-LOBO, MORALITY AND THE HUMAN GOODS: AN INTRODUCTION TO NATURAL LAW ETHICS 126 (2002).

26. *See* John Finnis, *Natural Law and the "Is"–"Ought" Question: An Invitation to Professor Veatch*, 26 CATH. LAW 266 (1981).

27. *See* Patrick Lee, *The New Natural Law Theory*, *in* THE CAMBRIDGE COMPANION TO NATURAL LAW ETHICS 73 (Tom Angier ed., 2019).

28. THOMAS AQUINAS, THE TREATISE ON LAW: SUMMA THEOLOGIAE I–II, q. 94, a. 2 (R.J. Henle, S.J. trans., University of Notre Dame Press ed., 2012).

29. Jānis (John) Ozoliņš has remarked that:

> There are undoubtedly other ways in which we might divide the basic human goods. The salient point, however, is not how many basic human goods there are, but that there are basic goods that contribute to our fulfillment as human persons. They are intelligible as basic goods that contribute to our well-being.

Ozoliņš, *supra* note 22, at 126.

30. *See* Samuel Gregg, *Economics and Natural Law*, *in* THE CAMBRIDGE COMPANION TO NATURAL LAW ETHICS 215, 228 (Tom Angier ed., 2019). Moreover, comparing the basic goods of knowledge of truth with friendship is like comparing the width of a page with the design of a book cover. *See also* WILLIAM E. MAY, AN INTRODUCTION TO MORAL THEOLOGY 97–98 (2d ed. 2003).

31. JOHN RAWLS, A THEORY OF JUSTICE 54 (rev. ed. 1999).

for human action constitutive of human flourishing.[32] Liberty is unquestionably a pre-condition for enjoying most basic human goods, including practical reasonableness or prudence, that is, the good of freely exercising one's own moral reflection to bear on the problems of choosing one's actions, lifestyle, and character.[33] But as an instrumental good like wealth, albeit important, it does not in itself fulfil in the absence of an understanding of what is good.[34]

Apart from the First Principle of Practical Reason, this framework consists also of the First Principle of Morality,[35] classically expressed in the formula "love your neighbor as yourself."[36] The First Principle of Morality, by definition, directs us to rein in our selfishness and be concerned for others sharing in our humanity. This is self-evident in common morality.[37] It follows that we should respect all of the basic human goods, whether instantiated in ourselves or others, each an essential facet of human fulfilment.[38] A state has a duty to safeguard the common good, which can be defined by neither individualism nor collectivism, but the conditions that enable the members of a political community to participate in the basic human goods and pursue fulfilling lives, of which the maintenance of public health is undoubtedly one. People cannot be passive in seeking fulfillment. Rather, they lead good and virtuous lives by freely taking those actions by which they flourish.[39] It constitutes a grave injustice for the political community's apex authorities to usurp responsibilities within the competence of subordinates. This we call the principle of subsidiarity.

As a basic human good, health is a constituent of human fulfillment and a self-actuating motive for action.[40] The preservation of one's life and health is generally accepted as a proper moral imperative.[41] According to "natural morality regarding most basic values,"[42] it usually trumps opposing

32. *See* GARY CHARTIER, FLOURISHING LIVES: EXPLORING NATURAL LAW LIBERALISM 7 (2019).

33. *See* GÓMEZ-LOBO, *supra* note 25, at 27.

34. *See* FARR CURLIN & CHRISTOPHER TOLLEFSEN, THE WAY OF MEDICINE: ETHICS AND THE HEALING PROFESSION 43 (2021); *See* John Farrelly, *A Contemporary Natural-Law Ethics*, *in* NORMATIVE ETHICS AND OBJECTIVE REASON 163, 181 (George F. McLean ed., 1996).

35. *See* JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 127 (1998).

36. *See* THE TREATISE ON LAW: THOMAS AQUINAS, SUMMA THEOLOGIAE I–II, q. 99, a. 1 (Alfred J. Freddoso trans., St. Augustine Press ed., 2010).

37. *See* RICHARD BERQUIST, FROM HUMAN DIGNITY TO NATURAL LAW: AN INTRODUCTION 90 (2019).

38. JOHN FINNIS, REASON IN ACTION: COLLECTED ESSAYS VOLUME I 245 (2011).

39. *See* JOSEPH BOYLE, NATURAL LAW ETHICS IN THEORY AND PRACTICE: A JOSEPH BOYLE READER 248, 248–49 (John Liptay & Christopher Tollefsen eds., 2020).

40. *See* CURLIN & TOLLEFSEN, *supra* note 34, at 4; Samuel Gregg, *Health, Health Care, and Rights: A New Natural Law Theory Perspective*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 463, 469 (2012).

41. *See* FINNIS, *supra* note 26, at 213.

42. YECHIEL MICHAEL BARILAN, HUMAN DIGNITY, HUMAN RIGHTS, AND RESPONSIBILITY: THE NEW LANGUAGE OF GLOBAL BIOETHICS AND BIOLAW 15 (2012).

considerations that are not basic human goods.[43] Members of a community may disagree on the best ways to promote the public health in light of other considerations like individual liberty and economic prosperity, but to save lives and palliate the effects of disease are values shared by all.[44] We can therefore say that health has intrinsic value for populations or "collections of individuals within moments in time defined by at least one but potentially many organizing characteristics," such as "geographic area, time period, or characteristics of persons."[45]

It goes without saying that health is one of many basic human goods, although considered together with life, it is definitely the first one, without which people could not partake in other goods, or not without considerable difficulty.[46] Viewed etymologically, "health" is inseparable from the notion of "wholeness."[47] Over the centuries, philosophers of medicine have disagreed over what health means. Health in antiquity was understood as a balance between body and mind.[48] Hippocrates (460-380 BC) and Galen of Pergamon (129-210 AD) were the first to develop the intuition that "healthy" means a person is in balance: the sundry parts and functions of the human body and mind interlock, and are supposed to harmonize and shore each other up.[49] This tradition lives on, residually, in one of modern physiology's main concepts, "homeostasis," which denotes the feedback-looped interrelations and cybernetic control pathways governing the body's multifarious physiological functionality.[50]

Modern epidemiology is wont to define health as the absence of disease. Epidemiologists "measure the presence of diseases in individuals" and "the occurrence of infections, syndromes, symptoms, and biological or subclinical markers associated with disease."[51] Health indicators map the presence of disease, symptoms, disability, and syndromes onto the quality of life, wellness, and other health-related outcomes.[52] A landmark paper in the philosophy of medicine published in 1977, contended that disease is a "value-free theoretical notion"[53] and that "health" as freedom from disease means "normal functioning

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43. *See* Y.M. Barilan & M. Brusa, *Human Rights and Bioethics*, 34 J. MED. ETHICS 379, 381 (2008).

