

Preserving Freedom in Times of Urgency

Kevin Leportier*

University Paris 1 Panthéon-Sorbonne

Centre d'économie de la Sorbonne

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Abstract

The paper shows how the provision of public goods through a public intervention forcing individuals to contribute can be said, paradoxically, to preserve their freedom—when they face what I call a ‘situation of urgency’. By this I mean a situation in which cooperation between individuals is needed to address a catastrophic situation but is costly for individuals, such as the start of a serious epidemic, an imminent invasion by a foreign power or rapidly evolving climate warming. It reconciles a libertarian framework centred on rights, inspired by Nozick, with public coercive interventions meant to avoid severe collective losses. It concludes that, contrary to what is often claimed, measures such as the imposition of a lockdown, conscription or strict quotas on carbon-intensive consumption, are not necessarily liberticide.

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*e-mail address : kevin.leportier@gmail.com

Introduction

The inability of markets to provide public goods at a level sufficient to ensure efficiency is one of the best-known and most frequently highlighted market failures. The financing of public goods by voluntary contributions, often modelled as a prisoner’s dilemma, fails to produce a Pareto optimum. This would justify the use of coercion by public authorities, forcing individuals to contribute to finance or produce an efficient level of public good. The call for coercion is justified, within traditional welfare economics, in purely *welfarist* terms: a Pareto improvement is good because everyone’s welfare is improved; forcing everyone to cooperate is a Pareto improvement and therefore coercion is warranted. If a coercive intervention could be avoided because an alternative arrangement is feasible, which would bring about the exact same level of public good without coercion, welfarism would be indifferent between the two. This specific evil of coercion is therefore not recognized at all by traditional welfare economics. And yet, as seen during the recent pandemic, its large-scale use by governments sparks debate, protests and outrage among many citizens. Is there nothing to object to opponents of lockdown measures deeming them liberticide?

The opposite problem is found in a completely different approach, namely the brand of libertarianism inspired by Nozick (1974). In this approach, coercive state intervention to force individuals to finance or produce public goods is always wrong, even if the resulting situation is vastly preferable to the *status quo* in terms of welfare. In the scheme sketched by Nozick, individuals are endowed with rights that impose constraints on actions that anyone else may legitimately perform¹. The fact that, according to Nozick’s libertarianism, individuals have the right to dispose of their bodies and possessions as they see fit imposes the obligation for everyone, including the government, to refrain from doing anything that might violate these rights, even if it means that vital public goods are not financed or produced. Rights define what individuals may do, at any point in time, and any situation that results from these actions on the part of individuals is just, provided that the initial situation was itself just. Legitimate actions thus ‘preserve’ the justice of the initial situation, as well as the freedom of individuals—which consists in not being prevented from doing anything they might want within the limits imposed by their rights. The use of coercion, on the other hand,

¹Hence the expression ‘rights as side-constraints’ (Nozick 1974, 29).

implies *ipso facto* that the resulting situation is unjust, and that freedom is not preserved.

How can public goods be produced in a libertarian society? If contributions can only be voluntary, and the choice to contribute or not is decentralized, we may expect self-interested individuals not to contribute, as in a classic public good problem. The public good would therefore not be produced, without this creating any injustice or loss of freedom according to libertarians. Yet it would be wrong to conclude that libertarianism has nothing to say about public goods. A third party may well propose to every individual concerned by the public good a voluntary *assurance contract* (Schmitz 1994, Tabarrok 1998) by which individuals commit *in advance* to contribute to the public good on the condition that all others do the same commitment, and receive compensation if they do not. This circumvents the public good problem: at equilibrium, everyone makes the commitment and the public good is produced without anyone's rights being violated.

One of the weaknesses of this kind of non-coercive solutions to the public good problem is that they may have a huge opportunity cost—the cost of not forcing people to contribute—, especially in catastrophic situations. In what I will call ‘situations of urgency’, it would take a long time to propose and implement the contract (because of the need to spread information about the contract and convince people to sign it), whereas the value (or the cost) of the public good may decrease (or increase) sharply over time. An immediate coercive intervention would thus be much more efficient. An exemplary case of this kind of situation is that of the start of a deadly epidemic in a locality: local residents may slow down or even stop the progression of the epidemic by carrying out certain actions that are very costly for them, such as isolating themselves for several weeks. The public good—which is the disappearance of the epidemic—would be considerably more difficult to produce once the epidemic spreads to the population: the number of people who need to be confined increases exponentially, etc.

Other examples of such situations may be:

- an imminent flooding requiring the immediate edification of a dam;
- a military invasion requiring to resort to compulsory mobilization of individuals;
- a global climate warming with very serious negative feedback loops requiring that everyone reduce their carbon emissions immediately.

Let us assume that we are in such a dramatic situation of urgency. The provision of a public good by setting up an assurance contract is no longer something that can be seriously considered. Either the public good is produced by compelling thousands individuals to contribute, or nothing is done, and individuals fail to coordinate to produce the public good. Nozick (1974) acknowledges that it may be desirable to suspend the obligation to respect individual rights in the event of a ‘catastrophic moral horror’², but does not go on to specify what would make such violations acceptable.

We can go further by noting, with Sen (1995), that even if individuals facing such a public good problem *cannot* really coordinate to contribute and produce the public good, they *would* choose to do it if they could, even if it means that they would have to sacrifice some of their freedom. A coercive intervention could therefore, in a sense which needs to be specified, impose nothing on individuals that they would not, in certain circumstances of their choosing, do by themselves. But how can there be freedom where individuals have no *control* over their actions? To make sense of this idea, I will prolong Sen’s efforts to define what he called ‘indirect liberty’ (Sen 1982) and integrate it into an ‘extended’ libertarian framework to derive the conclusion that coercive state interventions, and in particular lockdown measures, are not necessarily liberticide.

