

A Public Health Reset Through Contractualism

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ABSTRACT

Public health ethics has been contingent on a political landscape leading to several operational hurdles, especially during global health emergencies. Several scholars have pointed out that liberal decision-making has prevented public health institutions from achieving their goals. Thus, the need for a substantive outlook on public health has never been stronger. First, this article highlights the ethical tension and limitations of a presumptive approach to public health that a vaccination policy might produce in a liberal political landscape. Second, influenced by the works of Angus Dawson, this article emphasizes the importance of a substantive approach to public health, especially in a post-COVID era. Last, it looks at how TM Scanlon's theory of contractualism aids in framing a substantive approach to health policy design and the added advantages of the theory.

Keywords: Public Health, COVID-19, Contractualism, Policy Design, Substantive Approach

INTRODUCTION

A public health intervention like a vaccination program for COVID-19, let alone a mandatory one, faces difficulties in implementation as it presents a clash between the *role of the government and liberty of its citizens*.¹ The clash stems from public health operating in a liberal political landscape that accords great regard for individual liberty. The government, in good conscience, is right in feeling morally obligated to act in ways that serve to prevent the pandemic from escalating. To represent the citizens, governments and policymakers prioritize achieving and maintaining herd immunity. The tension of the state versus individual liberty questions the extent to which governments can go to implement a vaccination policy.

In trying to balance the considerations of individual liberty and the scope of the state to impose an intervention, the Nuffield Council on Bioethics came up with a design known as the 'intervention ladder.'² The takeaway from the intervention ladder is that the state has the burden of proof in justifying reasons for implementing a particular policy.³ Such justified trade-offs envisioned from the intervention ladder have

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guided policymakers in their attempt to design and shape interventions. However, public health ethics and even the intervention ladder view public health through a presumptive or a moderate liberal lens.⁴ In a presumptive approach or a moderate-liberal approach to public health, policymakers regard values like liberty or autonomy as more prominent when weighed against values like creation of public goods and their maintenance.⁵ A libertarian approach favors liberty and autonomy even more strongly.

The substantive view of public health holds that values, such as liberty and autonomy, do not automatically hold precedence over community-oriented values such as public goods creation.⁶ Some have critiqued the intervention ladder endorsed by the Nuffield Council of Bioethics. Angus Dawson remarks that the intervention ladder as a metaphor prevents the act of climbing. He claims the ladder assumes that liberty is the only guiding principle in policymaking. Such a view neglects any responsibility the citizens have in achieving public goods and maintaining them.⁷

The emphasis on the drawbacks of a presumptive approach, especially in a situation like the COVID-19 pandemic, leads us to question should public health undergo a redefinition? The approach in public health focusing on non-interference stems from traditional clinical bioethics.⁸ However, I argue that public health ethics in a pandemic should accord less emphasis to individual liberty and evaluate every ethical value on a level playing field. Individual liberty provides less platform for action in situations where the community has not established herd immunity. Accountability for the harm principle and maintenance of public goods override concerns surrounding liberty.⁹ Angus Dawson argues that with more participation in a vaccination program, protection of public goods from disease can be created faster.¹⁰

Characterizing public health as an antagonist to individual liberty undermines the confidence in public health institutions and interventions for which public trust is vital. Although the government may propose a mandatory vaccination policy when voluntary measures fail to meet public health requirements, clear scientific evidence and accountability for public welfare should be the guiding principle. Thus, resetting the parameters gauging a public health intervention is the starting point to prepare for future pandemics.

In *Resetting the Parameters*, Angus Dawson suggests that utilitarianism or contractualism could serve as philosophical frameworks that may aid in framing a substantive approach to public health.¹¹ Evaluating utilitarianism and contractualism according to the COVID-19 facts would help clarify which is better suited to framing a substantive public health approach.

I. Is Utilitarianism Substantive?

Under utilitarianism, the morbid circumstances of the COVID-19 pandemic urge us to act in ways that translate to maximizing the overall good. Utilitarianism is a philosophical theory that prides itself on maximizing the best of outcomes for the maximum number of people. In an ideal utilitarian framework, a morally right act does good for all. Utilitarians consider utility the single determining variable that should guide actions.¹² The actionable aspect of a utilitarian framework is its ability to quantify thresholds or markers that mostly dwell in the abstract.

In *Utilitarianism and the Pandemic*, Savulescu et al. outline certain determinants as aids in applying utilitarianism.¹³ Looking at the aids in the context of a mandatory vaccination policy in light of COVID-19, shows some pitfalls of utilitarianism.

