

Chapter 3

Vaccination, Autonomy, and ‘Moral Recklessness’

Chapter 1 was about maturity and freedom of thought and expression. In this chapter, which should be seen as an oversized appendix to chapter 1, I link the theme of maturity, and in particular the question of the ‘compulsion over conscience’, the second point in the earlier quoted passage in the *Orientieren* essay that concerned the freedom to think (*Orientieren*, AA 8:144 [Kant 2001b:16]), to a pressing topical issue: What would Kant think of a mandatory vaccination against COVID-19, and the resistance to it? I will discuss this subject by looking at the historical case of smallpox vaccination, about which Kant himself made some striking statements late in his life that can shed light on the moral-philosophical legitimacy of a state-mandated vaccination, such as was introduced in Austria and Italy, and about to be introduced but ultimately called off in Germany. What is at stake here is not only freedom of thought and moral autonomy (freedom from the coercion of conscience), but above all, according to Kant, man’s innate right to be free from any improper paternalistic state interference (external or political freedom). Both last aspects of freedom will be discussed.

I want to emphasize that this essay is not about a critique of vaccination *per se*. I am neutral about this, partly on the basis of my Kantian point of view, which values the centrality of conscience. My analysis here concerns purely and solely the moral grounds, from a broadly Kantian perspective, for either vaccinating or not and, in particular, the legitimacy of a vaccination mandate in a society like ours, which regards freedom as the highest good. It is not an essay in Kant interpretation, strictly speaking, but rather an attempt to formulate a Kantian

type argument dealing with the moral issues around vaccination.

I.

In August 1799, the young and dutiful Count Fabian Emil zu Dohna wrote the following letter to Kant, who was already advanced in years by then:

Most venerable man, only the importance of the question to my heart gives me the courage to ask you for an answer. I have a bride with whom I am in close friendship and hope to enter into a loving relationship, who has not yet had smallpox. An incident in our family where a young woman of nineteen years of age contracted smallpox in her child's bed and died without rescue, which is frequently reported, made my bride decide to have herself inoculated with smallpox, in anticipation of my fervent wish. Now I am reading your *Doctrine of Virtue*, which has become my handbook since I got to know your system in 1797 in a *privatissimum* with Professor Beck in Halle. And now I particularly notice today the passage under the casuistic questions where you talk about the smallpox inoculation. I deem it lawful, since I risk my life by exposing it to something more uncertain, if I should let it come to being infected by an eviler poison, at a more dangerous time, and unprepared. I request that you let me know as soon as possible what the law says. Perhaps the inoculation has already taken place when your answer arrives, but do not spare me, I want to know if I was mistaken, but I will try to put it off as long as possible. ...

Your eternally grateful Fabian Emil Imperial Count zu Dohna.

(*Correspondence*, Aug. 28, 1799, AA 12:283–4, trans.
mine)

In the following year, Kant also received two letters from one Johann Christian Wilhelm Juncker (1761–1800), a renowned young professor of medicine in Halle, with the question ‘whether and to what extent [he] considered it

moral to be vaccinated' (AA 12:314, my translation). The passage to which the Count refers above concerns the following section in the *Doctrine of Virtue* from the *Metaphysics of Morals*, published in 1797, in an appendix to the section on the moral prohibition of suicide:

Anyone who decides to be vaccinated against smallpox puts his life in danger, even though he does it *in order to preserve his life*; and, insofar as he himself brings on the disease that endangers his life, he is in a far more doubtful situation, as far as the law of duty is concerned, than is the sailor, who at least does not arouse the storm to which he entrusts himself. Is smallpox inoculation, then, permitted? (*Doctrine of Virtue*, AA 6:424 [1999:548])

A contemporary reader will probably be surprised that the question is even raised whether it is morally permissible to get vaccinated against viral diseases. One would think that it is not in dispute that vaccination is morally right, or even a moral duty. But this seems less obvious than it is, for two important reasons, one historically and one related to Kant's strict, principled conception of morality and individual responsibility based on nothing but the principle of autonomy. On the other hand, it also has to do with Kant's remarkably pragmatic view of the relationship between man and nature, that is, to what extent the natural course of events, including its destructive side, should simply be accepted. This concerns Kant's conception of the relationship between nature and human history in general. I will come back to this in my essay on Kant's two important works of philosophy of history in the third part of this series of essays.

The historical basis for Kant's striking statement about vaccination in the *Doctrine of Virtue* passage lies in the fact that vaccination against viral diseases was still in its infancy in Kant's time. Shortly before Kant published his *Doctrine of Virtue* in 1797 (as part of the *Metaphysics of Morals*), the British physician Edward Jenner had developed a method—after discovering that milkmaids were immune to cowpox (the *vaccinia* virus)—by infecting

the population with cowpox against the extremely dangerous human variant (variola virus, i.e. smallpox), a less risky method of vaccination than the standard one of variolation (with *variola*). The now commonly used term ‘vaccination’ originates from this: inoculating with *vaccinia*. Kant was well aware of these developments in medical science through William Motherby, a physician who lived near Kant in the home of his bookseller Nicolovius. William Motherby had brought the cowpox vaccine from Britain, where he had obtained his Ph.D in medicine, and had started vaccination in East Prussia. Motherby’s father, along with his trading partner Joseph Green, belonged to Kant’s inner circle of friends. Kant often dined at the Motherbys.

As biographer Wasianski reported, Kant was initially quite sceptical of Jenner’s new method of cowpox inoculation. He was generally not very enthusiastic about medical assistance for himself. Kant was certainly not negatively disposed towards new developments in medical science. However, he was above all a supporter of the popular vitalistic system of the Scottish physician John Brown, which was based on the notion of *excitabilitas* (*Irritabilität*). Wasianski reports that Kant viewed smallpox vaccination as too much of a ‘familiarization with the animal’ and ‘a kind of bestiality in the physical sense’. But apart from Kant’s personal view with respect to smallpox inoculation, the new way of inoculating cowpox was by no means free of problems and risks, and there was certainly ground for doubt in the beginning.