The paper thus contributes to the debate about the merits of public or private provision of public goods by showing how the public provision of a public good *via* some form of coercion can still be compatible with freedom. It does so without resorting to traditional welfarist evaluation, but relying on what I call ‘extended libertarianism’, which is capable of justifying, under conditions that will be specified, a coercive intervention. This was already Serge-Christophe Kolm’s goal when he attempted to define what he called a ‘liberal social contract’ in a somewhat forgotten book (Kolm 1985). A liberal social contract is a hypothetical contract to which individuals could have consented, to produce some specific results such as the provision of public goods. However, Kolm did not say much about the exact conditions that would make such a counterfactual consent valuable from the perspective of freedom, which this paper intends to do.

In the first section, the paper describes the structure of the problem of

²‘The question of whether these side constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror, and if the latter, what the resulting structure might look like, is one I hope largely to avoid’ (1974, 30).

producing public goods that will be considered next, and how it may be done in a libertarian society. In the second section, the article introduces Sen's idea of 'indirect liberty', and his critique of the restriction of the meaning of freedom to what he calls 'freedom as control'. Someone's indirect liberty is preserved if, although they are not in control of the decision, they get what they would have chosen. The article develops Sen's idea by presenting the elements of an ethics of simulating choices, which is concerned with the permissibility, for a third party, to do certain things for individuals that they would choose to do themselves if they could. Finally, the third section applies the elements of this ethics to the case of the public good problem to show how extended libertarianism, which allows for public intervention that simulates choices that individuals would have made, legitimizes the use of coercion to produce a public good in a situation of urgency.

1 Producing public goods in a libertarian society

The essential characteristic of a public good is that, once it has been produced, all individuals enjoy it in the same way, whether or not they have contributed to its production. The collective response to the kind of 'catastrophic moral horror' which I will consider here is a public good: everyone is saved from an epidemic, a war, a flooding, a brutal climate change in the exact same way. This collective response takes the form of coordinated rule-following behaviour expected from individuals: isolating oneself, accepting military conscription, building a dam, and respecting a set of individual quotas on carbon-intensive consumption. If enough individuals follow these rules, the 'catastrophic moral horror' is avoided and everything goes back to normal. But following them has a high cost for individuals: a loss of freedom, a loss of time and money, a risk of death, etc. If her effort is not *necessary* to build the collective response that averts the catastrophe, an individual will choose not to make them. Neither will she make these efforts if they are not *sufficient* to avert the catastrophe.

Therefore the essential feature of this collective response can be modelled as follows: (1) contributions from individuals are binary: they can either contribute, which is costly for them, or do nothing; (2) the public good is itself binary. More precisely, I will assume that there is a certain critical number

of contributions such that we can be sure that the public good is produced when this number is reached; (3) each individual prefers the situation where the public good is produced to the situation where it is not but, everything else being equal, they prefer not to contribute. (4) the *status quo* situation is such that the public good is not produced and no contribution has been made³.

In this setting, a ‘public good problem’ arises. Let us suppose that there are N individuals and that the contribution of at least $K \leq N$ individuals will be enough to produce the public good. In this setting, the *status quo* where the public good is not produced and no individuals contribute is a Nash equilibrium, because contributing is costly and will only make the person who pays it worse off given that no one else is contributing. We can thus expect the status quo to persist, and the ‘moral horror’ is not avoided. At the same time, any situation where more than K individuals contribute is a Pareto-improvement from the status quo, since individuals prefer the situation where the public good is produced to the situation where it is not, whether or not they contribute⁴. If welfare is the only thing that matters, a coercive state intervention that forces at least K individuals to contribute is justified because it leads to such a Pareto improvement: everyone is made better off.

The ‘public good argument’ (Schmidtz 1991) therefore applies there. According to this general argument, since in a public good problem the *status quo* equilibrium is expected to persist if individuals are allowed to choose whether to contribute or not, and that forcing individuals to contribute is a Pareto-improvement, it is necessary to force individuals to contribute in order to improve the situation of everyone. As coercion is *necessary* to reach this desirable outcome, it is also *justified*. The public good argument is supposed to give normative validation to coercive state interventions aiming at producing public goods. However, libertarian-minded economists and philosophers have devised solutions to the public good problem that disprove the public good argument—by showing that the premise that coercion is necessary is false. In particular, there exists now a whole class of ‘assurance

³This description is in line with Tabbarok (1998), whose assurance contract I will consider later.

⁴However there is no clear case of optimality to be defined here if there does not exist a precise threshold such that the public good is produced if it is reached and not produced if it is not. In my presentation, the number K is not such a threshold. Even if we can be sure that the epidemics disappear if ninety percent of the population self-isolates for two weeks, it does not mean that a smaller number would not be as effective.

contracts' which shows how the public good problem can be addressed by a voluntary—'private' but coordinated—kind of provision. Assurance contracts enable people to coordinate to produce the public good, by making one's contribution conditional on the contribution of others, and by giving individuals incentives to sign the contract even if they expect it to fail. I will describe Tabbarok's (1998) particular solution to the problem, as it is perfectly suited to the public good model I consider.

The contract has two steps. In the first step, an entrepreneur offers the contract to every one of the N individuals, who is free to accept or reject it. We thus have two possibilities: either a number $X \leq K$ of individuals have entered into the contract, and the contract is said to have succeeded, or this is not the case and the contract is said to have failed. If the contract has succeeded, the X individuals who have entered into the contract are required to contribute, and if they do so the public good is produced. If the contract has failed, the X individuals who have entered into it are not required to contribute, but they receive a small payment—and of course, the public good is not produced. The only subgame perfect equilibria of the corresponding game are the situations where exactly $X = K$ individuals enter into the contract. As before, any such equilibrium is a Pareto improvement from the *status quo* situation. It makes everyone among the K contributing individuals necessary and sufficient to produce the public good. In other words, every contributing individual is *pivotal*.

