In Defense of Vaccine Mandates: An Argument from Consent Rights

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This article will focus on the ethical issues of vaccine mandates and stake claim to the relatively extreme position that outright requirements for people to receive the vaccine are ethically correct at both the governmental and institutional levels. One novel strategy employed here will be to argue that deontological considerations pertaining to consent rights cut as much in favor of mandating vaccines as against them. The presumption seems to be that arguments from consent speak semi-definitively against forcing people to inject something into their bodies, and so any argument in favor of mandates must produce different and overriding logical and ethical considerations. Our central claim will be that the same *logic* that might seem to prohibit vaccine mandates as violations of consent actually supports such mandates when viewed from the perspective of the potential bystander who might otherwise be exposed to COVID-19.

Introduction

Recently, the question has arisen of the ethics of pressuring people into getting one of the COVID-19 vaccines. Debates exist along several crisscrossing axes, including:

1. The acceptable form of any potential mandate: incentives vs. outright requirement.
2. The acceptable locus of any potential mandate: governmental vs. institutional.
3. Legal vs. ethical vs. policy considerations with respect to any potential mandate.

This article will focus on the ethical issues and stake claim to the relatively extreme position that outright requirements for people to receive the COVID-19 vaccine are ethically correct at both the governmental and institutional levels. By 'outright requirement', we do not mean to suggest that people will be forcibly vaccinated, but rather that some penalty will be assessed for most of those who choose to forgo a vaccine. One novel strategy employed here will be to argue that deontological considerations–and consent rights in particular—cut as much in favor of mandating vaccines as against them. To make allowances for a (narrow) realm of vaccine refusal, we do carve out an exception for those who are willing to take what we call Maximal Preventive Measures (MPMs): doing *all of* masking, social distancing and providing evidence of a negative test whenever they go into a public space; this carve-out would be sufficiently onerous for most people that it would act as another form of mandate, while allowing for certain legitimate exceptions. Note that our thesis is specifically applicable only to COVID-19 vaccines; we will however explore to what extent our argument might generalize to other vaccines. Even more precisely, our argument was originally formed in the context of variants of COVID-19 through delta. We comment below on how circumstances have changed with omicron (though not in a way that invalidates our argument), but of course given the likelihood that facts on the ground will continue to evolve, it is possible that some of our arguments might prove outdated. Even should that be the case, we maintain that the following ethical analysis of vaccine mandates in the era through delta (and to a lesser extent omicron) still has value in manifesting general argumentative positions that will likely apply to future variants or other viruses altogether.

We take it that one of the strongest arguments against requiring vaccines is that people generally have a right to refuse consent to any infringement on bodily integrity.

doi:10.1093/phe/phac005
Advance Access publication on 15 April 2022

We frequently hear vaccine opponents invoking the language of medical choice or informed consent. The presumption seems to be that arguments from consent speak semi-definitively against forcing people to inject something into their bodies, and so any argument in favor of mandates must produce different and overriding logical and ethical considerations.

Other defenses of vaccine mandates in the literature have generally taken this structure of rights vs. some other good. For example, they have focused on the unvaccinated's contribution to a collective harm (Brennan, 2018), the protection of the general public (Flanigan, 2014; Savulescu, 2021), the protection of the otherwise unvaccinated (Giubilini and Savulescu, 2019), herd immunity (Giubilini, 2020) and considerations of fairness (Giubilini, 2020). In most of these arguments, the general idea is that the considerations in favor of the mandate outweigh whatever claims or rights an unvaccinated person has to remain unvaccinated. The exception to this strategy is Brennan's (2018) libertarian argument. Since the libertarian does not allow that considerations of the wellbeing of others can ever outweigh one's right to liberty, a mandate will only be viable if the mandate falls outside the scope of one's liberty rights. As such, Brennan argues that the unvaccinated contributes to a collective harm that the government is justified in preventing via vaccine mandate.

Our argument comes closest to Brennan's in that we also do not focus on benefits of the vaccine mandate outweighing any harms or rights to the otherwise unvaccinated. Where it differs, however, is that our focus is not on a contribution to a collective harm that a government may protect against, but rather on a conflict of rights between the would-be unvaccinated and individuals with an interest in people with whom they interact being vaccinated. Indeed, our central claim is that this is a conflict of the very same right, i.e. one's purported right to remain unvaccinated is undergirded by the same deontological logic of consent rights that we contend motivate the right of a potential bystander to not be unnecessarily exposed to COVID-19. As a catch-all term, we speak of a general right to engage in the world free of harms imposed on one's body without consent; we mean by this construal to pick out whichever right or rights vaccine refusers and bystanders alike seek to invoke. The crux of the argument is that when one defends one's right to remain unvaccinated, one inevitably also accepts infringement upon a bystander's right to not be exposed to COVID-19 by the unvaccinated. What justifies a vaccine mandate, or so we will argue, is how this conflict of rights in kind gets settled.

We will be focusing our arguments exclusively on the justification of mandates for vaccines in Western cultures. We suspect that the strongest case against individual mandates can be made for a Western culture such as that of the USA, for two reasons. First, given their emphasis on individualism and individual rights, one would suspect a stronger cultural norm against essentially overriding individual decision making. Second—and we will return to this in the objections and replies—given the emphasis in at least the more liberal corners of Western culture on bodily integrity in support of reproductive rights, we might expect similar logic to speak in favor of preserving bodily integrity in the case of vaccine refusal.