44. *See* Dan E. Beauchamp & Bonnie Steinbock, *Introduction: Ethical Theory and Public Health*, *in* NEW ETHICS FOR THE PUBLIC'S HEALTH 3, 22 (Dan E. Beauchamp & Bonnie Steinbock eds., 1999).

45. KATHERINE M. KEYES & SANDRO GALEA, EPIDEMIOLOGY MATTERS: A NEW INTRODUCTION TO METHODOLOGICAL FOUNDATIONS 11 (2014).

46. *See* GÓMEZ-LOBO, *supra* note 25, at 11.

47. *See* Lennart Nordenfelt, *On Concepts of Positive Health*, *in* HANDBOOK OF THE PHILOSOPHY OF MEDICINE 29, 30 (Thomas Schramme & Steven Edwards eds., 2017).

48. *See id.* at 40.

49. *Id.* at 32–33.

50. *Id.* at 40.

51. KEYES & GALEA, *supra* note 45, at 19.

52. *Id.* at 31.

53. Christopher Boorse, *Health as Theoretical Concept*, 44 PHIL. SCI. 542, 542 (1977).

vis-à-vis species design."[54] The definition of "normal," however, is not as straightforward as it may appear.[55] It bears clear ethical implications, for example, in terms of distributive justice.[56] Even so, this stance implies that statistical reference values could be calculated and assigned to any human function so as to make health objectively quantifiable independently of "value judgments."[57] This biostatistical approach is criticized on the grounds that the selection of reference classes to determine a typical statistical contribution of an organism's parts to its wholesome goals of reproduction and survival cannot be a strictly value-free computational exercise: what besides a value judgment prevents excessive drinkers from being designated as a class, such that the statistically normal array for liver-functions would end up including those that any public health practitioner would surely regard as pathological—as it certainly is among non-drinkers.[58] Determining a normal range is irreducibly a subjective and potentially an arbitrary exercise.[59] Imprudently to deploy "normality" in the context of health is to "program-in" risky underestimations of the significance of individual variation or to assess it unfairly, pushing individuals toward a Procrustean norm instead of accepting differences in populations.[60]

An international treaty to which most countries in the world are parties, the Constitution of the World Health Organization, in its Preamble, boldly redefines the concept of health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[61] It is "one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."[62] It continues, "[t]he health of all peoples" is "fundamental to the attainment of peace and security," and is "dependent upon the fullest co-operation of individuals."[63] It declares, "[u]nequal development in different countries in the promotion of health and

54. JAMES A. MARCUM, AN INTRODUCTORY PHILOSOPHY OF MEDICINE: HUMANIZING MODERN MEDICINE 75 (2008).

55. R. PAUL THOMPSON & ROSS E.G. UPSHUR, PHILOSOPHY OF MEDICINE: AN INTRODUCTION 17 (2018).

56. *See* Ruth Chadwick, *Normality as Convention and as Scientific Fact*, *in* HANDBOOK OF THE PHILOSOPHY OF MEDICINE 17, 26 (Thomas Schramme & Steven Edwards eds., 2017).

57. Johannes Bircher & Shyama Kuruvilla, *Defining Health by Addressing Individual, Social, and Environmental Determinants: New Opportunities for Health Care and Public Health*, 35(3) J. PUB. HEALTH POL'Y 363, 365 (2014).

58. Christopher Boorse, *Concepts of Health and Disease*, *in* HANDBOOK OF PHILOSOPHY OF SCIENCE, VOLUME 16: PHILOSOPHY OF MEDICINE 13 (Fred Gifford et al. eds., 2011).

59. *See* EDMUND D. PELLIGRINO, THE PHILOSOPHY OF MEDICINE REBORN (H. Tristram Engelhardt, Jr. & Fabrice Jotterand eds., 2008).

60. Chadwick, *supra* note 56, at 27.

61. *Governance, Basic Documents: Forty-Ninth Edition*, WORLD HEALTH ORG., https://apps.who.int/gb/bd/pdf_files/BD_49th-en.pdf#page=6.

62. *Id.*

63. *Id.*

control of disease, especially communicable disease" is "a common danger."[64] The Preamble avers, "[h]ealthy development of the child" is of "basic importance," and the dissemination of "medical, psychological and related knowledge" is "essential to the fullest attainment of health."[65] Article 1 of the Constitution proceeds to announce, "[t]he objective of the World Health Organization shall be the attainment by all peoples of the highest possible level of health."[66]

The Ottawa Charter for Health Promotion, a non-binding "soft law" adopted in 1986, by the World Health Organization further elaborates, "[h]ealth is, therefore, seen as a resource for everyday life, not the objective of living. Health is a positive concept emphasizing social and personal resources, as well as physical capacities. Therefore, health promotion is not just the responsibility of the health sector, but goes beyond healthy lifestyles to well-being."[67] This definition points in the direction of an ability-oriented definition of health.[68] Today, the chief controversy among philosophers of medicine, seen in the debates mentioned above, is whether health and disease are value-laden or scientific, value-free concepts.[69] This obsession ought to be moot. Neither evolutionary biology nor value judgment suffices by itself to define most negative or harmful physiological or psychiatric conditions[70] because health is at once inseparable from "the physical, social, and economic environments in which people live, study, and work."[71] A reasonable definition of health ought to take into account the "physical and mental functioning of the person as a whole, in terms of well-being . . . ."[72]

Health and well-being undoubtedly have immense instrumental value because, without it, people would be unable meaningfully to exercise autonomy in social, economic, and political life,[73] or engage in work and recreation according to their lifestyles.[74] People pursue health as necessary to a flourishing

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64. *Id.*

65. *Id.*

66. *Id.*

67. *Ottawa Charter for Health Promotion, 1986*, WORLD HEALTH ORG., https://www.euro.who.int/__data/assets/pdf_file/0004/129532/Ottawa_Charter.pdf.

68. Nordenfelt, *supra* note 47, at 34.

69. *See* Elselijn Kingma, *Disease as Scientific and as Value-Laden Concept*, *in* HANDBOOK OF THE PHILOSOPHY OF MEDICINE 45, 46 (Thomas Schramme & Steven Edwards eds., 2017).

70. *See* Jerome C. Wakefield, *Mental Disorders as Genuine Medical Conditions*, *in* HANDBOOK OF THE PHILOSOPHY OF MEDICINE 65 (Thomas Schramme & Steven Edwards eds., 2017).

71. Claudia M. Witt et al., *Defining Health in a Comprehensive Context: A New Definition of Integrative Health*, 53(1) AM. J. PREVENTIVE MED. 134, 136 (2017).

72. Bengt Brülde, *Health, Disease and the Goal of Public Health*, *in* PUBLIC HEALTH ETHICS: KEY CONCEPTS AND ISSUES IN POLICY AND PRACTICE 20, 33 (Angus Dawson ed., 2011).

