

Reasons, respect and identity in public health decision-making

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Hafez Ismaili M'hamdi argues in the paper 'Neutrality and perfectionism in public health' that the state can legitimately implement public health policies that protect capabilities, even if these policies to some extent infringe the liberty of citizens (M'hamdi 2021). I completely agree with the conclusion, probably in part because I am a liberal, Scandinavian welfare state supporter at heart, but I think some of M'hamdi's arguments to this conclusion are fundamentally problematic.

The core of my concern is that two distinctions that are made in the arguments developing criteria for which liberties the state should respect and which it can infringe are much more complicated to make than it initially seems. The first is the distinction between liberties that are essential to our identity and liberties that are less essential or more peripheral. The second is the distinction between those values and reasons that are worthy of respect explicated as being "morally acceptable and based on minimally sound epistemic insights" (M'hamdi 2021, line 126-127 in manuscript).

Because of these issues the fourth criterion M'Hamdi proposes for legitimate public health decision making is not operationalisable. He writes that "...public health policy should not force or coerce citizens to abandon or revise their deepest morally acceptable and epistemically sound conceptions of what constitutes a valuable life in their eyes" (M'hamdi 2021, line 580-582 in manuscript) But, almost all public health policies may force or coerce in this way, and it is often undecidable whether the "conceptions of what constitutes a valuable life" that are infringed are the "deepest" and "morally acceptable and epistemically sound". This means that we can't avoid making choices when we implement public health interventions. Sometimes we will have to infringe liberties that are closely linked to peoples' identities and which are based on perfectly reasonable values and reasons. We do this, because other liberties and other capabilities are, all things considered, more important in the context of the specific public health policy decision.

Identity and liberties

The distinction between identity-essential and identity-peripheral liberties is not clear cut. M'hamdi mentions the liberty not to wear seatbelts as an example of an identity-peripheral liberty, but even that liberty could be identity-essential for a dyed in the wool Randian libertarian who like Atlas has shrugged off the shackles of the state. It also seems that many Americans - quite inexplicably seen

from a European perspective - think that the liberty to own and use powerful assault rifles is identity-essential; and during the Covid-19 pandemic the liberty not to wear facemasks has also been claimed to be identity-essential.

If we consider this facemask claim it can be linked both to libertarian claims about liberty from state interference, and to more internal convictions about how to show personal integrity. Something like 'to be a fully authentic person or citizen I need to show myself authentically, and that means showing my face openly'. This is not in itself an odd or peculiar view¹, it can for instance be found in a well-known Danish song from the Romantic period about the mythical Danish hero Holger Danske. The song is in the voice of Holger and we, for instance sing in the third verse "When I threw down my gauntlet to men, I opened my knight's helmet. They saw that I was Holger Danske, and not a disguised rascal." (Ingemann 1837, my accurate but poetically inept and non-rhyming translation²). So, it is not obvious that we could conclude conclusively that the liberty not to wear facemasks is definitely identity-peripheral.

Another problem is that most of us have several overlapping identities that are all important to us in different ways. I am a cis-gendered, heterosexual, male, 'White (any other)'³, middle-aged, husband, father, academic, tenured, physician, philosopher, MD, PhD, DrMedSci, adopted, Christian, immigrant, Dane, among many other things. All of these are in some contexts and in some combination depending on context core to and important for my identity. Some of these have been important to me for a long time, whereas others have changed importance over time. This means that there are liberties that are identity-essential for me in some contexts, e.g. academic freedom, but not in other contexts. When I am old and happily retired I might still have an intellectual commitment to and strong attachment to academic freedom, but if this liberty is curtailed then it will not affect me existentially in the same way as it would do now.

A final problem with the distinction is that there are a number of core features of identity where we think that it is right that people should be able to self-identify their identity, i.e. where there is wide scope for the individual to state or decide which of many possible identity descriptions apply to them and that others should use. But this creates a problem for any distinction based on the strength of the link between a particular liberty and a person's identity, because any third party identity ascription becomes problematic. If I can't correctly or securely ascribe identities to others, I

¹ For the complexities of the meaning of mask wearing see Tateo 2021, Green et al 2021.

² "Når mænd jeg kasted min handske,
opslog jeg min ridderhjem;
de så, jeg var Holger Danske
og ingen formummet skælm."

³ Self-identified UK 2021 Census category

am in a precarious position when trying to argue that a particular liberty is essential or peripheral to an identity.

Values and reasons worthy of respect

The distinction between values and reasons worthy of respect and those not worthy of respect is also problematic, and it intersects in complicated ways with the identity based distinction. Let us deal with the intersectional problem first. M'hamdi mentions 'creationism' as an example of a value or reason not worthy of respect. I take that this is based on creationism not being 'based on minimally sound epistemic insights', since there doesn't seem to be anything *prima facie* morally unacceptable about holding creationist views or acting on them in your personal life. But, creationism is closely connected to particular strongly held religious identities. An atheist creationist would be a rare creature indeed, necessarily lacking the theistic belief in a creator who could create. But, many religious people of different religions do strongly believe in a creator and their creationism is supported by many other beliefs for which they think they have epistemic warrant. So, you can't isolate and extirpate the creationism from the belief system that is foundational to and part of the person's religious identity. This, at the very least make it possible that certain liberties that are supported by creationist reasons are identity-essential. Another example is that particular ethnic groups have origin myths that link them to specific localities. Seen from the outside these myths may not be epistemically sound, and perhaps even conclusively disproven, but they are never the less core to the identity of the group and its members, and any liberty flowing from these myths identity-essential.

The more direct problem with the distinction is that it is not clear how we are to decide whether a value or reason is 'morally acceptable' or 'based on minimally sound epistemic insights'. There are of course morally unacceptable values and reasons which can be discounted as reasons in a liberal society, but they are in some ways uninteresting because to reach the status of "morally unacceptable" for policy-making purposes they have to already be generally socially repudiated. But there are many cases where the justification of prescriptive public health interventions will involve the balancing of degrees of reasonableness. Let us, for instance think of the kind of social distancing rule that was introduced in England and other places as a response to Covid-19 which had as a consequence that old people in nursing homes could not receive visits from any of their relatives. The reason for this curtailment of liberty to visit and to receive visits was primarily the protection of all the nursing home residents from the possible introduction of Covid-19 into the nursing home, and the concomitant high risk of mortality if Covid-19 was introduced. The main reasons for not

abiding by the rules is that there is a human right to family life and that not allowing visits causes significant detriment to the welfare of both the elderly person and the family members. These reasons for upholding the liberty to visit elderly relatives and the liberty to receive visitors fit well within a capability framework focused on promoting human flourishing and seem to be eminently 'morally acceptable' perhaps even morally laudable and also to be 'based on minimally sound epistemic insights'. So, if we think it is justified to override them in order to protect the life and health of others it is not because the values and reasons are not acceptable or not sound, but because other values and reasons are more important for this specific decision.

References

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