We will also largely be omitting one standard argument in favor of vaccine mandates, as hinted to above. One might think that the sheer scope of the COVID-19 pandemic would justify overriding what would normally be ethical rights for the sake of avoiding catastrophe. While the scope of the pandemic will play a role in our argument, we do not intend to argue that otherwise unethical action is justified in this case on purely utilitarian (i.e. outcome-based) grounds. Rather, we argue that—properly thought of—mandating COVID-19 vaccines is not unethical in the first place. While others (especially Brennan, 2018) have argued that vaccine mandates do not violate general constraints against government restriction, we take our advance to be framing the defense of mandates in the very language of rights and consent most commonly used by their opponents.

For purposes of this paper, we begin with three assumptions. First, we assume the extreme safety and relative efficacy of the COVID vaccines. More specifically, we assume that there are very low odds of unforeseen serious side-effects (Blumenthal *et al.*, 2021, Klein *et al.*, 2021), that being vaccinated reduces one's odds of acquiring COVID-19 (Thompson *et al.*, 2021) and that being vaccinated greatly reduces the odds of transmitting COVID-19 to other people. This could be true because it reduces viral load (Petter *et al.*, 2021; Vitiello *et al.*, 2021) or because it reduces the length of one's contagion (Thompson *et al.*, 2021), but if nothing else it follows as at least plausible from the fact that vaccinated individuals are less likely to be infected in the first place (Centers for Disease Control and Prevention, 2021b). Obviously many people who oppose vaccines on any level are likely to dispute this assumption, arguing either that vaccines are unsafe or that they are ineffective. However, the fact that people argue something does not in itself imply that it is a plausible position, and so—given the overwhelming empirical evidence—in this case it is reasonable to simply set aside for the

purposes of ethical analysis claims that deny the vaccine's (general) safety and effectiveness, so long as there is support for those who suffer side effects, as well as a very limited set of exceptions for those with legitimate medical reasons not to get the vaccine. That said, while the safety of the vaccines is unlikely to change, the soundness of the assumption that they reduce infection and transmission might wax and wane as new variants become dominant. For example, when this paper was drafted the dominant variant was delta (see citations above), but during revision the omicron strain became responsible for almost all infections in the USA (Centers for Disease Control and Prevention, 2022). While the omicron variant exhibits significantly more vaccine escape than earlier variants (Lyngse *et al.*, 2022), preliminary results indicate that vaccines are still somewhat effective at reducing infection and transmission (Lyngse *et al.*, 2022) Perhaps by the time this paper is published or read the situation will have changed sufficiently that our underlying assumptions are no longer sound. If so, we present our arguments as pre-emptive considerations for how to treat vaccine mandates in the face of future variants or pandemics where these assumptions do apply.

Second, we assume that in the absence of a mandate there will be a large number of people who do not get the vaccine and that in the presence of a mandate this number will go down. The former claim is undeniably empirically accurate—there are as of this writing large swaths of the population who refuse to get the vaccine. The latter point is more speculative—it is possible that a mandate would somehow backfire and lead to fewer total vaccinations. However, evidence suggests that at least at the institutional level when mandates are enacted people become more likely to get the vaccine (Greyson *et al.*, 2019; Gostin, 2021); so this seems like a reasonable assumption. (We do not however commit to how many more people would be likely to get it.) Finally, we assume that the vaccine is readily available—obviously it would be unjust to mandate someone get something that there is no way for them to get.

Note also that the exception for people taking MPMs discussed above (masking + distancing + testing whenever entering a shared public space) also entails that our discussion only applies to people who enter shared public spaces. If one really lives one's entire life in a wholly insular fashion (as in a hermit in the woods), then one can trivially satisfy the mandate by doing nothing new (since one is not entering publicly shared spaces). In addition, there is likely a gray area where one has such minimal contact with outsiders—perhaps in a rural farming community—that taking MPMs is sufficiently doable that it represents a reasonable alternate path such that the vaccine is in some sense no longer 'mandated'. Given how interconnected most people are (even those who spend most time in isolated locations generally have some need of interacting with the broader population) we thus focus our discussion on those who have some interest in regularly being in shared public spaces.

The structure of this paper is as follows. The next section provides the major arguments in the paper, showing how the very same deontological considerations that might speak *against* mandating vaccines in support of the consent rights of the recipient also speak *in favor* of mandating vaccines in support of the consent rights of those who might potentially be exposed. We will then discuss how to address these competing rights-claims and argue that the best resolution is to favor the rights of potential victims of COVID-19. In the following section, we will build on well-known analogies from clinical/medical/nursing ethics—this is intended merely to be illustrative. We then expand the argument from governmental mandates also to defend on similar grounds institutional mandates at effectively any sort of institution. We conclude with objections and replies.

Rights-Based Arguments for and against Mandates

Vaccines and Individual Rights

When someone makes a decision not to get a COVID-19 vaccine, they are of course making a decision pertaining to their own healthcare. However, what is sometimes overlooked is that they are making a decision pertaining to others' healthcare as well. Though there is no guarantee that anyone who is not vaccinated will be exposed to COVID-19 and will pass it on, not being vaccinated makes it more likely that they will do so (see above). In that way, they affect the rights of future people with whom they interact. By analogy, it is clearly wrong to put toxic chemicals in someone else's water; we can then consider a person or company that allows potentially (but not certainly) dangerous chemicals into a local water supply. They might not know that they are putting anyone in danger and certainly would not be able to point to a specific individual who will be harmed. However, the potentially more diffuse nature of the wrong in not knowing whom will be hit seems on the surface almost exactly counterbalanced by the very real possibility that they will harm multiple people. In the same way, while we cannot point to a specific individual Y who will get COVID-19 as a result of person X's

decision not to get vaccinated, there are a whole host of individuals Y_1–Y_n who suddenly find themselves in unwanted harm's way. It is also worth noting that some of the Y_is might not be able to get the vaccine themselves, either due to overriding medical reasons or the simple fact that (as of this writing) it is not yet approved for or available to all populations. In the case of pollutants, the right being violated is Y's ability to live their life and assume a certain level of safety in their water supply, or more generally the right to engage in the world free of harms imposed on one's body without consent.

