As a reaction to COVID-19, many democratic countries around the world imposed a curfew on their entire population. Schools, shops, public and private buildings were shut down while all forms of public assembly were temporarily banned. Strong restrictions were imposed on liberties in many domains of the quotidian life of citizens to preclude a collapse of the health system. From the perspective of political philosophy, the normative legitimacy of lockdown policies needs to be investigated. Under which conditions can large-scale interventions in the private and public spheres be justified? In this article, I discuss contractualist political theory as a potential framework for assessing the restrictions as a response to the menace of a global pandemic. I will apply the reflections of Robert Nozick in the first part of his famous *Anarchy, State, and Utopia*. His reflections on how a society should deal with risks are of great value in assessing policies to combat the spread of viruses. Nozick introduces a surprising element in his theory that is an important factor for a potential justification of lockdown policies – the incidence of fear. Because people are afraid of the worst outcome, they are willing to prohibit conduct that includes risks, and they are willing to restrict their own liberty to engage in that conduct.

**Key words** COVID-19 • lockdown • contractualism • Robert Nozick • fear

**Key messages**
- Argues for a justification of lockdown policies by hypothetical consent.
- Shows why such consent is contingent upon fear from risks.
- Critically reflects the justificatory role of fear.

To cite this article: Moser, E. (2021) Nozick, the pandemic and fear, *Global Discourse*, vol 11, no 3, 355–371, DOI: 10.1332/204378921X16172755430067
Introduction

The emergence of the new coronavirus (SARS-CoV-2) in 2020 brought about a major global crisis. Today, around 100 million people have been infected worldwide, and over 2 million people had died of COVID-19 by January 2021 (Worldometers, 2021). Almost all states across the world implemented radical measures to limit the spread of the disease. These measures were unprecedented in post-war history. Few people have witnessed in their own lifetimes governments closing airports and borders. Many democratic countries around the world imposed a curfew on their entire population. Schools, shops, public and private buildings were shut down while all forms of public assembly were temporarily banned. Strong restrictions were imposed on liberties in many domains of the quotidian life of citizens to preclude a collapse of the health system.

But this lockdown is really among the strictest political measures to be taken in the face of a risk. As the Director-General of the World Health Organization (WHO) stated in March 2020 (WHO, 2020b): ‘Lockdowns are a blunt instrument, and with the right mix of targeted measures, further national lockdowns can be avoided.’ Still, at least at the beginning of the crisis, most citizens of OECD countries seemed to support drastic measures against the disease. The vast majority of people did not perceive their government’s efforts as illegitimate or non-democratic. In general, citizens acknowledged the threat of the pandemic as a high risk for health and life, and were, therefore, willing to restrict their own liberties to prevent the worst outcome. However, the factual legitimacy – the high approval rates – is not sufficient to morally justify strong restrictions of individual rights.

From the perspective of political philosophy, the normative legitimacy of lockdown policies needs to be investigated. Under which conditions can large-scale interventions in the private and public spheres be justified? In this article, I discuss contractualist political theory as a potential framework for assessing the restrictions as a response to the menace of a global pandemic. On the one hand, the account explains why, and under which conditions, people are willing to relinquish their liberties in favour of health and security. On the other hand, the account shows how large-scale restrictions of individual liberties might be justified.

The following enquiry provides a philosophical framework for assessing the ‘second wave’ of lockdown policies as well as future political reactions to pandemic risks. As health economists Jamison Pike et al (2014: 18519) observed well before the current pandemic: ‘Emerging pandemics are increasing in frequency, threatening global health and economic growth.’ In the face of a regular occurrence of deadly diseases, political philosophy really needs to ask the question if, in the future, we should react to a potential pandemic in the same way as we have for COVID-19.

As an exercise in contractualist theory, I will apply the reflections of Robert Nozick in the first part of his famous Anarchy, State, and Utopia (Nozick, 1974, hereafter, ASU). In my opinion, his reflections on how a society should deal with risks are of great value in assessing policies to combat the spread of viruses. Nozick’s work is (in-) famous primarily for his relentless defence of a minimal state and his fierce critique of distributive fiscal policies. Throughout the study, he does not once mention the possibility of a pandemic. Why then read Nozick?

First, public discourse on politics during the coronavirus crisis has so far largely neglected rights-based contractualist theories of the justification of laws and policies designed to combat the spread of the virus. Predominantly, political arguments and
public health explanations seem to follow a consequentialist route. They discuss the merits of certain policies, the reduction of risk, and compare them with their societal and economic costs. Rarely is the question asked from the perspective of the individual right holder. I believe that policies have to do justice to the fact that people have rights to their liberties, and, in principle, they have to consent to encroachments on those liberties.

Second, in contrast to other contractualist theories, Nozick’s account is valuable because a substantial part is dedicated to the question of how we should deal with risks. He is aware of the fact that rights infringements caused by risky behaviour are a problem for any contractualist theory, and that this explains why other contractualists before him avoided investigating the issue (ASU: 74). Undoubtedly, the normative dimension of the COVID-19 pandemic must be studied in terms of risk. Therefore, what Nozick has to say is of potential interest.

Third, Nozick introduces a surprising element in his theory that is an important factor for a potential justification of lockdown policies: the incidence of fear. Because people are afraid of the worst outcome, they are willing to prohibit conduct that includes risks, and they are willing to restrict their own liberty to engage in that conduct. As I will argue, fear has been a major motivation for individual behaviour during the pandemic. Nozick’s theory can show how fear can provide a justificatory ground for lockdown policies.

