

# Giving Me Liberty Does Not Give You Death

## A Libertarian View from the COVID Foxhole

Mike ter Maat, April 30, 2020<sup>1</sup>

The recent novel coronavirus outbreak has prompted a variety of responses from our federal, state and local governments that confront personal liberty. Emergency policy issues have included the marshalling and coordination of health care workers and medical resources, restrictions on private-sector business activity and the movement of citizens, and the financing and implementation of economic relief. Governments were initially overwhelmed, understandably, by the need for urgent and effective action on a scale never before seen in peacetime. As Donald Trump has put it, his has become a wartime presidency.

As has been the case in other of our government's wars, lovers of liberty find plenty in the current political environment about which to be concerned.

Consider how the missions of the War on Poverty, the War on Drugs, and the War on Terror expanded over time, despite the fact – or perhaps because of the fact – that they each earned bipartisan support, notwithstanding broad, objective criticism for their lack of success. Such wars are announced by politicians to gin up a sense of patriotic fear, presumably to motivate Americans to tolerate an unusual degree of government activity, and to undermine normal modes of official decision making. As proven time and again, a war footing makes leaders less accountable, less constrained by formal and informal counter-balance and less tolerant of dissent.

The current hyperinflation of governmental command and control has raised questions of individual liberty, naturally inviting the input of libertarian political thought. At the same time, more than one pundit has suggested that the urgent need for government action means this is not the time for libertarianism. We libertarians

### No Atheists in Foxholes?

This line of reasoning has been fashionable since Harvard's Jeffrey Frankel wrote in the *Cato Journal* in the spring of 2007, "They say 'there are no atheists in foxholes.' Perhaps, then, there are also no libertarians in crises." While it may have been true there were suddenly no atheists at the Battle of Bataan where Father Cummings is said to have first laid the claim, they were not all Catholics either. And soldiers there were as unlikely to uniformly accept the Church as the only path to salvation as Americans are now ready to accept a monolithic view of health risks advanced by the prevailing epidemiological paradigm.

So, too, have libertarian views been disregarded in a number of conflicts, both metaphorical and real, including the Milgram experiments on obedience to authority using simulated electrocutions. These tests have been reliably replicated enough times for psychologists to recognize that independent judgment, even regarding the wellbeing of our fellow man, often takes a backseat when evaluating a directed course of action.<sup>9</sup> Indeed, the Constitution is sometimes liberty's only backstop in the face of popular science, as illustrated by, for example, New York City Board of Health's sugary drinks portion cap rule. Supported by both Mayor Bloomberg and his successor, Mayor de Blasio, the regulation had to be struck down by the New York Court of Appeals in 2014.

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<sup>9</sup> See "Behavioral Study of Obedience," *Journal of Abnormal and Social Psychology*, 1963, by Stanley Milgram

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are not anarchists – we recognize the need for effective government action, especially for the defense against invaders, even if they each measure a mere millionth of an inch. But this does not imply that Americans should become *sheeple*, following leaders who would flout individuals' personal rights.

Libertarians are Constitutionalists: We believe in delimited government. We share the Founding Fathers' skepticism of politicians' best intentions, as well as skepticism of their capabilities even when their intentions are recognizably pure of heart. This is not because we dislike politicians, politics or government, but because there is a cost to large or pervasive government, and that cost comes in the form of reduced individual rights and personal resources. Thus, libertarians' objective is to keep government limited in size and scope, accountable, transparent, and focused on those enumerable tasks that governments should be performing, like helping to keep us safe.

## War on COVID

As libertarians, we would like to preclude our government's latest *war* from devolving into the jumbled mess of poorly defined objectives that has characterized past non-military wars. Such calls to arms, without specifically assigned goals and tasks, create irresistible political cover for leaders to pursue ulterior political motives. And because significant resources and significant compromises in individual liberties are involved, a lack of government transparency and accountability will lead to further erosion of trust in government and a widening of current political divisions. Like so many issues of our times, public reaction to this issue has correlated with party affiliation, with February/March polls indicating that Republicans fear the pandemic much less than Democrats do. Little wonder then that public reaction was mixed when government officials initially claimed that as many as over two million American lives were at