What right then is being violated with respect to a person who is forced to get a vaccine? The clearest answer is the same as above, i.e. one's right to engage in the world free of harms imposed on their bodies without their consent. This suggests we look at the literature on consent to ascertain whether their rights are more sacrosanct than the victims of any potential COVID-19 exposures. In the remainder of this section, we speak as if there is one particular person who will be exposed to COVID-19 as a result of an individual's vaccine refusal—as pursuant to the previous paragraph, we take this to be morally similar to the more realistic scenario where there are multiple people with massively increased potential exposure.

Sources of Consent Rights

In this section, we will go over some common justifications for people's right to refuse interventions on their bodies and argue that those same justifications provide at least some *prima facie* reason to think that they in most cases do not have a right to refrain from getting a COVID-19 vaccine. The key to this strategy is arguing not that there are conflicting kinds of rights, but rather that the very same *kind* of right that would justify vaccine refusal also justifies vaccine mandates.

For example, the right to refuse interventions is most frequently grounded in autonomy, which is literally the right to make laws for oneself. Spelling out precisely why this is the case is complicated by the fact that philosophers have no clear unified conception of autonomy (Buss and Westlund, 2018). We do not need a full account of autonomy however to note that one necessary condition for autonomy is the liberty to decide for oneself how to live one's life free of unnecessary externally imposed impediments. It is this liberty criterion that vaccine mandates are often thought to violate, but we will argue that the absence of mandates is responsible for violations of that same liberty criterion. For approximately as long as philosophers have discussed anything like autonomy or liberty there has been a general recognition that liberty rights can conflict in such a way as to make it impossible for everyone to have maximal liberty all of the time. Hobbes (2016/1651, Chapter 13) famously observed that if everyone were free to do as they would, life for everyone would be 'nasty, brutish, and short', and even John Stuart Mill's (2011/1859) most famed statement of maximal individual freedoms in 'On Liberty' acknowledged that one's liberty always needs be curtailed when its exercise would infringe upon the liberty of others. Yet—given our assumptions about the effectiveness of the vaccine and the need for common areas—this seems like a paradigmatic example of where one person's liberty would limit another's. My liberty to be able to engage in society without being 'assaulted' by a vaccine is no more obviously sacrosanct than your liberty to be able to engage in society without being 'assaulted' unnecessarily by deadly virus. I cannot govern myself as I will when I am willfully exposed to COVID-19.

Two notes are in order. First, some would argue that the battery of having a needle puncture your body violates one's rights in a way that an increased risk of contracting COVID-19 does not (for one such argument, see Kowalik, 2021). For the most part we simply reject the reasonableness of this distinction on several grounds. First, on the actuality of the harm the needle causes vs. the mere possibility of contracting COVID-19, we note that the harm of the needle itself is quite minimal and that is the only harm 100% guaranteed. The reception of the vaccine itself is not a harm, unless there are adverse side effects, which are simply an added risk—not unlike the added risk of contracting COVID-19. Thus, if we step back and look at the overall expected utility of the actual needle jab and the possibility of adverse side effects of the vaccine with the overall expected utility of the increased risk of COVID-19 exposure, we contend that the latter is much worse. The risks of COVID-19 include unpleasant symptoms [Ma *et al.* (2021) recently provided a headline-generating result that 40% of cases are asymptomatic, but that suggests that 60% might not be], 'Long COVID' (Crook *et al.*, 2021), hospitalization (Scobie *et al.*, 2021, especially Figure 2) and death. The seeming similarity in kind and relative seriousness of potential harms from the virus as compared to the risks of the vaccine (Blumenthal *et al.*, 2021; Klein *et al.*, 2021) + the actual harm of the jab make it seem like the rights violation are minimally of a piece (leading to our discussion in the next section of how they should be adjudicated). Second, focusing on the unwanted foreign agent itself, whether one receives an unwanted vaccine or an unwanted infection, the issue is that an unwanted foreign agent is entering one's body without one's consent–drawing a sharp distinction based on the foreign agent's mode of entry would suggest that a vaccine mandate

would be ethically worse than making the vaccine airborne and spreading it throughout the country. We suspect that most of those we have encountered who argue against mandates on the grounds that they do not consent to the intervention of a shot would be unlikely to accept the intervention being thrust on them via a different and more pervasive mechanism such as being omnipresent in the atmosphere. Finally, one might argue that there are different levels of consent violations–an unapproved cheek swab is an ethical problem, but clearly a smaller one than an unapproved surgery. Precisely what makes one violation worse than another is beyond the scope of this paper, but presumably one vector of evaluation is the expected harm done (as measured in the severity of possible outcomes multiplied by the likelihood of those outcomes obtaining). As just discussed, the calculus of expected harms speaks in favor of mandating a vaccine—the point here is that this same calculus might well also speak to the severity of a rights violation in exposing someone to that harm without consent relative to the consent violation of being mandated to get an unwanted vaccine.