I proceed in three steps. In the next section, I defend a contractualist account of the justification of COVID-19 lockdown policies. After that, I sketch Nozick’s contractualist justification of governmental coercion and provide the framework for thinking about risks. The element of fear will be explained with respect to its justificatory role. In the penultimate section, I outline major dimensions of the concept of fear within Nozick’s (and others’) contractualist account. I will conclude with a short summary and a plea for a reflective stance towards the emotion of fear.

**A rights-based assessment**

What does a rights-based account for a justification of laws and policies consist of? First, it assumes that individuals – by nature or convention – are endowed with a set of rights. They have certain assets – their life, their liberty, their property, and so on – and, with respect to these assets, individuals have a specific domain of discretion. Individuals are free to make use of their rights and they can transfer and relinquish them. There are obligations that restrict their freedom to interfere with other individuals’ use of their rights, and rules that prevent government from implementing laws that restrict individuals’ use of their rights.

Second, in asking what justifies laws and their enforcement through governmental coercion, the rights-based account assumes that these freedoms, obligations and rules are moral facts. They are not necessarily – or not yet – positive binding law. However, a justified impairment of the individual assets must respect these moral facts.

**Contractualist justification of policies**

From a contractualist viewpoint, there is only one possible justification for a government to ignore or to infringe the rules that protect individual assets: the asset holder must have given explicit or tacit consent to it. In agreeing to restrict
their liberty, individuals may empower the state to dispose of their rights. Hence, a government can be assigned the task of restricting the liberties of individuals. It is likely—and this is the core claim of contractualist political theories—that individuals would, in order to better protect their assets, want to install an institution that coercively enforces restrictions of their own liberties (Tuck, 1979). Therefore, the members of a society would set up an implicit contract among each other that includes the mutual relinquishing of their liberties and the authorisation of a centralised institution with the power to restrict those liberties.

How can this theory of justification of governmental power be applied to the question of the legitimacy of policies to prevent the spread of the coronavirus disease? To limit the negative impact of the coronavirus on health and to reduce fatalities, individuals may be ready to accept policies and ad hoc laws that restrict their liberties—their freedom of motion, migration and travelling, assembly, work and business. Those restrictions reduce the risk of people infecting one another with the virus and make them less likely to suffer impairment of their health, or even death.

In a contractualist framework, the justification of these restrictions is dependent on individuals’ tacit consent. Consent, in turn, is dependent on the individual’s own evaluation of their different assets—freedom, on the one hand, and health or life, on the other. It is neither necessary nor sufficient that, from a third-person perspective, the restrictions are beneficial for the individual. Only the first-person evaluation of the right holder is necessary to judge whether encroachments on rights are justified.

Furthermore, it is not sufficient that a majority decides to put the restrictions in place. The contractualist justification of a lockdown needs to respect the fact that all individuals have rights to their basic liberties and that a government can legitimately encroach on these rights only if all individuals implicitly consent. One may object to this idea that, even if implicit, unanimous consent is illusory. However, during the coronavirus crisis, in almost all European countries, we have been able to observe something that comes very close to a social contract. At least in the early stage of the pandemic until May 2020, approval for governmental measures to combat the spread of the virus1 was conspicuously high—such broad support for governmental action is rarely seen in democratic countries. It seems that the vast majority of citizens were willing to give up their freedoms in order to protect their health and lives. Public opinion on restrictions during the early phase of the coronavirus crisis, therefore, almost amounted to an ‘actual social contract’.

Now, coming close is not the same as being there. The longer individuals are deprived of their basic liberties, the more the public approval for the restrictions diminishes. A contractualist theory cannot rely on unanimous actual consent. Therefore, the theory does not argue that an agreement, in fact, occurs. The contractualist argumentative strategy is two-fold. On the one hand, the theory provides a hypothetical explanation of how all individuals could be led to agree to a social contract. On the other hand, the conditions under which this agreement would be achieved are formulated as side constraints for justified government.

This hypothetical explanation provides for the normative framework to assess the actual political system. As regards the COVID–19 restrictions, a contractualist theorist must show under which conditions all individuals could consent to the removal of their basic liberties. The question is: when are people ready to trade their freedom for the protection of their health and lives? This pattern of argumentation, in my
opinion, has some advantages over the now predominant consequentialist approach to assessing policies that aim to combat the spread of the virus.

Problems of a consequentialist approach

Consequentialist grounds for assessing policies focus exclusively on the value of the outcome of different actions. With respect to the question of whether a lockdown is justified, two outcomes need to be compared: the situation that would result if no action were taken, and the situation that would obtain if restrictions were put in place.

There are positive and negative aspects to both. As some have warned, besides the deprivation of liberty there are other negative impacts of the lockdown that have been neglected, such as psychological problems (Mucci et al., 2020; Rubin and Wessely, 2020), and an increase in domestic violence (Russell, 2020), among many others. The most discussed costs of the lockdown, however, are monetary. Governments have caused an economic downswing and temporary vast unemployment. Furthermore, they have accepted considerable fiscal costs to stimulate the economy,² which may result in tax increases, austerity politics or inflation.

