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RAPID ETHICS REVIEW

ETHICAL ANALYSIS OF CONSERVATIVE MPS' OPPOSITION TO COVID-19 CERTIFICATION

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Tuesday 14th December 2021 saw a package of emergency covid-19 restrictions for England pass through the Westminster Parliament, the so-called 'Plan B' measures, in response to the spread of the Omicron variant.¹ Covid-19 certification – either in the form of a negative test or proof of vaccination – is now required for access to nightclubs and other large venues. Mandatory vaccination is now required for healthcare workers. Masks are again mandated in most indoor public spaces (though not hospitality), and new isolation requirements have been brought

in for individuals who come into close contact with a covid-19 case. Although the measures were passed, there was widespread opposition from the government's own MPs. In the biggest rebellion for the government since its election, nearly 100 Conservative backbenchers voted against covid-19 certification. This piece will focus on these MPs' arguments against covid-19 certificates. Why did some oppose the measures? What are the ethical underpinnings of their arguments? And how do these arguments fit with the government's broader legislative agenda?

OVERVIEW

- While the UK Government's 'Plan B' covid-19 measures passed through Parliament, they were opposed by many on the libertarian right of the Conservative Party. The biggest rebellion came against the requirement for covid-19 certification for large venues.
- Libertarianism places personal freedom as the primary ethical value, with a very strong presumption against state interference with individual behaviour.
- Whilst libertarians accept restrictions on individual behaviour to prevent direct harm to other individuals, Conservative libertarians have been opposed to the 'Plan B' measures to limit the Omicron wave. Nevertheless, there is good reason to support covid-19 certificates in order to prevent harm to others.
- Covid-19 certificates can also be justified on the grounds of freedom, even if it is a form of freedom that libertarians do not recognise as morally significant. The restrictions are intended as limits to our individual negative freedom, in order to secure our collective positive freedom.
- Some Conservative MPs have opposed covid-19 certificates on the basis that they are discriminatory. Although they are not directly discriminatory, there is a risk their implementation could be indirectly discriminatory, and these concerns must be addressed.
- The libertarian justifications that Conservative opponents have provided against covid-19 certification have been notably absent from their votes on the Nationality and Borders Bill, the Elections Bill, and the Police, Crime, Sentencing and Courts Bill. This is despite there being a greater harm based justification for restrictions in response to Omicron than for any of these other measures.

LIBERTARIANISM, HARM, AND COVID-19 RESTRICTIONS

Much of the opposition to the UK government's 'Plan B' package of emergency covid-19 restrictions came from the libertarian right of the Conservative party. Libertarian ideology is made up of several commitments. Firstly, the primacy of individual freedom as the central ethical value, secondly, the very strong presumption against any violation of individual freedom except to prevent direct harm to others, and thirdly, the rejection of any coercive state authority greater than is strictly necessary to guarantee the second commitment.² There are a number of Conservative MPs who identify as libertarian, and they were particularly prominent in their criticisms of the introduction of new covid-19 restrictions, on the grounds that they constituted unjustifiable restrictions on the liberty of citizens. In the run up to the Tuesday 14th December vote, Steve Baker, the Deputy Chair of the Covid Recovery Group, an informal coalition of Conservative MPs opposed to covid-19 restrictions, accused ministers of 'creating a miserable dystopia' and argued that his party needed to be truer to its beliefs about the freedom of the individual.³ During the 14th December debate Conservative MP Greg Smith said that the restrictions constituted 'a fundamental change in the relationship between citizen and state, and one to be resisted'.¹

Clearly, UK law contains many restrictions of the behaviour of individuals, justified both on grounds of limited forms of paternalism, for example seatbelt mandates, and because of the risk of harm to others, for example speed limits. Given the generally accepted principle that individuals should, in most cases, be able to decide on the level of risk they are willing to accept in their own lives, more substantive restrictions are placed on individual behaviours that pose a risk to others. Whilst sometimes covid-19 restrictions are criticized on anti-paternalist grounds – for example 'I'm vaccinated, and I can decide what is worth the risk' – they are better justified on the grounds of protection to others – for example 'I wear a mask to protect others from infection'. An infectious disease is not only an individual health risk, and infectious individuals can harm the people around them.