Of course, one might argue that we are underestimating vaccine risks and overestimating how severe COVID-19 is to everyone. After all, there have been cases of reactions to COVID-19 vaccines (Centers for Disease Control and Prevention, 2021a) and there are populations for whom severe cases of COVID-19 are rare (American Academy of Pediatrics, 2021). On the first issue, (of underestimating vaccine risks) we make three points. First, we began with the assumption that the vaccines are safe. To that end, it may be that certain vaccines, e.g. Johnson and Johnson or AstraZeneca, may not be ethically mandated due to their increased safety risks and lower efficacy (Centers for Disease Control and Prevention, 2021c). Second, we remind the reader that the mandate we propose does include MPMs as an alternative to receiving the vaccine. Those unwilling to receive the jab may choose N95 masking, distancing and testing as an alternate route to avoid violating the consent rights of bystanders. Third, we would agree that we can set aside the relatively rare instances of vaccine side effects, so long as there are accommodations for those who have side effects, as well as an exemption for legitimate medical reasons. The idea here is that when there are indeed side effects from the vaccine received due to a mandate, the ethical mandate will include provisions for compensation. On the latter issue of overestimating the severity of COVID-19, we again make three points. First, there are cases of severe COVID-19 across all age-groups, even if prevalence of cases is lower in certain age-groups (American Academy of Pediatrics, 2021). Indeed, the prevalence of severe COVID-19 across groups is higher than the prevalence of severe reactions to COVID-19 vaccines (compare Centers for Disease Control and Prevention, 2021d to Delahoy *et al.*, 2021 for cases of adverse reactions to the vaccine to COVID-19 hospitalizations). Second, unless the unvaccinated can be sure only to interact with individuals from those groups who do not regularly suffer from severe COVID-19, it will not matter that some individuals fall into that camp. The unvaccinated will inevitably interact with those for whom severe COVID-19 has a higher prevalence. Finally, while it is possible to offer compensation and accommodation to those few who react poorly to the vaccine, a parallel proposal for those who ultimately suffer from severe COVID-19 is untenable. That is, it seems much more plausible to make whole those who have bad side effects from the vaccine mandate than to make whole those who suffer severe COVID-19 due to the lack of a vaccine mandate.

As a second note on the liberty argument, Brennan (2018) has already argued that variants of Mill's harm principle are sufficient to justify vaccine mandates. Our approach is subtly different in that Mill's harm principle is characterized as a general limit on person X's liberty whereas we are grounding our argument in the very same rights justifying vaccine refusal (e.g. liberty). This has an advantage that it defends against those who might think that unwanted medical interventions are a different kind of consent violation that cannot be overridden by Brennan's 'clean hands principle'—we argue that those the very same principles that support the vaccine refuser's argument also undermine it. (Brennan's approach has other advantages in engaging with specific libertarian concerns–as such we consider the two complementary rather than in competition.)

Similar strategies of looking at the question of rights from the potential of the prospective victim of COVID-19 exposure suffices to defray many other concerns with other intrusions on bodily integrity without consent. For example, some people ground the right to refuse intrusions in the fact that we own our own bodies (Eyal, 2012: 14). But just as my ownership right to a field gives me a claim against a neighbor whose conduct polluting risks dropping soot on my crops, so my ownership of my body gives me a claim against someone whose conduct risks dropping unnecessary SARS-CoV-2 droplets in my breathing area. Likewise, while your bodily integrity is undermined by receiving an unwanted shot, mine is undermined by receiving an unwanted COVID exposure.

One final worry worthy of special mention is that allowing the right to refuse bodily infringements is necessary to prevent abuse at the hands of authority figures (Manson and O'Neill, 2007). In this case, one might worry that allowing the government the authority to mandate one shot will open the door for allowing future governments to mandate shots for more nefarious purposes. Another version of this concern might be a 'slippery slope' objection, which acknowledges that a vaccine mandate might be justified in this case but that allowing one would open the door to instances where such a mandate would be unjustified. However, the proper response to this is perhaps the standard one to most slippery slope arguments, which is that if the current action is justified but a future later one might not be then we need a mechanism in place that pulls the brakes right at the juncture between the justified and the unjustified. The way to prevent unjustified behavior is not to ban justified behavior, but rather to be vigilant regarding when one might cross the relevant boundary. This objection reasonably speaks against giving the government *carte blanche* authority to institute vaccine mandates but does not speak against allowing it to mandate this specific one. We would in effect require a new analysis to be done for each prospective vaccine. For example, current flu vaccines might not be amenable to mandates, as they violate the assumptions of strong effectiveness and high likelihood of spread and conceivably alter the calculation of expected harm that might be relevant for weighing consent violations against each other. As the effectiveness of flu vaccines increases and if the contagiousness and severity of flu infections increase the case will approach to COVID-19; our current situation provides a clear case against which other vaccine mandates could be compared—if the harms of the virus and safety/effectiveness of the vaccine are at least as great as they are for COVID-19, then a mandate is justified. Anything less must be evaluated on a case-by-case basis.

Competing Rights Claims

Suppose one accepts as above that there are competing rights claims—of the same kind—between potential unwilling vaccine recipients and potential unwilling victims of COVID-19 exposure. The next question is how we adjudicate between such conflicting rights claims. One move that would be reasonable here would be to reinvoke the societal costs of COVID-19 and argue the default should be the permissibility of a vaccine mandate unless there is a rights-based argument against having one. If the rights-based arguments all turn out to counterbalance, that would leave in place the default need to protect society of a rampaging pandemic. We think this would be a perfectly reasonable argument; however, as the 'consequentialism vs. deontology' argument (basically an argument between achieving positive outcomes at the cost of violating ethical 'rules') is well-trod ground, we table that line of reasoning in favor of arguing that a consideration of rights on their own terms favors vaccine mandates.

It is of course well beyond the scope of this paper to consider every way in which one might resolve conflicts among different people's rights. We will thus argue from a framework inspired by Rawls' landmark *A Theory of Justice* (1971/1999), widely considered to be the dominant work of political philosophy of the last century. We believe that the choice of this framework is not necessary for our ultimate conclusion and that virtually any system for trading off rights would get the same result—however, we obviously save proving this claim for future work. We will however entertain the possibility that this whole approach is wrong-headed and that a proper deontological (i.e. rule-based rather than outcome based) perspective demands that rights cannot really be weighed against each other or traded off in the first place.