73. Lawrence O. Gostin, *Public Health Law in an Age of Terrorism: Re-thinking Individual Rights and Common Goods*, *in* ARGUING ABOUT BIOETHICS 374, 383 (Stephen Holland ed., 2012).

74. *See* Elinor Gardner, Saint Thomas Aquinas on the Death Penalty (May 2009) (unpublished Ph.D. Dissertation, Boston College) (on file with author).

life; communities develop health expertise and healthcare infrastructure to cultivate prosperous civilizations.[75] A healthy public supplies the community with the requisite human capital for a social productivity fit to compete in the international arena and safeguard itself from enemies.[76] But the "well-integrated, harmonious, psychosomatic functioning" of the person is not merely an extrinsic instrumentality; it is also an intrinsic condition of human well-being.[77] Like other basic human goods, health is an end that does not require a prior speculative inquiry to identify its worthiness.[78] It has immeasurable worth and forms one fundamental dimension of "the solid core of the notion of human dignity."[79] Human dignity bears no necessary connection with any specific ideology or doctrine; we find it in "[the] classical antiquity, in the monotheistic religions, and in the secular enlightenment."[80] It holds that all people "are entitled to equal respect from others, to live life well, with choices, and free from arbitrary action by those in positions of power."[81] It is reasonable, then, to infer a healthy life from one lived with dignity.[82]

We must take care lest we underestimate the vagueness of our notions of health.[83] What is "'enough health,'" individually and populationally?[84] Since death is inevitable, health cannot be a goal to be definitively achieved; rather, it is always an "ongoing undertaking."[85] It follows that we can never get enough health or safety.[86] On the other hand, human beings are not mere animals, but rational and social animals.[87] Biological life and health are not the only basic human goods.[88] There are others, with human rights to protect them, that

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75. Lawrence O. Gostin & Lesley Stone, *Health of the People: The Highest Law?*, *in* ETHICS, PREVENTION, AND PUBLIC HEALTH 59, 67 (Angus Dawson & Marcel Verweij eds., 2007).

76. JAMES F. CHILDRESS, PUBLIC BIOETHICS: PRINCIPLES AND PROBLEMS 257 (New York, Oxford Univ. Press 2020).

77. BOYLE, *supra* note 39, at 288.

78. Greg Walker, *Health as an Intermediate End and Primary Social Good*, 11(1) PUB. HEALTH ETHICS 6, 11 (2018).

79. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 225 (2d ed. 2011).

80. BARILAN, *supra* note 42, at 3.

81. Erin Daly & James R. May, *The Indivisibility of Human Dignity and Sustainability*, *in* THE CAMBRIDGE HANDBOOK OF ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT 23, 24 (Sumudu A. Atapattu et al. eds., 2021).

82. JAMES R. MAY & ERIN DALY, ADVANCED INTRODUCTION TO HUMAN DIGNITY AND LAW 106 (2020).

83. *See* Allen Buchanan & Matthew DeCamp, *Responsibility for Global Health*, *in* GLOBAL HEALTH ETHICAL CHALLENGES 136, 141 (Solomon Benatar & Gillian Brock eds., 2d ed. 2021).

84. Gostin & Stone, *supra* note 75, at 64.

85. BOYLE, *supra* note 39, at 290.

86. *See* DANIEL CALLAHAN, WHAT KIND OF LIFE: THE LIMITS OF MEDICAL PROGRESS 113 (1990).

87. *See* ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES (1999).

88. GÓMEZ-LOBO WITH KEOWN, *supra* note 9, at 14.

prohibit us to exhaust our resources on health alone:[89] friendship and community are basically good, but hostility and loneliness are basically bad; knowledge of the truth is basically good, but falsehood and ignorance are basically bad; fulfilling work is basically good, but unremitting work is basically bad; reasonable action is basically good, but arbitrary action is basically bad; experience of beauty is basically good, but experience of ugliness is basically bad; so on and so forth.[90] The basic good of our own bodily survival does not arise from knowledge of truth, knowledge of truth does not arise from friendship and community, and friendship and community do not arise from experience of beauty;[91] none of which could ever perfectly substitute for fulfilment and excellence in work and play.[92] Comparing the basic good of knowledge of truth with that of friendship is like comparing the width of a page with the content of a book.[93] Comparing the goodness of instantiations of the same basic good can be equally futile: your health and my health are both incomparably good.[94]

It may be concluded that the basic human goods cannot be weighed against each other, or one destroyed for another's sake.[95] Not even one's life is absolute in the sense that its pursuit should always and everywhere, regardless of circumstances, take precedence over other basic goods.[96] There can be a good life, individually or societally, without the highest attainable level of health.[97] A person in poor health can still enjoy other basic human goods such as friendship, community, and knowledge of truth.[98] A person may choose to give more priority to friendship and community over pursuit of knowledge, even if the person could be out saving lives through famine relief or medicine. The person's subjective ranking is down to factors such as upbringing, capacities, temperament, and opportunities, not differences of intrinsic value between the basic human goods.[99] Needless to say, citizens do not need to be in perfect health in order to participate in social institutions, nor do social institutions, to function properly, need such perfect citizens.[100]

The dominant way of framing ethical debates over modern public health hinges on the tension between the collective interests of the state and individual

89. *See* Buchanan & DeCamp, *supra* note 83, at 141.
90. Ozoliņš, *supra* note 22, at 127.
91. Gregg, *supra* note 30, at 229.
92. CHARTIER, *supra* note 32, at 6.
93. MAY, *supra* note 30, at 97.
94. *Id.* at 98.
95. Ozoliņš, *supra* note 22, at 128.
96. GÓMEZ-LOBO, *supra* note 25, at 40.
97. CALLAHAN, *supra* note 81, at 114.
98. GÓMEZ-LOBO, *supra* note 25, at 12–13.
99. FINNIS, *supra* note 35, at 94.
100. CALLAHAN, *supra* note 86, at 114.

liberty.[101] By contrast, natural law ethics privilege the interests and preferences of neither individual persons nor the state collective,[102] but proclaims that the basic good of friendship and community, for instance, is an irreducible dimension of the good of all. The common good understood in the natural law tradition is not an aggregational construct.[103] It consists of the conditions enabling individuals making a political community to lead fulfilling lives,[104] such as the protection of personal security and property, access to the necessities of life like food, shelter and medical care, and a healthy environment to live in.[105] Human beings are social animals; they find comfort and security in the company of family, friends, and neighbors.[106] It is nearly impossible for an individual to self-isolate from others' impact on their health and ability to live a normal life, especially in modem times. The primary rule of organized society is to embrace the fact that we are better off working with and for each other.[107] The basic human good of friendship and community is irreducibly part of everyone's own good, consisting of the mutually dependent sharing of the good of another as one's own.[108] It manifests the natural inclination for living and working together for the common needs of one's own community.[109] Hence, we owe a duty to one another to promote the common good. It is misguided to argue that the common good must prevail over individual rights, for their protection, necessary for the pursuit of basic human goods and fulfilment, is a core facet of the common good.