The mechanism behind Tabbarok's 'dominance assurance contract' is intuitive:

- the situation where strictly less than K individuals sign the contract is not an equilibrium since any one of the others has an incentive to also sign it, either to receive the small payment or to make the contract succeed and produce the public good;
- the situation where strictly more than K individuals sign the contract is not an equilibrium either since any one of these individuals has an incentive to deviate and not sign it as they would not have to contribute but would still benefit from the production of the public good;
- when exactly K individuals sign the contract, any one of the others have no incentive to also sign it as they benefit from the production of the public good at no cost for them, whereas every one of the K contributing individuals, being pivotal, cannot deviate without making

the contract fail and preventing the public good from being produced. We therefore have an equilibrium.

Assuming that transaction costs are not too high, such an equilibrium could easily be reached, which leads to the conclusion that coercion is not necessary: the public argument would fail to justify coercive state interventions in any situation where dominance assurance contracts could be implemented.

However, I am concerned here with what I call ‘situations of urgency’, which rule out the implementation of this non-coercive solution, because:

- collecting contributions can take a very long time, due to the procedures involved in drawing up the contract, reaching potential contributors and convincing them, etc.
- The value of the public good may decrease rapidly over time, or the public good may be more difficult to produce (more contributions required, or at a higher level, or the population concerned by the public good is larger) over time.

I will suppose that the opportunity cost of waiting for a dominance assurance contract to be implemented voluntarily is too high to be paid—we would be falling quickly into a ‘catastrophic moral horror’ if we simply wait. This particular context gives relevance to the public argument, as coercion appears necessary from a *moral* (and not a technical) point of view. For moral reasons, individuals cannot be left to coordinate voluntarily as they would do if a dominance assurance contract could be implemented. In such situations of urgency, the public good argument is—as seen during the recent pandemics—often formulated in terms of a trade-off between freedom and other values. Coercive safety measures are justified by insisting that the momentary or limited loss of freedom experienced is more than outweighed by the expected gain in terms of lives saved and lower pressure on hospital services. This does not address the concern that these measures are profoundly *liberticide*, which can lead some people to object to these interventions, even if they agree that preserving the *status quo* situation is not desirable and that they would change it if they could. But, as I will show, the case for a coercive state intervention need not be formulated in terms of such a trade-off between freedom and welfare or other values, which libertarians or freedom lovers may refuse. Such an intervention can be justified purely in terms of freedom.

Broadly speaking, there are two ways of assessing the freedom of individuals in an economic context. The first is based on the measurement of choice sets, or opportunity sets. According to this approach, each individual has various opportunities, which are things that she can bring about if she chooses to do so. The set of all these opportunities is her opportunity set. In principle, if we have a satisfactory metric for measuring these opportunity sets in terms of freedom⁵, it is possible to compare each opportunity set with any other, and thus to compare the opportunity sets that individuals have when the *status quo* situation is preserved with those that they would have in the situation where the public good is produced because of a coercive intervention. If we find that everyone has more freedom in the latter situation, we could conclude that the intervention is actually improving freedom globally. But carrying out this type of analysis is very difficult because:

- Some metric or rule must be chosen to measure each individual’s opportunity set, but there is no consensus in the freedom of choice literature to favour one or another. Another difficulty is that of identifying all the opportunities accessible to an individual, which is not an easy task.
- a coercive intervention would close off certain opportunities at some point in time (such as seeing one’s friends during an epidemic), and open up other opportunities later (living a life free of epidemic disease)—compared to maintaining the *status quo* situation. We would thus need to compare *sequences* of opportunity sets, which is more difficult than comparing opportunity sets. How would the trade-off between having fewer opportunities before the intervention, but (presumably) more after, be represented? To my knowledge, there exists no framework proposing to describe intertemporal freedom tradeoffs convincingly.

Another approach to freedom evaluation, inspired by Nozick (1974), would completely evade these difficult—if not intractable—questions. This approach is not based on comparisons and does not attempt to measure freedom. It remains agnostic on the question of whether a certain social or economic change increases or decreases the opportunities available to individuals. The evaluation is binary, in that it only asks whether or not a change

⁵A literature has emerged in normative economics and social choice theory to complete this task, which I will call the ‘freedom of choice literature’. See Barberà et al. (2004) for a survey.

preserves the freedom of every member of a society. In the Nozickian version of libertarianism, individuals have rights (to dispose freely of the things they own—including their own body—, by giving it away, exchanging it, etc.). These rights can be exercised in whatever manner that pleases individuals. Individuals are free, in a negative manner, when they are not prevented by anyone to do whatever they want within the limits defined by their rights. If a social change happens in such a way that it does not violate anyone's rights, it can be said to preserve the freedom that everyone had before the change (if they were already free), since it does not prevent anyone from doing whatever they want within the bounds of their rights. Although Nozick does not insist much on that point, we can identify a freedom-preserving social change without having to specify which opportunities are opened to whom.

Compared to standard welfare economics evaluation practice, this approach has another particularity: because of its non-consequentialism, the focus of the evaluation is not on results (or 'alternatives'), such as a given allocation of goods in an exchange economy, but on social changes. In order to know whether a social change is freedom-preserving or not, the question is only whether such changes violate or respect individual rights. But in order to know whether a society is free, globally, as a result of this change, we would also need to know if it were free before it. If this was not the case, there would be nothing to preserve. According to Nozick's 'historical' conception of justice and freedom, a society is free if it started from a just initial attribution of rights (in particular, property rights over natural resources), and evolved through social changes that never violated any one of them. This makes this conception particularly demanding and inconvenient for evaluating whether a society is free or not, as past violations of rights would make virtually any society unfree. But we can still evaluate whether or not a change is freedom-preserving.