Rawls' central innovation is the 'Veil of Ignorance', wherein people in an 'Original Position' determine what is just by what one would agree to if one did not know exactly who one was. The basic idea is to imagine a group of people setting the rules for a new society, in particular the allocation of primary goods [including (at least in our version) such 'goods' as rights]. However, no one in that room has any idea who they are in the society; they do not know their race, gender, economic status, or any other identifying feature. Since they do not know who they are, anyone can be reasonably expected to represent all of humankind. Rawls, for his part, concludes that two principles of justice fall out of this setup. However, there is a wealth of literature debating whether Rawls is correct about what principles would fall out of the Original Position as well as how and to what those principles should apply, if correct. We do not wish to get bogged down in Rawlsian interpretation here. For our purposes, we instead turn to a Rawlsian lesson: the contractarian under-pinning of moral principles.

In envisioning the social contract, we need to discern what we would all agree to if we were fully rational and free of prejudice. This is what the Original Position and Veil of Ignorance are meant to establish. Though individual public health issues go beyond the scope of Rawls's vision, we can use his thought experiment to develop one way of thinking through how a society ought to trade off rights when they conflict. We maintain

that when setting up a society, if you do not know who you will be in that society, it is in your interest to protect those worst-off, in case you are one of those people. As such, when an issue arises in which not everyone's rights can be met, one way of thinking through how to resolve the conflict of rights is to focus on protecting the rights of whoever would be worse off for the violation. Getting back to COVID-19 vaccine mandates, we contend that this reasoning speaks fairly clearly in favor of mandates. Given that we carve out exceptions for those with legitimate medical needs, the person who gets a vaccine they did not want is significantly better positioned than the person who gets COVID-19 exposure they did not want.

Given our use of Rawls's setup, it is worth considering some of the push back it has received. First, some (MacIntyre, 1981; Sandel, 1982) have argued that it is problematic to deny people in the original position all knowledge about their identity. How can I make a rational choice if I have no knowledge about my values or aims? If what is rational is whatever is in my best interest, I need to know what interests I have. Minimally, one should be offered their probability of belonging to a particular group that has particular interests. For example, if one knew that there was only a 1/7,000,000,000 chance of being a single person picked out for human sacrifice in a world where everyone else is obscenely rich, one might reasonably choose to take one's chances. However, providing knowledge of probabilities would only make the case for mandating vaccines that much stronger, since one is much more likely to be harmed by exposure to COVID-19 from an unvaccinated individual than to receive any harm from the vaccine (see previous section). Others (Harsanyi, 1975) have worried that even in the absence of probabilities Rawls (and in turn we) overestimates how risk averse people either are or should be. Psychologically speaking, perhaps people would be willing to risk a low well-being floor in the hopes of achieving a high well-being ceiling. This may be true, but notice that in this case, since one's well-being floor and ceiling *both* go up if there are vaccine mandates (with suitable narrow medical exemptions), for each individual person in the population one's odds of harm are greater if there is no mandate than if there is a mandate. Thus—whomever one thinks one might be—one is better off with the mandate. And the same math works for average utility. Given that the question of rights was a wash, this suggests that anyone in the Original Position should opt for a mandate.

One might at this point object that this entire section is based on a faulty assumption that rights claims can be traded off at all. One might think that certain rights are inviolate, even if respecting them involves a greater infringement on the rights of others (Thomson, 1990; Kamm, 1996). There are countless cases used to show that one may not harm an individual to prevent harm to others. For instance, many argue that one may not push a hiker off a footbridge to stop an out-of-control trolley from killing five others (Thomson, 1976). Likewise, it is argued that one may not kidnap an innocent person and harvest their organs to save the lives of five people in need of organ transplants (Foot, 1967). To generalize the point, if there is an existing threat to some group of people, it is wrong to introduce a new threat to a third party to protect the group already under threat (or so the argument goes). In the case of COVID-19, one might argue that those who might get COVID-19 are already under threat and that the vaccine mandate introduces a new threat to the unvaccinated to protect the group already under threat. However, there is a clear disanalogy here insofar as the unvaccinated individuals *are* the threat. There is a morally important difference between putting an individual at risk when an out-of-control trolley will possibly cost lives and putting an individual at risk when that very individual will possibly cost lives.

There is another way to see the case, however. We have been arguing that there is a conflict of rights in the vaccine mandate case. Yet, the trolley and surgeon cases above are not necessarily conflicts of rights. These cases involve violating a right to save people, and few actually argue that individuals have a genuine right to be saved from harm. Many do argue, however, that one may not infringe a right to prevent others from having their rights violated (Kamm, 1989; Heuer, 2011; Johnson, 2019). Indeed, one may not even do so when the same right is at issue. That is, I am not permitted to kill one even if it would stop five others from being killed. In the literature, this particular case has been dubbed the 'paradox of deontology'. After all, it seems a bit odd that one would think killing is bad, yet not try to minimize them (Nozick, 1974; Scheffler, 1988). However, deontologists (i.e. ethicists who focus on rules rather than outcomes) have argued at length, and in many ways, that we are not permitted to treat an individual as a mere means to an end. In these cases, violating that one right would be akin to using that individual as a mere means to the end of preventing other rights violations. Bringing this back to the vaccine mandate, it seems that we have a case of violating an individual's liberty/consent rights (as characterized above) to prevent the violation of the liberty/consent rights of others, a clearly impermissible action according to these deontologists.

