

Rule of Law vs. Rule of Experts in Public Health Emergencies

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The COVID-19 pandemic laid bare the existence of certain technocratic features of American government. For better or worse, expert agencies were given wide degrees of latitude to set public health policy. Many of the policies that governed us during the COVID era were the result of rule by expert, of a kind. For example, the initial lockdowns of March 2020 were an instance of experts advising executives to follow a particular course of action and those executives doing so. The issue of expertise and bureaucratic discretion was also recently highlighted by the Supreme Court overturning the *Chevron* deference doctrine in the case of *Loper Bright Enterprises v. Raimondo*.¹ Take the CDC’s federal mask mandate as an example. In her ruling in the case of *Health Freedom Defense Fund v. Biden*, which placed an injunction on the mask mandate, Judge Mizelle argued that the CDC’s interpretation of the law would delegate vast public health powers to the agency, if it were applied consistently, and that this is not the

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1. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

intention of the law that the CDC cited in favor of its mask mandate.² In this case, there is a clear tension between rule of law (assuming that Judge Mizelle is correct about the law) and rule by experts, who wanted to impose the mask mandate for public health. These cases highlight a well-known conflict in liberal political philosophy between the rule of law and the rule of experts. I am particularly interested in how this dynamic plays out in public health emergencies, and that will be the focus of this paper.

To risk a platitude, we should have the rule of law. That's a premise I think virtually all will agree with. The use of expert rule in public health emergencies (or emergencies generally) is a threat to the rule of law. Unless the experts are simply going to tell us to follow the law as it is written (in which case there is no need for them), then expert rule would conflict with rule of law. Whether for good or ill, expert rule involves experts ruling by their own will and desires rather than by the law itself. To be very clear, I am not assuming that experts are poorly intentioned or interested only in their own gain. I am assuming that most would-be expert rulers genuinely want to promote the common good and believe that their intervention against the rule of law would accomplish this. In a public health emergency, which is more just, rule of the law or rule of experts?

My thesis in this paper is that liberals should adopt a very strong presumption in favor of the rule of law during a public health emergency and should only turn to rule by experts under very narrow, and extremely rare, conditions. In addition to defending this thesis, this paper offers a general framework for when liberals should permit violations of the rule of law in favor of rule of experts during public health emergencies.

The paper proceeds as follows. In Section I, I define some thorny theoretical issues about the rule of law that will clarify what, precisely, I mean by rule of law and rule of experts in public health. In Section II, I advance several arguments in favor of the rule of law in public health. These arguments will be the following: (1) the democracy argument, (2) the autonomy argument, (3) the respect for rational planning argument, and (4) the precedent argument. These arguments are intended to establish the claim that liberals should endorse a very strong presumption in favor of not violating the rule of law during a public health emergency. In Section III, I ask when this very strong presumption in favor of the rule of law

2. See *Health Freedom Def. Fund v. Biden*, 599 F.Supp.3d 1144, 1165 (M.D. Fla. 2022). In her ruling, Judge Mizelle argues: "The government interprets 'sanitation' and 'other measures' to include traditional techniques that impede the spread of disease. (Doc. 45 at 24; Doc. 50 at 7.) One definition it relies upon is even broader, defining 'sanitation' as the 'applying of measures for preserving and promoting public health.' If Congress intended this definition, the power bestowed on the CDC would be breathtaking. And it certainly would not be limited to modest measures of 'sanitation' like masks. It would also justify requiring that businesses install air filtration systems to reduce the risks from airborne contagions or install plexiglass dividers between desks or office spaces. So too, a power to improve 'sanitation' would easily extend to requiring vaccinations against COVID-19, the seasonal flu, or other diseases. Or to mandatory social distancing, coughing-into-elbows, and daily multivitamins. In short, 'the sheer scope of the CDC's claimed authority under §[264(a)] would counsel against the Government's interpretation.'" (citations omitted).

may be overridden in favor of rule by experts. I outline a narrow set of conditions that must obtain for this to be the case. My own view is that these conditions very rarely, if ever, obtain in the real world. But, if the reader disagrees with me on this point, the general framework is still useful.³

I. SETTING UP THE TERMS

The rule of law is an intuitive idea that has been muddled by years of unclear theoretical debate. Here are a few major definitions of the rule of law:

Waldron: “The most important demand of the Rule of Law is that people in positions of authority should exercise their power within a constraining framework of well-established public norms rather than in an arbitrary, *ad hoc*, or purely discretionary manner on the basis of their own preferences or ideology. It insists that the government should operate within a framework of law in everything it does, and that it should be accountable through law when there is a suggestion of unauthorized action by those in power.”⁴

Hayek: “Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.”⁵

Marmor: “[T]he essence of the ideal of the rule of law is that people ought to be governed by law. This general ideal has at least two main components. First, it requires that governments . . . should rule, that is, guide their subjects’ conduct, by law. Second, it requires that the law by which governments purport to rule should be such that it can actually guide human conduct.”⁶

The core concept of the rule of law is that the law is laid down by the state and is enforced consistently. The law, not human discretion, is supposed to hold authority. Beyond this common-sense definition, the nature of the rule of law seems to be torn in two opposed directions in the literature. These two directions are in response to the question of whether the rule of law is a moralized or non-moralized feature of legal systems. On so-called *thin* views of the rule of law,⁷ the rule of law is simply the state where the written law governs, regardless of the

3. This argumentative strategy of suggesting that liberals should have a strong presumption in favor of liberal values but which is ultimately defeasible in some cases, is similar to my past work in Samuel Director & Christopher Freiman, *Civil Liberties in a Lockdown: The Case of COVID-19*, J. MED. & PHIL. 48, 613–23 (2023) and in Samuel Director, *Public Health Officials Should Almost Always Tell the Truth*, J. APP. PHIL. 40, 951–966 (2023).

4. Jeremy Waldron, *The Rule of Law*, in STAN. ENCYCLOPEDIA PHIL. (2016).

5. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 112 (2007).