Since our goal is essentially comparative, there is no need to endorse Nozick's full historical conception. Provided that the situation before the social change was free enough⁶, in a sense that does not need to be further

⁶What would make a society free, initially? One possible answer would be that a society is free if it guarantees a certain number of fundamental social opportunities to each of its members, enabling them to lead their lives as they see fit—Sen (1995, 67) refers to Berlin's emphasis on the 'liberty to choose to live as he or they desire' (Berlin 1969/2002, 215)—and excluding the exploitative situations that Nozick's libertarianism would allow. Defining precisely these fundamental opportunities is obviously difficult.

determined, and that individual rights are well defined, it is possible to conclude that a social change is freedom-preserving, and that society is at least as free as it were before the change—just as the conclusion of a deductive reasoning is as true as its premises, provided that it logically follows from them. The comparative nature of the evaluation we need to conduct makes it admissible to get rid of the most controversial aspect of Nozick’s conception while conserving its most appealing feature, which is its simplicity. If we can be reasonably sure that the society in which we find ourselves is free *to a certain degree*, then a social change that respects everyone’s right preserves that freedom, provided that we accept two assumptions essential to Nozick’s approach:

- A natural change (such as an earthquake, flooding, etc.) that reduces individual opportunities cannot affect freedom, since such a change does not violate anyone’s right, at least directly. A natural disaster that destroys a country’s infrastructure and economy undoubtedly makes people’s lives miserable but does not affect freedom.
- When individuals choose actions that have the consequence of reducing their own opportunities (in a way that is compatible with their rights) or of reducing others’ opportunities, society is still as free as it was before. What matters is that individuals are able to exercise their rights, and not the consequences of how they exercise them: this is the product of Nozick’s non-consequentialism. Thus, the appeal of this conception depends largely on the way rights have been defined.

While this approach, because of its crude binary character, cannot constitute a viable alternative to the evaluation practices of standard welfare economics, it can complement it because it allows us to make judgements about freedom that are simply based on the information that we have about rights violations. A social change is not freedom-preserving if it violates someone’s rights. It is freedom-preserving if it does not violate anyone’s right. An example of such social change is the design and implementation of a dominance assurance contract, as defined earlier. A third party (the state or an independent entrepreneur) may propose the contract to anyone likely to sign it and then ensure compliance with the terms of the contract. Even if such an enforcement operation is likely to meet some resistance from people who had initially accepted but changed their minds, it does not violate any libertarian right, since individuals have the right to enter into contracts by

which they bind themselves by promising to do or deliver something in the future.

The consent that makes the contract valid (according to libertarians) encapsulates a different kind of information than the purchase of a good, for example. When deciding whether to consent to signing such a contract, an individual may have in mind:

1. the *final result* that she gets for herself.
2. the *process* by which change occurs for the individual. In particular, if the final results that she gets for herself are not enough to offset the loss of freedom that she would incur by binding herself (in our case, by promising to contribute to the public good at a later date), she may refuse the contract even if she values its final result.
3. the final results that *other* individuals get. In particular, if the *distribution* of resources or burdens (in our case, the burden of contributing to the public good) that the individual expects the implementation of the contract to generate violates her sense of justice, she may refuse it even if she values its final result for her.

In consenting to such a contract, an individual determines that, regarding the three previous aspects, combined together as a whole, signing the contract is better than doing nothing (and maintaining the *status quo*). The information that this consent would reveal is much richer than what the preferences defined over final results that are the basic inputs of the evaluation in standard welfare economics encapsulate⁷, as, crucially, it also says something about the *trade-offs* that individuals are willing to make, in terms of welfare and freedom. The person who consents to bind herself and lose some significant opportunities in the hope of attaining a better situation is making such a trade-off, which indicates what is an acceptable compensation for the loss of her opportunities. By contrast, limiting the inputs of the evaluation to preferences defined over final results overlooks the fact that a change may be considered unacceptable because it involves losing too much freedom, even though the individual is better off as a result of this change⁸.

⁷and that, for instance, a series of purchases of private goods would reveal.

⁸In a different context, Fleurbaey (2006, 303-304) argues that a capability metrics based on set evaluation would lose sight of achievements by focusing exclusively on opportunities.

In Nozick's own version of individual rights, a coercive state intervention always violates the rights of individuals, even if it does not reduce individual freedom more than what they would be ready to accept in the context of a voluntary transaction. If we want to determine how such an intervention may be acceptable to avoid the 'catastrophic moral horror' that a situation of urgency may produce, we will need to change the definition of rights that is the core of Nozick's conception so as to amend his libertarianism. I propose to call this amended version 'extended libertarianism'. I will define it in the next section.

2 An ethics of simulated choices

What individuals control, in a public good problem, is essentially their choice of whether or not to contribute to the public good. What is beyond their control (except in very special circumstances) is the production of the public good. And yet, producing the public good is something individuals would choose to do if they could really do it. In this sense, it matters for freedom, provided that there can be freedom where there is no control. This point was made by Amartya Sen:

The freedom to live in an epidemic-free atmosphere may be important for us, and given the choice, we would choose to achieve that. But the controls of general epidemic preventing may not be in our hands—it may require national and possibly even international policies. If we do not have control over the process of elimination of epidemics, there is no more to be said, as far as our 'freedom as control' is concerned, in this field. But in a broader sense, the issue of freedom is still there. A public policy that eliminates epidemics is enhancing our freedom to lead the life—unbattered by epidemics—that we *would choose* to lead (Sen 1995, 65)

Unfortunately, Sen does not describe in greater detail this counterfactual choice, which he considers relevant to assessing an individual's freedom. It is

He recommends focusing instead on what Sen called 'refined functionings', which consists of the pair (capability set, achieved functioning vector). The kind of information I have in mind here would consist of a triple (former opportunity set, new opportunity set, final outcome), encapsulating the trade-off that individuals would make between losing opportunities and attaining a valuable outcome.

the reference to this counterfactual choice that allows Sen to conclude that the end of an epidemic improves individual freedom. The choice of stopping the epidemic is not a choice that someone can make on his own under normal circumstances, but it is a choice that one would want to make, and would make, in circumstances where one would have this opportunity. To elucidate the nature of the counterfactual choice that Sen alludes to, we need to identify those circumstances, and the exact trade-off that people would be willing to make to be able to live in an epidemic-free atmosphere.

