



2020

## Governmental Public Health Powers During the COVID-19 Pandemic: Stay-at-home Orders, Business Closures, and Travel Restrictions

Lawrence O. Gostin

*Georgetown University - Law Center - O'Neill Institute for National and Global Health Law,*  
gostin@law.georgetown.edu

Lindsay F. Wiley


*American University - Washington, College of Law,* wiley@wcl.american.edu

This paper can be downloaded free of charge from:  
<https://scholarship.law.georgetown.edu/facpub/2254>  
<https://ssrn.com/abstract=3578817>

---

The Journal of the American Medical Association, published online April 2, 2020

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.  
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

 Part of the [Constitutional Law Commons](#), [Health Law and Policy Commons](#), and the [Public Health Commons](#)

## VIEWPOINT

# Governmental Public Health Powers During the COVID-19 Pandemic

## Stay-at-home Orders, Business Closures, and Travel Restrictions

**Lawrence O. Gostin, JD**  
O'Neill Institute for  
National and Global  
Health Law,  
Georgetown University  
Law Center,  
Washington, DC.

**Lindsay F. Wiley, JD,  
MPH**  
Washington College of  
Law, American  
University,  
Washington, DC.



Supplemental  
content

**The president and all 50 governors** have declared health emergencies to counteract the spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), which causes coronavirus disease 2019 (COVID-19). While researchers race to develop vaccines, officials are implementing physical distancing, including orders to stay at home, restricting travel, and closing nonessential businesses (see eFigure in the [Supplement](#)). To limit cross-border spread, more than a dozen states have issued mandatory quarantines for interstate travelers. Some models suggest physical distancing would have to persist for 3 months to mitigate the peak effects on health systems and could be required on an intermittent basis for 12 to 18 months.<sup>1</sup> What legal powers do governments have? What is the role of the courts? How can public health be balanced with personal and economic rights?

### Closure of Schools and Businesses

Guidelines from the US Centers for Disease Control and Prevention (CDC) recommend closing schools and other gathering places to mitigate pandemics.<sup>2</sup> Yet, closures have significant social and economic consequences. During extended school closures, educational development is disrupted, as well as access to meals and social support systems. Business closures cause unemployment and economic harm, which may, in turn, harm health.

In response to COVID-19, cities and states have curbed educational and business operations under penalty of citations, fines, and loss of licenses. Almost all states have closed or limited operation of bars, restaurants, theaters, gyms, shopping malls, and other settings. More than half of states have closed all nonessential businesses, with exceptions for health care, first responders, the food and agriculture sector, and other needs.

States and localities historically have exercised broad authority over business operations to protect the public's health, including licensure, nuisance abatement, and closures. As early as 1873, the Supreme Court upheld an order to relocate private slaughterhouses downriver from New Orleans, Louisiana, to mitigate cholera outbreaks.<sup>3</sup> Courts routinely support orders to abate public nuisances, including unsanitary conditions reasonably believed to spread contagion. In 1986, for example, a New York court upheld bathhouse closures to prevent the transmission of HIV.<sup>4</sup> Given the rapid spread of SARS-CoV-2, health authorities have well-established power to order a shutdown of places where people congregate. That power may not, however, be wielded in ways that are arbitrary or unreasonable. In addition, courts may closely scrutinize determinations for private organizations, whose operations are

central to the exercise of particular constitutional rights (eg, houses of worship, abortion providers, and firearm retailers), as being nonessential.

Federal power to close businesses is limited to preventing the interstate spread of disease. The president could, for example, order transportation companies to limit travel across state and territorial lines. Federal restrictions on businesses operating wholly within a state would be difficult to justify; federal power to order states to lift restrictions is even more limited. The president could theoretically withhold federal funding, as he did for sanctuary cities; however, it is doubtful the courts would uphold punitive economic sanctions against states for reasonable exercise of their police powers.