What matters, therefore, is whether these restrictions are a necessary and proportionate response in relation to potential harms to others. Of course, whilst the harms of the coming Omicron wave are as yet uncertain, what is clear is the astonishing speed of the variant's spread and the limited capacity of the National Health Service (NHS) to deal with any significant increase in hospitalisations. NHS Providers have warned that bed occupancy was already at 94-96% on Monday 13th December, before any impact

on hospitalisations from Omicron.⁴ As with previous measures, the new 'Plan B' restrictions in England have largely been justified with the goal of preventing an overwhelmed NHS.

Will they work? There is currently a great deal of uncertainty around Omicron. It is clear that Omicron is far more transmissible than Delta, and that the mutations on its spike protein gives it greater capacity for immune escape, meaning it is more likely to infect people who have prior history of infection or vaccination.⁵ However, there is early evidence that two doses of a vaccine maintains protection against severe illness or death,⁶ with a booster dose bringing much higher levels of protection against symptomatic infection.⁷ As of the 16th December, 25 million people had received their booster in the UK,⁸ with the rollout being accelerated dramatically over Christmas. Thankfully, lateral flow⁹ and PCR tests¹⁰ are still able to detect Omicron, and so negative results provide a good degree of confidence that one is not currently infectious.

In conjunction with the other 'Plan B' measures, covid-19 certificates should help prevent some cases, though the package of measures are far less extensive than those announced by the Scottish¹¹ and Welsh devolved governments¹² later that week, and the additions that government scientific advisors are pushing for in England.¹³ Furthermore, Conservative MPs have fairly pointed out contradictions in the government's decision making. Steven Brine MP pointed out: 'We are told that people need to work from home where they can, but they can meet the very same people in the pub that evening and every evening. Is that going to slow the spread? I do not think so.'¹¹ The response to this point however, is that its consequent is that the measures announced do not go far enough, not that they should be abandoned. Specifically in reference to covid-19 certificates, requiring people to show proof of vaccination or negative test to enter high risk settings as a measure is not obviously an overly burdensome requirement to prevent an overwhelmed NHS.

Why would libertarians oppose this? Libertarians view the individual as the centre of moral concern. The only justifiable restrictions on individual behaviour are when they directly harm or impose a significant risk of harm on other individuals. Libertarians are less likely to consider indirect, potential risks of harm on a societal level, risks that are several degrees removed from the individual actor and involve assumed behaviours of many other agents, as sufficient to justify restrictions on individual liberty. So from this perspective, it may

be justified to deny entry to a nightclub to an obviously too drunk individual, on the basis that they may pose a direct risk to others inside. But it would not be justified to deny entry to someone without a covid-19 certificate, even if enough people going into nightclubs without covid-19 certificates might cause enough covid-19 cases to overburden the NHS. A number of Conservative MPs pointed to (as yet unconfirmed) reports that Omicron causes 'milder' illness than previous variants.¹ The proponents of restrictions pointed out that even a low risk of serious harm for any single person can mean a huge amount of serious harm spread across society, given conditions of exponential viral growth. But societal harm is not of primary moral concern for libertarians. The risk of individual harm in this case is too low to justify any state restrictions on individual behaviour.

However, we understand enough about the pandemic by now to know the undeniable impact societal harm has on individuals: school, work, and social life massively disrupted by the spread of disease; staff in

hospitals driven to desperation at the overwhelming volume of care; deaths, hospitalisations, and long-term health complications arising from covid-19 infection. Even if Omicron is milder, and less likely on an individual level to lead to hospitalisation (which we do not yet know), the huge number of cases expected in the coming weeks could still place a significant burden on the health services. And this would cause problems for anyone needing hospital care, not just covid-19 patients. During Richard Drax's speech in Tuesday's debate opposing covid certification the MP asked, 'do we want to see hundreds of thousands of NHS patients waiting, some in agony, because their operations have been delayed again?'¹ Obviously no one wants this. But it is unclear how allowing hospitals to become full of covid-19 patients again will help speed up operations for other conditions: the harms cannot be separated. A just published *Lancet* paper estimated that Omicron disruption could lead to the cancellation of over 100,000 operations in England alone.¹⁴