In response, again we can see a disanalogy. In ordinary cases discussed in the literature, there are a number of people whose rights will be violated, unless the rights of a

neutral third party are violated. In the vaccine mandate case, however, the unvaccinated individual is not a neutral third party. Rather, the unvaccinated individual is the one who, if their rights are not violated, will violate the rights of the masses. To summarize, we have two parties at issue (the potential COVID-19 getter and the unvaccinated) and two possible situations (mandate or no mandate). Both parties have the potential to have their rights violated, depending on the situation. However, it is only the unvaccinated that would become a rights violator (in the no mandate situation). As such, this is not an ordinary conflict of rights. Rather, we have an innocent party at risk from a potential guilty party. And, although one might argue that seen this way, the mandate constitutes a sort of Pre-Crime preventative justice measure, a safe and effective vaccine can hardly be seen as a punishment, and prior to vaccination, we would argue that the unvaccinated is already violating the rights of potential COVID-19 getters. As such, it is not merely preventative. This marks a key area where our argument reaches farther than Brennan's (2018)—since that piece was not addressed to deontologists, it (quite reasonably) does not consider the position of those who would take certain specific rights to be inviolable even to protect the rights of others. Our argument does so. (In a sense, our task has been made much easier by the sheer virulence of COVID-19 allowing us to assign individual culpability rather than rely upon concerns relating to collective action.)

There is another disanalogy worth mentioning before moving on. In the cases deontologists normally discuss, it is an ordinary bystander that we imagine either initiating the new threat or else violating the rights of the individual. Deontologists then argue that a bystander is not morally permitted to perform such acts to prevent harm or rights violations. However, in the vaccine mandate case, we do not have a mere bystander, we are considering government and institutional mandates. A bystander has no special obligation to the persons whom they would protect. Governments do have such special obligations, and some institutions might as well. So, not only do the stakes change insofar as the unvaccinated individual is the threat or potential rights violator, but the Government or institution who would infringe the rights of the unvaccinated via a mandate also have a special obligation to all parties involved to do what is necessary to protect them.

While one might seem to have a liberty/consent right not to be forced to get a vaccine, refraining from getting a vaccine makes one a perpetrator violating the liberty/consent rights of others. As such, it is legitimate for the government to prohibit one from doing so.

Analogies: Rights Violations and the Protection of Others

In this section, we point out that not only are there other circumstances (even in the medical domain) where we think that it is acceptable to infringe on what seem to be the rights of someone to protect the rights of others, but that (again) the same logic applies even more forcefully in the case of mandating COVID-19 vaccines. Some of the claims in this section will be controversial, so we note that our central argument in the previous section can (and should) be accepted independently of the analogies presented here. However, we believe the present analogies are still instructive regarding when it might be acceptable to infringe on what seem to be the rights of X for the sake of protecting the rights of Y.

To take perhaps the most obvious example, psychiatrists are required (legally and presumably also ethically) to break what is otherwise a strong right of confidentiality if not doing so would endanger the health and safety of a potential victim of violence (Kahn, 2020). That case on the surface is fairly analogous to the present one, where mere potential harm to someone else suffices to override someone's rights. Nor do we think the ethical calculus changes dramatically if—instead of threatening a specific individual—a psychiatric patient 'just' threatens to put potentially toxic chemicals into a shared water reserve—a diffuse risk of harm to a large number of anonymous people seems just as ethically relevant as a more specific risk of harm to a named individual.

However, one might believe that confidentiality rights are somehow more contingent or defeasible than consent rights, and so we turn to a second analogy perhaps more closely aligned with vaccine mandates. Parents generally have a right to decide for their children whether or not they will receive a medical intervention (Wilkinson and Savulescu, 2018). However, the default view of ethicists in the relevant domains is that there are generally some (limited) circumstances where it is acceptable to override those rights for the sake of protecting someone else's—in this case the child's. For example, it is generally believed (e.g. Conti *et al.*, 2018) that it is acceptable to provide blood transfusions for the children of Jehovah's Witnesses, even if the parents believe that doing so will cost the child their soul. If this position is correct (and we think that it is), then by itself it shows that we can override X's rights for the sake of Y's health. One might object that in this case the parental right is really just the child's right by proxy, and hence, the cases are not relevantly analogous. However, there is still a conflict of autonomous individuals even in this case.

While parents have default decisional authority on behalf of their children, the child still has a liberty interest of their own, which the parent is potentially violating by making a decision that has the potential to harm the child. (For more on the distinction between decisional authority and children's liberty/autonomy, see Wilkenfeld and McCarthy, 2020). Seen as a potential conflict of liberty rights, we argue that a recent look at the best logic behind overriding parental rights also suggests overriding the apparent right to refuse a vaccine.

A recent article by Brummett (2021) makes the point that despite ethicists' best efforts, it is not really plausible to ground the acceptability of overriding parental refusal in terms of neutral criteria like 'minimizing harm' (Salter, 2012) or demanding internal consistency (Bester, 2018). Brummett's insight is that if one *really* took seriously the prospect that receiving a blood transfusion might cost a child their soul, then one could not reasonably maintain that doing so minimizes harm or in some way enforces consistency. Rather, we override the parent's judgment not based on neutral procedural grounds, but based on our firm conviction that they believe a metaphysical claim that is simply false. If Brummett has correctly identified the justification for overriding parental rights, then it applies one thousand-fold to the question of vaccine mandates. The reason is that while we might *believe* that Jehovah's Witnesses are wrong about blood transfusions costing children's souls, it is hard to reasonably claim that we could possibly *know* it, and impossible to reasonably claim that we could ever *prove* it. However, per our assumptions, we *do* know that beliefs about the dangers of vaccines are simply incorrect and we have *already* proven it. Thus, if X's endangering Y being based on a false belief is reason to override X's rights, then the case is significantly stronger here than it is in the case of blood transfusions. Lest one worry that this logic could prove too much by allowing clinicians to paternalistically override patients' wishes whenever those wishes are based on a provably false belief, note that when X's decision only endangers himself there is no competing rights claim and the issue never arises in the first place.