As we shall see, the fact that these circumstances do not arise is a product of the public good problem, which prevents individuals from cooperating to produce the public good (especially if we are in a situation of urgency). The public good can be immensely valuable for individuals, and that may justify a coercive state intervention aiming at coordinating individuals' efforts to produce it. And if it can be justified in terms of freedom, the notion of freedom we need would not be tied to that of control, actual choice and opportunity. My claim is that coercion can preserve freedom, provided that the restrictions that are imposed on individuals are exactly the ones that they would impose on themselves if they were sufficient to produce the public good (that is, if the production of the public good were under their control). To accomplish this task, I will need to broaden the concept of freedom which is implicit in Nozick's version of libertarianism.

The libertarian approach is tied to a notion of 'liberty as control', as Sen puts it⁹. According to this conception, 'a person's liberty is related to the extent of the control that he or she has over decisions in certain specified spheres' (Sen 1982, 207). Contracts and other voluntary transactions are exercises of this freedom as control, because if someone has agreed to restrict their freedom in the future to get something in return (as is often the case with contracts), they have consented to everything they are bound to do. Coercion, on the other hand, take the levers of control out of individuals' hand. If we stick to this idea of freedom as control, it will be impossible to understand how building a collective capacity to put an end to an epidemic can enhance—or, as I will argue, preserve—individual freedom.

Sen's key argument against the notion of liberty as control is that there are many situations where individuals are not in control, and yet freedom is

⁹Sen has in view this particular passage from Nozick: 'Individual rights are co-possible; each person may exercise his rights as he chooses. the exercise of these rights fixes some features of the world' (Nozick 1974, 166).

at issue. Consider Sen's example of someone who, after an accident, is left bleeding and unconscious, in need of a blood transfusion¹⁰. A conception of freedom as control does not give us any guidance about what should be done to her out of concern for her freedom since the unconscious individual is no longer in a position to exercise her right to receive or refuse the transfusion. Yet someone who knows the person reasonably well could tell us if she has, for example, religious objections to receiving the transfusion. By considering the choices the person would have made had she been conscious, we extend that person's capacity to choose—and her freedom—to this situation; we can simulate her choice, just as if she were there. However, such a judgment in terms of freedom can hardly be justified on the basis of the notion of freedom as control. There is nothing that such a conception could tell us about what to do in this circumstance. We therefore need to add what Sen calls 'indirect liberty' or freedom.

According to Sen, we can say that someone's indirect freedom is better 'served' (Sen 2002, 396) in the case where she receives the transfusion, than in the case where she does not, provided that she would have chosen to receive it. To adapt Sen's perspective to Nozick's framework¹¹, I will say that receiving the transfusion 'preserves' the indirect freedom of someone who would have wanted it. Respecting someone's counterfactual choice in his absence simulates the exercise of a right that the individual would have chosen to exercise had he been present.

From a classic libertarian perspective, deciding for someone else seems to be permissible only if an act of *delegation* has been made. Certain decisions can be delegated to a proxy agent (as in the case of proxy voting), who is allowed to simulate the decisions that a person would have taken if she were

¹⁰See Sen (2002, 396).

¹¹The distinction between 'liberty as control' and 'indirect liberty' was made by Sen in response to an objection raised by Nozick about Sen's 'Paretian liberal' theorem. In essence, Nozick objected to Sen's definitions of rights in a social choice theory framework that rights 'fixes some feature of the world' prior to the application of a social choice procedure. Rights put constraints on the possible outcomes of the procedure. Sen responded that the social choice theory perspective can still be useful especially when 'liberty' is not conflated with control. The goal to integrate this 'indirect liberty' into the libertarian framework may thus appear surprising. But the value of Sen's argument can be acknowledged by libertarians since it brings to the fore the impossibility for advocates of 'liberty as control' to say anything relevant about fairly common situations (such as that of the unconscious person). This shows the limitations of the libertarian perspective on freedom.

When delegating a decision to someone else, I	Blood transfusion example:
(1) choose to delegate (and some agent to act on my behalf)	I authorize physicians...
(2) choose a set of circumstances in which this person is allowed to choose	... in matters relevant to blood transfusion and if I am unconscious...
(3) choose what she will choose in these circumstances.	to perform the transfusion

Table 1: Indirect liberty and delegation

able to do it¹². In the blood transfusion example however, something crucial is missing: the decision to delegate has not been made—if the person had already stated that she wanted to receive a blood transfusion, we would still be in the realm of freedom as control. But suppose that we could be reasonably sure that the person would have made this act of delegation—letting physicians take care of her body and perform the transfusion. What we need to make sure is that every aspect of this act of delegation would have been consented by the person. The decision to delegate can be broken down into different choices, that would need to be simulated. They feature in the left column of table 2.1.

The notion of indirect liberty or freedom¹³ involves that it is sometimes legitimate for a third party (here, the physicians) to intervene in someone’s life, even though she has not authorized them by an explicit act of delegation to decide her place. I will call such an intervention which replicates exactly the choices that someone would have made ‘simulated choice’. Simulating choice is relevant only if the person is really not in a position to make those choices and an act of delegation could not have taken place—the first

¹²This process of simulation, and the reference to some act of delegation, is also present in Sen’s analysis, who uses the example of a proof-reader: ‘The proof-reader will be doing what I would, counterfactually, have done if I were to correct all the proofs myself with eyes as efficient as that of the proof-reader’ (Sen 1995, 64). The proof-reader simulates the decision that I would have made. Even if Sen does not say it, he is normally allowed to do it because I (the author) have agreed to let him do that. But Sen seems to imply that the simple fact that some choices are effectively simulated (with or without consent) is sufficient to conclude that our freedom is enhanced. I will propose here a more ethically demanding ethics of simulated choices.

¹³I use the two terms interchangeably.

choice described in the above table cannot be made. This reflects the idea, also shared by Sen, that freedom as control has some priority over indirect freedom.