6. Andrei Marmor, *The Rule of Law and Its Limits*, in LAW AND PHIL. 23, 1–43 (2004).

7. I draw the thin-thick distinction from John Tasioulas, *The Rule of Law*, in THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW 117–34 (2020).

law's content. According to the thin view, the rule of law concerns "formal and procedural aspects of governmental institutions, without regard to the content of the policies they implement."⁸ Thus, apartheid South Africa and Jim Crow America satisfy this conception of the rule of law, because both regimes followed the written law. As Raz says, "a non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies."⁹

The opposing, *thick*, view of the rule of law says that the rule of law is not only a procedural notion but instead has a certain substantive content. Proponents of this view say that the rule of law is conceptually connected with certain substantive features of a theory of justice (e.g. liberty, democracy, rights, etc.). On this view, rule of law is defined as rule of good or just law. As Waldron summarizes this view:

At the very least, the formal/procedural aspects generate a certain momentum in a substantive direction. Generality—proceeding according to a rule—is often said to contain the germ of justice (Hart 1961: ch. 8). And, stability, publicity, clarity, and prospectivity indicate a pretty fundamental connection between the Rule of Law and the conditions of liberty.¹⁰

Dworkin is a proponent of this view, which he calls the "rights conception" of the rule of law. He puts it as follows:

I shall call the second conception of the rule of law the "rights" conception . . . It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type . . . The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights.¹¹

Strongly expressing his disagreement with the thin conception (specifically that of Raz) of the rule of law, Lord Bingham says the following:

While . . . one can recognize the logical force of Professor Raz's contention, I would roundly reject it in favor of a "thick" definition, embracing the protection

8. See Waldron, *supra* note 4.

9. JOSEPH RAZ, *THE AUTHORITY OF LAW*, 211 (1979). As Tasioulas says, "The tightly circumscribed scope of the rule of law, thinly understood, means that a legal system can in principle satisfy its demands in spite of deficiencies with respect to other values, such as justice, human rights or democracy." Tasioulas, *supra* note 7, at 6. Waldron notes that this is a commonly held view, as "[M]any jurists follow Raz 1977 in thinking that the Rule of Law is a purely formal/procedural ideal . . ." Waldron, *supra* note 4.

10. Waldron, *supra* note 4 (internal citations omitted).

11. RONALD DWORKIN, *POLITICAL JUDGES AND THE RULE OF LAW* 11–12 (1985).

of human rights within its scope. A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed.¹²

The problem is this: the thin conception of the rule of law doesn't seem very important. If North Korea can satisfy the rule of law, then I don't think the rule of law is very important on its own. However, the thick view of the rule of law seems question begging and also renders the notion of the rule of law unnecessary. As Raz says, "If the rule of law is the rule of good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function."¹³ Tasioulas adds, "the Dworkinian [thick] analysis comes to grief at a hurdle similar to the one that toppled the idea of the rule of law as the rule of legitimate law: it threatens to make the rule of law ideal redundant to another ideal, in this case, justice. . ."¹⁴ In short, if the rule of law just means the rule of *just law*, then justice is doing all of the theoretical work, and we have no need for the concept of rule of law. Thus, we are in a position where the rule of law is either a mostly morally empty notion or superfluous to the theory of justice. Marmor sums it up as follows:

If we assume that any means of social control which actually amount to a form of governance are legal, then the ideal that government should rule by law becomes morally vacuous. Alternatively, if we impose some substantive moral constraints on what counts as law, then the ideal that governments should rule by law would amount to the ideal that governments should rule by good law.¹⁵

I want to avoid this thorny issue, although I'll register that I think there may be a fundamental problem in the concept of the rule of law.¹⁶ Almost all will agree

12. THOMAS HENRY BINGHAM, *THE RULE OF LAW*, 67 (2010). Tasioulas notes the possibility of a modified version of the thin view that permits some moral content: "A more nuanced elaboration of the thin account of the rule of law would stress that it possesses significant moral value in its own right and that it has intimate connections with other important values, such as human rights and democracy, and is therefore not properly conceived of as a mere regulatory tool that is equally at home in decent and oppressive regimes." Tasioulas *supra* note 7, at 125. The debate between the thick and the thin view still continues today. See generally Waldron, *supra* note 4.

13. RAZ, *supra* note 9, at 181.

14. Tasioulas, *supra* note 7, at 1205. As Marmor adds, "The most common mistake about the rule of law is to confuse it with the ideal of the rule of good law, the kind of law, for instance, that respects freedom and human dignity. But of course, understood as a general ideal of good law, the rule of law is no longer a unique ideal but a whole moral-political philosophy about what the law should achieve and the values it should uphold." Marmor, *supra* note 6, at 1–2.

15. *Id.* at 4.

16. For an argument along these lines, see generally Waldron, *supra* note 4. Shklar puts this quite strongly: "It would not be very difficult to show that the phrase 'the Rule of Law' has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter." JUDITH SHKLAR, *POLITICAL THEORY AND THE RULE OF LAW* 1 (1987).

that the concept of the rule of law that is morally relevant for liberals is something like the following: the law applies equally to all people and is fairly and equally enforced, *and* the law is procedurally just. In other words, nobody should care about the rule of law if the law is obviously unjust. Another way to put the point is that we should care about the rule of just laws; I'll bracket whether that is *what the rule of law is* or if that is *the rule of law combined with a liberal theory of justice*.¹⁷ I am not taking a view about the nature of the rule of law; instead, I am saying that the kind of rule of law that we care about (and which merits ethical analysis) is the rule of liberal/just law.

Does setting up the issue this way stack the deck against expert rule? If the rule of law is just rule of just laws, then clearly any deviation from it (including rule by experts) would be unjust and thus not to be pursued? To avoid this issue, I'll clarify that when I say rule of just law, I mean rule of procedurally just law. A procedurally just law is one which is democratically consented to and which satisfies certain liberal requirements about respect for persons, etc. There can be laws which pass this test that we might not always want to rule the day but which are still just laws. For example, if everyone democratically agrees to a law that protects individual rights, many will reject the universal rule of this law if violating the rule could save millions of lives in some situations, even though it involves a procedurally just law. Even just laws are not so perfect that they can anticipate every situation. There will obviously be cases where enforcing the law seems to lead to a suboptimal outcome. So, even though I'm setting up the issue as rule of just law vs. rule of experts, the deck is not stacked against rule by experts.

Given these clarifications, I'll operationalize the kind of rule of law that we should care about (henceforth just "rule of law") as the state of affairs in which procedurally just laws rule the land and are applied equally, and where such procedurally just laws are those that are the result of the democratic process and which fit a roughly liberal view of justice. When it comes to public health emergencies, should we follow the rule of law (so understood), or should we instead allow rule by experts who may act outside of the bounds of the law to promote the good in view of their expertise?