In sum, however, there are strong consequentialist reasons in favour of the restrictions. Most people consider the positive health impact and the saving of lives to be more valuable than the negative psychological and health impacts and the economic and financial problems. On these grounds, most OECD countries chose to implement restrictions in order to save lives and to avoid health problems for infected persons. As I shall argue, however, the consequentialist argumentation has three major philosophical problems.

First, an exclusively consequentialist account of the justification of lockdown policies cannot explain why far-reaching encroachments on individual freedoms can be regarded only as a measure of last resort, and why, as soon as developments permit, the restrictions must be lifted. Although many scientists, experts and politicians expressed their admiration for the Chinese government’s successful control of the outbreak of the COVID-19 pandemic and its effective reduction of the number of infected people (Kupferschmidt and Cohen, 2020), one also has to admit that its success was possible only with the help of severe infringements of rights. The same measures are not available in liberal democracies – and for good reason. They sacrifice individuals’ liberties (without any potential consent) for the greater good.

Second, there is a major problem in weighing the value of life against the value of liberty, the psychological aspects, and the economic costs (Gostin et al., 2020: 11). These different values are not always comparable (Griffin, 1986; Chang, 1997). Even if we grant that, within the domain of healthcare, the net value of each outcome can be determined, there is still the problem that we cannot answer the question of how much a single life is worth in terms of money. Obviously, the majority of the citizens of OECD states agreed that the economic costs of saving lives in this specific situation were worth paying. But what if these costs had been much higher – for example, what if there were to be a long period of recession, and mass unemployment? At what point would people be ready to give up their conviction that saving lives and health should have priority?

Consequentialist cost–benefit analysis necessarily runs into these difficult questions (Adler et al., 2020). In my opinion, the values of life and liberty, and, especially, the values of life and money are incommensurable. An individual person might
well compare for themselves the values of life, health, liberty and money. But a policymaker, political institution, or expert committee cannot always do so from a third-person perspective.

Third, one could argue that a consequentialist account could be supplemented with side constraints. For instance, the International Health Regulations of the WHO can be interpreted as adopting a side-constrained consequentialist approach. According to its constitution, the organisation’s objective is ‘the attainment by all peoples of the highest possible level of health’ (WHO, 2020a: 1), whereas the Health Regulations state: ‘The implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons’ (WHO, 2005: 3, §1).

This idea is highly intuitive in respect of the fight against the pandemic. However, the account is not helpful if it does not specify the moral weight of the side constraints. Concerning the coronavirus lockdown, to regard liberty rights as any sort of constraints would be somewhat hypocritical since ‘constraints’ are supposed to be boundaries that cannot be crossed. Especially in the early months of the coronavirus crisis, we witnessed that even the most basic liberties, such as the freedom of work and freedom of assembly, were sacrificed to the common objective of fighting the spread of the virus.

A side-constrained utilitarian account could incorporate consent as a requirement for justified encroachments. However, in order to show the conditions under which voluntary agreement is likely to occur, the defender of the side-constrained utilitarian account needs, for the most part, to abandon utilitarianism and argue within a framework very much resembling a rights-based contractualist account.

The requirements of a contractualist justification

A rights-based contractualist justification of COVID-19 policies needs to account for individuals’ consenting to give up their liberties – and this requirement is more demanding than the mere desirability of an outcome. Two main features distinguish a contractualist approach from consequentialism.

First, the assessment of the value of different outcomes is ‘decentralised’. It is not assumed that experts, policymakers or politicians know best how much a life is worth, and that, by calculation of the weight of values, they can find out which option is preferable on objective grounds. Instead, it is assumed that policies can be justified only if individuals themselves could, in principle, agree to having their rights encroached on. Therefore, the account does not need to take the restrictive assumption of commensurability of values from a third-person perspective. We need assume only that individuals can decide from a first-person perspective how much value they attach to their own rights – life or liberty.

Second, for a contractualist justification to apply, it is necessary not only that the benefits of a policy outweigh its costs but also that the benefits possibly outweigh the costs for each individual. Otherwise, we cannot assume that individuals would voluntarily relinquish their rights. In economists’ terms, this amounts to a requirement of Pareto efficiency (Pareto, 2014): an action is assumed to be Pareto-efficient only if at least one person benefits from it and no other person is put in a worse-off position.
Nozick’s rights-based justification of restrictions

Nozick’s rights-based account differs from the traditional contractualist theories of, for example, Thomas Hobbes (2012) [1651] or John Locke (1980) [1690], in that it does not assume any actual historical event led the people to agree to being governed by a state. It is also distinct from the contractualist theory of John Rawls (1971), as it does not conceptualise certain ideal conditions – the ‘veil of ignorance’ – under which individuals are able to reflect on the principles of justice. Nozick chooses a different path of argumentation. He imagines a hypothetical history of voluntary interacting individuals who agree to install political institutions that are to govern them.

The hypothetical history explains how, from a situation in which no centralised coercive power exists, a political system ‘naturally’ evolves. The history is hypothetical, since it does not provide an adequate picture of how – in the history of mankind – political bodies, in fact, emerged. It explains how they could have emerged; how people could have moved from a just situation, in which they are naturally endowed with rights, to a just situation, in which a government is in place. The transition from the former to the latter is contingent on rational individuals’ voluntary use and transfer of their rights, an outcome that is justified through each person’s individually-given consent.