The first utilitarian aid is to save the maximum number of lives.¹⁴ Rightly so, an intuitive starting point in a pandemic with striking mortality rates is attempting to save the most lives. However, implementing and justifying a policy with the aim of saving the highest number of lives is complex. While a high number of

deaths is a concern, it is reductionist to concentrate only on the end goal and not the means through which such a goal is attained.

The second utilitarian aid is the length of life.¹⁵ The length of benefit gained from an outcome is crucial for utilitarians. The duration of a benefit determines the quantity of good produced. As an extension, younger people should then, theoretically, count for more than older individuals in prioritizing benefits. Such prioritization has been a matter of concern during the COVID-19 pandemic. While it is true that younger people might tend to benefit more, the pathology of COVID-19 goes against such logic. Elderly populations have experienced disproportionately more severe cases. Therefore, prioritizing youth when the elderly are suffering more of the harm would be ethically contentious.¹⁶

The third utilitarian aid is the quality-of-life post-intervention.¹⁷ Through measures such as QALYs and DALYs,¹⁸ utilitarians have attempted to quantify each individual's quality after an intervention. This quantification can result in connecting an individual's quality of life to their social worth. From a utilitarian viewpoint, a person's ability to produce relevance in society becomes a key determinant in shaping public policy. By extension, people born with disabilities such as mental illness or late-stage dementia can be overlooked merely because they lack "social value."¹⁹ And yet, "taboo trade-offs occur when we are forced to put a finite monetary value on these sacred values [life, health, ability], when we acknowledge that there is a maximum 'price' that we want to pay to uphold values that should be of 'infinite' value."²⁰ As such, it is unethical to place a value on someone's life based on the duration or quality of life they may have after an intervention.

Besides creating difficulty in assessing the quality of life, measures such as QALYs do not address the nuances in providing healthcare. In *Economic Evaluation of Mental Health Interventions*, Luyten et al. discuss several operational changes that account for these nuances.²¹

Utilitarians believe in a moral indifference between actions and omissions as the fourth aid.²² It does not matter how a result is achieved as long as it benefits the common good. Putting forward a bad policy is the same as not putting forward a policy. In the ever-changing and unpredictable dynamics of the COVID-19 pandemic, actions and omissions have different moral implications. Equating them often places an unfair burden on lawmakers, leaving them emotionally and morally exhausted as they weigh the advantages and risks of various outcomes.

Actively avoiding social biases, feelings, intuitions, and heuristics is the fifth aid.²³ The pandemic elicits strong feelings and aggressively tests beliefs. During the pandemic, some profoundly troubling ethical dilemmas stemmed from bias. In a utilitarian system, a mandatory vaccination policy aimed at crossing the threshold for herd immunity may overlook groups of people who are vulnerable due to a lack of access to the social determinants of health. Attempting to avoid feelings and intuitions all the time does not always result in the creation of a fair policy. Anti-vaccination activists use emotion to further their cause, hence it is critical that politicians consider the feelings at stake for the general public when enacting a mandatory vaccination policy.

While utilitarianism has benefits such as developing simple operationalizable concepts, providing a quantitative check, and balance sheet of risks and benefits, it is based on an ethical dystopia. Utilitarian policies can treat people as a means to an end by focusing solely on outcomes. *Utilitarianism rests on a presumptive outlook toward public health by replacing liberty with utility.* It ignores fair and just distribution and allocation of resources. Utilitarianism is not the most ethical approach to pandemic vaccination policy.

II. Is Contractualism Substantive?

The libertarian and utilitarian frameworks assume positive and negative connotations to different actions. They hold that certain acts are right and certain acts are wrong. A libertarian might hold that unnecessary infringement of individual liberty is not acceptable, while a utilitarian might be of the opinion that actions that contribute to disutility are unfavorable for the promotion of the greatest happiness principle.²⁴

Contractualism is a philosophy that values the social contract. A contractualist approach begins its discourse by arguing that actions have inherent neutrality.²⁵ By saying that, “being valuable is not always a matter of being ‘to be promoted’”²⁶, Scanlon does not neglect the value of certain actions but urges us to respond to value through other means, as well as to find value in plurality. In *What We Owe to Each Other*, Scanlon finds morality through the ability to reason while attributing inherent neutrality to our actions. A discourse in contractualism does not begin by presuming that values such as liberty or autonomy hold precedence among other ethical values, *i.e.*, it is not presumptive in its approach. Instead, he locates morality in the ability to reason and find justifications for certain actions. Thus, compared to utilitarianism, contractualism allows for a substantive approach by holding all the relevant ethical values in a level playing field. Liberty would gain precedence when justifications for safeguarding it are strong and cannot be reasonably rejected. The same goes for other values, such as promoting public goods.