Unfortunately, nothing has survived from Kant’s reply to the letters of Count zu Dohna and Junker, except for a number of fragments that remained unpublished during Kant’s lifetime, which can be found in the *Nachlass* volumes of the *Akademische Ausgabe*. While those fragments, like the passage from the *Doctrine of Virtue* quoted above, do not provide a uniform picture of Kant’s position on vaccination, they are striking and give an idea of how a Kantian view on vaccination might be shaped. I will quote some of those excerpts here before saying a little more about them further below. One of those fragments is entitled ‘About the smallpox crisis’:

The greatest danger to people in their dealings with one another is this: to wrong others. Suffering injustice, on the other hand, is not something to be esteemed and to tolerate it is often even meritorious, provided one can hope that such tolerance does not further strengthen the will to hurt. Among the manifold necessities which fate imposes on the human race, there is an emergency, a disease because of which one is in greater danger if one surrenders to nature than if one inflicts it on oneself in order to be able to heal it with greater certainty, namely, the smallpox problem. The moral question here now is whether the rational man is authorized to inoculate himself and others who cannot judge for themselves (children) with smallpox (*Blattern*), or whether this way of endangering one's life (or mutilation) is wholly morally wrong; whether, therefore, an appeal should be made here not merely to the physician but rather to the moral jurist. There is always something daring here, but the *moral recklessness (the danger of doing wrong) is clearly greater than the physical one....*

(AA 22:302, trans. and emphasis mine)

To endanger life is an evil (a physical evil), but to put oneself in harm's way by choice (*willkührlich*) is a dereliction of duty (a moral evil), whether one deliberately exposes oneself to it or leaves it to chance, for the maxim for acting in such circumstances results in ... the charge of suicide.

(AA 22:302–3, trans. mine)

Smallpox, therefore, is one of the most worrisome [tribulations] because the cure for it [vaccination] seems to go against morality at the same time.

(AA 22:304, trans. mine)

In another reflection, most likely part of notes for a reply to the letters sent to him by Count zu Dohna and Professor Juncker, Kant writes:

In the yearbooks of the Prussian monarchy a letter to Count Dohna, concerning smallpox inoculation and the admissibility of it, with reference to Prof. Juncker in Halle, to moderate the fire alarm. Lest states be overrun with people and nipped in their buds, two evils have been placed in them as antidotes: smallpox and war. The increase in luxury already reduces an excess of births. Nature does not treat people more gently than it does plant and animal species. Due to its fertility, it abundantly replaces their use, without the need for anti-natural agents.

(AA 15:971, trans. mine)

The wise use of such means cannot be expected from individual men, but from providence, which seems to have willed war and smallpox—by design—to limit the great procreation.

(AA 15:972, trans. mine)

These considerations raise serious doubts about vaccination. First, Kant sees a moral danger in smallpox inoculation. Secondly, he considers that a disease such as smallpox, like war, is a means of nature to combat overpopulation. The latter may sound somewhat bizarre or shocking to modern ears. Moreover, Kant also suggests, almost as a proto-*Verschwörungstheoretiker*, that ‘doctors are more concerned with giving their surgery prestige than with people’s felt distress’ (AA 22:296, trans. mine).

But even the idea that smallpox inoculation poses a moral hazard, that it amounts to ‘moral recklessness’, seems rather strange to us. It would still be morally the right choice to be vaccinated according to the most common opinion today. The German health secretary at the time of the COVID-19 pandemic, and many prominent politicians and opinion makers in Germany with him, considered it indisputably an ethical categorical imperative, with a direct appeal to Kant, to get vaccinated. (We don’t blame them for not realizing that the Kant they are appealing to turns out not quite to be the Kant that is speaking here.)

Even in Kant's time, doctors thought that inoculation was morally the right choice. The aforementioned Juncker, a professor of medical science in Halle, elaborated, after a smallpox epidemic in 1791, a detailed plan to combat such epidemics, which he published in a three-volume book entitled *Gemeinnützige Vorschläge und Nachrichten über die Pockenkrankheit. Für Deutschland's Aerzte. Ein Vorschlag aus der Volksarzneywissenschaft* (1792). Part of his campaign against smallpox was the question addressed to philosophers (including Kant) about the ethical implication of the smallpox vaccination. Juncker himself was convinced that vaccination was the moral duty of citizens and the state, and a sign of a cultured and civilized society. Juncker's recommendation formed the basis for large-scale state-funded vaccination campaigns in the German states, as well as for the general vaccination mandate introduced in Bavaria as the first among the German states in 1805—Prussia and other German states in the west and north were initially more cautious about such a breach of parents' autonomy to decide whether or not to vaccinate their children, although vaccination was often a prerequisite for obtaining state grants or access to schools and guilds. These vaccination campaigns also started the process of the large-scale professionalization of the medical profession—as distinct from the age-old practice of barber-surgeons—and the associated increasing medicalization of society. Mandatory vaccination against smallpox throughout the German Empire was introduced by Bismarck in 1874.

We shall see later on that the moral issue, instigated by the physician Juncker, is not that simple. That such a rigoristic view, coming from opinion makers and even politicians and state officials who today refer to Kant without much knowledge, conflicts with Kant's own views on inoculation, may be clear from the above reflections from late in his life. At the same time, those reflections and Kant's comments in his published works (especially the *Doctrine of Virtue*) leave open the question of whether Kant actually believed that vaccination is morally

impermissible.¹ Moreover, there is a grey area between what is morally permissible and what is morally obligatory. In my view, based on the published and unpublished statements that we know from him, Kant would never go so far as to say that vaccination is a moral duty *schlechthin*. Never mind that he would agree to a state-imposed general vaccination mandate (*allgemeine Impfpflicht*), such as it was about to be introduced in Germany in the latter days of the corona pandemic, and was in fact introduced in Austria and, albeit temporarily and in a limited way, in Italy and Greece.

¹ Reinhard Brandt (2010:112–14) suggests that in one of these reflections (Refl 1551) on the question of smallpox vaccination Kant effectively ducks the question by shifting the responsibility to the government: as long as the government prescribes the vaccination against smallpox, it is *eo ipso* morally permissible. But I think this interpretation is not necessarily warranted by the text. Kant writes:

Even if, so far as war is concerned, this is not a means permitted for people, the second means, namely that of smallpox, is however permitted by other people: “that is, that the government urgently recommends [*anbefehle*] smallpox inoculation throughout, since it is then unavoidable for every individual: and is therefore permitted.”