What would rule of law look like for public health emergencies? Rule of law would look like one of two things: (1) the existing law applies without exception during the emergency, or (2) we legislatively set up exception cases with clearly defined application windows for emergencies, and these exceptions allow state officials to act with discretion. These state officials could be experts. Gross refers

17. As a further reason to avoid taking a view on the thin vs. thick debate, it seems to me that it has implications for the nature of law itself. The thick view of the rule of law comes close to endorsing natural law theory, and the thin view fits more with a positivist view of law. I have less than zero interest in wading into that morass, so I'm going to be neutral.

to (1) as the “Business As Usual” model and (2) as falling under the heading of “models of accommodation.”¹⁸

In contrast, rule by expert would look like the suspension of the law in favor of expert advice. Given that (2) above is a form of rule of law, rule by expert would require that the state not have a version of (2) in place or that the experts go beyond the powers authorized to them in (2). As I am setting up the issue, the rule of experts requires that the experts override the rule of law (whether in form (1) or form (2)). Why would experts override the law? There are several reasons, some well-intentioned and some not. Obviously, experts overriding the law for clearly unjust reasons or for immoral ends is morally impermissible. What is more interesting is whether well-intentioned experts acting for morally desirable ends may break the rule of law in the pursuit of their ends. Those are the kinds of cases I am discussing, wherein the experts want to limit liberty or law in order to promote greater well-being.

A few conceptual notes: the way that I have set up the issue blocks cases where an expert would impose freedom and liberalism against a tyrannical law. Although such a case is technically a case of rule of experts ruling over the law, that falls outside of the scope of how I’ve operationalized the rule of law as the rule of liberal law. Additionally, we could have rule of redundant experts, wherein the expert simply tells us to obey the existing law. For my purposes, I will not consider that a case of expert rule. From here on, when I use the term “rule by expert,” I am assuming that such rule would require going against the just law of a liberal country.

One final definition is needed: I haven’t yet said what I mean by “expert.” I follow Goldman in defining an expert in the following way: “an expert (in the strong sense) in domain D is someone who possesses an extensive fund of knowledge (true belief) and a set of skills or methods for apt and successful deployment of this knowledge to new questions in the domain.”¹⁹ On Goldman’s definition, expertise is specific to domains of knowledge. This view permits the common-sense notion that one can be an expert in one domain and not in another.

II. ARGUMENTS IN FAVOR OF RULE OF LAW AND THE LIBERAL PRESUMPTION

In this section, I advance several arguments for the claim that rule of law is generally morally superior to rule by expert in public health emergencies. These arguments will be the following: (1) the democracy argument, (2) the autonomy argument, (3) the respect for rational planning argument, and (4) the precedent argument. Each of these arguments on its own provides a reason to generally favor rule of law in public health. These arguments are intended to establish the claim that liberals should endorse a very strong presumption in favor of not violating the rule of law during a public health emergency.

18. See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?*, 122 YALE L. J. 1011, 1021 (2003).

19. Alvin I. Goldman, *Experts: Which Ones Should You Trust?*, 63 PHIL. & PHENOMENOLOGICAL RES. 85, 92 (2001).

A. *The Democracy Argument*

In a well-functioning liberal democracy, the law is a reflection of the rules and principles that we have democratically agreed to. In such a society, the citizens elect officials who pass the laws, so the law is the will of the people. For the sake of argument, I am assuming that we live in such a state. If the law consists of what we have agreed to, then following the law and enforcing it is the democratic will of the people. Rule by expert, on the other hand, deviates from what we have democratically agreed to and is thus anti-democratic. While there is certainly a robust literature arguing against democracy, I am going to bracket those issues for the purpose of this paper.²⁰ However, I do not mean to endorse a hyperbolic conception of democracy as intrinsically valuable and always worth pursuing. I intend this democracy argument to be in line with instrumentalist defenses of democracy which see democracy as the best of the feasible institutional arrangements at protecting against tyranny and ensuring that a liberal conception of justice is followed. When I say that the rule of law promotes democracy, it is this conception of democracy that I have in mind. The value of the rule of law on this conception of democracy is that it prevents arbitrary power from exerting itself over the populace. Rule by expert threatens to do just that and thus would frustrate the instrumental value of democracy. According to my instrumentalist account of the value of democracy, democracy protects us from tyranny because the law is (for the most part) all of us using coercion on each other in ways that we agree to. Rule by experts involves one person or group of people using coercion on us without our permission.

The rule of law requires that we are ruled by the law, which is passed by democratically elected officials who are delegated the power to legislate. Bureaucratic experts in agencies have not been elected and have not been delegated the power to legislate. Thus, rule by experts involves the experts asserting their will against the law, without having been democratically given this power. This means that rule of experts is committed to the population being ruled, at least temporarily, by rules they did not consent to, by agents who they did not elect, and who are not democratically accountable. Such agents frustrate the value of democracy, understood in the instrumental sense above. Although different in some respects, the Supreme Court's major questions doctrine captures roughly this idea, that large scale power that has not been explicitly delegated to an agency should not be vested in the agency in question. Otherwise, the agency would be ruling, rather than the law ruling.²¹

20. For recent criticisms of electoral democracy, see generally JASON BRENNAN, *AGAINST DEMOCRACY* (2016); ALEXANDER GUERRERO, *LOTTOCRACY: DEMOCRACY WITHOUT ELECTIONS* (2024); CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS* (2016).

21. Summarizing the major questions doctrine, Sunstein says the following: "I contend that the major questions doctrine has been understood in two radically different ways—weak and strong—and that the two have radically different implications. The weak version suggests a kind of 'carveout' from *Chevron* deference when a major question is involved. Because *Chevron* does not apply, courts are required to resolve the relevant question of law independently, and without deference to agency

One might object that the alternative to bureaucrats ruling by expert opinion is judicial interpretation of the law. Perhaps this simply substitutes one form of rule by expert for another. While I agree that judges are, at least ideally, experts in the law, I don't think that judges interpreting the law constitutes rule by expert for our purposes. Judges interpreting the law and mandating that it be enforced according to what they think is the correct interpretation of the law is a form of rule by law. Yes, there is a human will in the process, but it's a will at least theoretically in favor of enforcing the law.

Perhaps this is not welcome news to many in the public-health ethics community, where deference to experts is popular. For example, in an editorial in *Science*, Gostin and Wetter express their dismay at the way that courts frustrated rule by experts during the pandemic:

During the pandemic, over 30 states passed laws curbing health measures such as mask and vaccine mandates, quarantines, and business closures. *Many state law reforms now allow the legislature to rescind executive health orders, effectively shifting decisions from infectious disease experts to lawmakers ill-equipped to make rapid, science-based judgments.* The pandemic also unleashed more than 1000 lawsuits challenging COVID-19 measures put into place by health officials, a quarter of which were successful in invalidating them. The Supreme Court, with a conservative super-majority, struck down state COVID-19 restrictions on religious gatherings as well as the CDC's tenant eviction moratorium and vaccine-or-test rules for large employers put forth by the Department of Labor's Occupational Safety and Health Administration.²²

Gostin and Wetter clearly believe that rule by experts should be pursued during an emergency in public health. They are quick to note that there needs to be a balance and a check against executive power. However, I cannot help but read this as fundamentally anti-democratic, in that it suggests that the people should not be the rulers but rather experts should be. In such a view, the legislative process prevents the experts from doing what really needs to be done. Although it should be not necessary to signal, I want to explicitly say that the above skepticism of the COVID-19 regulatory state (and the skepticism expressed in the rest of the paper) should not be read as trying to minimize the threat of COVID-19, promote anti-vaccination, or be anti-science. My own views are very pro-vaccination and pro-science. It is, of course, possible to object to the methods of the public health bureaucracy without thereby objecting to its goals. It may very well be, as Gostin

interpretations. The strong version, by contrast, operates as a clear statement principle, in the form of a firm barrier to certain agency interpretations. The idea is not merely that courts will decide questions of statutory meaning on their own. It is that such questions will be resolved unfavorably to the agency. When an agency is seeking to assert very broad power, it will lose, because Congress has not clearly granted it that power." Cass R. Sunstein, *There are Two Major Questions Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021).

