Values for victims and vectors of disease

Elsa Kugelberg

ABSTRACT

John and Curran have convincingly shown that Scanlonian contractualism is a valuable resource for evaluating pandemic response policies, and that we should reject cost–benefit analysis in favour of a contractualist framework. However, they fail to consider the part of contractualism that Scanlon constructed precisely to deal with the question of when the state can restrict individuals from making choices that are harmful to themselves and others: the value of choice view (VoC). In doing so, they leave it open for opponents of lockdowns to misuse contractualism to justify mistaken policies. This is because the most powerful contractualist objections to locking down are likely to be based on the VoC.

When we apply the value of choice view (VoC), we see that a lockdown policy's justifiability depends on the extent to which particular values of choice are found to be threatened by the policy in question, and what safeguards policy-makers have put in place to increase the value of choice and protect people from the harmful consequences of lockdown. Without the VoC, it is harder to explain why lockdowns, to be non-rejectable, must have certain features. With the VoC, the case for contractualism over cost benefit analysis (CBA) can be made even stronger.

Liberal democracies throughout the world responded to the COVID-19 pandemic by 'locking down', that is, by restricting people from accessing certain areas of their communities such as shops, schools and workplaces or even leaving their homes, in order to stop individuals from infecting each other with the virus.

John and Curran recently argued in this journal that TM Scanlon's contractualist framework does a better job than the CBA at assessing the permissibility of these measures.[1] Scanlon's theory looks at the burdens that particular individuals are under and allows us to choose the policy that individuals have least reason to complain about.[2] John and Curran demonstrate how the burdens that different people would be under on particular lockdown policies can be weighed against each other. They make clear that contractualism, in contrast with CBA, has the resources to explain why and when it is justified to restrict people's liberties (John and Curran,[1] p3).

John and Curran show that Scanlon's work is a valuable resource for evaluating pandemic response policies, and that we should reject CBA in favour of it. Further, the distinction they make between vectors and victims is a crucial one, and I will use it throughout this paper. However, they fail to consider the part of the contractualist framework which Scanlon[2]) (ch6) constructed precisely to deal with the question of when the state can restrict individuals from making choices that are harmful to themselves and others—the VoC. In doing so, they leave it open for opponents of lockdowns to misuse contractualism to justify mistaken policies. This is because the most powerful contractualist objections to locking down are likely to be based on VoC.

In the case of reasonable short-term lockdown policies in relatively well-ordered democratic societies, I doubt that such objections are likely to succeed. However, as we will see, this depends on the extent to which particular values of choice are found to be endangered by the policies in question, and what safeguards policy-makers have put in place to increase the value of choice and protect people from the harmful consequences of lockdown. Without the VoC, it is harder to explain why lockdowns, to be non-rejectable, must have certain features. With the VoC, the case for using contractualism instead of CBA can be made even stronger.

THE VOC: HAZARDOUS WASTE

On contractualism, an action is right if there is a principle permitting it that no one could reasonably reject, and wrong if there is no such principle (Scanlon,[2] p98). People can reject a principle or a policy using reasons that people in their position would generally have. Such reasons include not wanting one's body to be harmed and wanting to be in control over what happens to it (Scanlon,[2] p204). Importantly, Scanlon argues that 'principles that no one could reasonably reject often must be ones that make normative outcomes sensitive to individuals' choices, or at least to their having had the opportunity to choose'(Scanlon,[2] p251). Because choice is valuable, policy-makers must enable us to make valuable choices. In circumstances where the value of choice is considerable, this counts against policy interventions in our lives.

Scanlon illustrates this with his hazardous waste case, a thought experiment in which policy-makers have been assigned the task of protecting the inhabitants of a community from breathing in a dangerous material which badly harms human lungs. What is of importance when we consider whether their policy can be rejected, Scanlon argues, is whether policy-makers provided sufficient safeguards that enable citizens to make valuable choices. Examples of such precautions are information campaigns warning people from going out, setting up a fence at the site where the hazardous pollution originates, and so on. These safeguards improve the value of choice by ordering the alternatives so that people are less likely to choose the alternative on which they would end up harmed. If anyone can complain, it is because policy-makers' precautions were insufficient to enable people, generally, to choose well. What matters is not what people actually end up choosing, but rather that they had a good enough opportunity set; even though some people, because they forget about the danger or because they are too curious to stay inside, will end up harmed, they cannot complain if policymakers provided all with a sufficiently good opportunity to avoid the harm involved (Scanlon,[2] p258).