(AA 15:972, trans. mine)

Here it might seem indeed that Kant reasons that if the government urgently recommends the vaccination against smallpox, it is permitted since the recommendation then holds for ‘each individual’, and so, as Brandt says, it ‘relieves’ the individual from his moral burden—namely, the conflict of duties in that on the one hand I must avoid endangering my life, and on the other hand I must do all that I can to preserve my life. But first, importantly, the relevant sentence is placed within quotation marks, so it would appear this is not Kant’s own view *per se*, but a view he quotes (though unclear wherefrom), and secondly, even if it were a view he shares, it concerns merely a strong recommendation from the government, not a mandate. In other words, while on a liberal interpretation of this text passage it might be plausible to argue that Kant indeed shifts a question about an individual’s moral responsibility to a question of right, rather than morality, it is still an issue of permissibility, that is, whether it would be morally permissible for the individual to get a vaccination, not about whether a vaccination mandate would be morally justified.

Although Kant never commented on this—state-mandated vaccinations did not appear until later—such a state-mandated duty to be vaccinated would contradict Kant's strict conception of external freedom, which can only be limited under certain conditions. We will come back to this later (see section III). First, I would like to make a few comments on the question of whether vaccination in the context of the corona pandemic is morally permissible in the Kantian sense and whether vaccination against the coronavirus can in a certain sense even be regarded as a moral duty in the Kantian sense, and if so, under what circumstances.

What is in any case not up for discussion in this essay is the scientific reliability in general of vaccines, nor the political desirability in general of vaccination, neither of vaccination in general nor of vaccination against the coronavirus in particular. This essay concerns purely the moral question surrounding vaccination against COVID-19 from a broadly Kantian point of view (section II) and, secondly and more specifically, the lawfulness of the introduction of a general (or partial) mandatory vaccination in the context of the corona pandemic from a broadly Kantian point of view (section III). It will turn out that the grounds for a general mandate to vaccinate, i.e. a legal obligation, in particular, are rather flimsy from a Kantian point of view and raises the serious question whether a state which imposes such a mandate can still strictly speaking be called a state which has the best interests of its citizens in mind, most importantly their fundamental right to liberty.

II.

At first, one could argue that in Kant's day and immediately thereafter, there were significant risks associated with vaccination. For example, through the practice of *Abimpfen* of children, vaccination actually contributed to the spreading of infectious diseases because of general ill health and unsanitary living conditions. This made mandatory vaccinations problematic. In Germany, in the course of the 19th century, a vehement, well-organized anti-vax movement also emerged on the basis of such

objections. The policies on vaccination did improve as a result, with all kinds of measures taken by the Prussian government that significantly increased its safety over time. The fact that Kant seems to object to vaccination therefore seems to have in the first place to do with the non-negligible risks that were then and later still associated with vaccination, which is consistent with Kant's moral prohibition against self-harm. The state of medical and pharmacological science at the time is undeniably incomparable with that of today. The advances in science in the field of virology and vaccine research thus create a different starting point for moral considerations (but more on that later).

For Kant, self-preservation (*conservatio sui*) is an important criterion that forms the basis for our moral considerations. No act contrary to the principle of self-preservation can be regarded as morally permissible, since it is not in accordance with a self-determining will to perform an act directly contrary to it. It is also for this reason that the casuistic question about smallpox inoculation appears in the section, in the *Doctrine of Virtue*, on the prohibition of suicide. The reasoning is that, at first sight at least, a decision to get vaccinated appears to be in line with this prohibition of suicide or self-harm, because vaccination precisely prevents one from dying from a serious illness, smallpox in this case, or from becoming seriously ill at the very least, with all the associated health risks. Seen in this way, getting vaccinated seems a moral duty if only from the egocentric point of view of sheer self-preservation.

But is there any basis for the idea that it is morally right or even a duty to get vaccinated? Many argue that this duty is indeed there because from an ethical point of view it is both a duty to protect oneself (in German: *Selbstschutz*) and a duty to protect others (*Fremdschutz*). The latter in particular is seen as a compelling reason to be vaccinated: out of solidarity with the other, in consideration of the *Gemeinwohl*, one is morally obliged to protect, if not oneself, then certainly the other in one's environment. It sounds commendable, but it is not that simple. What is being invoked here is the principle that an

agent, having an autonomous will, should regard it as his moral duty to be vaccinated because it is a maxim that can be made into a universal law. But this is based on the idea that an inoculation is life-saving, so implies self-preservation, which for Kant is a narrow duty to which one is bound. But it is not clear whether inoculation in all cases, certainly not in the case of the new types of mRNA and vector vaccines, is life-saving or even completely protective (or even necessary in the case of the omicron variant in the later phase of the pandemic), or whether corona is indeed a disease that is dangerous for everyone alike and must be combated at all costs. There are too many factors at play to simply use the universalizability principle in this case.

But what would such a universalizable maxim look like in the case of corona? In the first instance, what has been called a ‘virological imperative’ could be formulated like this:

P: *Act in such a way that you minimize the risk of infection with the virus and thus passing the virus on to others.*

Seen in this way, it seems logical that you get vaccinated against the virus because vaccination lowers the risk of infection and you therefore also have less of a chance of passing the virus on to others. In this way you fulfil the duty to protect yourself (moral duty of self-preservation) and the duty to care for others (moral duty of benevolence towards others). This satisfies the general rule that Kant establishes in his *Groundwork of the Metaphysics of Morals* (1785), namely: act only in accordance with that maxim which at the same time you could will to become a universal law (AA 5:402). But why is that so? Why is maxim **P** moral? We’d have to look at it counterfactually. Suppose you are not vaccinated, i.e. you refuse a vaccination on any ground. Why would this be immoral?

Of course, everyone is in principle free to refuse a vaccination. We have that capacity of freedom of choice. The point, however, lies in the fact that if everyone were to refuse a vaccination and take it for granted that they would thereby potentially infect others—thus regarding my

maxim of not getting vaccinated as a universal rule—not only would one be potentially endangering others (by transmitting the virus) but one would also endanger oneself, both by exposing oneself directly to the virus and indirectly by exposing oneself to infection by others who also refuse to be vaccinated. And putting myself in danger I cannot will.