### Bans on Gatherings

Bans on large gatherings are a cornerstone of physical distancing strategies in pandemic plans. As SARS-CoV-2 community spread mounts, governments have tightened restrictions from initial bans on groups of 1000, later bans on groups from 250, to 50, to 10, and eventual bans on groups of any size. Bans affect religious congregations, entertainment, business meetings, and even political rallies. Although the First Amendment protects free speech, religion, and assembly, COVID-19 bans do not single out any group or censure any idea. The Supreme Court often upholds "content-neutral" restrictions when justified by a compelling public interest. A New Hampshire court recently held that because SARS-CoV-2 can spread rapidly when people congregate, bans on gatherings are a permissible limit on free assembly.<sup>5</sup>

### Curfews

Several local governments have imposed nighttime curfews to limit gatherings, particularly in states where governors have been reluctant to impose stay-at-home orders. States and localities have often issued curfews during natural disasters or periods of civil unrest. Courts uphold time-limited curfews in exigent circumstances unless those curfews are arbitrary or discriminatory.<sup>6</sup>

### Stay-at-home Orders

Even though the parameters and methods of enforcement vary considerably, governors and mayors have directed or advised the majority of the US population to stay home, with limited exceptions for meeting essential needs (eg, food shopping or refilling a prescription) and outdoor physical activity (eg, walking or jogging).<sup>7</sup> Modeling studies for COVID-19 suggest that intensive physical distancing could help maintain health system

**Corresponding  
Author:** Lawrence O.  
Gostin, JD, O'Neill  
Institute for National  
and Global Health Law,  
Georgetown University  
Law Center, 600  
New Jersey Ave NW,  
Washington, DC 20001  
([gostin@georgetown.edu](mailto:gostin@georgetown.edu)).

capacities.<sup>8</sup> Long-term, compulsory stay-at-home orders applicable across a large geographic area are untested in the courts. Court cases approving emergency orders that limit access to restricted zones during periods of civil unrest<sup>9</sup> provide guidance, but they have operated for short durations in narrow geographic areas.

Individual freedom is not absolute—it is balanced against compelling public health necessities. Judicial review of stay-at-home orders could require states to show that large-scale restrictions on personal movement are proportionate to the threat based on the best available evidence. Courts normally require health officials to provide individualized risk assessments to warrant isolation and quarantine, along with procedural protections. Traditional constitutional safeguards, however, appear impractical in the face of large-scale interventions.

At a minimum, health authorities should state clear, evidence-based criteria for when and how stay-at-home orders will be implemented, as well as when they will be eased or lifted. Although the courts grant wide leeway during emergencies, discriminatory enforcement would not be permitted. When possible, physical distancing should be sought through volunteerism, appealing to civic responsibility rather than by punitive measures that erode the public's trust.

### Quarantines for Travelers

More than a dozen states have issued mandatory quarantine orders for travelers entering the state. A few states have issued quarantines for anyone entering from outside the state. Most state orders apply to travelers from specific areas with high COVID-19 mortality, including New York, New Jersey, Connecticut, Washington, California, and Louisiana. Quarantine orders for travelers require individuals to stay at home or in temporary lodging at all times for 14 days, while submitting to monitoring. During this time, these individuals are not allowed to go out to get food or other necessities in contrast to general stay-at-home orders that allow these types of activities.

These state orders apply equally to both travelers and returning residents, avoiding constitutionally prohibited discrimination against nonresidents, but may impermissibly interfere with exclusive federal power to regulate interstate commerce. During the 2014-2016 West African Ebola epidemic, courts upheld state quarantines against travelers returning from affected countries if justified by individualized assessments of exposure levels and symptoms. Quarantines applicable to all travelers irrespective of individual risk could be challenged in the courts.

### Travel Restrictions

Congress has the authority to restrict travel between states and territories if clearly needed to prevent the interstate transmission of a contagious disease. Presidential authority to do so is uncertain, absent clear legislative authorization. During the 2016 Zika outbreak, the CDC advised (but did not order) pregnant women to avoid non-essential travel to Miami-Dade County, Florida. A similar CDC travel advisory now urges residents of New York, New Jersey, and Connecticut to refrain from nonessential domestic travel for 14 days to avoid transmitting COVID-19. To impose a large-scale domestic travel ban, the president would probably require more specific legislative authority than current statutes provide.