### The COVID War through the lens of the Powell Doctrine

1. *Is there a vital national interest at stake?* In the case of the COVID-19 epidemic, it was initially believed that the stakes were as high as they get, with hundreds of thousands or even millions of lives at risk, although our view today is very different. And the speed with which the virus spreads as people move freely across state lines, presented the problem as nationwide in nature.
2. *Do we have a clear and attainable objective?* As health experts have articulated, the goal is to flatten the spike of infections so that our medical system will be able to handle the influx. The goal should not be the complete elimination of the spread. The contemporaneous experience of other nations as well as our past experiences with other epidemics suggests this can be done.
3. *Have all other policy means been fully exhausted?* In a fast-moving crisis, there is no time for trial and error or incremental implementation. Consequently, dispensing with alternatives is necessarily a hypothetical exercise. Less draconian measures have been put in place, for example, in Sweden, with effects that cannot yet be fully evaluated.
4. *Have the risks and costs been fully and frankly analyzed?* Here's the rub: Do you trust the judgment of the officials who have been tasked with making necessarily broad educated guesses based on information that is simultaneously both fluid and unprecedented, using imperfect and occasionally even misrepresented international data?
5. *Is there a plausible exit strategy to avoid endless entanglement?* There appears to have been little forethought to ramping-up the economy on the other side of the crisis until recently, weeks after the launch of statewide lockdown.
6. *Have the consequences of our action been fully considered?* The issue is whether the government, even if unintentionally, gains control over individuals' lives on a permanent basis. Compromises of liberty must be made explicitly temporary.
7. *Is the action supported by the American people?* As much as faith in American institutions has waned over the years, doctors are still accorded deference. Politicians, on the other hand, have done little to provide a sense that current policies are supported across a philosophical spectrum, and the press continues to exploit political differences.
8. *Do we have international support?* US actions fall within the range of the spectrum of nations across the globe. Although the Administration initially took some heat over instituting a travel ban, first with China and then with Europe, international support has been robust. Support for the President's recent decision to punish the WHO is less likely to receive such support.

risk, based on early modeling.<sup>2</sup> As it turns out, both U.S. and U.K. policy was heavily influenced by a model that is now recognized as alarmist by both the standards of other models and the disease's actual progress in each of these two countries.

Given the unpredictable risks, unknown resource requirements and unbound timeframes, it is more important than ever that we be able to trust our government. Or put differently, trust in our government is as important now as when entering a military war. After all, government intervention in the private sector is its own form of aggression against free will, and therefore runs counter to a fundamental purpose of the Constitution to protect American liberty. In this context, a useful constraint could be the Powell Doctrine of military conflict, by which former Chairman of the Joint Chiefs of Staff Colin Powell asked a series of questions, each requiring an affirmative answer prior to our government taking war action compromising individuals' rights.

### No Place for Weak Politicians

In February, given the staggering magnitude of the mortality originally perceived to have been at risk, the attention of government policy makers turned to determining what level of interventional response would be appropriate, based on the advice of medical experts. The choices were broadly described by two basic packages:

*Mitigation.* Includes isolating patients, quarantining those who have been in contact with patients, and social distancing of the elderly and other vulnerable segments of the population. The basis for this strategy is to allow population immunity to build-up through the epidemic, leading to an eventual rapid decline in transmission.

### The Income-Mortality Balancing Act

While a suppression strategy may be appealing from a narrowly medical point of view, it prompts the question whether imposing on the population the cost of a partial closure of the economy until a vaccine is developed in 2021 would be consistent with how Americans typically make such cost trade-offs in their own lives.

Using a variety of types of studies, researchers have found that Americans typically choose to incur costs to reduce risk to their lives consistent with a range of \$6 to \$11 million per life saved.<sup>10</sup> At this rate, an economic shutdown that cost us as much as, say, twenty-five percent of national income, or \$100 billion per week, would seem like a good deal, from a citizen's point of view, for as long as we believed we were saving at least 9 to 17 thousand lives per week. However, it is unlikely that many epidemiologists would suggest we are saving lives at this rate. If a flare-up were to occur upon lifting the current suppression, it would have to result in mortality in the range of five to ten times the current rate in the U.S., which officials believe to be the peak, as of this writing.