So, such a course of action as the refusal of vaccination could not possibly be willed as a universal law. The maxim that says it's okay not to get vaccinated and take it for granted that you thereby potentially infect others therefore exhibits a contradiction in the will. It is not based on a rational consideration and thus cannot be regarded as moral.

But this is a bit too simple. In the first instance, this has to do with the fact that empirical factors are involved that put the danger that plays a role in the above reasoning in perspective. There is in fact a not inconsiderable difference between, for example, a virus with a very high lethality such as Ebola—to take an extreme example—and the coronavirus, and moreover, at one point we had to distinguish between the different variants of the coronavirus, whose lethality was not equally high. With a virus such as Ebola, it seems indisputable that a refusal to be vaccinated, if there were such a vaccine, is immoral: it is incompatible with the principle of willing only that act which one could also will to be a universal law. This is not so clear-cut in the case of the coronavirus.

Firstly, as mentioned, the lethality of corona, certainly with the later omicron variant—and the imminent introduction, in Germany, of the vaccination mandate should be seen in the context of the prevalence of omicron—is not nearly as great as with Ebola. Moreover, the vaccination against the coronavirus does not protect in an absolute sense (it does not establish sterile immunity) so that neither protection against infection nor the prevention of transmission of the virus to others can be guaranteed. In other words, eradication of the pathogen or a so-called 'herd immunity', which is always the goal of a vaccination mandate, is not feasible in the case of COVID-19.

However—and this is the reasoning that one mostly focuses on in the vaccination debate—there is still a very good moral reason to get vaccinated. In view of the demonstrably increased risk for the unvaccinated of a more serious illness and therefore an increased risk of ending up on the ICU, as well as in view of limited ICU capacity, it is morally right to get vaccinated so that the ICUs are not swamped. The argument here revolves around the fact that due to the explosive increase—and this was especially true in the first waves of the pandemic, with omicron this was significantly less so—of COVID patients who ended up on the ICU for a shorter or longer period of time, other acute non-COVID patients had to be barred from ICU treatment to the extent that COVID patients were taking up places or putting such a burden on care in general that other hospital care including surgeries had to be postponed (i.e. all plannable care had to be postponed).

This is where the notion of solidarity comes into play. In the spirit of solidarity with non-COVID patients who, through no fault of their own, require ICU treatment or acute care treatment or surgery, it would be morally right to get vaccinated against COVID-19 because then I protect myself against serious illness, making it less likely that I myself end up on the ICU and in that way contribute to a lessening of the burden on ICUs. That such a course of action is a noble act is, I think, beyond doubt. It is also plausible that one can regard it as one's moral duty towards others, and thus as in conformity with the categorical imperative. But the question is whether such a duty can also be lawfully imposed by the state, directly or indirectly, and linked to sanctions accordingly. A moral duty is not yet a legal duty.

First, it must be borne in mind that, for Kant, an action can be regarded as moral if and only if it is regarded as necessary by the agent herself in virtue of the categorical imperative. This is implied in the definition of a duty as the necessity of an act out of respect for the law only; duty is the coercion to which a rational agent finds herself subject in so far as it concerns an agent for whom the effect of his good will does not automatically follow, as would be the case with a holy will. Man is not a holy being of course,

and therefore must regard himself subject to duties. The moral law from which that duty follows is then the objectively determining ground of a moral act, my respect for that law being its subjectively determining ground. The agent's will is the central factor here, subjecting itself to the coercion of the moral law—this is the core of the idea of autonomy. The compulsion (*Nötigung*) contained in this autonomy is a compulsion or coercion that lies in reason and is caused by reason alone. Autonomy is therefore not a kind of freewheeling act that is separate from coercion as such or duties: autonomy characterizes that action that takes place purely and solely in virtue of reason, a lawfulness that reason itself imposes.

It is important to realize that for Kant the moral content of an action is not something 'objective' that lies outside the willing agent, nor is it merely subject to an agent's choice. A moral act, as far as its moral character is concerned, can never be an act of mere inclination, however well-meaning that inclination may be; do-gooders, according to Kant, are not *ipso facto* morally high-standing persons, nor are people who have no innate personal propensity for charity *eo ipso* immoral people. The value of an action for Kant can only lie in the principle of the will itself.

This makes the willing, rational agent as such '*unhintergehbar*' if a moral value is to be assigned to an action. A moral duty is therefore always a duty only in so far as an agent herself sees for herself its necessary obligatory character by virtue of reason (the moral law). Therefore, something that is morally right can never be something that can be imposed from without; a moral act, as an act with a specific goal in mind, can therefore never be enforced heteronomously (cf. AA 6:381).

The fundamental Kantian point of 'moral recklessness' (AA 22:302) still stands—despite the undeniable differences in reliability between the smallpox vaccine then and COVID-19 vaccines now—that is to say, each individual must weigh the risks of either vaccinating or not according to his or her own conscience: for example, vaccination with the gene therapeutic mRNA substances and vector vaccines is not entirely without side effects, as

was soon apparent from the AstraZeneca vaccine and from cases of myocarditis in young men vaccinated with Moderna. In addition, there are no long-term studies known to indicate the long-term effects, which is why the vaccines had only been given temporary approval; and finally, the risk assessments for different groups (elderly, young people, children, pregnant women, the immunocompromised, etc.) are different. In the end, as with any medical intervention, this is a matter for the individual and for the individual alone (and in the case of children, parents), possibly in consultation with one's GP.

The principle of solidarity—the moral duty one has towards others—can therefore never stand alone, and is therefore not a good, *sufficient* moral ground for choosing to be vaccinated. This is so because, for Kant, the duty to oneself, namely not to harm oneself, is a duty in the narrow sense: the duty of self-preservation is absolute. Therefore, in the first instance the risk must be assessed for oneself. It is then important to allow the individual also the space to make that decision for himself, on the basis of the idea of maturity (see chapters 1 and 2) and with a view to the sacrosanct nature of moral conscience (see also chapter 1). Such a decision should not be made under pressure or coercion, let alone enforced. It is not without reason that informed consent to undergo medical treatment is a fundamental principle of medical ethics.