- *Condition 1.* An intervention simulating choices is permissible only if the person concerned did not already voluntarily delegate this choice to someone else, and was not in a position to do it.

The second condition is not mentioned by Sen, but it is crucial to make an intervention simulating choices as closely as possible as an act of delegation. Individuals choose to delegate some decision tasks to others because they would get bad or worse results without these others intervening to simulate their choices. But this delegation decision comes with many strings attached: a delegation is not an abdication of someone's will, but its expansion. An act of delegation would specify a future set of circumstances in which the proxy agent is allowed to choose, which determines the range of decisions that can be taken by this agent—this is the second choice described in the above table. One can represent this choice as a choice between opportunity sets: someone trades off the opportunity set he would have without delegating for the opportunity set he would have if he were the proxy agent. Someone who cannot cast a vote at election time because he must attend a funeral elsewhere can delegate to a proxy agent the task of voting for his favourite candidate. Without proxy voting, this person can only choose between casting a vote or attending the funeral. With proxy voting, he can do both (and is better off as a result). He has exchanged a less valuable opportunity for a better one. In simulating someone's choice of a future set of circumstances in which the proxy agent would choose on his behalf, we must make sure that the individual would be ready to trade off the opportunity set that he would have without the intervention for some opportunity set that he could have (through the intermediary of the proxy agent) if it were possible to delegate¹⁴.

- *Condition 2.* An intervention simulating choices is permissible only if the person concerned would choose to exchange the opportunity set he would have without the intervention for some opportunity set (call it

¹⁴This discussion supposes that individuals' preferences over opportunity sets are stable over time: at any point in time, an agent rank two sets in the exact same way. Therefore, whatever may be the circumstances of the decision of delegating, the choice of a set would be the same.

O), accessible only to a proxy agent, that contains the alternative that the intervention implements.

The intervention should therefore simulate the decision to trade opportunity sets which is implied in the act of delegating. It should also, of course, simulate the choice that the individual would want the proxy agent to make. This is the third condition:

- *Condition 3.* An intervention simulating choices is permissible only if the person would choose the alternative (call it a) that the intervention implements in the opportunity set O .

The second condition is essential to define extended libertarianism and compare it to other approaches. Some economists and philosophers have already explored the issues I am raising here (e.g. Duflo 2012, Sunstein 2019). Esther Duflo, in particular, defends a form of paternalism based on the idea that it is desirable to avoid imposing certain choices on individuals that unnecessarily complicate the decision-making process or are time-consuming. For example, for Duflo, the fact that individuals in poor countries have access to both non-potable water and potable water (by boiling the former, for example), whereas individuals in rich countries only have access to potable water (as they would have to go through some complications to get some non-potable water) does not show that the former are freer, or better off, than the latter. The undesirability of non-potable water—the fact that, in Sen’s terms, nobody *would* choose to drink non-potable water—, would justify removing this option and switching to the situation where everyone can only drink potable water.

From Duflo’s point of view, then, it would not be illegitimate to restrict the choice of options through coercive state intervention, provided that we eliminate only parasitic options, which only make the decision more complex because they are undesirable—in the sense that nobody would choose them under reasonable circumstances. This point of view is, of course, at odds with the classical libertarian approach, since the elimination of undesirable options would violate the rights of individuals to retain them if they correspond to a rightful exercise of their rights. It is true that, in a libertarian society, individuals could freely agree to give up these parasitic options. They could thus ‘choose not to choose’ (as Sunstein 2015 puts it) and make arrangements not to have these options or to delegate to another agent the task of doing

these choices for them. People who hire life coaches, personal assistants or rely on family members to make decisions on their behalf do exactly that.

But the possibility to delegate, which a libertarian framework offers, is probably not enough, in Duflo's view, as this decision, or more generally the decision to 'choose not to choose' is itself costly as it requires time and energy, particularly from poor people who have a limited psychological 'bandwidth' because of poverty¹⁵, but may be those who need it the most. A coercive intervention that restricts individual choices may therefore be desirable to restore what Sunstein (2019) calls the 'navigability' of individual choices. The intervention would implement the alternative that individuals would choose, simplifying the decision process and making their lives easier. But from the perspective of extended libertarianism that I just defined, it is not enough to point at evidence that some options are parasitic, or make the choice process too complex or time-consuming, to make such an intervention permissible. It is not enough that people get what they *would* choose as a result of the intervention; for there is no assurance that individuals would be willing to trade off the restriction of their choices for the outcome of the intervention. However, if they would accept to delegate these difficult choices to someone else, but could not do it because they are trapped in poverty or do not have enough 'bandwidth', we can be sure that we did not impose on individuals more constraints than they would impose on themselves.

The essential difference between Duflo's paternalism and extended libertarianism's justification of a coercive intervention is therefore that the latter requires, in addition to the fact that individuals cannot really avoid some difficult choices by making other people make decisions on their behalf, that *they would if they could*. In this sense, extended libertarianism is more ethically demanding and requires more information on individuals' counterfactual choices. It is the price to pay to be able to preserve individual freedom, in a meaningful sense.

Let us now return to the case of public goods. An intervention simulating choice would have to be based on a delegating decision which would involve multiple individuals, as an isolated individual cannot produce the public good by herself. In a libertarian society, individuals may accept Tabbarok's dominance assurance contract, which gives everyone an incentive to contribute to the public good. Acceptance of this contract can be seen as

¹⁵'Bandwidth captures the brain's ability to perform the basic functions that underlie higher-order behavior and decision' Schilbach et al. (2016).

a form of delegation: by promising to contribute if the contract succeeds, the individual allows the executor of the contract to make him contribute (or not) in the situation where the dominance contract succeeds—that is, in the situation where enough individuals have accepted the contract to make it work. It is no longer, in this case, up to the individual to choose to contribute or not, and at the same time, the choices are not the same as before, since now contributing leads to the production of the public good. The situation is therefore formally similar to that of a delegation, as I have described it. If individuals would agree to sign a dominance assurance contract, they would satisfy the two last conditions that I defined earlier.