22. Lawrence O. Gostin & Sarah Wetter, *Fix the Backlash Against Public Health*, 379 SCIENCE 1277, 1277 (2023) (emphasis added).

and Wetter suggest, that legislatures are likely to make less informed policy decisions than experts. But, to suggest that those experts should therefore be given that power is clearly technocratic and anti-democratic.

One might pose the following objection: what if the violation of the rule of law and rule by experts during a particular emergency is favored by 51% of the population? Would the value of democracy then point toward suspending the rule of law and allowing the experts to rule? In a certain sense, this would be more democratic but not in the sense of democracy that liberals should care about. Liberals are not committed to the kind of democracy where liberal rights and freedoms may be trampled in any case where a majority of the population supports doing so. Our rights are not up for popular vote during emergencies. Is that anti-democratic? Only if constitutions are anti-democratic. And, at least in the abstract, we have all democratically agreed to the rules spelled out in our constitutions, which stipulate that our fundamental rights may not be violated whenever a simple majority wants to violate them.

B. The Autonomy Argument

As I have set up the issue, we are assuming that the law is liberal in nature. Given this, it would take individual freedom as its default and view coercion as always in need of being justified.²³ If the law is liberal in nature, then it necessarily promotes individual autonomy, barring cases of physical harm to third parties. Rule by experts is almost always coercive, because it typically seeks to overrule individual liberty in the name of the common good. After all, if following the liberal law is just what the experts would advise us to do, then they would not need to back their rule by coercive threats. But, in such a case, we would have no need for rule by experts. The only cases where it would make any sense for experts to rule are the ones in which following the liberal law would be suboptimal in some way, and in which citizens are not likely to follow the experts' guidance without threats of sanction. Again, if citizens are willing to comply with expert advice of their own free will, this would not constitute a violation of the rule of law. For example, if in the Spring of 2020, the American government had decided to advise but not mandate people to stay at home to stop the spread, and if all Americans had complied, then this would not have been a case of rule by expert. It would have been a case of the public following the advice of experts. It is only rule by expert if there is a threat of punishment for violating the expert's guidance. Thus, rule by experts is coercive in nature. Given its coercive nature, rule by experts does not let me live my life as I wish. Assuming that the law is just, rule by law provides me with the method to live my life as I wish. This means

23. As Gaus, Courtland, and Schmidt say, "Liberalism is a philosophy that starts from a premise that political authority and law must be justified. If citizens are obliged to exercise self-restraint, and especially if they are obliged to defer to someone else's authority, there must be a reason why. Restrictions on liberty must be justified." Shane D. Courtland, Gerald Gaus & David Schmidt, *Liberalism*, STAN. ENCYCLOPEDIA PHIL. (2022).

that there is a paternalistic feature of suspending the rule of law. Liberals are usually skeptical of paternalism. Perhaps I am more committed to anti-paternalism than most philosophers, but it seems to me that liberalism and anti-paternalism are part of the same package.

I do not want to endorse the claim that the liberal state is never justified in using coercion. Rule by law is also coercive, in that the violating the law comes with a threat of punishment. The difference is that the coercion involved in the law, in a liberal society, is the kind that maximizes freedom by preventing us from interfering with each other. At the very least, liberals are committed to viewing coercion with skepticism and requiring that any instance of it has a compelling justification. This means that we should presume that liberty is innocent until proven guilty and that coercion is unjustified until shown otherwise.

C. The Rational Planning Argument

The rational planning argument holds that the subversion of the rule of law undermines my agency, because it removes the ability to plan my affairs as I wish. The rule of law allows one to plan their actions, which allows for rational behavior. If the law is consistent and accessible (which the rule of law requires), then it provides me with a system of rules in which I can plan my behavior. As Waldron says, “law should be epistemically accessible: it should be a body of norms promulgated as public knowledge so that people can study it, internalize it, figure out what it requires of them, and use it as a framework for their plans and expectations and for settling their disputes with others.”²⁴ Or, as Raz notes, “this is the basic intuition from which the doctrine of the rule of law derives: the law must be capable of guiding the behaviour of its subjects.”²⁵ Simply put, if I know the rules, I can plan around them. If I don’t know the rules, planning becomes extremely difficult, akin to playing a board game without knowing any of its rules. If a personal anecdote can be permitted, I’ll ask the reader to indulge me. In the spring of 2020, my fiancé (now wife of four years) and I were planning our wedding, which was to take place on July 5th. Each month, the governor of Colorado (where we lived at the time) released new rules (informed by experts in public health) that stated under what conditions indoor or outdoor gatherings could be hosted. My wife and I did not want to break the law, but we also did not want to delay our wedding. With each month that passed, the plans had to change. We naively assumed in March that a wedding in July would be free from regulations, as the crisis would have ended. Or so we thought. Sometimes, the governor’s monthly rules were clear, and other times they were not. The rules that were to be binding at the time of our wedding were extremely unclear. My friend (who is an accomplished lawyer with years of clerking experience) and I sat down to parse the rules. We could not determine what the rules required. This was in part because the rules had a section for guidelines and a section for mandates, but

24. Waldron, *supra* note 4.

25. RAZ, *supra* note 9, at 214.

some of the items under the recommendations section included imperative wording, such as “you must do X.” I personally cannot make sense of a recommendation that is obligatory. If a lawyer and a philosopher cannot parse what the law is, this does not bode well for the ordinary person without training in law and logic. In the end, we had to re-plan our whole wedding in the span of three weeks and do a small backyard wedding. In the grand scheme of things, our problems paled in comparison to others. We were fortunate enough to have parents with a beautiful backyard and the luxury of working from home in jobs that allowed us to maintain our income during the lockdown. Others were not so fortunate; businesses that relied on in-person patronage were looking at the same rules and were confronted with the same uncertainty. For a business owner in Colorado at the time, planning how to run their business within the confines of the law would have been virtually impossible, yet that person could have been punished if they got it wrong.