Conscience, which can never be objectively tested, plays an important role in this (see *Doctrine of Right*, AA 6:400–1). At one point during the pandemic, there was a proposal in Germany to invite unvaccinated people to an *obligatorisches Beratungsgespräch* (in addition to the vaccination obligation). Such medical guardianship is not only paternalistic and emblematic of not taking the citizen's maturity seriously, its mandatory character is above all against morality as it implies coercion of conscience. It gives the false impression that with such a mandatory conversation you are still free to choose either to get vaccinated or not.

III.

It is important to maintain the distinction between a moral duty and a legal duty. This is not always treated with care in the public discussion surrounding the vaccination mandate. When the debate is about compulsory vaccination, considerations of a strictly moral nature are strictly speaking irrelevant. Something that is morally right or even required may not be required by law at all, or what is required by law may even violate the moral law. This is the central issue. Of course, there are restrictions that the state can and must impose that are also perfectly legitimate and meaningful. But when it comes to moral commandments or prohibitions, we have to differentiate between different kinds of duties, which we would accept to a greater or lesser extent to be enforced by the state. We accept, for the benefit of our coexistence, that the state imposes the moral obligation not to kill in an absolute sense—i.e. it enforces this obligation, if necessary by coercion or state violence. But we would certainly not accept an enforcement of the moral obligation not to lie—how could the state control an absolute ban on lying at all? The same is true of the moral duty to take care of oneself or not to harm oneself: how could the state enforce such an injunction? (In the past there was a legal prohibition on suicide though, and in many countries there is still an absolute prohibition on abortion, both of which are immoral in Kant's eyes.) The moral universalisability principle cannot therefore be applied in all kinds of cases, let alone all cases, and in the same way in terms of an absolute duty imposed by the state.

When it comes to a mandatory vaccination, therefore, we are not talking about a *moral* obligation that we should observe in virtue of reason, but about a duty that the state imposes on a subject on pain of sanctions (a fine, or worse, a custodial sentence). In contrast to a moral duty which is performed voluntarily, a duty decreed by the state, a vaccination duty in this case, constitutes an infringement of the freedom of the agent because such a duty is not a necessary act arising from a law imposed by the agent on herself. It limits the free will of the agent insofar as one cannot decide for oneself whether to be vaccinated or not.

The legitimacy of this follows from the state-ordained law to which every subject of that state must submit, whether the individual agrees or not. (According to Kant, it is of course possible that an arbitrary law is one to which one as a subject could submit *oneself* in good conscience, but note that the vaccination obligation is a special legal arrangement that you cannot compare with the obligation to pay your taxes, say.)

Nevertheless, the moral argument frequently resurfaces in the debate about compulsory vaccination. That in itself is not surprising, because a duty imposed by the state should ideally also be tested on ethical grounds—which the Deutsche Ethikrat in fact did by means of an ad hoc advice on the vaccination mandate, which to be sure was not unanimously agreed upon by all of its members.

In the case of the vaccination mandate, this has not least to do with fundamental legal principles, first and foremost the fundamental right to corporeal inviolability or bodily integrity (*körperliche Unversehrtheit*). But what I mean primarily here is that often a moralism creeps in when considering the necessity of introducing compulsory vaccination. This concerns the appeal to the solidarity argument already discussed above: in order to relieve the pressure on ICUs, we are morally obliged to have ourselves vaccinated. And this is then presented as the primary ground for a vaccination mandate. But there are several arguments against such an argument for a vaccination obligation.

But first I would like to discuss the idea that a vaccination mandate restricts the freedom of the agent, and what can be said about this from a Kantian point of view. For Kant, the freedom of a subject as a resident of a state is his external freedom, namely freedom insofar as the power to choose is not unduly restricted by the state. ‘My external (rightful) freedom is ... to be defined as follows: it is the warrant to obey no other external laws than those to which I could have given my consent’ (*Towards Perpetual Peace*, AA 8:350n. [Kant 1999:323]). Freedom is not a tradable commodity. It is an absolute right that can be restricted only for its own sake. What is important to Kant is that *freedom can be restricted only if freedom is*

restricted. At first hearing, that sounds tautological. What is meant is that the state has the right to restrict a person's freedom if and only if that person's action results in a direct hindrance to a third party's freedom to act. In short, the state can use coercion to curtail someone's freedom only if this is necessary to guarantee freedom.

However, it is not the case that you can simply speak of a 'positive balance' of freedom, which a vaccination obligation would supposedly entail, that is, by restricting the freedom of a particular individual or group of individuals, the freedom in general (i.e. of the larger group) can on balance be guaranteed. There must be solid grounds for such a restriction, directly and solely related to the hindering of the freedom of the larger group by the smaller group, based on the Kantian principle that coercion can be used only as 'a hindering of a hindrance to freedom'. Kant writes in the *Doctrine of Right*:

If a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it.

(*Doctrine of Right*, AA 6:231 [Kant 1999:388])

When can one's freedom actually be curtailed? Kant is very absolute and principled about this. His understanding of freedom is such that it is not so easy to restrict what he sees as the only innate right that man has (*Doctrine of Right*, AA 6:237; cf. *On the Common Saying*, AA 8:292–3), at an individual level and by implication at a societal level. Only when someone's free action itself creates an obstacle to the capacity for free action of someone else or others can that person's freedom be restricted by state intervention: by 'hindering a hindrance to freedom'.

Does this mean, then, that when one's health is harmed, say, one's freedom is thereby jeopardized—since health is a necessary condition for being able to pursue one's life's goals in accordance with free choice? You might think that

harming the health of a third party prevents his freedom, and thus the freedom of the one who harms the health of the third person could be curtailed as a result. But my right to health does not take precedence over the right to liberty nor is it even equivalent to it. My free action must actually be demonstrably related to a hindrance of another's *ability* to act according to his free choice (i.e. amount to a 'hindrance to his freedom'), so that my free action can lawfully be restricted ('hindered') in turn; note: a hindrance to his freedom, not a hindering of this or that particular action or free choice. This norm, which follows from Kant's definition of freedom, must be guaranteed by the state, and as such is an expression of the collective will of its free citizens, and must also remain in accordance with it (and by implication also in accordance with the moral law).