In short, an action is termed wrong when “the principle that allows for it, can be reasonably rejected.”²⁷ For Scanlon, justifiability to others is the normative determinant of right or wrong.²⁸ He proceeds to say that the value of justifiability is the underlying premise of our duties. Additionally, Verweij argues that treating people rationally occurs by treating them in “ways they cannot reasonably reject.”²⁹ By disregarding any *a priori* assumptions about the importance of different values, people can find and construct values that cannot be reasonably rejected as they would be justified. Scanlon believes that this can be attained if we reflect on what we owe to each other.

III. The Inherent Moral Neutrality Allows for a Substantive Approach

A contractualist approach has implications for framing a substantive approach to public health. These values have been adapted from Scanlon and Verweij, and the elaboration has been framed in the context of COVID-19.

The inherent neutrality of principles that contractualism holds becomes crucial while devising a public health intervention. The COVID-19 pandemic presents a situation where otherwise acceptable ethical principles require scrutiny. A blank state where there are no *a priori* principles that suggest which acts are morally justified and which are not helps us navigate the operational principles involved in a vaccination policy. Thus, values such as liberty, utility, and autonomy are viewed on the same level as the creation of public goods, fairness in contribution, and avoiding collective harm.

a. Arriving at Principles

Starting with the inherent neutrality, the state, policymakers, and the public can identify ethical principles that would form a part of the vaccination policy smorgasbord. In a public health framework where negotiation is a crucial aspect in its implementation, it is important that all the stakeholders aim to find principles that are acceptable for everyone. This would culminate with principles of action that would produce the least number of complaints by all the parties involved. If an individual has very strong reservations against a principle, these cannot be outweighed by weaker reservations held by others.³⁰

b. Reasonable Rejection as a Marker of Deliberation

A mandatory vaccination policy in a contractualist framework would then have to incorporate reasonable rejection. A framework based on reasonable rejection includes a variety of moral considerations that shape well-being and provide a basis for fairness, choice, and responsibility. Scanlon makes an important remark in the thesis of *What We Owe to Each Other*: the acceptability of a principle depends on a one-by-one assessment of the strength of individuals' reasons for rejecting the principles compared to any existing alternatives. In other words, for Scanlon, what is foundational for contractualism is not minimizing what is undesirable but constructing principles no one can reasonably reject.

In the context of COVID-19, a person should be able to justify the level of precaution he takes to anyone who would bear the risk of exposure. Each individual would then have strong reasons for contributing to herd immunity with regard to their duty to protect the vulnerable. The justification to forego vaccination would need to be strong.³¹ The difference in a contractualist approach is that it provides a platform for valid concerns from the public. This allows more room for dialogue and for individual liberty, which seems to form a significant part of the critique. A plan of action that allows for individual concerns such as safety, efficacy, and strong medical reasons to forego vaccination encourages inclusivity in policymaking.

Another public concern is that public health institutions have alienated themselves from society in general.³² A dialogue between the stakeholders would remedy such a notion and help redefine public health according to how Dawson and Verweij view "public"—as a social entity/target as well as a mode of intervention (requiring collective action).³³

Contractualism, like the rest of the ethical frameworks, has its own set of critiques. In *Obligatory Precautions Against Infection*, Marcel Verweij argues that a contractualist theory inadvertently ends up asking for excessive precautions. The first claim that contractualism asks for excessive precautions arises from the fact that a contractualist approach does not consider the consequences of individual actions.³⁴ He believes that since consequences are not weighted, one individual's wish to forego precautionary measures does not justify another's non-compliance towards precaution, culminating in the other having to take excessive precautions. He also criticizes the contractualist deliberation for its failure to focus on the consequences of individual acts but on creating universalizable principles.³⁵

While this may seem true, such a conclusion rests on the fact that the consequences of individual acts are not weighted. However, an excerpt from Verweij's paper offers evidence that contractualism does weigh individual acts:

Suppose that we both aim to find moral principles that regulate our interaction and that can be accepted by both of us. If you then propose a principle that imposes many risks on me but none for you, then it would be reasonable if I were to reject it (especially if there are alternative principles that would yield much lower risks).³⁶

Both a consequentialist approach and a contractualist approach share the language of risks and burdens. For the utilitarian, risks and burdens are consequences of an action, whereas, for the contractualist, they are consequences of accepting or rejecting a principle. In the excerpt above, when an individual assesses the risks imposed, a consequentialist way of thinking is incorporated in contractualism and consequences to individuals do matter and are weighed. Verweij's contention that a contractualist approach does not focus on individual consequences is not supported, and, as a logical extension, the argument of excessive precautions begins to fade.