What is the moral import of all of this? The rule of law allows people to plan their lives, which enhances their agency and ultimately provides a framework that respects their capacity to be self-governing, autonomous agents. The rule of law allows for diachronic respect for plans across time. This is put well by Tasioulas and Raz in the following passages:

“The rule of law respects the capacity of the individuals who are subject to the law to choose and pursue pathways through life by weighing up reasons and by anticipating how the law is liable to impinge upon their potential decisions through grasping the content of legal rules.”²⁶

“[O]bservance of the rule of law is necessary if the law is to respect human dignity. Respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, respecting people’s dignity includes respecting their autonomy, their right to control their future.”²⁷

Rule by expert, in contrast, frustrates our ability to plan for the future, because the rule of experts interrupts the framework of laws in which we made our previous plans. And, given the nature of a crisis, rule by experts is liable to change course as the events of the crisis change, introducing further uncertainty into agents’ ability to plan their lives.

D. The Precedent Argument

Suspending the rule of law in a crisis comes with the assumption that the rule of law will be restored after the crisis has been resolved. This is an empirical claim that is certainly questionable. Governments are not prone to giving back emergency powers once they have taken them. “Never let a good crisis go to waste” is a well-known phrase for a reason. Although I lack space to cover a long

26. Tasioulas, *supra* note 7, at 121.

27. RAZ, *supra* note 9, at 221.

history of how emergency powers become entrenched long after the crisis for which they were designed, the following passage from Gross puts the general pattern very well:

Institutional and structural modifications that are installed as essential for crisis management may continue long past the termination of the original crisis. In times of emergency, governments enjoy unparalleled concentration and expansion of powers. More often than not the executive enjoys substantial, if not overwhelming, support from the public and from the other branches of government . . . emergencies have led to quantum leaps in this process of aggrandizement. Past examples include the explosions of executive powers accompanying the “economic war” against the Great Depression (and later on, World War II) in the United States, the transformation from the Fourth to the Fifth Republic in France (closely linked to the Algerian War), and the fundamental changes in the governmental structure of Great Britain during and after World War I.²⁸

Beyond the concern about entrenching emergency powers in the government, there is a related concern about how this precedent would enable one’s ideological opponents to use the same power. In a perfect world, the experts would not be partisans, but that is far from the case. Just like all of us, public health experts are prone to bias and partisanship, and many of them are appointed via political processes. This means that there will inevitably be a portion of partisan bias in any expert’s advice. Allowing experts discretion rather than binding them strictly to the law would allow for their own will to creep into their advice. This seems well and good when it is *our* experts advancing *our* ends, but that is not the case about half of the time for most Americans (and virtually none of the time for non-partisans). I would rather live in a state where both my experts and my ideological opponents’ experts lacked emergency powers than a world in which both possessed a wide degree of discretionary power at different times.

To conclude this section, the violation of the rule of law in favor of rule by experts offends against many cherished liberal principles (democracy, autonomy, rational agency, and freedom from dangerous levels of state power). To my mind, this clearly suggests that liberals should oppose expert rule and maintain their commitment to rule of law. More specifically, all of this should lead us to a strong presumption in favor of not overruling the rule of law.²⁹

What, then, is the role of expertise in a liberal government that respects the rule of law? Experts still have a substantial role to play, just not in enforcing their will beyond the law. In a well-functioning liberal democracy, the legislative branch should consult experts when crafting the law, and the judicial branch

28. Gross, *supra* note 18, at 1095–96. Director and Freiman outline a number of ways that emergencies powers have stuck around and been used long after their initial crisis was supposed to have resolved. See Director & Freiman, *supra* note 3, at 617–18.

29. Director and Freiman make a similar move about a liberal presumption but applied to the general topic of the suspension of civil liberties during a pandemic. *Id.* at 616–17.

should consult experts when appropriate (not in interpreting the law but in empirical matters which bear on whether a properly interpreted law applies in a given case). I bring this up to highlight that nothing in my argument is anti-expertise. If one's goal is to form true beliefs in some domain, deference to genuine experts seems clearly rational. My position is against expert rule, not experts themselves. Public policy would be likely much better if legislators actually listened to experts and created laws in light of their testimony. For example, if experts in economics were appropriately listened to during the legislative process, no politician would propose tariffs.

III. WHEN IS THE PRESUMPTION OVERCOME?

Of course, all the preceding arguments may be true, and it would still be justified to override the law and follow expert advice in a crisis. If the consequences or the harm prevented are dire enough, anyone but an absolute deontologist would say that the law can be suspended if doing so would prevent such a catastrophic harm. Given that I am not an absolute deontologist (and presumably few people are), I endorse a threshold account of when harm prevention may justify the suspension of rules and liberties. If a public health emergency meets whatever this threshold is (on which I'll be agnostic), then the rule of law should be suspended if doing so would prevent the harm. Surely, respect for rational planning, democracy, etc., don't always defeat the promotion of wellbeing. Potential harm prevention seems to be the major potential advantage of rule by expert. It allows a wide range of discretion for the expert to shape public policy to promote the good at a time when the law is not the best tool for doing so. The law is a blunt instrument and cannot be nimble in the way that experts are. If experts could really save many lives, perhaps even a liberal should say that expert rule should trump the rule of law. This is all compatible with there being a general liberal presumption in favor of the rule of law; the claim here is just that this is not an *absolute* presumption but rather a defeasible one.

And we have reason to think that experts may be able to act faster and be nimbler in their approach to a crisis than simply applying legislation. Part of the reason for this is that the crisis will likely present challenges that are either unforeseeable at the time of legislating or so complex and novel that legislation could not anticipate them. If we free experts from the law, they can act quickly for the common good based on evidence, potentially avoiding catastrophic consequences.

I agree that liberals should be prepared to permit cases where the rule of law may be defeated if the harms of a public health crisis are great enough, but such cases must meet very strict requirements. I'll defend the following view about when rule of experts may supersede rule of law in a liberal state: rule by experts (and thus the suspension of the rule of law) is justified during a public health emergency if and only if public health officials have a justified belief with a high degree of confidence that:

1. the threat to public health is very high.
2. the suspension of the rule of law and the use of rule by experts would be successful at avoiding the harm from (1) without introducing substantial negative long-term harms.
3. the suspension of the rule of law and the use of expert rule must be substantially more effective at avoiding the harm than methods that are less *prima facie* wrong than the suspension of the rule of law.