In other words, the autonomy of every citizen-agent by definition is never a self-standing principle or capacity: everyone is bound by the norms that are intrinsically linked to it by virtue of the moral law and freedom as the first principle. It therefore concerns all free citizens of a state *together*, whose autonomy is collectively anchored in legal norms. But, of course, that also means in turn that the autonomy of *each individual* agent who prescribes the moral law for herself is safeguarded: it is not the case that we collectively give up our own individual responsibility and autonomy for the benefit of, or in exchange for, an alleged collective autonomy that exists in the form of the state that exists in abstraction from the individuals' autonomy (the collective will of the people). It is rather a collectively normative autonomous activity of all subjects individually who know themselves to be expressed in the collective will and who have given their consent to it. The will of each individual subject and the collective will are not two variables or entities that can be or must be negotiated: the will of each individual subject/agent is *eo ipso* bound to the collective will of all other individual subjects by a normative structure. And reciprocally, this standard ensures that everyone's *individual* freedom is guaranteed. Freedom in the strictest sense is the essential characteristic of that standard.

As soon as an individual agent violates that normative structure, by unlawfully restricting someone else's freedom—for example, making him a prisoner or slave or forcing him to perform a certain act, or intentionally inflicting injury, for example intentionally infecting someone with the coronavirus, or worse, taking his life—the state that guarantees the normative structure can, through the legislature, impose a hindrance to the obstacle to liberty on this particular individual, *in virtue of liberty itself*. That is why Kant here invokes the principle of non-contradiction: the freedom of the one who unlawfully restricts the freedom of others can be legally restricted just because he acted contrary to freedom in the general sense, even though he acted of his own free will. The obstacle to freedom that must be addressed here is not merely a limiting of a person's options, but actually limiting his *ability* to choose freely and actively pursue his life goals. That is why in the case of sanctions that are accompanied by the legal 'hindering of a hindrance to freedom', the ultimate consequence is a custodial sentence, which in German and Dutch is aptly called a *Freiheitsstrafe* and *vrijheidsstraf*, respectively, a taking away of someone's freedom.

If we extrapolate this to a group, the group of the unvaccinated, say, then the actions of the one group or individuals in the group whose freedom is being curtailed by way of a sanction must actually and demonstrably cause the curtailment of liberty, in particular the freedom to act (not just this one or other specific act), of the other, larger group, to which the former does not belong. In other words, it must be possible to demonstrate that freedom has actually been used in a way that constitutes an obstacle to the freedom of others. This could be, for example, when an unvaccinated person, in spite of the obligation to wear masks, in places where the risk of infection is extra high, knowingly enters a hospital without a mask. His use of his freedom in this case is an intentional abuse of his freedom because it hinders the freedom of others.

As said earlier, freedom is not what is left on balance after the deduction of restrictive acts and subsequent curtailments. It is also completely against the fundamental

right of freedom to state—and this is unfortunately something one heard frequently among politicians and opinion makers, at home and abroad during the pandemic—that vaccination should be seen as the ‘gateway to freedom’. In Germany you often heard the following argument: A state-sanctioned vaccination mandate offers the possibility of a guarantee of freedom, namely in order to get rid of other, ever-imposed, restrictions on freedom, such as lockdowns and 2G measures. A vaccination mandate would supposedly enable a ‘positive Freiheitsbilanz’,² as if freedom were indeed the outcome of a calculation.

This amounts to a perversion of the idea of rightful (external) freedom. The individual is then no longer free by virtue of his inalienable inner value, his innate right, as Kant says, but only because he submits to a demand from the government, namely the demand to be vaccinated. It cannot be the case that what is guaranteed to an individual under the constitution, namely his freedom and human dignity, is granted to him only on the condition that he first meets criteria established by the state which determine his harmlessness. The state is entitled to restrict someone’s freedom only if the individual himself constitutes a *de facto* and *demonstrable* obstacle to the freedom of another, and not in anticipation of a *possible* obstacle he *might* pose.

An even more bizarre, perverted reason for introducing mandatory vaccination was also regularly heard in the German media, and even from professors of law: introducing a vaccination obligation is good *precisely because* it is good to observe commandments and prohibitions. It supposedly provides ‘Rechtsgesinnung’ or ‘Rechtsfolgebereitschaft’³ that is beneficial to the relationship between citizen and state, and can even have a *liberating* effect, putting both the vaccine-willing and the vaccine-unwilling or vaccine hesitant before the law as equals, which they both have to obey in equal manner.

² See Wißmann (2021) <https://verfassungsblog.de/impfen-im-verfassungsstaat/>.

³ See Wißmann (2021).

Freedom is thus the effect of a legal obligation that applies to everyone. But introducing a mandatory vaccination law because the law requires equal obedience from all is, of course, one of the worst arguments for introducing a law. It's an even worse argument for freedom.

It is also a perversion of the principle of equality. The reasoning is that unvaccinated people have only themselves to blame for the fact that they are treated unequally, namely by the mandatory corona passport—in France, Italy and Germany this was at one point a so-called 2G passport (in Germany with the exception of public transport, which is currently 3G, and fortunately, in the land of *Geist* unvaccinated people are still allowed to frequent the bookstore as an essential daily need!)—which excluded unvaccinated people from large parts of public life. They have themselves to blame because they can be voluntarily vaccinated. So here too, the fundamental right to equal treatment applies only if you meet criteria imposed by the state. Equality is thus no longer a fundamental right, but an earned right for which certain conditions must be met. This is the bizarre logic of the authoritarian government that sells obedience as liberty and equality.

A side effect of this view is that compulsory vaccination implies an *Entmündigung* as *ultima ratio*: once the mandate is there for all to obey, we no longer have to think about whether we are able or have the right to make our own decision with regard to vaccination, because the state then determines 'for us', as our representative, what is good for us. The state is paternalistic, according to Kant a sign of despotism. The state relieves us of our duty to think for ourselves, and we consent to this. It doesn't get any more unkantian. In *On the common saying: That may be correct in theory, but it is of no use in practice*, from 1793, Kant writes:

A government established on the principle of benevolence toward the people like that of a *father* toward his children—that is, a *paternalistic government (imperium paternale)*, in which the subjects, like minor children who cannot distinguish between what is truly useful or harmful to them, are constrained to behave only

passively, so as to wait only upon the judgment of the head of state as to how they *should be* happy and, as for his also willing their happiness, only upon his kindness—is the greatest *despotism* thinkable (a constitution that abrogates all the freedom of the subjects, who in that case have no rights at all).