Public health is a condition for human fulfilment, instrumental in securing individual survival and health, among other basic human goods. It is, therefore, a constituent of the common good, alongside other conditions like peace and justice.[110] The purpose of the political community is to enable such conditions to exist, rather than to replace the proper role of individuals and voluntary

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101. Angus Dawson, *Theory and Practice in Public Health Ethics: A Complex Relationship*, *in* PUBLIC HEALTH ETHICS AND PRACTICE 191, 201 (Stephen Peckham and Alison Hann eds., 2010).

102. ROBERT P. GEORGE, CONSCIENCE AND ITS ENEMIES: CONFRONTING THE DOGMAS OF LIBERAL SECULARISM 83 (2013).

103. *See* Paul Brady, *Coercion, Political Authority and the Common Good*, 62(1) AM. J. JURIS. 75, 82–83 (2017).

104. *See also* N. E. SIMMONDS, CENTRAL ISSUES IN JURISPRUDENCE: JUSTICE, LAW AND RIGHTS 126 (5th ed. 2018).

105. Christopher Wolfe, *Political Theory and Natural Law*, *in* THE CAMBRIDGE COMPANION TO NATURAL LAW ETHICS 235, 248 (Tom Angier ed., 2019).

106. FRANKLIN WHITE ET AL., GLOBAL PUBLIC HEALTH: ECOLOGICAL FOUNDATIONS 54 (2013).

107. Michael R. Ulrich, *A Public Health Law Path for Second Amendment Jurisprudence*, 71 HASTINGS L.J. 1053, 1074 (2020).

108. ADAM J. MACLEOD, PROPERTY AND PRACTICAL REASON 25 (2015).

109. DOMÈNEC MELÉ, MANAGEMENT ETHICS: PLACING ETHICS AT THE CORE OF GOOD MANAGEMENT 31 (2012).

110. *See* John Finnis, *Public Good: The Specifically Political Common Good in Aquinas*, *in* NATURAL LAW AND MORAL INQUIRY 174 (Robert P. George ed., 1998).

associations in carrying out what ought to be their own responsibilities. The state may not justly overreach individuals, families, and community associations as to what they could do for themselves in that pursuit.[111] Public health decisions ought to be driven by a prudential pursuit of incommensurable basic human goods, not utilitarian computations of conjectured costs and benefits, giving due respect to the principle of subsidiarity. Consequently, state authorities must neither frustrate the common good, arbitrarily exaggerate or discount basic human goods or legitimate interests, be indifferent or hostile to any good,[112] nor usurp the role of local associations, in pursuit of public health objectives.

II. THE MORALITY OF PUBLIC HEALTH LOCKDOWNS

Lockdowns present a genuine moral dilemma when incommensurable instantiations of basic goods are in mutual tension. Decisions in the midst of a pandemic had to be taken under epidemiological situations that were constantly changing rapidly, in spite of the insufficiency of scientific evidence in relation to the effectiveness and unintended consequences of public health measures.[113] During the first few months of the pandemic in the United States, governors in over forty states issued "stay-at-home" orders that caused severe disruptions to society and the economy.[114] Certain local jurisdictions imposed tighter restrictions that targeted specific groups of people; for instance, the mayor of New York City, with blessings from the governor of the State of New York, closed schools and all non-essential businesses within nine zip codes in the City, where positive test rates were rising upwards.[115] In the United Kingdom, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 imposed the first COVID-19 national lockdown in England and Wales under the Public Health (Control of Disease) Act 1984. These regulations, backed by criminal law sanctions, obligated the closure of certain business premises and places of worship, banned public gatherings of more than two people, and most drastically decreed that "no person may leave the place where they are living without reasonable excuse."[116] In Australia, "one of the world's toughest covid-19 lockdowns" took place in Melbourne, lasting for 112 days since July 7, 2020, which put five million residents under "a form of protective custody," and

111. BOYLE, *supra* note 39, at 277–305.

112. ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, EMBRYO: A DEFENSE OF HUMAN LIFE 100 (2d ed. 2011).

113. Nils Haug et al., *Ranking the Effectiveness of Worldwide COVID-19 Government Interventions*, 4 NATURE HUM. BEHAV. 1303, 1303 (2020).

114. John Kirlin, *COVID-19 Upends Pandemic Plan*, 50(6–7) AM. REV. PUB. ADMIN. 467, 467 (2020).

115. Lindsay F. Wiley, *Democratizing the Law of Social Distancing*, 19 YALE J. HEALTH POL'Y, L., & ETHICS 50, 80 (2020).

116. John Yap & Nicholas U. Jin, R (Dolan) v Secretary of State for Health and Social Care*: Legality in the Time of Coronavirus*, X OXFORD UNIV. UNDERGRAD. L.J. 171, 173 (2021).

subjecting about 3,000 residents living in deprived areas from leaving their apartments.[117]

The standard justifications for lockdowns are commendably lofty in giving the highest priority to the basic good of life and health: to "flatten the curve",[118] to buy time to "reduc[e] morbidity and mortality."[119] The motto of the British Government during the earlier months of the pandemic, "stay home, protect the NHS, save lives," painted COVID-19 as a shared threat that requires individuals—old and young—to make great sacrifices; eventually, members of the public from various age groups became increasingly anxious about their own risks of suffering from the disease, far beyond and above any objective estimate.[120] It can be said that the COVID-19 pandemic has triggered fear on a scale not seen after the Second World War.[121]

We must continuously turn to COVID-19 lockdowns for lessons, as they are the only public health lockdowns in recent memory. Utilitarian maximization appears to be the most fitting principle justifying such lockdowns as a means "to save lives," because social distancing rules, school closures, mass quarantines, and curfews are intuitively the most effective way to curtail disease transmission.[122] A common utilitarian approach to COVID-19 ethics is to "estimate how much lockdowns cost the economy," which would enable us to further "estimate the years of healthy life we are likely to gain now by containing the virus," and then "compare it to how many years we are likely to lose later from a smaller economy."[123] For instance, it has been argued that, if the costs to human wellbeing outweigh the benefits, then lockdown measures should be considered unethical.[124] Lockdowns have taken a long period, particularly for high-risk groups; care home residents in multiple countries have been denied visits from relatives and friends for weeks, and even months.[125] The tacit assumption is that the costs that lockdowns inflict on other dimensions of health including mental health, friendship and community, pursuit of

117. Paul Smith, *Hard Lockdown and a "Health Dictatorship": Australia's Lucky Escape from Covid-19*, 371 BMJ m4910 (2020).