### Sanitary Cordons

No city or state has erected a sanitary cordon, prohibiting exit from an area of active SARS-CoV-2 contagion. Nor has any city or state imposed a reverse cordon, completely barring entry from zones of substantial transmission (eg, New Orleans, Louisiana). Just as for stay-at-home orders, modern courts have not reviewed sanitary cordons. At the turn of the 19th century, a federal court struck down a San Francisco, California, cordon to control the bubonic plague. The judge ruled the geographic quarantine was ineffective because infected and uninfected individuals were congregated together, risking transmission. The order was also invidious, operating almost exclusively against Chinese Americans. Similar concerns would apply today, with individuals claiming a sanitary cordon would place them at risk, which could erode public trust and provoke migrations to safer geographic areas.

### Balancing Public Health With Individual Rights and Supporting Vulnerable Individuals Within the Community

Physical distancing raises profound questions of culture, faith, and family. Coming together affords comfort during times of crisis. At the same time, physical distancing affects rights, including liberty, privacy, and freedoms of speech, religion, and assembly. How are the fundamental values of health and human rights balanced in times of crisis? Although there is no clear answer, there are guideposts: adopt rigorous scientific standards based on the best available evidence, make decisions transparently and fairly, and adopt the least restrictive measures needed to protect the public's health. Physical distancing is a growing reality. Caring for the most vulnerable will be a crucial measure of humanity. When this national emergency ends, the US must emerge stronger with the values of human rights, social justice, and the rule of law intact.

#### ARTICLE INFORMATION

**Published Online:** April 2, 2020.  
doi:10.1001/jama.2020.5460

**Conflict of Interest Disclosures:** None reported.

#### REFERENCES

1. Ferguson NM, Laydon D, Nedjati-Gilani G, et al; Imperial College COVID-19 Response Team. Impact of non-pharmaceutical interventions (NPIs) to reduce COVID-19 mortality and healthcare demand. Published March 16, 2020. Accessed March 30, 2020. <https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/>

[Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf](#)

2. Qualls N, Levitt A, Kanade N, et al. Community mitigation guidelines to prevent pandemic influenza—United States, 2017. *MMWR Recomm Rep*. 2017;66(1):1-34.

3. *Slaughter-House Cases*, 83 US 36 (1873).

4. *New York v New St Mark's Baths*, 497 NYS2d 979 (Sup Ct 1986).

5. *Binford v Sununi*, Order of NH Super Ct. Docket No. 217-2020-CV-00152. March 25, 2020.

6. *Smith v Avino*, 91 F3d 105 (11th Cir 1996).

7. Kaiser Family Foundation. State data and policy actions to address coronavirus. Updated March 30, 2020. Accessed March 30, 2020. <https://www.kff.org/health-costs/issue-brief/state-data-and-policy-actions-to-address-coronavirus/>

8. Walker PGT, Whittaker C, Watson O, et al; Imperial College COVID-19 Response Team. The global impact of COVID-19 and strategies for mitigation and suppression. Published March 16, 2020. Accessed March 31, 2020. <https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-Global-Impact-26-03-2020v2.pdf>

9. *Menotti v Seattle*, 409 F3d 1113 (9th Cir 2005).