(*On the common saying*, AA 8:290–1 [Kant 1999:291])

This passage is primarily concerned with state interference with the happiness of citizens, but the same applies *mutatis mutandis* to their health. The government, of course, has an active duty to take measures that safeguard public health so as not to put it at risk, as in the case of pandemics, but it does not have the right to determine by law for individual citizens what is and is not healthy for them and to impose sanctions on its violation, nor coercively regulate the lifestyle of individual citizens in such a way that the health system not be overburdened. Safeguarding public health, for example by facilitating sufficient ICU capacity and training medical personnel, is the responsibility of the government, not that of the individual citizen.

We saw a para-authoritarian development emerging around the corona debate, in particular with respect to vaccination mandates: society collectively determines what individual citizens should think, by making a morally coercive appeal to their sense of solidarity or community spirit. In addition, you saw more and more that those who insist on their own individual responsibility, or even claim their freedom to make decisions for themselves, were openly reprimanded, not only on the usual social media and by commentators in the mainstream media, but even by politicians, intellectuals and scientists. The authoritarian nature of this mentality lies in the fact that people are denied their maturity. When the state actively promotes this—whether through statements by political leaders or through sanctions announced or actually implemented—this amounts to a political variant of what is appropriately called *Entmündigung* in German psychiatry (guardianship): a person is temporarily or for a longer period of time declared legally incapacitated, because he

can no longer be considered capable of making decisions independently, and to account for his own decisions. However, every citizen's right to self-determination is a high good and can be restricted only in extreme circumstances and under very strict conditions, when the individual poses a direct danger to himself or others.

To return to the solidarity argument: we also do not impose an obligation to donate one's organs in the event of death, while it would still be morally good if everyone (or at least a majority of the population) were to donate one or more organs in the event of death, in order to help one's fellow human being who is on a waiting list for an organ. Such a measure would be completely disproportionate. Organ donation cannot be made mandatory because solidarity is not a legitimate ground for making it mandatory by the state. The principle of bodily inviolability or integrity applies here in full. It is not the individual's legal duty to remedy the shortage of organ donors. This applies *mutatis mutandis* to the vaccination requirement.

First, an individual cannot be required to protect *himself*; if a sick person cannot be enforced without his consent a medical treatment that can cure him of an *actual* illness, much less can a healthy person be enforced a medical treatment that protects as a precaution against a *possible* illness. The right to self-determination applies here: only by expressly consenting to the treatment is the treatment legal.

Second, it is not the individual's duty to lessen the burden on health care. The causes of ICUs getting swamped must be objectively determined: in the Netherlands one of the important factors in the pandemic was the year after year of scaling back, as a result of neoliberal policies, of ICU capacity based on the economic just-in-time principle. The failure of the government, which has a constitutionally established duty of care, cannot be passed on to the individual citizen. There must really be a life-threatening risk linked to refusing to vaccinate yourself, with a causal link between the refusal to vaccinate and actual individual harm to third parties that cannot be explained from other causes. The burden of proof therefore

lies with the state in order to be able to infringe on a fundamental right, for each individual affected person. Proportionality, which is not a crude parameter but a precise, veritable legal criterion, must be considered when weighing mutual fundamental rights and their curtailment: the curtailment must be necessary, appropriate and reasonable. What also plays a central Kantian role here is the dignity of every individual, every citizen. Article 1 of the German constitution states that ‘die Würde des Menschen ist unantastbar’. That dignity as a human being is violated precisely when an individual, a person, is made into a mere object, or is used as a means to another end. Here we hear the echo of one of Kant’s formulations of the categorical imperative (the so-called Formula of Humanity):

So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.

(*Groundwork of the Metaphysics of Morals*, AA 4:429
[Kant 1999:80])

In short, what Kant has in mind with this formulation of the categorical imperative is that in every action towards others and also ourselves (!) we always consider the person in question as an end in itself, with an inner value. We can never use others, but nor ourselves, as a mere means to achieve another goal. This implies, among other things, that a government may never use individuals against their will as a means to achieve another goal, for example the goal of lessening the pressure on ICUs, or the goal of achieving herd immunity by means of a vaccination mandate. (That is different from trying to achieve herd immunity through voluntary vaccination, which is a legitimate goal.)

If the main reason for a vaccination mandate is that we thereby relieve the burden on health care, in particular ICUs, then why do we make—even apart from the aforementioned objection to blaming the individual for the ICU shortage—an absolute distinction between unvaccinated people who run an increased risk of ending

up on an ICU and other groups of people who run an increased risk of ending up on an ICU? In the latter group, we should especially think of people with cardiovascular diseases who are also partly ill through their own fault, such as smokers and obese people with unhealthy eating patterns, certain traffic victims.

Many people run an increased risk of ending up in the ICU due to their poor lifestyles, reckless driving, etc. If we then reason that corona victims have an unduly high occupancy on ICUs because of refusing to get a vaccination (if that can be proven at all), then the aforementioned cases of non-COVID ICU patients can with equal right be accused of their lack of solidarity, for they have largely to blame themselves for the fact that they end up on the ICU (of course not those who end up on an ICU through *someone else's* fault). This is a slippery slope argument: If we are going to use self-blame as a criterion for medical treatment, then we should not stop at a vaccination mandate, but also immediately introduce a ban on smoking, alcohol, and why not, driving. That is of course possible, but we must then ask ourselves whether we still live in a free society as we know it.

Another small but important point: people do not neglect to emphasize the difference between a vaccination obligation (*Impfpflicht*) and a vaccination coercion (*Impfzwang*). A legal obligation with regard to vaccination would, as it is said, not be the same as a coercion: it is true that people are legally obliged to be vaccinated, but it is not the case—this is presented as a kind of solace—that the police knock on your door and literally stick a needle in your arm. But this is just sophistry that has no legal basis. After all, in a legal context, a duty can have legal effect only if it is accompanied by a sanction; that is why there are, sometimes quite severe (in Austria up to €3,600), fines for failure to comply with the vaccination mandate.