118. RUTH F. CHADWICK & UDO SCHÜKLENK, THIS IS BIOETHICS: AN INTRODUCTION 250 (2021).

119. *See* Holly Jarman et al., *In and Out of Lockdowns, and What is a Lockdown Anyway? Policy Issues in Transitions*, 26(2) EUROHEALTH 93 (2020).

120. John, *supra* note 5, at 270.

121. JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE WAKE-UP CALL: WHY THE PANDEMIC HAS EXPOSED THE WEAKNESS OF THE WEST, AND HOW TO FIX IT 76 (2020).

122. Rosamond Rhodes, *Justice and Guidance for the COVID-19 Pandemic*, 20(7) AM. J. BIOETHICS 163, 164 (2020).

123. Peter Singer & Michael Plant, *When Will the Pandemic Cure Be Worse Than the Disease?*, PROJECT SYNDICATE (Apr. 6, 2020), https://www.project-syndicate.org/commentary/when-will-lockdowns-be-worse-than-covid19-by-peter-singer-and-michael-plant-2020-04).

124. John, *supra* note 5, at 275.

125. Bouke de Vries, *State Responsibilities to Protect us from Loneliness During Lockdown*, 31 KENNEDY INST. ETHICS J. 1, 6 (2021).

knowledge, practical reasonableness, excellence and satisfaction in play and work, and so on, will be outweighed by the benefits in terms of the number of lives saved, as if basic goods are commensurable. Utilitarian logic assumes commensurability of incommensurable goods; invoking it as a justification of lockdowns is arbitrary.

The laws and policies of public health should be driven by a prudential pursuit of various incommensurable basic human goods, *not* by calculations of an alleged "net societal benefit,"[126] over and above the costs. Yet there is a widespread assumption that utilitarian ethics, which requires precisely incommensurable calculations, is an approach well-suited for evaluating and justifying what should or should not be done in public health.[127] The assumption is to be expected, as so many public health programs are underwritten by cost-effectiveness approaches to resource allocation that seek to maximize the aggregate number of healthy life-years in the population.[128] If one's approach to public health is rooted in utilitarianism, such that its aim is to achieve the greatest good for the greatest number, even to the detriment of the rights and interests of the individual, then the law might be deployed to do anything to control disease and other threats to health.[129] The utilitarian principle of "the greatest happiness of the greatest number"[130] is invoked to justify mass compulsory immunizations, and other public health and injury prevention measures such as fluoridation of public water supplies, speed limits, and quarantines that yield little due process during public health emergencies, policies that intervene in unhealthy lifestyle choices, and public health surveillance infringing on individual freedom of choice.[131] The utilitarian insists that "one should always choose the act that, so far as one can see, will yield the greatest net good on the whole and in the long run," or that "one should always choose according to a principle or rule the adoption of which will yield the greatest net good on the whole and in the long run."[132] Not without simplification, utilitarian public health ethics can be summed up in one sentence: "the morally right thing to do is to maximize benefit; health is a

126. George Duke, *The Common Good*, *in* THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE 369, 378 (George Duke & Robert P. George eds., 2017).

127. *See* Kathryn MacKay, *Utility and Justice in Public Health*, 40 J. PUB. HEALTH e413 (2017).

128. Andrew W. Siegel & Maria W. Merritt, *An Overview of Conceptual Foundations, Ethical Tensions, and Ethical Frameworks in Public Health*, *in* THE OXFORD HANDBOOK OF PUBLIC HEALTH ETHICS 5, 6 (Anna C. Mastroianni et al. eds., 2019).

129. Robyn Martin, *Law as a Tool in Promoting and Protecting Public Health: Always in Our Best Interests?*, 121 J. ROYAL INST. PUB. HEALTH 846, 847 (2007).

130. Dan Beauchamp & Bonnie Steinbock, *Introduction: Ethical Theory and Public Health*, *in* NEW ETHICS FOR THE PUBLIC'S HEALTH 3, 13 (Dan E. Beauchamp & Bonnie Steinbock eds., 1999).

131. WHITE ET AL., *supra* note 106, at 56.

132. FINNIS, *supra* note 79, at 112.

benefit; therefore, any public health policy that will produce maximal health gain is morally justified."[133]

A utilitarian public health ethic faces insurmountable difficulties. Utilitarianism entails calculating what makes a better consequence, which can be unduly difficult.[134] What counts as a good rule that leads to beneficial consequences according to rule-utilitarianism may vary significantly across social settings, jurisdictions, and time periods; this implies that rule-utilitarianism's principles of justice in a self-defeating manner fall short of universality.[135] Moreover, the *modus operandi* of utilitarianism, be it act- or rule-utilitarianism, implies that, if it can be predicted that intentionally sacrificing the lives of a few sick persons will hugely maximize the health utility of the many, it is justifiable to do so; exceptionless rules that prohibit such action may be overruled.[136] More to the point, utilitarian public health ethics is irrational. No plausible sense can be given to concepts like "greatest net good," "best consequences," or "smallest net harm," because humans do not have any "single, well-defined goal or function,"[137] and to maximize a "net good" is as arbitrary as "try[ing] to sum up the quantity of the size of this page, the quantity of the number six, and the quantity of the mass of this book."[138] It is problematic for public health that utilitarianism can provide no intrinsic reason for preferring altruism to egoism.[139] In principle, it can call for public health authorities to lie, oppress, and stigmatize when such practices are calculated to yield beneficial consequences for public health.[140] The resort to utilitarian ethics to justify public health work is thus irreducibly unreasonable, because sundry basic human goods are incommensurable in the sense of having no common measure; the choice is arbitrary which good to maximize and which to sacrifice.

Lockdowns intuitively reduce viral transmission.[141] Public health officials supposedly impose lockdowns "to save the most lives" and conserve hospital capacity "to avoid the worst outcome." All of this is understandable; the utilitarian overtones notwithstanding. We commonly recognize whatever protects our survival and bodily integrity as good, and whatever causes sickness and bodily disintegration as evil. Without tolerable public health measures, few people could meaningfully participate in political processes, create art, generate

133. JAMES SVARA, THE ETHICS PRIMER FOR PUBLIC ADMINISTRATORS IN GOVERNMENT AND NONPROFIT ORGANIZATIONS 75 (2d ed. 2015).

134. RICHARD BURNOR & YVONNE RALEY, ETHICAL CHOICES: AN INTRODUCTION TO MORAL PHILOSOPHY WITH CASES 123 (2d ed. 2018).

135. *Id.* at 144.

136. GÓMEZ-LOBO, *supra* note 25, at 114–15.

137. FINNIS, *supra* note 79, at 113.

138. *Id.* at 115.

139. *Id.* at 116.

140. OLIVIER BELLEFLEUR & MICHAEL KEELING, NAT'L COLLABORATING CTR. FOR HEALTHY PUB. POL'Y, UTILITARIANISM IN PUBLIC HEALTH 3 (2016).