One might legitimately ask what scientific value can be attributed to a philosopher’s imagination of hypothetical histories. In fact, the explanatory power of Nozick’s enquiry is poor. The interesting dimension of his account is not its descriptive adequacy of causal events but instead the normative conclusions we can draw from them. Nozick outlines the possibility of a series of events that take place in an ethically justified manner. If this development is possible, it outlines conditions under which a justified state of affairs might emerge – and these conditions are then the moral benchmarks for a political system.

Nozick’s hypothetical history will be applied to the philosophical question of whether current coronavirus policies are justified. What I outline here is not an investigation into the empirical question of what causal forces led governments to implement a lockdown. Rather I consider how individuals in a state without any pandemic prevention rules would come up with a response to the pandemic that entailed the voluntary surrender of their liberties.

Justification of government

The starting point is a conception of a state of nature, a situation in which people find themselves without a centralised institution that implements laws and enforces them by means of sanctions. Individuals, Nozick assumes, are similar to those described in John Locke’s Second Treatise of Government (1980: I). They are free to do what they want but they must also respect the ‘law of nature’ that obliges them to respect others’ life, liberty and property.

In accordance with the natural law tradition, Nozick presupposes that individuals, by nature, possess rights – rights to life, to bodily integrity, to liberty, and to property. Furthermore, he makes anthropological assumptions about the needs, desires and motives of people, and their capability of making instrumentally reasonable judgements about fulfilling them.

However, it may (and frequently does) occur that some people ‘transgress’ the bounds of the law of nature. People live at risk of having their life, liberty and
property violated. Individuals need defence against such transgressions and, if they suffer a violation, they will want compensation for their loss. Individuals therefore have a strong incentive to transcend the state of nature. The solution they choose is to outsource their freedom to enforce their claims to compensation and retaliation to neutral private ‘protective agencies’ which apply reliable norms, rules, and standards of judgement to cases of conflict (ASU: 13). ‘Out of anarchy, pressed by spontaneous groupings, mutual-protection associations, division of labour, market pressures, economies of scale, and rational self-interest there arises something very much resembling a minimal state …’ (ASU: 16–17).

A similar hypothetical history can be narrated, not to show under which circumstances a state might be justified, but with regard to a specific policy issue. Individuals hold rights which might potentially be infringed by the behaviour of other people. The potential for infringement leads them to accept laws that regulate conduct. Individuals are, therefore, willing to give up some of their liberty rights in order to have other rights secured. A lockdown policy can be justified if there is a hypothetical history in which individuals are willing to abandon their freedom of movement, assembly, work, in order to reduce the risk of being killed or suffering health impairments.

Prohibition

As mentioned above, rights can be secured in two different ways: The state can either prohibit conduct that leads to a transgression, or it can make transgressors compensate those individuals whose rights they have infringed. So, Nozick asks the crucial question: what reasons speak in favour of prohibiting conduct rather than adopting a merely compensatory scheme (ASU: 58–59)?

A lockdown to avoid infections altogether (or, at least, to reduce the number of infections to a magnitude that is manageable by the health system) can be regarded as protecting the rights to health and life with the help of prohibitions. Of course, a complete lockdown includes heavy encroachments on fundamental rights. But in principle, every single regulation includes a prohibition of its own. When a person is deprived of their ability to make a living, they are deprived of a fundamental right and the requirements for justification might be very demanding. When, in contrast, a person is obliged to wear a mask in public buildings, they might readily do so without questioning the merits of the obligation. Though very different in their level of demands, the contractualist strategy for defending these different restraints has the same structure. It asks: would people be ready to prohibit conduct rather than settle for being compensated for its negative effects?

The question ‘Why ever prohibit actions?’ is rarely asked, not only because prohibitions are such a constitutive feature of our legal systems but also because of our moral thinking. We seem to know that theft is bad, robbery is cruel, fraud is unjust, killing someone is evil. In order to justify the prohibition of these actions, however, Nozick does not appeal to our de facto moral convictions. He does not explain the political fact of legal prohibitions ‘teleologically’ (ASU: 19) but as a result of a hypothetical deliberative process – referring to individual motivations that lead people to accept legal prohibitions. Prohibitions are justified not because certain conduct is morally bad but because individuals have an interest in the prohibition of that conduct rather than in being merely compensated for its bad effects.
This non-teleological approach is particularly useful with respect to the philosophical justification of COVID-19 restrictions. We cannot draw on the moral convictions we have towards actions that increase the likelihood of infections (see Harris and Holm, 1995), because our moral beliefs have radically changed over the past year. Before the crisis, actions leading to an increased risk of infection were not regarded as potential transgressions of rights worthy of blame. But now, these previously held convictions have been turned upside down. Because they are unstable, common moral convictions of putting someone at risk of infection are not reliable. In this respect, infecting someone cannot be compared to stealing, robbing, defrauding or killing – actions that we know are blameworthy. We need to ask the question: why we would be willing to prohibit conduct that increases the likelihood of infections?

**Compensation**

If we are not willing to prohibit conduct, we have the option of providing for those whose rights to life and bodily integrity have been infringed to be compensated. Now, it is clear that someone who is killed by the virus cannot be compensated for their rights loss. Nozick acknowledges that some rights infringements have to be prohibited because one could not possibly make amends (ASU: 66). However, compensation can be supplied for the risk people face.