However, the fact that the burden of contributing must be shared among different individuals adds another layer of complexity. An additional condition must therefore be added: *who* is asked to contribute may indeed be of importance for the person who considers signing the contract. Suppose that all individuals would accept the contract, but the executor would only ask that the poor, or some particularly disadvantaged part of the population, to contribute. As some would find this particularly unfair, they would not consent to sign such a contract and would prefer that the public good should not be produced at the cost of such injustice. We must therefore add a fourth condition for a coercive intervention based on simulated choice to be permissible:

- *Condition 4.* An intervention simulating choices is permissible only if the person who would choose a in opportunity set O knows the distribution of benefits and burdens that such a choice entails.

This knowledge of the final result of the person’s choice for others guarantees that she actually consents to the distributive consequences of this choice. We must be sure that all the relevant trade-offs (between one’s freedom, or other people’s result, and one’s final result for oneself) have been done by individuals. Otherwise, we would ignore a relevant source of concern for individuals, which libertarian freedom addresses (since individuals can refuse to engage in a social change that has distributive consequences that they find unfair), and that extended libertarianism should also acknowledge.

I claim that these four previous necessary conditions are jointly sufficient to make a coercive state intervention permissible. This would allow for the existence of a more-than-minimal state. Rights are, in Nozick’s framework, materialized by a set of constraints imposed on the actions of individuals.

They are all the constraints that an individual's right imposes on the action of others, as required by the doctrine of 'rights as side constraints'. For a coercive state intervention to be possible in such a framework, it must be that the state has some rights of its own, which are not the result of past transfers of rights from individuals and imposes some constraints on the actions of individuals—such as the obligation to contribute to the public good in a situation of urgency. But such a right arises *as if* it was the result of a transfer of rights from individuals. In that respect, extended libertarianism remains distinctively libertarian.

I will now reformulate the four conditions above so that they can be applied to a public good model, which will be done in the next section. Let us call S_1 the *status quo* situation, S_2 the situation post-intervention, $C_i(S)$ the opportunity set that individual i has in some situation S . The rights of individuals should be defined such that they would not be infringed by an intervention which would take us from S_1 to S_2 and be such that:

1. S_1 is a situation of urgency.
2. every individual i concerned by the intervention would accept to exchange $C_i(S_1)$ for $C_i(S'_1)$, where S'_1 is a *hypothetical* situation such that the opportunity sets $C_i(S'_1)$ of every i are mutually compatible—provided that they would get what they *would* choose in $C_i(S'_1)$.
3. the choice that every i would make in $C_i(S'_1)$ produces situation S_2 and i knows it.

The first condition ensures that the coercive intervention was unavoidable: individuals could not set up a dominance assurance contract to produce the desired result. The second condition considers a hypothetical situation S'_1 , which provides every individual with opportunities that they would not have in a *status quo* situation. As was emphasized earlier, we delegate a choice to someone else is because the set of choices that the proxy agent can make (in our name) is better, from our point of view, than the set of choices that we would have without delegating. The second condition reflects exactly that: individuals would be ready to trade their opportunities in the *status quo* situation for the opportunities they have in the hypothetical situation—which is hypothetical because, in a situation of urgency, these opportunities would never be directly available to them. The fact that opportunity sets are mutually compatible ensures that the intervention simulates choices which could

really have taken place. Finally, the fact that every individual knows that the opportunity selected in the hypothetical opportunity set will lead to the post-intervention situation (condition 3) ensures that consent has been given to let the distributive consequences of the intervention happen.

To summarize the argument: extended libertarianism states that it is legitimate to use coercion only if the result of a coercive intervention simulates the series of choices an individual would make if he were in a position to delegate a decision he would want to make, and would actually make that delegation. Libertarianism considers such delegation legitimate, but it is sometimes made impossible or very costly by circumstances. It is therefore desirable to amend libertarianism, to allow for a coercive intervention which would not restrict freedom more than what individuals would accept themselves if they could make this act of delegation. This type of intervention does not preserve freedom as control (which is characteristic of libertarianism), since coercion violates the rights of individuals, defined in a standard libertarian way. But it does preserve indirect freedom, in the sense that individuals would have made the relevant trade-offs between the final outcome and a certain loss of freedom that the intervention simulates. But because of the priority of freedom as control over indirect freedom, extended libertarianism, which gives an important role to the state, only applies when delegating is impossible even if it is desirable, in particular when we are in a situation of urgency.

3 Application

How do the examples of a collective response to disasters which were presented in the introduction—building a dam to avoid imminent flooding, creating a conscript army to fight an invading military power, setting up carbon quotas to avoid fast global warming, setting up a lockdown to prevent the spread of an epidemic—relate to the model I proposed in the first section? Among the population that is concerned by the public good and can contribute, the contribution can be seen as binary, and the public good is produced when a certain amount of contributions are made. In every case, it is possible, without needing too much information, to fix a threshold such that we can be reasonably sure that if it is reached, the public good is produced. In each of these situations, waiting for too long has a huge opportunity cost because of the decrease (increase) of the value (cost) of the public good with

time. We thus are in situations of urgency, which would, according to the public good argument, justify a coercive intervention. But how could it preserve freedom?

We need to check if the three previous conditions defined in the last section are verified. Since the examples are chosen to exemplify situations of urgency, the first condition is satisfied. To see if it is also the case for the other conditions, some assumptions about individual preferences need to be made. I will assume that, as in the structure of the public good game described in the first section, all individuals taken from the relevant population would prefer the situation in which the public good is produced, whether or not they have contributed to it. However, they prefer to contribute only when they are *pivotal* in producing the public good—because they would pay the cost associated with their contribution for nothing if there are not enough people ready to contribute to the public good, or if there are already too much. It is precisely this structure of preferences that makes a collective response difficult to organize, but also possible to reach (otherwise there would be no hope of preserving freedom, as it was defined in the last section). The fact that a majority of governments of democratic advanced economies have chosen to impose strict lockdowns at the start of the recent COVID epidemic suggests that public officials believed at that time that key features of the public good model were relevant.