TWO TYPES OF FREEDOM AND COVID-19 RESTRICTIONS

As well as trade-offs between freedom and potential harms to others, these restrictions can be justified on the grounds of freedom alone, just not the kind of freedom libertarians recognize. Libertarians generally conceive as freedom as freedom *from* coercion, or negative freedom. Restrictions on our behaviour by the state create the 'miserable dystopia' Baker warns about.¹ But interventions from the state can also help create the conditions necessary *for* freedoms to be realized, to maximise our positive freedom.¹⁵ Applying conditions of entry to nightclubs to make them safe enough so they can stay open is a sacrifice of negative freedom of the individual for positive freedom at a collective level. This point was raised by the Labour MP Lloyd Russell Moyle in the debate, when he said: 'this pass is actually a pass for freedom to allow us to continue to enjoy activities that otherwise would be shut down, and the libertarians opposite should be welcoming it, not bemoaning it.'¹

Nevertheless, since negative freedom is associated with the individual, whilst positive freedom is maximized through collective action which may involve some restrictions on individual behaviour, it is difficult to reconcile positive freedom with libertarian ideology, which has as its primary concern individual liberty. When Conservative MP Miriam Cates argued, 'Freedom is what enables my constituents to see their family, comfort the dying, go to school and go to work. That is what freedom looks like',¹ she used the language of freedom *to*, most associated with

positive freedom. But she stood opposed to collective measures aimed at preventing a situation where people cannot see their family, because they are all isolating due to sickness, or to go to school, because there are not enough healthy teachers to lead classes.

Pandemics are collective action problems, too large to be solved by the voluntary actions of any single person. But it is unclear what meaningful measures for an individual are without collective action supporting these individual choices. What good is it to ask people to wear masks if there is no guarantee others will do the same? Or test daily if no one else does? Or isolate if they test positive but have no access to a decent level of statutory sick pay?¹⁶ The libertarian pandemic response is essentially limited to encouraging individuals to get vaccinated and act in accordance with 'common sense'.

In voting against covid-19 certification, the Conservative MP Steve Brine bemoaned what he saw as the government abandoning its previous aim of living with the virus: 'the concept of "learn to live with covid" is as dead as anything I know',¹ he said. Brine is not precise on what he understood 'learn to live with' to mean in this context. An individual learning to live with a chronic illness does not do so by ignoring it. Rather, they learn to manage it in such a way as to maximise their wellbeing and opportunities. Likewise, society learning to live with covid-19 does not mean taking no measures to mitigate it. Instead it means

investing in ventilation in schools and public spaces, increases in sick pay, investment in the health and social care sector, and so on: all of which can only be done at a collective level. The UK's high vaccination rates meant a minimalist, individualist approach

COVID-19 CERTIFICATION AND DISCRIMINATION

Non-explicitly libertarian arguments were also given by Conservative MPs against covid-19 certification. Some opposed them on the grounds that they 'are discriminatory and segregate people',¹ to use the words of Miriam Cates MP. Clearly, covid-19 certificates do discriminate on the basis of vaccination or test result, with entry being barred to certain venues for those unable to demonstrate either. That they do so does not demonstrate that their use is ethically wrong. Discrimination needs to be unjust to be ethically wrong. An example of ethically nonproblematic discrimination is discriminating between candidates at a job interview on the basis of professional competency to decide who to hire for the position. Discrimination is ethically problematic if the basis of discrimination is an arbitrary feature irrelevant to the decision task, if it is problematically based on a protected characteristic,¹⁷ for example race, religion, gender, or age, or if the feature is otherwise outside of an individual's control. So, it would be morally wrong to reject a job applicant on the basis of race, a protected characteristic, or shoe size, an arbitrary characteristic. Covid-19 certificates are not discriminatory along any of these lines. Access to them is open to all, regardless of protected characteristics, and they track a feature that is entirely within the individual's control, namely their testing or vaccination history. These features are not arbitrary, as they are directly relevant to the goal of the public health legislation mandating them: making crowded venues more protected from the impact of covid-19 and reducing the burden of the pandemic.