141. HORTON, *supra* note 10, at 21.

wealth, or provide for the common security.[142] Yet there must be no arbitrary exaggeration or discounting of any incommensurable basic human goods.[143] If state public health intervention had stemmed from an intention to protect the basic human good of life and health, and deployed means not prohibited by principles deducible from the First Principle of Morality, then the natural law approach would readily affirm it. But the same Principle rules out intentional subversion of instances of basic goods to bring forth another good, be it instrumental or basic; it is wrong to enslave, for example, because it is *inter alia* an intentional destruction of the opportunities for the enslaved person to exercise practical reason, even if slavery would bring wealth to slave masters.[144] It follows that lockdown measures that authoritarian or democratic states might adopt, such as the outlawing of public assemblies, cancellation or postponement of elections, or closure of universities and religious congregations, that might be motivated by an ulterior purpose of crushing dissent or suppressing opponents by wrecking the basic human goods, must be *ipso facto* immoral, even if done in the venerable name of public health.

Recall from Section II that health is not the sole basic human good and cannot override all other basic goods to dominate decision-making. It is unethical to deploy public health powers to perform inherently immoral acts like intentionally killing innocent lives,[145] or as a means to consolidate the tyrannical powers of the ruling regime that is motivated by an ulterior purpose of crushing dissent or suppressing opponents by wrecking other basic human goods and the conditions that enable people to participate in them.[146] A public health surveillance measure that collects data for partisan purposes, or discriminates against a particular group of people must be immoral and illegitimate.[147] Besides, public health authorities must never treat as a mere means to securing a "greater" good, a public health intervention that is an impediment on an individual's participation in basic human goods other than life and health, as in the situation of a quarantined individual.

Quarantine, and the mass quarantine of lockdown especially, is in many ways "a blunt instrument to use in the control of infectious diseases."[148] The uniform, unilateral, indefinite, on-and-off application of lockdowns damages or subverts various basic human goods. Persons suspected but not proven to carry infections and their close contacts are guilty of no moral wrongdoing and cannot justly be harmed "for the community's sake" in disproportionate ways. While

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142. LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 8 (3d ed. 2016).

143. FINNIS, *supra* note 79, at 107.

144. MACLEOD, *supra* note 108, at 4.

145. *See* John Finnis, *Limited Government*, *in* HUMAN RIGHTS AND COMMON GOOD 85 (Oxford Univ. Press 2011).

146. *See* GÓMEZ-LOBO WITH KEOWN, *supra* note 9.

147. James F. Childress, *Surveillance and Public Health Data: The Foundation and Eyes of Public Health*, *in* ESSENTIALS OF PUBLIC HEALTH ETHICS 97, 110 (Ruth Gaare Bernheim et al. eds., 2013).

148. Ross Upshur, *The Ethics of Quarantine*, 5 AMA J. ETHICS 393, 394 (2003).

predictable but unintended restrictions on basic human goods incidental to a public health intervention in pursuance of the basic human good of life and health are not necessarily immoral, there must be moral reasons sufficiently cogent to justify them.[149] For instance, public health authorities should be very hesitant about quarantining asymptomatic individuals unless they are at high risk of being already infected with a highly contagious and lethal disease. The purpose of quarantine is to bring about public health from lethal contagious diseases, but the fact that human beings cannot thrive except as social animals means that separation of the quarantined from the rest of society, if mandatory, must be temporary and targeted. General lockdown is severely restrictive of the basic human goods of community, of excellence and satisfaction in work and play, and of practical reasonableness, harming quarantined people's ability to freely choose a reasonable way of life.

Public health lockdowns imposed to safeguard certain facets of health, such as respiratory health, might unintentionally compromise other facets of health.[150] Consider lessons from the COVID-19 lockdowns again, which had kept patients with conditions other than COVID-19 away from hospitals, paralyzed regular immunization programs, and precipitated the malnourishment and illnesses of millions.[151] It was estimated that globally 28,404,603 operations had been cancelled or postponed during the peak twelve weeks of COVID-19.[152] "Stay-at-home" orders might sacrifice the treatment of chronic health issues such as cardiovascular, metabolic, musculoskeletal, psychiatric, and pulmonary conditions.[153] In England, lockdowns lowered the number of hospital admissions of patients with acute heart disease, which resulted in an increase of deaths from heart disease outside hospitals.[154] The upshot was the rise of a preventable increase in neonatal deaths and stillbirths.[155] Across the globe, lockdowns have reportedly become a source of anxiety and fear no less than the pandemic itself.[156] Social distancing rules have increased depression

149. *See* Robert Anderson, *Boyle and the Principle of Double Effect*, 52 AM. J. JURIS. 259, 262 (2007).

150. *See* Eric C. Ip & Shing Fung Lee, *Preparing for the Coming Transnational Cancer Crisis Amid the COVID-19 Pandemic*, 31 CANCER CAUSES & CONTROL 703 (2020).

151. *See* CHARLES KENNY, THE PLAGUE CYCLE: THE UNENDING WAR BETWEEN HUMANITY AND INFECTIOUS DISEASE 181 (2021).

152. Hon-Lam Li et al., *Reopening Economies During the COVID-19 Pandemic: Reasoning About Value Tradeoffs*, 20 AM. J. BIOETHICS 136, 137 (2020).

153. Nina Trivedy Rogers et al., *Behavioral Change Towards Reduced Intensity Physical Activity is Disproportionately Prevalent Among Adults with Serious Health Issues or Self-Perception of High Risk During the UK COVID-19 Lockdown*, 8 FRONTIERS IN PUB. HEALTH 1, 2 (2020).

154. HORTON, *supra* note 10, at 31.

155. *Id.* at 32.

156. *See* Shweta Singh et al., *Impact of COVID-19 and Lockdown on Mental Health of Children and Adolescents: A Narrative Review with Recommendations*, 293 PSYCHIATRY RSCH. 113429 (2020).

and distress.[157] Additionally, stress, loneliness, and depression have reportedly worsened disproportionately among students as they have become isolated from their habitual social support networks,[158] even as the peril of COVID-19 has proved least among young people.[159]

Absent extreme scenarios, "one-size-fits-all" lockdowns, insofar as they intentionally damage other basic human goods, are more likely than not to be immoral. Officials who impose "far too indiscriminate"[160] general lockdowns that discount basic human goods other than that of life and health can be said to have been acting irrationally and immorally. The natural law ethicist accepts that many morally good acts must inevitably yield bad effects, and that this alone is not a reasonable justification for remaining frozen in real life.[161] She asks, instead, which bad side-effects are prohibited by the derivative principles of the First Principle of Morality, and which are not.[162] During the COVID-19 pandemic, senior officials and their medical advisors who have implemented harsh distancing rules from many parts of the Global North have reportedly been caught breaching those measures, contrary to the Golden Rule of fairness, one such subsidiary principle.[163] The Rule moreover forbids arbitrarily privileging some persons over others when all are equal in dignity.[164] It is unreasonable for public health policymakers to rule as if an epidemic is equally perilous to all, as if one assessment avails for all, when it does not. It is arbitrary for policymakers to systemically ignore certain types of bad outcomes, and the people affected by those bad outcomes. Rather, the same policymakers should candidly consider embarrassing facts, basic human goods other than life and health, and societal commitments apart from pandemic mitigation. Since reasonable members of the political community are likely to hold differing views on these issues, public health policymakers are well advised to facilitate open, public debate among opposing experts and decisionmakers—the absence of which is an unmistaken sign of moral irresponsibility and unreasonableness.[165]