Being vaccinated would absolve us of having to take excessive precautions. Upon crossing the threshold of herd immunity, excessive precautions such as masks, social distancing, rigorous testing pre- as well as post-travel, and obsessively checking our phones for exposure can be done away with. The COVID-19 pandemic has immersed us in routines of excessive precautionary measures that it has become normalized for most of us. Thus, being vaccinated and covering society with a blanket of herd immunity removes the need for excessive precautions.

IV. Bridging What “Is” and What “Ought” To Be

Although contractualism presents a perspective that best suits a substantive approach to public health, it appears desirable only in theory. There exists a distinct reality outside of academia – politics, societal engagement, and governance reflect a different picture. This can be thought of as the gap between the is and the ought. We could envision and claim that a mandatory vaccination policy ought to be implemented in a certain manner, however, it might not be.

In her paper, *Realizing Bioethics’ Goals in Practice: Ten Ways “Is” Can Help “Ought,”* Mildred Z. Solomon provides several reasons for this disconnect.³⁷ The general theme is the importance of empirical research – the need to find a balance between normative assumptions and empirical evidence – and how policymakers can, in turn, use such evidence to fine-tune the policy design process. Contractualism can prove especially useful to bridge the divide between is and ought. Theories of libertarian philosophy and utilitarianism rest on a design based on a normative approach that values liberty and utility and should guide the policymaking process. However, contractualism separates itself from these theories since constructing principles justifiable for all, and the idea of reasonable rejection must rely on empirical evidence. Engagement between various stakeholders and recognizing the plurality in values helps bridge the disconnect between the is and the ought. This is more important in the context of a mandatory vaccination policy since its requirement arises only if voluntary vaccination policies fail. Knowing why vaccination rates are low and how better to reach herd immunity will be important empirical evidence that can fine-tune the policy.

In *Re-enchanting Democracy as a Mode of Governance*, Patsy Healey acknowledges that a struggle for political change often focuses on installing new policy designs.³⁸ Healey provides a list of qualities to keep in mind when designing a more people-centered policy initiative.

The first quality is recognizing a shared, diverse, and conflictual political community where distributive justice is vital. The second is to foster respect for different arguments, positions, and feelings—considering groups with conflicting values as adversaries but not enemies. The third quality is that of an ‘intelligent’ and multi-sided discussion of issues and reasoning ‘in public.’ The fourth is the fostering of respect for the role of the government while simultaneously recognizing the complexities of interactions. The fifth, and a key value in the context of the COVID-19 pandemic, is fostering respect for people who perform public services. Liberalism and utilitarianism create combative ethical discourse around those qualities, while contractualism could elevate shared public values. While liberal democracies arguably have the makings of those qualities, public engagement must be fostered at an intellectual level to promote cohesion.

Another important aspect to consider is the question of what a framework should aim to answer. In *Building an Ethical Framework for COVID-19 Resource Allocation: The How and Why*, Angus Dawson addresses the goal of a framework, especially at the time of a pandemic.³⁹ He stresses the importance of context in constructing a framework and urges to engage with a diverse group of people. Value-laden normative

approaches such as the libertarian and utilitarian frameworks provide less opportunity for different stakeholder claims. Dawson then argues that explicit discussions provide more clarity and help policy makers better understand the role of context in shaping a framework. Dawson asserts that a frame chosen sympathetically can help the public better appreciate the moral content involved in deliberation, whereas aiming for goals such as liberty and utility is a distraction from the workings of reality.

In evaluating stakeholders, those with lower incomes often are unable to work remotely. They face a greater risk of COVID-19 due to workplace exposure as well as commutes and living conditions.⁴⁰ Although a mandatory vaccination policy has the clearly defined goal of achieving herd immunity, ensuring distributive and procedural justice should not be viewed as being mutually exclusive.

CONCLUSION

Societal change relies on justifiable goals, policies, and a multitude of viewpoints. As such, a contractualist approach best accommodates a multitude of views of what we owe each other. Moving forward, if pandemic-type circumstances do disseminate within the constructs of our society, public policy should further consider contractualist approaches as a healthy, inclusive means.

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- ²³ Savulescu, et al.
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