Risky actions are characterised as actions which, individually, have a low probability of yielding a rights infringement, but which in large numbers increase the probability to a considerable threat (ASU: 73). A risk can be conceptualised as a so-called ‘expectation value’: the negative value of an outcome multiplied by the likelihood of its occurrence (the likelihood being a value between 0 and 1). The worse an outcome is and/or the higher the probability of its occurring, the more compensation has to be paid to individuals who are put at risk. So, individuals who are put at risk by others can legitimately demand compensation for this negative expectation value.

In the case of the pandemic, the compensation for risk is owed by all members of society, as everyone’s behaviour positively influences the likelihood of being infected. It is the sum of everyday individual actions that leads to the increased chance of health problems or death. Since everyone through the exercise of their liberties is partly responsible for the increased risk, the state could exact compensation for that increased risk from all individuals with the help of taxation. Hence, it could tax all members of society who enjoy their liberties and who, in doing so, accelerate the spread of the disease, which eventually leads to encroachments on the right to life and health of others.

Of course, careful individuals who drastically reduce the number of interpersonal contacts have a claim to pay less compensation because the possibility of their inflicting harm on others is lower. The tax would have to be dependent on the individual exercise of liberty rights. In practice, however, this would be hard to achieve. The state is not in the epistemic position to discriminate between individuals who contribute largely to the risk and individuals who make little contribution. So, it is reasonable to assume the state would impose the tax equally on its citizens.

Moreover, the compensation contemplated here has to be thought of differently from payment of damages. In the case of the pandemic, compensation could include, for instance, governmentally subsidised health insurance and free access to hospitals. But foremost compensation could be achieved with the help of rules and policies.
that reduce risk. These may include increased governmental spending on preparation for a pandemic (Sands et al, 2016) and special protection and treatment of elderly people and those who suffer from serious health conditions.

The coronavirus pandemic threatens the rights to life and health of the members of society. Rights infringements occur because, through everyday actions, all members of society increase the risk of rights infringements. Nozick’s account of how to deal politically with these potential infringements allows for two possibilities. A society may choose either to prohibit everyday actions that increase the risk – to implement a lockdown – or it may choose not to restrict individual liberties and instead to exact compensation for the increased risk. That compensation may be provided in the form of public health insurances, pandemic preparation, priorities for especially endangered individuals, and so on. The question is then: what would lead the members of a society to opt for prohibitions rather than for compensatory arrangements?

Fear

In respect of many rights, compensation for rights loss is entirely sufficient to protect and re-establish individual entitlements. For example, if a person is unable or unwilling to fulfil their contractual obligations, they might pay damages to compensate the creditor. Breach of contract is seen as a ‘private wrong’, whereas theft, robbery, fraud and murder are regarded as ‘public wrongs’, which should be prohibited and sanctioned.

What makes the latter rights infringements different? Nozick’s answer is surprising: people would fear having their rights violated. Therefore, compensation for a rights violation only would not be sufficient; full compensation would also have to cover the fear they had suffered. Nozick asks a rhetorical question to illustrate his point: ‘[I]f someone … came up to X and said, “I may break your arm in the next month and if I do, I will give you $2,000 in compensation; though if I decide not to break it, I won’t give you anything”, would X dwell upon his good fortune?’ (ASU: 66) X would clearly not since the possibility of having their arm broken would be a constant source of anxiety. Moreover, X would receive no compensation for that anxiety if their potential assailant chose not to break their arm.

One might say that, in addition to paying damages for the rights infringement, a transgressor should pay compensation for the fear their actions have caused. However, if arm breaking were to be allowed, the occurrence of fear would not be limited (as in the arm-breaker example) to a single person who is potentially negatively affected by the violation. A political system that allowed rights infringements provided compensation was paid would cause general fear. Everybody would be a potential victim of violent arm breakers. The fear caused by a few incidences of arm breaking would be so widespread that compensating for it would be problematic. An individual perpetrator could not be held responsible for that general fear since they alone had not caused it. Furthermore, compensation not only for rights infringements but also for widespread fear would be too expensive, such that no rights infringer would be able to pay for it. Thus, Nozick concludes, there is a public interest in prohibiting rights violations which, if they were allowed, would cause fear. Fear leads individuals to sign up to a social contract that empowers governmental institutions to restrict certain actions under the threat of sanction.
Returning to the case of COVID-19, one may apply the same reflection to risky conduct. As was stated above, everyone through exercising their liberty is co-responsible for the incidence of the risk and so everyone is co-responsible for the incidence of fear which that risk occasions. To hold everyone responsible for the fear their actions generate would, therefore, not overly charge anyone with something they have not caused. However, the problem would remain that compensation might be too expensive. There is a public interest in implementing a lockdown policy if apprehension is so substantial that compensation cannot be afforded.

Within this framework, people are willing to restrict their liberties because of their fear. But how should we understand the nature of fear? I assume what Nozick has in mind in the arm-breaking example is that fear is an unpleasant feeling for the person experiencing it. Thus conceived, fear is bad because it is detrimental to a person’s happiness or wellbeing and compensation, if it were possible, would have to make up for the negative experience of fear.

However, fear can also be conceptualised as a sort of ‘risk aversion’. According to this understanding, the incidence of fear alters the subjective expectation value of the risk. There are two ways in which fear may subjectively influence the expectation value. Either fear may increase the magnitude of the perceived disvalue of the negative outcome – the disease is perceived to be more dangerous – or fear increases the perceived likelihood with which the outcome occurs – people overestimate the probability of being infected. Fear, in this sense, is an amplifying effect on the expected disvalue of the pandemic, and, if individuals are more fearful, they will tend to demand more compensation.