However, it is important to recognize that legislation that applies to everyone may not apply to everyone equally: it may affect different groups in different ways, or be applied unequally so that different groups are impacted more by it than others. In other words, it might not be directly discriminatory, but it may be indirectly discriminatory. This was the point of Conservative MP Ben Spencer, when he argued against covid certificates on the basis of its impact on marginalized communities: 'Looking at the measures and the explanatory notes, I cannot see how one can show evidence of a negative test without having access to the internet or having a phone—how any validation process can go through. It is clear to me that it will exclude people. I cannot support excluding

was just about sufficient during the Delta wave to allow day-to-day life to continue in relative normality for most people, and not to completely overwhelm hospitals. It is unlikely to be sufficient with Omicron.

anyone, but especially those people who are the most marginalised in our society.¹¹ Elderly individuals are less likely to have smart phones or easy access to the internet.¹⁸ Given this, the introduction of covid-19 certificates may not directly discriminate against them, but it might constitute a form of indirect discrimination against elderly people as they will have reduced access to public spaces.

This is a valid concern, and at the very least justifies some form of non-digital certification equivalent to the covid-19 certificates. Along the same lines as Spencer's argument, covid-19 certificates might also be indirectly discriminatory because certain demographic groups are far less likely to be vaccinated or to be engaging in regular testing than others, leading to a situation where the parts of society where covid certificates are required are less open to those demographics. This might be considered especially problematic if those who are less likely to use the covid-19 certificates do so because of discriminatory behaviour at the hands of institutions that led to lower trust in government authority, or because they have been targeted for misinformation campaigns dissuading them from getting vaccinated or tested.

These are considerable concerns, and must be weighed against the public health benefits of the reduction in covid-19 cases the restrictions might bring as discussed earlier. Certainly, they must be paired with measures to support vaccine advocacy and support within minoritised communities using trusted local healthcare providers.¹⁹ It is also worth pointing out that whilst covid-19 certificates might disproportionately impact certain vulnerable and minority groups, these are also the same vulnerable and minority groups who will be most harmed by an out-of-control pandemic. There is also evidence from other countries that more stringent vaccine requirements have been effective in increasing uptake of the vaccine,²⁰ although allowing the exception of testing in the covid-19 certificates may limit this potential benefit.

However, it may be that this addition is the greatest positive impact of the Conservative rebels on government policy. Government ministers have often

referenced the testing option within the covid-19 certificate as demonstrating that the covid-19 certificate is not a domestic vaccine passport, with Health Secretary Sajid Javid saying he would not support a vaccine-only option during the 14th December debate.¹ This argument has been particularly directed at Conservative rebels, many of whom have libertarian concerns that requiring

CONSERVATIVE CONTRADICTIONS

Libertarian concerns on the Conservative right are no doubt sincerely held, even if they were sometimes expressed in an extreme manner. Marcus Fysh MP compared the Government's plans for covid-19 certificates with Nazi Germany, arguing the UK is not a 'papers please' society.²¹ Nevertheless, all the Conservative MPs quoted above voted for the third reading of the government's Nationality and Borders Bill,²² which grants the government extended powers to strip foreign-born Britons of their citizenship without notice. It is estimated that nearly 6 million people from ethnic minority backgrounds could become eligible to lose their citizenship without notice if the law is passed.²³ They all voted in favour of the second reading of the Elections Bill,²⁴ which included the introduction of a requirement for individuals to show a form of photographic ID at the polling station to vote. The Electoral Commission has warned that the introduction of voter ID requirements may make elections less accessible to individuals from lower socio-economic groups, people with disabilities, and the unemployed.²⁵ They also all backed the third reading of the Police, Crime, Sentencing and Courts Bill,²⁶ which granted the government vastly extended powers to criminalise 'noisy' and disruptive protests, and restrict the freedom of speech and assembly of those judged to have been involved in them.²⁷

All of these measures stand in direct challenge to a libertarian perspective. It is hard to argue that the national security risks posed by a handful of British citizens, the tiny number of recorded cases of voter fraud in UK elections,²⁸ and the inconvenience of loud dissent, pose enough risk of harm to justify such restrictions on personal freedoms. This is especially confusing when the same MPs who voted for these measures judged that the public health grounds for covid-19 certificates were insufficient to justify the restrictions, despite the tidal wave of Omicron cases currently hitting the UK and the likely impact on hospitalisations. It remains to be seen whether the Conservative opponents to covid-19 certificates will revise their support to these other government Bills, on libertarian grounds, in light of their arguments last week.

vaccination only would be too great an intrusion into a person's bodily freedom. Given the concerns around the decrease in protection only two vaccine doses provides against Omicron, but the continued effectiveness of lateral flow and PCR doses at detecting it, including this concession to libertarian concerns may have public health benefits.

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