THE VOC: COVID-19

Hazardous waste can be contrasted to the kind of case policy-makers faced during the COVID-19 pandemic. The cases are similar in so far as there is a danger to potential victims' lungs and life in going outside and breathing the air involved. They are different because in addition to this aspect, policy-makers in the COVID-19 case are also assigned with the task of preventing people from infecting each other as potential vectors. I consider these aspects in turn.

Department of Politics and International Relations, Oxford University, Oxford, UK

Correspondence to Elsa Kugelberg, Department of Politics and International Relations, Oxford University, Oxford OX1 3UQ, UK; elsa.kugelberg@politics.ox.ac.uk

Restricting us as victims

Ceteris paribus, we have reasons to prefer policies that make what happen to us depend on the choices we make. People attach different sorts of value to the same choices, and therefore we must use generic reasons that all can access when we reject policies. Scanlon argues that we have symbolic, instrumental and representative reasons to value choice. Individuals can complain about policies that hinder them from making choices that would be helpful to them instrumentally (make it more likely they get what they want); restrict them from choices that shape their lives and express their values, and 'stigmatise those that are interfered with by labelling them as immature or incompetent'(Scanlon,[2] p253–4).[i]

Contractualist lockdown critics would object to lockdowns by arguing that there are considerable instrumental, symbolic and representative reasons to reject policies that prevent people from going outside without being liable to state punishment. Indeed, many liberty-based arguments in the political discourse around lockdown policies have been premised on precisely the sort of rationale that underlines the contractualist VoC. People have been hindered from doing what they need to do to instrumentally further their aims; they have been unable to make choices necessary to express who they are; and they have been hindered from making choices that normally adult members of society are expected to be competent to make.

If lockdown proponents want to show that their policies are justified, they must show that this objection fails—that there is reason to restrict us, as potential victims, from choosing when to leave our homes, because the value of unrestrained choice is not great enough to outweigh the value of constrained choice (Scanlon,[2] p255). In not considering a strong contractualist objection based on the VoC, John and Curran do not make the best possible case for a contractualist framework for assessing lockdowns.

Restricting us as vectors

Considering that going out in the pandemic, as opposed to in hazardous waste, poses a risk not only to oneself but also to other people, we must look at what the VoC says about punishment and the necessary safeguards that must be put in place to stop people from harming others. Scanlon argues that this includes informing people about new laws and maintaining 'social and economic conditions that reduce the incentive to commit crime by offering the possibility of a satisfactory life within the law'—that 'without safeguards of these kinds, the value of choice as a protection would be unacceptably low'. Therefore, to use contractualism to justify a lockdown policy, we need to show that 'the importance of the social goal justifies creating the risk' of criminal punishment for going outside, and that 'given the safeguards that have been put in place enough has been done to protect people against suffering harm from the threat that has been created'. Hindering people from doing something morally wrong, such as negligently infecting others with a dangerous virus, does not on contractualism 'count as a morally significant loss'(Scanlon,[2] p264). But when the range of prohibited actions include what under normal circumstances would constitute morally unobjectionable activities, such as exiting one's house, going to work, or having a party, this makes such a policy harder to justify.[ii]

The most important question to ask when a short-term lockdown policy is proposed is what safeguards it is paired with—what economic, social, cultural and psychological support will be given to vulnerable communities? A lockdown policy can be justified only in combination with policy-makers' sufficient efforts to enable people to live satisfactory lives even when they are hindered from activities such as working, going to school, organising politically and caring for their loved ones.

CONCLUSION

In sum, if there is reason to lock down it is because when we take precautions into account, the instrumental, representative and symbolic value of being able to choose to freely move so does not outweigh the risk of becoming victims of infection (which potentially involves permanent damage, long COVID-19 or death), and the risk of becoming vectors for infecting others. John and Curran show why we should not use CBA when we evaluate lockdown policy. If their work is supplemented with the Scanlonian VoC, we would have an even stronger contractualist framework in which to assess pandemic response policies.

Twitter Elsa Kugelberg @elsakugelberg

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ORCID iD
Elsa Kugelberg http://orcid.org/0000-0002-7776-4100

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2 Scanlon T. *What we owe to each other*. Belknap Press, 1998.

[i]Regarding symbolic value, Scanlon argues that 'in a situation in which people are normally expected to make choices of a certain sort for themselves, individuals have reason to value the opportunity would be seen as reflecting a judgement (their own or someone else's) that they are not competent or do not have the standing normally accorded an adult member of the society'.[2] (253)

[ii]I am grateful to an anonymous reviewer for pressing me on this point. I recognise that this issue raises further questions about uncertainty and moral responsibility that go beyond the limited scope of this paper.