Indeed, as the *status quo* is a Nash equilibrium, we can expect it to persist in the absence of external intervention. The intervention to be evaluated consists of forcing a sufficient number of individuals to contribute, equal to the critical threshold beyond which we can be assured that the public good is produced. In the case of lockdowns, on which I will focus now, the public intervention sees to it that the major part of the population is forced to isolate themselves for a few weeks. At the *status quo* S_1 , all individuals would prefer that the epidemic is ended, whether they self-isolate or not¹⁶. I will make the additional assumption—which is not part of the traditional public good game—that individuals would accept to sign a dominance assurance contract, as described in the first section, if they could. Since a dominance assurance contract provides them with the opportunity to be pivotal in producing the

¹⁶Obviously, in a diverse society, preferences may differ and some people would never accept to self-isolate. But if such individuals are a small minority, as I suppose they are, we can restrict ourselves to the consideration of the majority who would self-isolate conditionally—because forcing people to do what they would never accept cannot preserve their freedom.

public good, we could expect individuals who value highly the public good and have the kind of preferences described in the previous paragraph to accept it. But in the ‘extended libertarian’ framework which I propose, one would also need to make sure that the cost in terms of loss of control that the contract involves is accepted.

At the *status quo* S_1 , individuals have the opportunity to self-isolate or not, but doing so independently from others will not be sufficient to end the epidemics, as it is expected that other individuals at the *status quo* will not contribute. I will now describe a hypothetical situation S'_1 which corresponds to the situation where a dominance assurance contract is proposed to a relevant number of individuals and where it is expected that, with effective coordination, the contract will be successful. Such a dominance assurance contract would involve the obligation to self-isolate for several weeks for those K individuals, who, at equilibrium, accept it. The expected success of the contract involves that every individual accepting it is pivotal in ending the epidemics—which means that by being among the K individuals accepting the contract, one effectively has control over the end of the epidemics, since the contract fails if they withdraw from the contract (the *status quo* persists) and it succeeds if they sign it. In this hypothetical situation S'_1 , the associated opportunity set $C(S'_1)$ contains the option to self-isolate and end the epidemics and the option to not self-isolate and return to the *status quo*. Compare it with $C(S_1)$, the opportunity set associated with the *status quo* situation: it contains the option to self-isolate without ending the epidemics, and to not self-isolate with the same result. In light of the previous assumptions, individuals would find it better to face the opportunities they have in the hypothetical situation S'_1 . The fact that they would accept the assurance contract shows that they would prefer being in this hypothetical position where they are pivotal in ending the epidemic rather than maintaining the *status quo*. This could be rationalized by saying that $C(S'_1)$ gives a higher indirect utility to the agents, or that in terms of freedom of choice $C(S'_1)$ dominates $C(S_1)$ because the option to self-isolate and end the epidemics dominates the option to not self-isolate and maintain the *status quo*, and the option to not self-isolate and maintain the *status quo* dominates the option to self-isolate and maintain the *status quo*. From an informational point of view, what is needed is just that individuals would effectively exchange $C(S'_1)$ for $C(S_1)$, which is guaranteed by the fact that individuals would accept a dominance assurance contract.

We also need to check if individuals would choose to self-isolate in the

hypothetical situation, so as to produce the final situation S_2 where the epidemics ended whereas a number of individuals exactly equal to the critical threshold have also contributed. This is indeed the case, if individuals have the kind of preferences that a public good game assigns to them: producing the public good is all that matters if they can really control its production, which is the case here. Condition 2 is therefore satisfied. A number of individuals equal to the threshold K would accept to trade the opportunities they have in the *status quo* for those they have in the hypothetical situation, and then would choose to self-isolate in the latter situation, thereby ending the epidemics for all. A public coercive intervention would simply contract these two stages into one by imposing on these individuals to self-isolate, as they would have preferred if we were not in a situation of urgency and an assurance contract was proposed to them. This produces directly the situation S_2 . We know that individuals would willingly go through these stages, as the trade-off involved between freedom and the final result is exactly the one that they would make in accepting the dominance assurance contract.

A final important point to discuss is whether or not S_2 is seen as just, which is the question of whether condition 3 is satisfied or not. As we have seen, individuals may refuse a dominance assurance contract because it leads to unjust results, for example, because those who are asked to contribute are otherwise more disadvantaged than others (imagine that only ordinary people are asked to self-isolate, while rich people or politicians are allowed to party as hard as they want). A significant number of individuals would probably not have accepted the contract in these conditions. This implies that a coercive intervention could not preserve freedom, as it would force individuals to make a particular trade-off that they are not willing to make, and would not really simulate their choices. In practice, it may be difficult to make sure that people would not object to the distributive consequences of a particular coercive state intervention, but this condition is necessary for the intervention to be freedom-preserving under extended libertarianism¹⁷.

¹⁷A simple way to bypass the issue of unfairness would be to require that everyone who can contribute does it, which would mean that we fix $K = N$. This would change nothing to the logic behind the design of the intervention, but would be much less efficient.

Conclusion

To conclude, I will consider what could be replied, in light of the previous discussion, to someone who complains that a lockdown is liberticide. We could ask her the following questions: (1) would you like to be in a position where you could end the epidemic just by self-isolating? If your answer is yes, then in proposing you an assurance contract, the government would do exactly that. (2) if you could end the epidemics just by self-isolating, would you do it? If your answer is yes, then by forcing you to self-isolate, the government does exactly what you would have done to yourself if you had accepted the contract that you would have wanted to sign. In sum, the government, in a situation of urgency, imposes on individuals nothing more than what they would impose on themselves in a favourable situation that they would have chosen themselves. Under these conditions, a lockdown is not liberticide. It preserves the freedom of everyone.

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