Moreover, long-term suppression represents an even worse bargain. Even the most alarmist of studies, the Ferguson model, predicted mortality to be reduced by half with just a mitigation strategy alone. Because, officials say, twelve to eighteen months will be required to develop and then widely distribute a vaccine, the economic cost of a continued full suppression lockdown strategy could be in the range of \$5 to 8 trillion. This figure, at \$6 to 11 million per life saved, would seem appropriate only we had a million lives at stake, which seems unlikely given the experience to date of having lost fewer than 75,000.

It is especially unlikely that the U.S. might have a million lives at stake if we were to follow a mitigation strategy, as used in some cities in 1918 in the U.S., as well as worldwide during the influenza pandemics of 1957, 1968 and 2009. Moreover, recognition is developing of the idea that our response, no matter what it might be, might not affect the mortality outcome as significantly as we first believed. It appears the infection pattern is more a function of a nation's healthcare system (e.g., Italy has had problems managing both seasonal flu in the past and COVID-19, Germany has done well with both), rather than interventional response (e.g., Sweden has done better without lockdowns than other European nations have with lockdowns), as revealed in research by Yitzhak Ben Israel of Tel Aviv University.<sup>11</sup>

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<sup>10</sup> See "The Value of a Statistical Life: A Critical Review of Market Estimates Throughout the World" by Viscusi & Aldy, *Journal of Risk and Uncertainty*, August 2003, updated to 2020 dollars by the author.

<sup>11</sup> See "Israeli Professor Shows Virus Follows Fixed Pattern" by Marina Medvin, *Townhall.com*, April 15, 2020.

*Suppression.* Includes, in addition to the measures describing *mitigation*, social distancing of the entire population, facilitated by the closure of most schools and businesses. It is believed that by sheltering in place, resulting in a partial closure of the economy, up to ninety percent of infectious transmission can be forestalled. However, a rebound of the virus is possible once the suppression is lifted.

The magnitude of the cost to these choices also is staggering. The less expensive option, mitigation, might reduce peak healthcare utilization by two-thirds, but mortality by only half. On the other hand, while a suppression strategy could reduce mortality by as much as ninety percent, this assumption is made only for the period of time during which the suppression is in place, as a rapid flare-up is possible upon lifting a suppression strategy.<sup>3</sup> Early estimates of the cost to implement a suppression strategy range up to a third of national income for whatever period of time we are in lockdown (about \$140 billion per week).

As libertarians, we believe this trade-off defines liberty and should be left to us each to weigh and to decide. Though balancing the costs of mortality and income is deeply troubling, it is nonetheless a challenge from which we cannot shrink. Nor can we allow politicians, who usurp our right to decide, to shrink from facing this balancing act. The alternative would be to claim that *any* expense, no matter how great, might be legitimately imposed on our population to save *any* number of lives, no matter how few, even though this is not how we as individuals make decisions in our own lives. This has been the position of New York Governor Andrew Cuomo who, when issuing his executive order to shut down non-essential business in the state, said “I want to be able to say to the people of New York, ‘I did everything we could do.’ And if everything we do saves just one life, I’ll be happy.”<sup>4</sup>

## **No Place for Strongman Politicians**

A major issue for libertarians is whether the government, even if unintentionally, will gain control over individuals’ lives on a permanent basis. Preliminary claims of success in nations of authoritarian rule, including China and Russia, foster significant threats to our own liberty. Already, a number of viewers have marveled at the speed with which these regimes have been able to tamp-down the spread of the virus. However, there is little use in comparing China to the challenges presented by a contagion in an open society like the US, in which the population travels freely and frequently within and outside of its borders. It is a more controllable threat faced by China, where mobility in even the best of times resembles America in lockdown. Authoritarian regimes have apparently been able to exert such control over their populations through information technologies, including widespread facial recognition and tracking. Mobile tracking apps are being developed in the U.S. under the presumption that participation will be voluntary. But the existence of such technology, and participation in it, will set the table for governmental abuse.

Erosion in democratic institutions has already taken place in more than one nation, portending ratcheting-up of authoritarian government control. While such cases are sometimes quite bald-faced power grabs by strongman rulers, power is more often ceded to governments organically out of fear. This author, as a police officer, has observed with dismay the frequency with which people are willing to invite enforcement action

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<sup>2</sup> The top end of the range of possible U.S. coronavirus deaths was set by a model using, among other information, data gathered from Italy: “Impact of Non-Pharmaceutical Interventions to Reduce COVID-19 Mortality and Healthcare Demand” Imperial College COVID-19 Response Team (Neil M. Ferguson et al), March 16, 2020.