In my view, well-being does trump the rule of law and favors rule by experts, but only in these narrow circumstances. So far, I've only outlined a framework for when public health considerations may justify violating the rule of law. I hope that this framework is agreeable, applicable, and useful to scholars in public health ethics. Some readers may want to get off the train after this because I'll next argue that conditions 1-3 are extremely hard to satisfy in the real world, such that it is rarely the case that rule of experts defeats rule of law in public health crises. My argument for this claim will be less than fully hashed out, given space considerations. However, I will illustrate the point with examples that reasonably generalize to public health crises broadly. Yet, even if one disagrees with me in the coming sections, the general framework developed here may be of substantial use. It might just turn out that the disagreements from hereon are empirical in nature.

For the rest of this section, I will go through conditions 1-3 and address why I think they are generally very difficult for public health experts to jointly satisfy.

As a caveat, I don't think it would be reasonable to say that we should evaluate the actual consequences of interventions that involve rule by expert. We should evaluate the reasonably expected consequences of these interventions at the time of being implemented. This puts us in the position of evaluating what public health officials may reasonably believe at the time of intervening. It is from this standpoint that I am making my argument.

A. Condition 1

Condition 1 seems like it should be relatively easy to satisfy. Although I'm trying to be, strictly speaking, agnostic about the exact harm threshold that must be met in order to suspend the rule of law, it's clear that there must be good evidence of a *substantial threat* to the population. There is an inevitable vagueness in this description, but we can at least appeal to clear cases of substantial threats. For example, if public health officials are justified in holding a 0.51 credence that there is a new Ebola variant that is spread via aerosol transmission, meaning that it is easily spread and virtually a death sentence, then this would clearly meet the bar of being a substantial threat. Knowing what we know now, COVID-19 was a substantial threat to the public's health in the way that I intend the term.

To satisfy condition 1, at the time of suspending the rule of law in favor of the rule of experts, the experts must have a well-justified belief that the threat is substantial. If experts override the rule of law based on anything less than well-justified belief, we should be wary of this. For example, suppose that I gravely violate

a stranger's right to privacy but do so because I'm 35% confident that doing so would save him from a serious injury. In my view, such a risk-confidence ratio does not justify violating one of his core rights in a serious way, even though the potential threat to his health is high. If the violation of the rule of law by the government were done with such a confidence level, we would be more aghast. I won't spell out the precise risk-confidence ratio that would satisfy this concern. However, I'll suggest that it is generally very difficult for public health officials to justifiably believe with sufficient confidence that a given public health crisis is dire enough to warrant the suspension of the rule of law.

Take COVID-19 as an example. Recall that I am asking the reader to evaluate what public health officials know in the moment, so this puts us in the frame of public health officials in the Spring of 2020. Did experts have a high enough level of justification that COVID-19 posed a substantial threat to the public? I do not intend any of this to suggest that COVID-19 was not a substantial threat to public health. As stated, I do think that it was such a threat. But we are asking whether, given what was known at the time, the threat was sufficiently understood to warrant the suspension of the rule of law in order to impose lockdowns. That is, or at least should be a very high bar. In March and April of 2020, when it was suggested that rule of law should be subverted to impose lockdowns, there was a lot that we didn't know about COVID-19, and there was substantial expert disagreement about its severity. What I aim to do in the coming paragraphs is to highlight disagreement about the potential threat of COVID-19 among experts, at the same time that governments were imposing lockdowns on the basis of expert advice.³⁰

In March of 2020, Stanford epidemiologist John Ioannidis wrote a piece critical of the data regarding COVID-19. As Ioannidis said, "At a time when everyone needs better information . . . we lack reliable evidence on how many people have been infected with SARS-CoV-2 or who continue to become infected. Better information is needed to guide decisions."³¹ He went as far as to say that the data was "utterly unreliable" and that "the consequences of long-term lockdowns are entirely unknown."³² As Oxford researcher Paul Klenerman said in March of 2020, "we need much more data about who has been exposed to inform policy."³³

COVID-19 proved especially difficult to model at the time. As Avery et al. point out:

30. Winsberg et al. develop a sustained argument that lockdown policies did not meet the required epistemic standards for such policies to be justified. *See generally* Eric Winsberg, Jason Brennan & Chris W. Surprenant, *How Government Leaders Violated Their Epistemic Duties during the SARS-CoV-2 Crisis*, KENNEDY INST. ETHICS J. (2020).

31. John Ioannidis, *A fiasco in the making? As the coronavirus pandemic takes hold, we are making decisions without reliable data*, STAT (Mar. 17, 2020) <https://www.statnews.com/2020/03/17/a-fiasco-in-the-making-as-the-coronavirus-pandemic-takes-hold-we-are-making-decisions-without-reliable-data/> [<https://perma.cc/KK66-5K7N>].

32. *Id.*

33. Ian Sample, *Coronavirus Exposes the Problems and Pitfalls of Modeling*, THE GUARDIAN (Mar. 25, 2020) <https://www.theguardian.com/science/2020/mar/25/coronavirus-exposes-the-problems-and-pitfalls-of-modelling> [<https://perma.cc/L4YK-KRS4>].

Uncertainty in rates and states are especially high for the current pandemic, both because forecasts must be made in real-time, and because there are unprecedented stresses at a global scale on the institutions that are typically responsible for collecting and reporting data. Due to the unusually high asymptomatic rate of infection, it is also difficult to distinguish changes in reported case numbers that are associated with actual infections vs. reporting biases, so nonlinearities and saturation points are particularly difficult to identify. Because SARS-CoV-2 appears to have a particularly long latent stage in comparison to similar diseases, lags between policy interventions and observable changes in dynamics have often taken a week or longer.³⁴

Many modelers reached vastly divergent predictions based on the data available in the Spring of 2020. This is most starkly seen when epidemiologists estimated the overall case fatality rate (CFR) of COVID-19. There was a drastic range in the projected death counts available in the literature. In a March 2020 survey of infectious disease researchers, the results revealed this range:

Experts' estimates of the number of COVID-19 deaths in the U.S. in 2020 ranged from 4,000 all the way to 1 million, a huge range that highlights how much we still don't know about this disease. The expert consensus is to expect about 200,000 deaths in the U.S. from COVID-19 this year, but the uncertainty around that number is *also* huge: There's an 80 percent chance the final number will be between 19,000 and 1.2 million, according to these estimates.³⁵

This disagreement was also found in the peer reviewed medical literature. Widely divergent estimates of CFR were offered. Ioannidis used the data from the Diamond Princess cruise ship to predict a CFR of between 0.05% and 1% in the US.³⁶ At the far end of this spectrum, the WHO-China Joint Mission on

34. Christopher Avery et al., *Policy Implications of Models of the Spread of Coronavirus: Perspectives and Opportunities for Economists* 9 (Nat'l Bureau Econ. Rsch., Working Paper No. 27007, 2020).