In the following discussion I will refer to this latter conception of fear because, I believe, it better explains the role of fear in the justification of a lockdown policy. Fear is not merely an unpleasant feeling, but it has a significant effect on how we perceive the magnitude of risks. Thus, it can explain the difference between a third-person risk assessment and a first-person evaluation of an outcome.

Nozick goes on to consider whether there are ways in which fear might be avoided so that people do not call for prohibitions. He imagines a government that not only compensates but also bribes the victims of hazardous practices not to tell anyone of their misfortune (ASU: 67). The occurrence of rights transgressions would then not become public, and people would be less apprehensive. Prohibitions would not be needed.

A similar strategy could be contemplated as a reaction to the pandemic. Although no government has been so brazen as to bribe victims of COVID-19 to stay silent, the health ministry of Brazil, for example, stopped publishing the death rate for COVID-19 in June 2020 (Phillips, 2020). The intention behind this move remains unclear but it might well have been to reduce fear and to avoid citizens calling for more restrictions. As Nozick concedes, this strategy would not be successful. Individuals would become aware of the fact that the risk (the probability and the disvalue) was being concealed by the government and their knowledge of that concealment would make them even more anxious about the potential threat. Therefore, fear cannot so easily be bypassed.

Nozick’s justification of prohibitions with reference to fear is surprising. He admits that he is unable to provide an explanation for why individuals experience fear (ASU: 69). He merely observes the phenomenon and acknowledges it as a major motivation of humans. I am afraid I cannot back up Nozick’s anthropological model.
with a psychological account that explains the incidence of fear. However, it is hard to neglect fear as a central element of political deliberation during the coronavirus crisis. Fear is a major emotion with respect to the justification of a lockdown. The fact that a great majority of citizens in OECD countries are supportive of 'blunt' lockdown policies to combat the spread of the coronavirus shows that anxieties must have played an integral part. Whether fear is an emotion that is worthy of respect, whether it is good to pursue strategies which are motivated by fear, or whether fear leads to irrational, destructive, even selfish actions (Nussbaum, 2013: Chapter 10), I shall not answer here. I do not intend to take an evaluative stance towards the emotion of fear. However, the reflections in the next section indicate how we might critically reflect on fear and its consequences.

Justification of a lockdown

Almost everything we do in life to some extent imposes a risk on others and every action might eventually lead to the infringement of rights. Consider, for example, the problem of air pollution and its hazardous effects, such as heart disease, lung cancer and pneumonia. A recent and oft-cited study estimated that nearly 800,000 early deaths a year in Europe are caused by air pollution, which amounts to 133 per 100,000 individuals (Lelieveld et al, 2019). Everyone is at risk of becoming a victim of air pollution and we all contribute to some extent to its causes; for example, in traffic, industry, and energy generation. Of course, in many states there are regulations designed to prevent excessive pollution, but no one would come up with the idea of simply shutting down industry and traffic in order to save these lives, even though they might believe that the existing regulations are justified and should be strengthened.

From this we can infer that not every behaviour that imposes a risk on someone is forbidden, and it is legitimate to ask up to what point causing risk should be allowed. Where is that point? An intuitive way of reflecting the prohibition of risk is in terms of a threshold of expected disvalue of the outcome. Let me illustrate this by reference to the risk caused by flu. In September 2020, the fatality of COVID–19 compared to a common type of influenza was estimated to be ten times higher (Johns Hopkins Medicine, 2020). So, one could estimate that a threshold, if it exists, lies between the ‘risk of flu’ and ‘ten times the risk of flu’. However, that proposal is too simple. There is the philosophical (and political) problem of determining the objective expectation value of the risk. Whereas the likelihood of being killed by a specific disease can be investigated empirically, the value of life and health cannot. A threshold account, therefore, needs to stipulate a specific value that applies to all people regardless of their individual first-person evaluation of the right. That account runs afoul of the same problem that consequentialist theories face – the assumption of the possibility of making a third-person assessment of the value of individual rights.

As rights-based contractualism does not argue in a consequentialist fashion, it avoids this problem. A contractualist account is based on potential subjective motives and, so, refers to the first-person evaluation of risk. The incidence of fear, therefore, becomes highly important to justifying restrictions of (presumably) intolerable risks. As a matter of fact, people fear COVID–19. In contrast, they do not have the same degree of fear of influenza or air pollution. Fear amplifies the negative expectation value of being infected. Fearful individuals tend to overrate the problem and so are
unwilling to accept mere compensation for their rights loss. They are willing to prohibit.

From a contractualist perspective there remains one crucial problem for the justification of lockdown policies. The proposal is one-sided. On the one hand, some people benefit from the increased security of their rights to life and health. On the other hand, some people are deprived of their liberty rights. So far, these two groups have been described as (extensionally) the same group of people: those whose liberty is restricted are those who benefit from the lockdown. However, in reality, those two groups of people are not identical. We can distinguish between people who have a high risk of dying from COVID-19 from those who are at particularly low risk.