Institutional Mandates

If the case has been successfully made that government vaccine mandates are ethically acceptable, then most of the logic applies doubly to institutional mandates, such as a university requiring vaccination as a condition of enrollment (subject to legitimate medical exemptions and corresponding precautions for those cases). The concern with government mandated vaccines is that they infringe on someone's rights; however, if we are correct that doing so is part of the best system of overall rights protection then it is just as legitimate for institutions to respect potential victims' rights in the same way.

In addition, there is the obvious point that groups of people are—with various exceptions—ethically free to associate as they see fit, and so they are likely entitled to demand people waive certain genuine rights as a condition of association. Presumably people have a right against being tackled by others, yet it is reasonable for professional sports associations such as the National Football League to demand that athletes waive that right to participate in on-field activities. It is their game, so they get to set the rules—if one does not want to waive that right, one always has the options not to play or to start one's own group.

There are several lines of resistance one could put up to this argument. First, one might argue that some institutions (e.g. hospitals) have an ethical obligation to be open to the public, and so logic gleaned from a football organization does not apply. One might also point out that if every institution instituted a mandate then there would be nowhere else for people who did not want vaccines to go. However, in both cases the answer is the same—at the limit, the most restrictive institutional mandates can be is akin to government mandates, depriving individuals of a choice regardless of their own decisions to associate. If we have already established that government mandates are acceptable, at most these arguments show that there are no *additional* reasons in support of institutional mandates.

Another objection might be that similar logic to that used to defend institutional mandates above (i.e. freedom to associate) has historically been used for pernicious ends such as refusing minorities service (e.g. by refusing to make wedding cakes for gay marriages). For the most part, the ethics of allowing refusal of service based on minority status are complex and beyond the scope of this paper. However, there are two clear disanalogies between requiring that (for example) students receive vaccines and requiring that wedding cake customers be heterosexual. First, in the bakery case there would be a concern that if all bakeries had similar policies, then it would be impossible for gay couples to get wedding cakes at all. However, in this case, one can acquire the services simply by getting the vaccine, so there is no risk of being shut out simply in virtue of one's identity. (We do assume that a gay person cannot just choose to be heterosexual, but even if they somehow could, it would be metaphysically impossible for this gay couple qua gay couple to somehow be heterosexual.)

Second, we suspect (though will not here defend) that part of the issue with the bakery example is that refusing service on the grounds of sexual orientation is a capricious reason to do so—it seems exclusionary for no legitimate reason. Since there are clearly strong legitimate reasons that an institution would want its students/workers/customers/etc. to be vaccinated, there is no worry about capriciousness here.

Objections and Replies

Objection 1: If one can be required to waive bodily rights for the sake of another person, that will be used as a reason to limit abortion rights. That functions as a reductio against the original argument.

Reply 1: First, let us grant for the sake of argument that the fetus is a *fully* rights-bearing person. Note that if it is anything less than fully rights-bearing then there is no conflict of rights among equals, and the arguments above never get off the ground. But in any event the argument still does not go through, because the translation of our original premise that the vaccine is safe is simply false (Kazemi *et al.*, 2017). Many pregnancies go relatively smoothly, but even then the woman is severely restricted for roughly nine months. And quite a lot of pregnancies do not go smoothly. Women can develop wrenching and dangerous nausea (Bustos *et al.*, 2017), heart problems (Iftikhar and Biswas, 2019), blood clots (Devis and Knuttinen, 2017), etc. So there is simply no analogy between mandating a vaccine and mandating a continued pregnancy. One might get the result that *if* a fetus is fully rights-bearing and *if* a woman can do so without cost or danger and *if* no one else can do so *then* she might have some minimal obligation to aid the safe extraction of a post-viability fetus. But such a triply conditional conclusion does not seem like an obvious reductio. Arguably it is just a restatement of famed abortion rights philosopher Judith Jarvis Thomson's (1976) concession that the right to an abortion is the right to end a pregnancy rather than a right to a dead baby. Note also that the limited conclusion might not allow for an enforcement mechanism as readily as would a vaccine mandate—knowing in the first place who is pregnant and what they are doing for their fetus would require a level of invasion of every woman's privacy (even those not actually pregnant) that has no analogy in the case where everyone is required to get vaccinated (or show evidence of MPMs) to enter public spaces.

Objection 2: Institutional mandates risk unintended consequences. For example, if a hospital mandates that nurses get the vaccine, then nurses might quit and go work at a less well-regulated care facility where still more vulnerable people will be exposed to the virus.

Reply 2: We consider this a very real concern, though note that it has only limited application. While unvaccinated nurses congregating at less well-regulated nursing homes might be a risk, there is no reason to expect (for example) unvaccinated students would gather anywhere vulnerable and less well-regulated. This is also more of a policy question than an ethical one, where what really needs be resolved is not whether institutional mandates are ethical but rather how we can make sure that the absence of mandates are not disproportionately burdensome on particular populations. Interestingly this very objection strengthens the case for a government mandate, as one of the points of government action is to make sure that we avoid a race-to-the-bottom where some institutions see advantages in refusing to enact vaccine mandates.

Objection 3: We do (and presumably should?) let people take all sorts of actions that pose risks to others, such as driving. Similarly, we should let people walk around unvaccinated.