<sup>3</sup> Once again, Imperial College COVID-19 Response Team (Neil M. Ferguson et al)

<sup>4</sup> Andrew Cuomo, Governor’s Daily News Conference, March 20, 2020

against their fellow citizens for perceived violations of shelter-in-place orders, business closures, social distancing, and even mask wearing.

The President has argued that he has absolute authority over individual states to issue shelter-in-place orders, a claim he walked back before testing. While governors have bristled at what they perceived as usurpation of their authority, they themselves certainly have not been particularly encumbered by the Constitution. New Jersey governor Phil Murphy, having earlier allowed the arrest of fifteen men at a funeral in a synagogue in April, dismissed questions regarding his authority to shut down religious gatherings with “I wasn’t thinking of the Bill of Rights when we did this,”<sup>5</sup> as though that were a *defense* of his position, as though there were a crisis exception written into our Constitution.

On the other hand, Governor Charlie Baker of Massachusetts has defended his issuance of an *advisory* as opposed to a shelter-in-place *order*. Officials there say their data indicate that the distinction has not affected the effectiveness of the response. However, the now-famous and uber-influential modelers at the Institute for Health Metrics and Evaluation at the University of Washington say that it can affect the spread of the disease by a factor of two.<sup>6</sup>

### No Place for Needy Politicians

Whether or not any society should have been better prepared for such a viral eruption, clearly the responsibility for advance preparation falls mainly on the public sector. Thankfully, when the virus hit, the private sector economy was operating at an unprecedented level, at least partially due to

### Bridling Bailouts

A bailout is not meant as stimulus *per se*, but rather as a measure to preclude a momentary business catastrophe from becoming a long-term problem for the economy. It is appropriate for consideration only under the narrow twin circumstances in which the failure was completely unavoidable by management *and* the economy would not be able to efficiently save or replace the business. Even in such a rare case, the following must be considered in order to avoid the moral hazard of undermining managers’ incentive to avoid risk.

1. Bailouts of individual commercial businesses should be conducted by banks in the private sector. A company’s inability to raise funds from their banks to get through difficult times reflects inadequate resiliency planning, inadequate capital base, inadequate business interruption insurance, or inadequate pre-committed lines of credit. When banks do not have the scale necessary to get businesses through a difficult period because *all* of the businesses in an entire industry or location are affected, it is the banks that should seek a relationship with the Federal Reserve to address the problem, not the borrowers themselves with the government.
2. Bailouts of small businesses to provide a safety net for the families of owners should be handled through unemployment insurance after a business had failed, and only at a subsistence level. The government must not be in the business of determining which businesses to support.
3. Bailouts of giant companies, including financial institutions, to avoid undermining the overall economy, reflect a failure to identify these businesses in advance as too big to fail. When organizations reach such a stature, they should be required to either reduce in size or break themselves up into pieces, or execute a *living will*, spelling out how the company will be resolved in the event of bankruptcy, and hold such capital reserves as to make a bankruptcy virtually impossible.
4. Bailouts of oil companies through price stabilization is especially problematic given how these companies get into financial trouble. Such businesses suffer when prices fall *precipitously* in response to a *moderate* reduction in demand, in contrast to what most businesses suffer under similar circumstances which is a *moderate* reduction in price. What causes this is the world oil price being set by collusion by producers, mainly through OPEC, to artificially elevate prices above what a competitive market would set, to increase profits for the producers. When the cartel is undermined by weak demand, prices can plummet rapidly. Such collusion would be, and *should* be, illegal if it were to incur inside the U.S. Government efforts to restore prices to their artificially high levels hurts consumers and is anathema to the competitive ethic of the American economy.

<sup>5</sup> See Phil Murphy interview, Tucker Carlson Tonight, Fox News, April 15, 2020.

<sup>6</sup> See “State, Local Experts Push Back on University’s Bleaker Coronavirus Forecast,” By Mark Arsenault, Boston Globe, April 15, 2020.

the Administration's efforts to get the corporate regulatory environment under control. Our economic health also has been attributable to the freedom enjoyed by our markets in labor, foreign trade and finance. Free markets are the reason our healthcare system had as many of the resources necessary to battle the virus as it did, in terms of equipment, personnel, and facilities. And the capacity of the system could be further increased by removing roadblocks to greater reliance on free markets. One of the most prominent examples of such being the commonplace requirement for prospective hospitals to obtain certificates of need, which reduce capacity and competition and drive up prices.