An early study in China found that the average ‘case-fatality rate’ was above 2 per cent. But cases in those aged 70 plus years had an 8 to 15 per cent fatality rate (Wu and McGoogan, 2020: 1239). Risk neutral young people who are at low risk of being killed would, therefore, either not support a lockdown, irrespective of the magnitude of risk, or they would demand compensation for prohibitions imposed on them.

For a lockdown policy to be generally accepted, there has to be some kind of recompense for the costs of those whose liberties are restricted by those who benefit from the restrictions; otherwise, the former would not accept the policy. Nozick discusses the problem with reference to the ‘principle of compensation’ (ASU: 78ff). Those people whose risk has been reduced have benefited from the others’ loss of liberty, and the beneficiaries should, therefore, have to reimburse the cost bearers for their loss of liberty (ASU: 83).

Fear, however, has the effect of rendering people in general more risk averse. Even though the objective risk for young and healthy people is very low, they tend to exaggerate the risk. Their negative evaluation of the potentially bad outcome is substantially larger than it is from a presumed third-person perspective. Therefore, even people who are unlikely to suffer from severe health problems would not demand compensation because, subjectively, they will also benefit from the restrictions. However, the less fear is present, the more likely it is that those people at low risk will demand to be compensated for the restrictions of their liberty and their claim to compensation is supported by a Nozickian contractualist account.

**Dimensions of fear within the account**

Nozick’s contractualist justification of restrictions of risky behaviour has two features that are worth highlighting with respect to a moral evaluation of COVID-19 policies.

First, Nozick regards all rights, including the right to life, as ‘alienable rights’ (ASU: 283–4). A person could, without restriction, allow someone else to kill them. Now, except for certain specific circumstances (such as when a person wants to commit voluntary euthanasia), it is highly improbable that an individual would allow another to take their life. However, with respect to placing one’s own life at risk, the situation is different. Often, people are, in fact, willing to accept a certain probability of being killed. People are therefore able to give valid consent to being put at risk.

One clearly misguided opinion in public discourse on COVID-19 is the idea that a person’s life should never be put at risk. That opinion would imply that in the contractualist bargaining process, individuals could never consent to a potential infringement of their right to life in favour of greater liberty. They could agree only to a policy that saves every life at any cost. This assumption of an inalienable right
to life does not make sense when we think of the risks of being killed. As the air pollution example shows, our society risks the life of a handful of citizens every year, and, as our previous experience with influenza has shown, our society is willing to put some individuals at risk of dying from a disease.

Second, Nozick does not assume that enjoying liberty at the expense of creating a risk for others is per se ‘unethical’. As was argued above, moral intuitions might undergo dramatic shifts because of a change in circumstances. This shift in moral convictions is clearly dependent on public opinion – the ‘social contract’ if you will – and the legal implementation and enforcement of restrictions to combat the disease. But it is important to acknowledge the fact that increasing the risk of infection for others is not a priori a wrongful action. Whether it is an infringement of a moral or justifiably legal obligation is contingent on the unwillingness of individuals to accept risks, and, ultimately, this willingness depends on the amount of fear individuals have of being killed or suffering from disease.

In order to determine whether a future lockdown would be a legitimate response to the threat of a pandemic, the members of a society have to ask themselves whether they are sufficiently afraid of the outcome of the pandemic to be ready to give up their liberties. The incidence of fear is not always an imperturbable fact about our emotions. We can critically reflect on fear and we are able to adjust our emotions. The following passages take up various aspects of fear and the role it may play in the political justification of the restriction of liberties. The aim is to provide a framework for critically reflecting on fear but, as previously stated, my aim is neither to condemn nor to applaud the emotion of fear.

_Irrational fear_

One oft-articulated critique of fear is that, as an emotion, it is irrational and so should not play a major role in political deliberation. In the early stages of the pandemic, some scholars (such as Asmundson and Taylor, 2020) wondered why people were so anxious about the new emerging pandemic whereas, in contrast, they seemed not at all concerned about annually recurring influenza. Indeed, there seems to be an inconsistency in people’s attitudes towards different threats. Some are exaggerated while others are taken less seriously than they should be.

One potential explanation for inconsistent evaluation lies in the so-called ‘availability heuristic’, as introduced by Amos Tversky and Daniel Kahneman (1981). They found that people tend to rely on immediate examples that come to mind when they assess a decision. If a person recalls something, it plays a more important role in the deliberative process than other less present facts. One clear difference between influenza and the coronavirus crisis lies in the news coverage each has received. The latter is far more present in the media, so that individuals’ fears of COVID-19 are triggered by news reports and those individuals are then supportive of governmental actions against the perceived threat.  

Whether this is an ‘irrational’ overestimation of the risk, I cannot answer here. But it is worth noting that rationality and emotionality are not necessarily mutually exclusive attributes of our perceptions and intentions (see for example Nussbaum, 2013). The apparent inconsistency between different attitudes towards the threat of influenza, on the one hand, and coronavirus, on the other, can also be resolved by an adjustment of our assessment of the threat of influenza. As the WHO (2019) urges
us, we have reason to take the threat of the flu more seriously and undertake actions to prevent the spread of the disease.

Moreover, even if we assume that fear is irrational, it does not follow that incorporating fear in the political deliberative process is wrong. Nozick’s account leaves room for the possibility that a government can be justified in prohibiting risky conduct even if the degree of fear it arouses is irrational. As long as it is possible that individuals would consent to a prohibition, it can be justified.