Reply 3: This objection is potentially more potent in the wake of omicron than it was upon drafting this paper. As mentioned at the start, vaccines are potentially less effective against the omicron variant than past variants. If the vaccine is not as effective, then one might to tempted to think that we might as well allow people to walk around unvaccinated at this stage in the pandemic. Unless we are endorsing a strict lockdown, people's rights to not be assaulted by COVID-19 will be infringed, vaccine or not. To reiterate the objection, we allow people to take all sorts of actions that post risks to other, so why not the act of walking around unvaccinated? There are several disanalogies between cases like being allowed to drive and being allowed to refuse a vaccine. First, there are legitimate societal reasons for wanting people to be able to drive. Even if sometimes people drive for no discernible reason, it is still at least potentially in everyone's interests for people to be able to drive generally. Returning to the Original Position, if no one were allowed to drive that would severely hamper one's unknown self's potential well-being in a way that being forced to receive a particular vaccine would not. Second, as Giubilini *et al.* (2021) argues, even in the case of driving, there is massive government regulation regarding how precisely it must be done. We cannot (and should not be able to) just drive as we see fit—if one wants to enter the sphere of drivers, there are certain rules. In fact, to even enter the sphere of drivers at all one needs to meet a certain government-imposed requirement (getting a license)—in the same way, to enter

the sphere of societal interaction one might need to meet another condition. One might argue that one could simply refuse to drive, but the foregoing is still sufficient to address the issue that we simply allow people to risk the lives of others. We can also see from this example why general lockdowns are less ethically justifiable than vaccine mandates, even in the face of a more transmissible variant such as omicron. The vast majority of people would be significantly harmed by being barred from public spaces altogether, so it is unlikely people would choose such an option from our version of the original position. As with driving, allowing and regulating the valuable activity is significantly more justifiable than simply banning it outright.

Objection 4: One reviewer notes that we generally countenance communities running risks of spreading the common cold or the flu, so we have no principled reason to deny localities the right to run the risk of spreading COVID-19.

Reply 4: As noted above, there are several disanologies between COVID-19 and the flu (and *a fortiori* even more disanlogies with the common cold). The flu is not analogous to COVID-19 in terms of either virulence or severity, and the vaccines are not analogous in terms of effectiveness (even in the era of omicron). As such, the diseases/vaccines are different in kind and a reasonable individual within a community with high disease risk tolerance could more justly complain of their neighbors' actions with regard to COVID-19 than the flu. We remain neutral on where the line is at which point an individual's objectively defensible claim to a rights violation become decisive, but COVID-19 is clearly on one side of it. Note that this is particularly true where high risk tolerance of a particular disease is based on false empirical beliefs about its severity (e.g. that COVID-19 is no worse than the flu), as this undermines the validity of everyone's consent to take the risk.

Objection 5: Once herd immunity nears or is reached, the risk of contracting COVID-19 in public spaces is reduced to the point that the conflict of rights ought to favor the unvaccinated, i.e. mandates are no longer permissible (Giubilini, 2020; Williams, 2021).

Reply 5: This objection is interesting insofar as it may grant our argument up to a point. What our argument gets thus far is that when the risk of COVID-19 (or some other infectious disease) is sufficiently high, the consent rights of the bystander trump the consent rights of the would-be unvaccinated. One goal of vaccination is to achieve herd immunity, such that a disease is unable to find a host, and eventually the spread peters out. This is especially important in protecting those that cannot be vaccinated due to age or medical conditions. Our argument largely set herd immunity aside, insofar as we were not defending a mandate as a way to achieve herd immunity. Here, however, it is important to acknowledge that herd immunity is indeed a hopeful and likely result of a successful vaccine mandate. Yet, once herd immunity is reached, and the risk of COVID-19 exposure diminishes, it seems that the bystander's right can no longer be said to trump the right of the would-be unvaccinated individual, such that the mandate is no longer ethical based on our argument.

A number of points are worth noting in response. First, as of this writing, herd immunity with respect to COVID-19 is far from becoming a reality. As new variants continue to emerge, the prospect of reaching herd immunity anytime soon continues to dwindle. As such, our argument stands strong for a COVID-19 vaccine mandate for the immediate and likely protracted future, even if not for all times. Second, removing a vaccine mandate once herd immunity has been reached invites new outbreaks and a general breakdown of the herd immunity. That is, it remains plausible that the risks of being unvaccinated, even once herd immunity is reached, continue to be high, insofar as herd immunity can easily be lost. We are seeing this occur presently with measles outbreaks and the prediction of many more to come in 2022 (Center for Disease Control and Prevention, 2020; World Health Organization, 2021). Finally, if herd immunity is reached in such a way that a disease is eliminated entirely, with no clear risk of reemergence, then we concede our argument for a vaccine mandate has concluded—as we are making specific claims about the applied ethics of a particular policy in a particular context, the fact that it would no longer be applicable in a radically different context is no objection.

In summation, we think the case is extremely strong for requiring everyone who is able to receive a COVID-19 vaccine, ideally at the level of governmental mandate and also at the level of individual institutions. This case is strong even without looking at the utilitarian arguments that allowing the virus to spread and mutate can have catastrophic consequences, which arguments seem fairly impressive on their own. Rather, we argue that the same logic of a deontological right to consent or not to bodily infringements that speaks in favor of not requiring people to be injected with a vaccine also speaks in favor of not requiring people to be unnecessarily exposed to COVID-19, and so a full reckoning will involve a tradeoff of rights that will speak in favor of vaccine mandates.

Acknowledgments

We would like to thank Allison McCarthy for extensive comments and feedback and Dean Jacqueline Dunbar-Smith for the original impetus for this project.

Funding

This work was not supported by any particular funding mechanism.

Conflict of Interest

None declared.

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