35. Jay Boice, *Infectious Disease Experts Don't Know How Bad The Coronavirus Is Going To Get, Either*, ABC NEWS (Mar. 20, 2020) <https://fivethirtyeight.com/features/infectious-disease-experts-dont-know-how-bad-the-coronavirus-is-going-to-get-either/> [<https://perma.cc/V3ZN-WNYX>]. Boice is referring to survey data drawn from Thomas McAndrew, COVID19-Expert Forecast-Survey5-20200316.pdf (Mar. 18, 2020) (unpublished paper), <https://works.bepress.com/mcandrew/2/> [<https://perma.cc/5DBC-2Y5X>].

36. Ioannidis, *supra* note 31 (“The one situation where an entire, closed population was tested was the Diamond Princess cruise ship and its quarantine passengers. The case fatality rate there was 1.0%, but this was a largely elderly population, in which the death rate from Covid-19 is much higher. Projecting the Diamond Princess mortality rate onto the age structure of the U.S. population, the death rate among people infected with Covid-19 would be 0.125%. But since this estimate is based on extremely thin data — there were just seven deaths among the 700 infected passengers and crew — the real death rate could stretch from five times lower (0.025%) to five times higher (0.625%). It is also possible that some of the passengers who were infected might die later, and that tourists may have different frequencies of chronic diseases — a risk factor for worse outcomes with SARS-CoV-2 infection — than the general population. Adding these extra sources of uncertainty, reasonable estimates for the case fatality ratio in the general U.S. population vary from 0.05% to 1%.”).

COVID-19 at one point estimated that COVID-19 had nearly a 4% CFR.³⁷ In June 2020, Ruan summarized this disparity well:

Current estimates of case fatality ratio for COVID-19 vary depending on the datasets and time periods examined. A study of nearly 1100 patients from China suggested a case fatality ratio of 1.4%. From a dataset of 44,672 confirmed cases in China, a report from the Chinese Center for Disease Control and Prevention . . . estimated an overall case fatality ratio of 2.3%, and pointed out that the ratio varied by location and intensity of transmission (e.g., 2.9% in Hubei vs 0.4% in other areas of China), in different phases of the outbreak (e.g., 14.4% before Dec 31, 15.6% for Jan 1–10, 5.7% for Jan 11–20, 1.9% Jan for 21–31, and 0.8% after Feb 1), as well as by sex (2.8% for males vs 1.7% for females). Moreover, the Chinese CDC reported that the case fatality ratio increases with age (from 0.2% for people aged 11–19 years, to 14.8% for people aged ≥ 80 years), and with the presence of comorbid conditions (10.5% for cardiovascular disease, 7.3% for diabetes, 6.0% for hypertension, 6.3% for chronic respiratory disease, and 5.6% for cancer). The WHO–China Joint Mission on COVID-19 provided similar data and reported a case fatality ratio of 3.8%, based on the 55,924 laboratory-confirmed cases in China.³⁸

Perhaps most notably, an exchange between authors in the *Lancet* revealed the depth of disagreement about the CFR of COVID-19. In the initial article (in July 2020), Baud et al. estimated the CFR of the virus as follows:

Using WHO data on the cumulative number of deaths to March 1, 2020, mortality rates would be 5.6% (95% CI 5.4–5.8) for China and 15.2% (12.5–17.9) outside of China. Global mortality rates over time using a 14-day delay estimate are shown in the figure, with a curve that levels off to a rate of 5.7% (5.5–5.9).³⁹

In a July 2020 response to Baud et al., Lipsitch had some strong words:

The delay problem highlighted by Baud and colleagues produces falsely low estimates, whereas the under-ascertainment of mild cases produces falsely high estimates. These issues are well appreciated in the field and have been discussed in the popular press in recent weeks. No expert thinks the 3.6% raw ratio of deaths to cases on March 1 is an accurate estimate of the CFR because it suffers from all of these biases. The authors make the situation worse: correcting for delay (with an invalid method) without correcting for ascertainment of mild cases inflates the estimates, bringing them further from what most

37. Shigui Ruan, *Likelihood of Survival of Coronavirus Disease 2019*, 20 LANCET INFECT. DIS. 630, 630 (2020).

38. *Id.*

39. David Baud et al., *Real Estimates of Mortality Following Covid-19 Infection*, 20 LANCET INFECT. DIS. 733, 733 (2020).

experts believe are the true numbers, around the 1–2% range for symptomatic cases.⁴⁰

Lipsitch went even further:

Baud and colleagues' estimates are not real; they are in fact less real than the biased calculations they claim to correct. Especially in a time of great urgency, authors have a responsibility to read and understand relevant background literature and look for obvious flaws in their own analysis. This work does not appear to have met that standard. The fact that peer review did not pick up these flaws should be a caution against hastening the peer review process at the expense of due care.⁴¹

Perhaps even more damning than this, in a March 2020 (published in 2023) article in the *British Medical Journal*, Wynants et al. reviewed the existing models and reached the following dim conclusion:

Prediction models for covid-19 entered the academic literature to support medical decision making at unprecedented speed and in large numbers. Most published prediction model studies were poorly reported and at high risk of bias such that their reported predictive performances are probably optimistic. Models with low risk of bias should be validated before clinical implementation.⁴²

They go on:

Most of the 606 models were appraised to have high or uncertain risk of bias owing to a combination of poor reporting and poor methodological conduct. Often, the available sample sizes and number of events for the outcomes of interest were limited. This problem is well known when building prediction models and increases the risk of overfitting the model. Other common causes for bias were not adequately accounting for missing data, using techniques that do not account for optimism in performance estimates, ignoring model calibration, and inappropriate model validation. A high risk of bias implies that the performance of these models in new samples will probably be worse than that reported by the researchers. Therefore, the estimated C indexes, often indicating near perfect discrimination, are probably optimistic. For most of these models, no independent external validations with a low risk of bias were performed, even though most were publicly available in a format usable in clinical practice.⁴³

The point I'm trying to make is that an expert in Spring 2020 was faced with considerable uncertainty. The data was incomplete, the models built on the data

40. Marc Lipsitch, *Estimating Case Fatality Rates from COVID-19*, 20 LANCET INFECT. DIS. 775, 775 (2020).

41. *Id.*

42. Laure Wynants et al., *Prediction Models for Diagnosis and Prognosis of Covid-19: Systematic Review and Critical Appraisal*, BMJ 1–2 (2020) <https://doi.org/10.1136/bmj.m1328> [<https://perma.cc/U46B-XVMT>].