The indiscriminate use of public health lockdowns during the COVID-19 pandemic has, at least in some countries, arguably "condemned part of the

157. *See* Eric Adjei Boakye et al., *Disproportionate Impact of COVID-19 Pandemic on Head and Neck Cancer Survivors*, 42 HEAD & NECK 1329 (2020).

158. Timon Elmer et al., *Students Under Lockdown: Comparisons of Students' Social Networks and Mental Health Before and During the COVID-19 Crisis in Switzerland*, 15(7) PLOS ONE e0236337 (2020).

159. Ellen Townsend, *COVID-19 Policies in the UK and Consequences for Mental Health*, 7(2) LANCET PSYCHIATRY 1014, 1014–15 (2020).

160. NIALL FERGUSON, DOOM: THE POLITICS OF CATASTROPHE 330 (2021).

161. GÓMEZ-LOBO WITH KEOWN, *supra* note 9, at 60.

162. *See* BOYLE, *supra* note 39.

163. *See* Thomson & Ip, *supra* note 14.

164. George & Tollefsen, *supra* note 19.

165. I am grateful to John Finnis for this point.

population to avoidable torments."[166] For example, the closure of businesses during COVID-19 lockdowns has led to their actual shutting down and loss of jobs, which in turn precipitated an economic downturn. In the United States, 40% of households earning fewer than $40,000 annually lost their jobs.[167] The economic ramifications of lockdowns were "historically unprecedented."[168] The superficially egalitarian appearance of a public health lockdown might cover up profound inequalities in its impairment of participation in basic human goods, most notably, fulfilment and excellence in work; lockdowns could easily impede the ability of the most vulnerable, the elderly, the chronically sick, the uninsured, the homeless, and those living in small, crowded homes or with the mentally disabled, to participate in basic goods.[169]

Be it in a future pandemic, the well-off can easily afford surgical masks, deliver services online, and stay put in a country house, while the less well-off must rely on public transport to get to work, have insufficient resources to sustain themselves without a pay cheque, and live in small and crowded apartments.[170] The massive unemployment that flows from an indefinite and repeated use of lockdown would severely impair the pursuit of the basic human goods of preservation of life and health, satisfaction and excellence in work and play, and practical reasonableness by the unemployed as well as their children and parents.[171] A locked-down, depressed, stressed, economically stagnant populace would not be sustainable for any political community. State authority is, after all, ultimately grounded in the common good, which demands a fair allocation of benefits and burdens across the whole community.[172] This authority would decisively be weakened by any indiscriminate lockdown, which cannot be egalitarian as to benefits or costs, when in fact the highest costs would fall on those living in poverty in the Global South.[173] At present, some COVID-19 lockdowns have reportedly accelerated worrisome trends towards centralization at the national in derogation of the local level in many nations,[174] contrary to the principle of subsidiarity.

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166. Rémi de Bercegol et al., *Confining the Margins, Marginalizing the Confined: The Distress of Neglected Lockdown Victims in Indian Cities*, ECHOGÉO (2020), http://journals.openedition.org/echogeo/19357.

167. ARUP K. CHAKRABORTY & ANDREY S. SHAW, VIRUSES, PANDEMICS, AND IMMUNITY 123 (2020).

168. FERGUSON, *supra* note 160, at 287.

169. Amy Fairchild et al., *Vexing, Veiled, and Inequitable: Social Distancing and the "Rights" Divide in the Age of COVID-19*, 20(7) AM. J. BIOETHICS 55, 59 (2020).

170. Rhodes, *supra* note 122, at 164.

171. David L. Blustein et al., *Unemployment in the Time of COVID-19: A Research Agenda*, 119 J. VOCATIONAL BEHAV. 103436 (2020).

172. Gregg, *supra* note 30.

173. Alexander Broadbent et al., *Lockdown is Not Egalitarian: The Costs Fall on the Global Poor*, 396(10243) LANCET 21–22 (2020).

174. JOHN FABIAN WITT, AMERICAN CONTAGIONS: EPIDEMICS AND THE LAW FROM SMALLPOX TO COVID-19 108 (2020).

The use of coercive state power to deprive entire populations of their physical liberty on-and-off indefinitely are extreme measures that, if ever justified, only extreme circumstances can justify.[175] Subject to the foregoing considerations, it is arguably justified to deploy brief general lockdowns in the earliest weeks of an outbreak like COVID-19, given the speed of transmission, massive uncertainty surrounding the actual death rate, and the want of a tested cure, which together added up to a seeming extremity at the time.[176] Now, whether COVID-19 will go down in history as on a par with extreme public health incidents like the Black Death of the 14th century or the Spanish Flu of the 20th century remains to be seen. This Article passes no judgment. Conserving the common good of the political community requires a highly contagious and lethal disease to be contained. From a natural law perspective, the right and duty of legitimate public authority to impose quarantines commensurate with the gravity of the public health incident ought to be acknowledged as well-founded, not excluding in cases of extremity an extreme intervention like a lockdown. However, the First Principle of Morality enjoins public health authorities to prefer the options that cause the least collateral damage to all other basic human goods besides health. Extreme measures should not be used unless there are compelling and cogent reasons. Less extreme counter-pandemic measures exist: enhanced hygienic practices, case tracing, and effective risk communications.[177] If such interventions are deployed early enough, pandemics can probably be suppressed without rolling out devastating lockdowns. And of course, it would be even better to deal with public health risks before they emerge, through stronger health and sanitation systems.[178]

III. SYNTHESIS

The natural law framework does not demand us to take sides respecting individualism versus collectivism.[179] The claim is suspect that "the common good must prevail" and individual rights are its enemy, because conservation of rights, as necessary for the pursuit of basic human goods and human flourishing, lies at the core of what we call the common good.[180] This we need not approach from an aggregational standpoint;[181] we need only realize that it consists of

175. Olivier Nay, *Can a Virus Undermine Human Rights?*, 5(5) LANCET PUB. HEALTH e238 (2020).

176. *See* Daniel Weinstock, *A Harm Reduction Approach to the Ethical Management of the COVID-19 Pandemic*, 13(2) PUB. HEALTH ETHICS 166 (2020).