Refusal to pay the fine can mean *Erzwingungshaft* in the German legal system—i.e. up to three months in prison, whilst the fine is thereby not waived. The measure of the *Erzwingungshaft* is explicitly intended as a means of coercion to break the will of the person concerned. This means that a vaccination mandate, to which a fine is

linked, is always accompanied by coercion. Coercion does not have to be physical, it can also be psychological. We already see such coercion with corona passports (the QR codes): many, and especially young people, have had themselves vaccinated under social pressure, or in order to be able to continue participating in society, not because they were convinced of its usefulness. We would have seen something similar were the vaccination mandate indeed to have been introduced; especially people from the lower social classes will feel psychologically compelled to opt for vaccination, because they cannot afford a large fine. That there was actually psychological coercion was apparent from statements by politicians who admitted or even gloated over the fact that an important function of corona passports was to indirectly coerce people to get vaccinated.

First and foremost, a vaccination obligation restricts the freedom of the vaccination-unwilling individual, namely his legal freedom in terms of ‘the warrant to obey no other external laws than those to which I could have given my consent’ (*Towards Perpetual Peace*, AA 8:350n. [Kant 1999:323]). This freedom has been unlawfully curtailed because a duty is imposed on this individual against his will, ‘conflict[ing] with inner morality’ (cf. *Doctrine of Right*, AA 6:371 [Kant 1999:505]), which is not in accordance with the strict conditions under which one’s freedom may be restricted. It is then sheer sophistry to say that he still has the free choice of paying the fine rather than get the vaccination: such an interpretation of his decision-making capacity would amount to being allowed to freely choose between a shot in the neck and the poisoned chalice. My freedom consists in my innate capacity to perform or not to perform an action, not just in the choice between two things. Coercing someone into making a certain choice by definition means incapacitating that innate capacity.

Finally, a last word about solidarity: the argument (in Germany at least) was that the unvaccinated would take society hostage. One also spoke in derogatory terms of a ‘pandemic of the unvaccinated’ or even a ‘tyranny of the unvaccinated’. But one could also say: it is the weak and those with an underlying disease that take society hostage.

If—foremost speaking for myself—I am someone who is terminally ill or has a weak immune system and risk a serious illness if I go and mingle among people without adequate protection, it is my moral duty as a weaker or ill person to take extra precautions. It is not my right that the whole society should revolve around me or the group to which I belong (the weaker ones). While it is still the duty of the rest of society to ensure that the weakest are exposed as little as possible to the risk of infection, it is not the duty of society to lock up the whole society just to protect a risk group (besides the fact that the far-reaching measures that were taken in this vein largely proved ineffective).

An important compelling argument of the anti-vax movement in Germany in the 19th century was that the unvaccinated could pose no danger to those who had been vaccinated if the vaccination did indeed work, i.e. provided protection against smallpox. In other words, there is no need for a vaccination mandate to protect others, because those who have been vaccinated are already protected by the vaccination. *Fremdschutz* is therefore not a good argument for compulsory vaccination. Even if merely *Selbstschutz* were an argument for a vaccination mandate in the sense of avoiding serious illness, such as with COVID-19, the vaccinated is *eo ipso* protected against the possibly increased risk of infection posed by the unvaccinated. There is thus a way for a vaccination-willing person to protect themselves against serious disease, or at least to minimize the risk, which infringes less on the autonomy of the vaccine-unwilling person than a general vaccination mandate, namely: to be vaccinated voluntarily! Not getting vaccinated poses a significant risk to public health, through infection, only if those who are willing to be vaccinated have not got vaccinated themselves. If those willing to be vaccinated do not get vaccinated, they are partly to blame for their own infection. By contrast, those who refuse to be vaccinated are not partly to blame for the violation of their rights that a vaccination mandate entails.

The unvaccinated were not the ones driving the pandemic as was often claimed, any more than the vaccinated were. It is mistaken to think that

comprehensive vaccination will make a virus disappear. Scientists are now agreed that that was not likely going to happen in the COVID pandemic. It became clear quite soon that after omicron, another mutation was most likely to emerge or the virus could become endemic in some form. Comprehensive vaccination mandates will not remedy this, but it will irrevocably drive a wedge in society whereby the unvaccinated (a significant minority) will be excluded from society as a kind of leper group. Such polarization and denigration of that group could be seen on a large scale in the media, social media, and even in politics—in a number of countries in Europe such social exclusion mechanisms were increasingly taking on protofascist traits.

With the seasonal flu, which in some years also kills a significant number of the elderly and the weak, we do not lock up the entire society or even parts of it. We didn't even do that with the highly contagious swine flu that swept across the earth more than ten years ago, to which many young people succumbed. We will have to accept that viruses like COVID-19 and pandemics are recurring phenomena and adapt our lives to them without compromising the achievements of a liberal society and the fundamental freedom rights associated with it.

Here again it is a question of proportionality: where an entire population group or large groups are in obvious mortal danger, such as with Ebola, it is a different story. If we did not take certain far-reaching protective measures there—and that could mean isolating individuals to protect others—a large part of a population would be at risk of imminent death. The lethality of a virus plays a crucial role here. How deadly was corona really, if we consider all kinds of co-responsible factors for the death of corona patients, i.e. the factor of co-morbidity? We cannot ignore the differences in the lethality of corona for different types of people (the weak, healthy people, elderly, the young); with Ebola, the lethality is many times higher, and more importantly, the same for everyone.

Measures should be necessary, proportionate and reasonable. They should be based on scientific facts and not politically or ideologically motivated. In light of

Germany's medical history, it is not all too surprising that the discussion about mandatory vaccination was so heated; after all, we saw at the beginning of this essay that the German states were among the first to introduce a general compulsory vaccination against smallpox at the start of the 19th century. But we no longer live in the 19th century. With a general vaccination mandate that lacks any solid scientific basis and rather stirs up more division in society, the foundations of a liberal society, in which the freedom of the citizen, and not his health, is the highest value, are being compromised. Or, to quote Kant, to risk ill health by being exposed to a 'physical evil' through no fault of one's own, is a lesser evil than to knowingly compromise oneself in 'moral recklessness', which is a 'moral evil'.