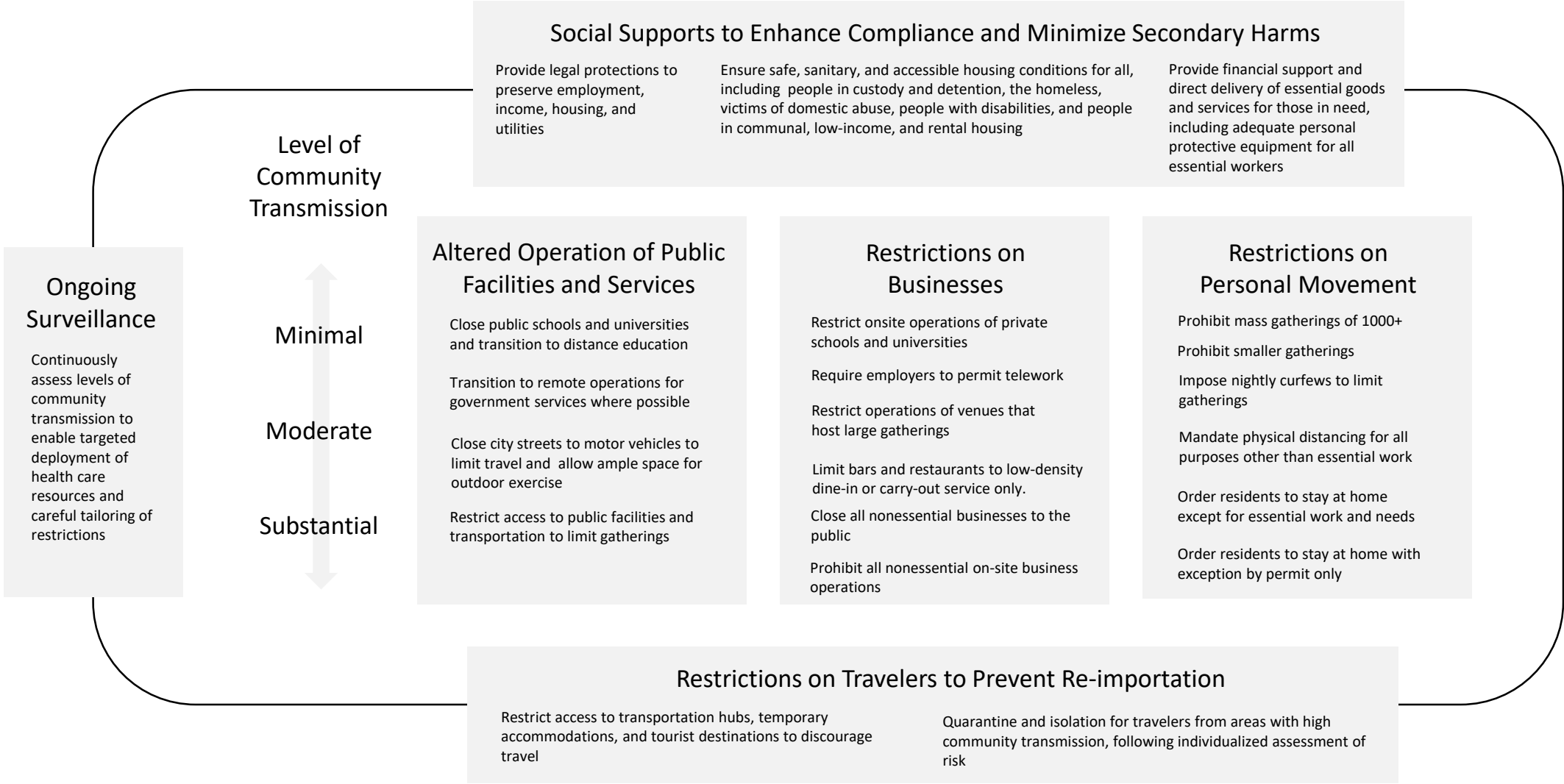
## Supplementary Online Content

Gostin LO, Wiley LF. Governmental public health powers during the COVID-19 pandemic: stay-at-home orders, business closures, and travel restrictions. *JAMA*. doi:10.1001/jama.2020.5460

**eFigure.** Physical Distancing Measures for Pandemic Response

This supplementary material has been provided by the authors to give readers additional information about their work.

**eFigure.** Physical Distancing Measures for Pandemic Response



CDC’s [Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission](#) defines levels of community transmission as follows:

**None to Minimal:** Evidence of isolated cases or limited community transmission, case investigations underway, no evidence of exposure in large communal setting, e.g., healthcare facility, school, mass gathering.

**Minimal to Moderate:** Widespread and/or sustained transmission with high likelihood or confirmed exposure within communal settings with potential for rapid increase in suspected cases.

**Substantial:** Large scale community transmission, healthcare staffing significantly impacted, multiple cases within communal settings like healthcare facilities, schools, mass gatherings etc.