177. *See* Chiranjib Bhattacharyya & V. Vinay, *Suppress, and Not Just Flatten: Strategies for Rapid Suppression of COVID19 Transmission in Small World Communities*, 100 J. INDIAN INST. SCI. 849 (2020).

178. KENNY, *supra* note 151, at 186.

179. *See* GEORGE, *supra* note 102, at 83.

180. *See id.* at 268.

181. Brady, *supra* note 103, at 83.

conditions, like protection of personal security and property,[182] that enable every individual belonging to a community to participate in the basic human goods and pursue a flourishing life,[183] rather than a community made unhealthy or insecure by harmful conditions, like crime and violence, impaired social relations, and unproductiveness.[184] The state's proper role is to "ensure that the totality of conditions necessary for citizens to pursue upright and flourishing lives, individually and in community (communities) with one another, is satisfied;" such conditions constitute the common good, protection of which is the source of political legitimacy.[185]

Like knowledge, health is at once an instrumental and a basic human good, which can be pursued for its own sake but without which it is hard for anyone to satisfactorily partake in many other goods in life.[186] The institutions and policies of public health designed to guard health at the population level are critical components of the common good, the social conditions conducive to human fulfilment. Only when health is secured can the well-being and interests of populations be meaningfully realized.[187] The law of the state is indispensable to reinforcing the conditions undergirding the common good through enforcing the rule of law and public order; the absence of which would impair the provision of public health and healthcare services.[188] Public health is a necessary constituent of the common good in the above sense.[189] Defending the general public from infectious diseases is commonly considered a fundamental responsibility of the modern state.[190] Many public health actions to stop the spread of disease are so coercive that only public health officials fixedly authorized by constitutional provisions and enabling statutes can undertake them.[191]

A public health lockdown that consists of mass quarantine of entire populations is a highly controversial measure which severely restricts the personal liberty of, and imposes psychosocial burdens on people suspected but not proven to carry lethal infectious diseases,[192] and their close contacts. These individuals are not guilty of any moral wrongdoing in this regard, and ought not to be deliberately harmed for the rest of the community's sake. The public

182. Wolfe, *supra* note 105, at 248.

183. SIMMONDS, *supra* note 104, at 126.

184. Gostin & Stone, *supra* note 75, at 64.

185. *See* Curlin & Tollefsen, *supra* note 33, at 36.

186. BURNOR & RALEY, *supra* note 134, at 14.

187. WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 267 (2009).

188. Gregg, *supra* note 40, at 477.

189. Lawrence O. Gostin et al., *The Law and the Public's Health: The Foundations, in* LAW IN PUBLIC HEALTH PRACTICE 25, 27 (Richard A. Goodman ed., 2d ed. 2007).

190. A.M. Viens et al., *Your Liberty or Your Life: Reciprocity in the Use of Restrictive Measures in Contexts of Contagion*, 6 BIOETHICAL INQUIRY 207, 208 (2009).

191. Mark A. Rothstein, *Rethinking the Meaning of Public Health*, 30(2) J. L. MED. & ETHICS 144, 149 (2002).

192. Nola M. Ries, *Public Health Law and Ethics: Lessons from SARS and Quarantine*, 13(1) HEALTH L. REV. 3, 4 (2004).

health lockdowns in response to COVID-19 brought this controversy to previously unimaginable heights, when entire populations, including countless individuals who carry no lethal infections, are now subjected to mass quarantine. It is alarming that so much public and media discussion about the lockdown as a strategy to contain a pandemic is tunnel-visioned on its one-dimensional effectiveness, ignoring all of the ethical problems that may be caused by such an extreme response.[193]

This Article has defended the use of public health lockdowns arising from pandemics, under conditions prescribed by a normative framework constructed from the building blocks of natural law ethics—one of the oldest, most influential traditions of moral reflection in the West and beyond, that remains all but untapped in contemporary public health ethical debates. Natural law ethicists' appeal to basic human goods and human fulfilment as the rational basis for assessing the moral permissibility of lockdowns differs in important ways from dominant convictions in public health ethics derived from utilitarianism, deontology, principlism, and others. Nothing in this Article, which concerns identifying the precise conditions under which a lockdown may be deemed moral, is meant to deny that COVID-19 is a real pandemic that has brought great suffering to humanity. The natural law framework enables us to specify the following conditions that govern a morally justified lockdown. General public health lockdowns are not necessarily immoral. In principle, one that satisfies *each* of the three principles outlined in the following paragraph could be objectively justified, entailing that the locked-down population is quarantined on the basis of the common good, and thus their own good, to which they cannot reasonably object.[194]

First, officials charged with planning and executing public health interventions ought to always intend to protect the basic good of life and health and the common good of public health, but to never intend as an end or means the subversion or damage of other basic goods contrary to the First Principle of Morality. This would forbid lockdowns used primarily to strengthen the tyrannical powers of the ruling regime or suppress constitutional rights that are necessary for people to partake in the basic goods. Second, the public health officials responsible for implementing lockdowns must never treat the lockdown's impediment of a quarantined individual's participation in the basic human goods as a mere means to securing a greater good. This standard forbids indefinite as well as one-size-fits-all lockdowns unconducive to the needs of the vulnerable for safe food and water, shelter, and psychosocial support, including affordable access to the internet and other non-social solutions to loneliness,[195] or indiscriminate lockdowns that trammel the universal need for economic activity. Third, foreseen but unintended restrictions on basic goods incidental to a lockdown are not necessarily immoral, but there must be moral reasons

193. *See* Steven R. Kraaijeveld, *COVID-19: Against a Lockdown Approach*, 13(2) ASIAN BIOETHICS REV. 195 (2011).

194. BERQUIST, *supra* note 37, at 120.

195. de Vries, *supra* note 125, at 11.

sufficiently serious to justify them that are not forbidden by any moral principle derivable from the First Principle of Morality.[196] This does forbid the deployment of lockdowns, undoubtedly an extreme measure, in excess of what is proved necessary to defeat a serious but not truly extreme threat to public health, which could justify at most the quarantine of those who are proved or at high risk to be already infected with a highly infectious and lethal disease. Public health interventions against an infectious disease have to be proportionate to the end of controlling that disease in the light of the seriousness of the threat posed by the disease, which will change from time to time, for instance, as the pathogen causing the disease evolves. Additionally, the First Principle of Morality forbids the unintended but foreseen subjugation of the quarantined to hazardous and negligently managed quarantine conditions contrary to the Golden Rule,[197] or any usurpation of the proper responsibilities of individuals and local associations for their own good, contrary to the principle of subsidiarity.

196. Anderson, *supra* note 149.

197. E. CHRISTIAN BRUGGER, CAPITAL PUNISHMENT AND ROMAN CATHOLIC MORAL TRADITION (2nd ed. 2014).