Blind fear

As was said above, for the most part, I have assumed that the risk of being killed and the risk of impaired health are uniformly distributed among the members of society. This assumption is, of course, an idealisation. In reality, it is holds for very few risky situations. There are always individuals who are more at risk than others. However, fear explains why certain risky conduct is prohibited even if the risk is not distributed uniformly among citizens. The incidence of fear leads to an amplification of the negative evaluation of the risk. Even with an objectively low probability of being killed, subjectively, it might appear sufficiently large to justify prohibitions.

To illustrate this, let me compare Nozick’s hypothetical history of fearful individuals with John Rawls’ famous thought experiment, the ‘veil of ignorance’ (1999[1971]: 118). Assume individuals are ignorant about their own identities and do not know whether they are old or young and healthy or unhealthy. According to the Rawlsian ‘difference principle’, individuals behind the veil of ignorance would agree on political institutions that put the worst-off people in the best possible position.

If we assume that dying is much worse than enduring a temporary restriction of liberty, people who are at high risk of being killed will be in the worst-off position. Therefore, a Rawlsian thought experiment would yield unanimous support for a lockdown. In Nozick’s account, a lockdown can be justified by the outcome of a hypothetical history in which fearful individuals are willing to restrict their liberty to avoid the risk. Ultimately, they will be so willing if they fear the negative outcome of risky actions.

In this instance, therefore, the results of the two most contrasting contractualist theories – Rawls’ and Nozick’s – are quite similar. Fear, to some extent, puts individuals behind a veil of ignorance – individuals are prevented from seeing to which risk group they belong, whether they are endangered or not. Thus, fear justifies a so-called ‘maximin distribution’ of the costs of rights infringements that result from risky conduct. The element of fear makes the Nozickian account on laws and policies remarkably Rawlsian.

Illiberal fear

An upshot of Nozick’s account is that fear sometimes becomes the antagonist of freedom. The more that the negative outcomes of risky conduct are feared by the members of society, the more restrictions will be justified. From a liberal perspective, there is a case against fear. Hillel Steiner (1977) discusses this aspect of Nozick’s thought in his critical appraisal of ASU. He problematises what he calls a ‘right not to be feared’. Such a right, he correctly observes, places great weight on the subjective experience of individuals. He condemns this idea in that he asks why only the fear
of rights transgressions provides a case for protection through the use of prohibitions: ‘Why not security from other possible sources of grief?’ (Steiner, 1977: 123).

If Nozick were unable to answer this question in a satisfactory manner, he would have to accept that we should restrict, for example, reviewers’ liberty to write negative reviews of books whose authors feared being criticised (Obler, 1981: 65). As this example shows, the right not to be feared could lead to an excess of restrictions on individual liberty. It would allow individuals to impose widespread and severe prohibitions on others.6

Steiner’s objection presupposes that every individual has a right not to be feared. However, I do not believe that this ultimately follows from Nozick’s theory. Fear needs to be conceptualised as a societal fact and the justification of restrictions on individual freedoms presupposes that in general, people fear being victims of the negative outcome of risky conduct. On the one hand, a single individual’s fear does not justify a restriction. On the other hand, as fear is a social construct, individuals have only limited choice over whether to fear the outcome of a certain conduct. This fact limits the potential excess of restrictions.

Nevertheless, it must be acknowledged that the more fear there is, the more restrictions on liberties are potentially justified from a contractualist perspective.

Concluding remarks

In this article, I have argued that a consequentialist justification of restrictions on individual liberty as a response to a pandemic is unsatisfactory as it makes strong philosophical assumptions about the relative value of different rights. Furthermore, it does not respect the fact that individuals have or should have discretion over the use, transfer and waiver of their rights. I have proposed a rights-based contractualist view of the issue of the legitimacy of lockdown policies of a sort that is endorsed in Nozick’s Anarchy, State, and Utopia.

Nozick argues that the prohibition of actions that impose risks on other members of society can be justified if those affected fear the negative outcome of risky actions. On this account, a restriction of liberty rights – such as freedom of movement, freedom of assembly, the right to work, the right to pursue business, and so on – in order to reduce the risk of spreading COVID-19 is justified because of individuals’ fears. If there were no fear, the pandemic could be dealt with legally in the same way in which we handle other societal risks, such as air pollution.

Nozick recognises that fear plays a crucial role in the justification of prohibitions, laws and legal obligations. His theory shows that, in order to reflect critically on the legitimacy of lockdown policies in times of a pandemic, we need to reflect on our emotion of fear.

Notes

1 For example in Germany, in early April, around 70 per cent of the population supported the political measures and over 10 per cent would have welcomed even stricter measures (Infratest Dimap, 2020).

2 In October 2020, the International Monetary Fund (IMF) estimated worldwide governmental spending to be approximately $12 trillion (IMF, 2020: ix).

3 Compare with, for example, the discourse on ‘acceptable risk’ in technology assessment (Fischhoff, 1994).
The WHO estimates a billion cases worldwide each year and fatalities of between 290,000 and 650,000 (WHO, 2019: 2; compare with WEF, 2020).

The opposite is claimed in Pike et al (2020).

Jeffrey Obler (1981: 71), therefore, proposes a minimum threshold of objective risk, which must be present for fear to justify a prohibition. However, as I argued above, such a threshold assumes objective values of different rights that are comparable.

Conflict of interest
The author declares that there is no conflict of interest.

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