But what markets need for supply and demand to accomplish efficiency is time, of which there is precious little during a crisis. Consequently, public officials have two modus operandi on which to rely other than markets: Advanced planning, and crisis management. Good crisis management may have been displayed under difficult circumstances by governors, health officials, local leaders, medical personnel and administration coordinators; but more critical to success is the ability to plan ahead so that the circumstances will not have been so difficult. As planning is not an activity that grabs voter attention, it is ill-suited to politics, which is why true leadership is no place for politicians who need continuous public affirmation.

Experts had warned us that we were ill-prepared for such a crisis, and warned us far enough in advance so as to have allowed officials to use market mechanisms to address shortcomings. Five years ago, Bill Gates, arguably the most widely recognized epidemiologically fluent individual in the world, famously said "We've actually invested very little in a system to stop an epidemic. We're not ready."<sup>7</sup>

Market purchases should have been made in advance of crisis circumstances to boost stockpiles in personal protective equipment, ventilators, and beds. And mutual assistance agreements among states should have been put in place to address the asynchronous nature of the attack across regions. As it happened, there seemed to be no pre-planned system for shifting personnel and equipment from localities with an abundance to those with shortfalls.

Moreover, even now at the time of this writing when the daily mortality figures have already crested, experts are warning that greater emphasis still needs to be placed on institutionalizing systems to develop and distribute tests, develop and distribute vaccines, and coordinate test result data. Each of these should have been addressed by public/private-sector advance agreements. Even the federal agencies themselves seem to lack an emergency mode, leading to several weeks of delays in deploying necessary tests due to the FDA approval process. The lesson to be learned is not that markets cannot be utilized, but that markets must be utilized in advance, lest we awaken one day, *again*, to no other choice but to have the National Guard confiscate ventilators, Customs agents seize international shipments of masks, the Navy deploy a floating hospital, and the governor of New York plead on live television for personnel.

So, too, should market mechanisms be utilized to the greatest extent possible once a crisis has begun. Politicians, let me know if you've heard this one before: Price controls do not *alleviate* shortages; they *cause* shortages. And does anyone think it's an efficient or ethical way to do business to force a manufacturer to produce something, even masks? The government should be negotiating prices through a bid process with multiple competing manufacturers. And if you find yourself subject to the whims of a single producer, then it's your own fault for not having addressed during better times the existence of a monopoly undermining the market function of the economy.

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<sup>7</sup> See TED, March 18, 2015, Bill Gates, "The Next Outbreak? We're Not Ready."

## War on Liberty

Bearing in mind the shortcomings of government preparation, the recent statements of Governor Cuomo seem not only irresponsible, but uninformed by the fundamental premise of American governance. This is not to mention that Cuomo seems, oddly for an American politician, out of step with public sentiment regarding economic liberty since his March 20 executive order. When Cuomo said “The illness is death” and asked rhetorically “What is worse than death?” he sounded unaware that this is a question answered by thousands of patriotic and religious martyrs over the ages, most typically with some version of *liberty*.

And Cuomo demonstrated a complete misconception of liberty with his follow-up, “The illness is maybe *my* death as opposed to *your* death. Yeah, it’s your life, do whatever you want. But you’re not responsible for *my* life . . . It’s not all about *you*; it’s about *me*, too.”<sup>8</sup> So, notwithstanding that indeed we are supposed to let people do whatever they want in a constitutional republic, the governor effectively overrules liberty as being more selfish than a government mandate to avoid health risk. This is asserted notwithstanding the fact that this health risk could be substantially mitigated by individuals choosing to shelter themselves in place without a government fiat. Apparently, the governor feels that liberty is defined by what the State of New York allows its citizens, and therefore it is acceptable for the state, for *him*, to decide what the balance should be between the cost of economic shutdown and the risks to public health, and disagreement with his fiat must be based on selfishness. Does this imply that when he decides that the time has come to end the shutdown, he is being selfish? Say what you will about how a governor sees the trade-off of our liberty and our health; as for me, give me liberty or give me death.

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<sup>8</sup> Andrew Cuomo, Governor’s Daily News Conference, April 23, 2020