43. *Id.* at 8.

seemed poor, and the estimates of CFR based on the data vastly diverged. Not only this, but the experts on these issues disagreed, even to the point of saying that other experts had obviously failed to consider relevant variables. In a discussion of several COVID-19 models, Avery et al. noted that “there seems to be a general tendency for researchers to report a greater degree of confidence than is warranted for an existing model.”⁴⁴ Avery et al., suggested that “we must recognize that we are making decisions under substantial uncertainty . . . we still know very little about the epidemiology of SARS-CoV-2.”⁴⁵

The preceding is far from an argument that all public health crises are such that it’s hard to ascertain the risk, but I think that what is true of COVID-19 generalizes. Crises in public health are such that data is scarce, the threats are novel, and their effects are relatively unknown. In the face of such a situation, drastic interventions into the very fabric of the law should not be undertaken with anything less than a high degree of confidence that the problem merits this severe of an intervention. At the very least, officials should have a 0.51 credence that the threat to the public’s health is grave. That will be hard to know in many cases, although not impossible to know.

What if inaction would certainly cause some harm? If we follow the rule of law, we may end up forcing experts to make no intervention at all. Clearly, interventions risk a harm, but (at least in the case of COVID-19) inaction certainly leads to harms as well. I agree that there is no costless or perfect decision in a crisis. But, as liberals we accept that following the law (by not intervening/being inactive during an emergency) should be the default governmental response, unless the benefits of action (overriding the rule of law) are extremely high.

B. Condition 2

Not only must experts have a justified belief that the threat to the public is grave, they must also have a justified belief that condition 2 obtains, namely that the suspension of the rule of law and the use of rule by expert would be successful at avoiding the harm from (1) without introducing substantial negative long-term harms. What might these long-term harms be? Some have already been discussed in the form of establishing a dangerous precedent of the state not giving back its emergency powers. Other long-term harms would depend on the nature of the intervention. The potential harms of COVID-19 lockdowns included downstream effects of economic downturn, harms to mental health, harms to quality of life, harms to educational attainment for young students, etc.⁴⁶

Note that condition 2 is not, strictly speaking, just about public health. Condition 2 asks officials to make a moral judgment about whether the harms of the intervention are worth it given the benefits of the intervention. This is asking for both empirical and moral evaluation. Public health experts are certainly

44. Avery et al., *supra* note 34, at 26.

45. *Id.* at 35.

46. Director & Freiman, *supra* note 3, go through a litany of potential harms introduced by a lockdown.

experts on the empirical issues, but they are far from experts on the moral issues. This confronts rule by expert with a further problem: if the experts include only public health officials (virologists, epidemiologists, etc.), then such a group lacks expertise with regard to the question of whether suspending the rule of law is worth it, because they lack expertise in the domain of moral philosophy. For an epidemiologist to make a moral evaluation and assert it as an expert judgment would be what Ballantyne calls *epistemic trespassing*, which is the phenomenon in which “[t]hinkers who have competence or expertise to make good judgments in one field . . . move to another field where they lack competence—and pass judgment nevertheless.”⁴⁷ Ballantyne rightly argues that “We should doubt that trespassers are reliable judges in fields where they are outsiders.”⁴⁸

This issue could be overcome if the relevant group of experts were actually assembled and asked to make this evaluation. If such a group were to reach the conclusion that the benefits justify the costs of suspending the rule of law, then that would satisfy condition 2. However, reasonable worries can be raised about how to determine who should be in this group of experts and whether it would represent a true selection of the expertise of moral philosophers. Suppose that such a group of experts could actually be assembled without bias in the process; my suspicion is that such a group would never arrive at any judgment with a high enough level of confidence to satisfy condition 2. Philosophers can’t even agree on whether there is such a thing as moral expertise, much less which instances of it are correct.

C. Condition 3

Finally, even if officials have a justified belief that the harm is severe and that the suspension of the rule of law would avoid the harm without introducing substantial long-term harms, they must also have a justified belief that the suspension of the rule of law and the use of expert rule is substantially more effective at avoiding the harm than methods which do not require the suspension of the rule of law. The reason that rule of experts must be substantially more effective than other methods is that liberals do not generally permit any expedience or increased good consequences to justify the violation of liberal principles. Liberals attach a strong presumption to the value of liberal principles, such that defeating them requires considerable benefit. As an analogy, W.D. Ross’ view of lying is that we have a *prima facie* duty to not lie but that sometimes our duty to promote the good may defeat our duty not to lie. However, he points out that a simple act-utilitarianism would tell us that we should lie whenever one more unit of utility would fall on the side of lying.⁴⁹ Like Ross’ view on lying, I think that our liberal duties may be violated, but only when there is considerable benefit of doing so. For this reason, even if some methods of avoiding the harms would be less effective than

47. Nathan Ballantyne, *Epistemic Trespassing*, 128 MIND 367, 367 (2019).

48. *Id.*

49. See generally W.D. ROSS, THE RIGHT AND THE GOOD (Philip Stratton-Lake ed., 2002).

suspending the rule of law, the suspension of the rule of law must be considerably more effective than these methods for its use to be justified.

What would the other methods be? Again, it depends on the crisis in question. One example is the suspension of travel within the United States during Spring of 2020. Americans have the right to move freely from state to state, but some states suspended this during the initial outbreak of COVID-19. The goal was to stop the spread of the virus across state lines. Other methods that did not require suspending the rule of law would have included the following: do nothing, simply asking the public to not travel across state lines except for dire need, employing nudges to deter people from traveling across state lines, providing incentives for people to not cross state lines, etc.⁵⁰ None of these options would have required suspending the rule of law. On a first gloss, some of these don't sound like promising routes for achieving the goal of preventing travel from state to state. But the point is that officials must rule these out first and only then can the suspension of the rule of law be on the table.

In the end, all three conditions must be met in order for the suspension of the rule of law in favor of rule by experts to be justified. This is possible to achieve, but it is extremely difficult. I would hazard that very few emergencies would pass this test.

IV. CONCLUSION

Liberals should care about the rule of law (defined as the rule of liberal law). The rule of experts during public health emergencies conflicts with the rule of law. I've argued that liberals should strongly favor the rule of law over the rule of experts but that this presumption may be defeated in very narrow circumstances.⁵¹

50. These interventions largely mirror the Nuffield Council on Bioethics intervention ladder. *See* NUFFIELD COUNCIL ON BIOETHICS, PUBLIC HEALTH: ETHICAL ISSUES, xix (2007).

51. I would like to thank Brian Talbot and Jess Flanigan for their helpful conversations about this paper. I also owe thanks to my undergraduate research assistant Lindsay Kramer, who helped me with research and provided comments on a draft of this paper. Thanks are also due to Emily Director.