

2024

## Pandemics of Limitation of Rights

Rinat Kitai-Sangero

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>

 Part of the [Constitutional Law Commons](#), [Health Law and Policy Commons](#), and the [Human Rights Law Commons](#)

---

### Recommended Citation

Kitai-Sangero, Rinat (2024) "Pandemics of Limitation of Rights," *Touro Law Review*. Vol. 39: No. 1, Article 5.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol39/iss1/5>

This Article is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

## PANDEMICS OF LIMITATION OF RIGHTS

*Rinat Kitai-Sangero\**

### ABSTRACT

This Article discusses the limitation of rights due to pandemics. It analyzes from a constitutional standpoint the holding of the German Federal Constitutional Court (Das BUNDESVERFASSUNGSGERICHT) from April 2022 as a symptom of moral panic disguised through an analytical process. Though it focuses on this case, it sheds light on the moral panic that characterized many countries' approaches during the COVID-19 pandemic.

On April 27, 2022, the German Federal Constitutional Court held that a provision to provide proof of vaccination against COVID-19, recovery from COVID-19, or a medical exemption to COVID-19 vaccination as a condition of employment in the health and care sectors was constitutional.

In the name of the necessity to protect life—which is undoubtedly the supreme value—the German Federal Constitutional Court was dragged after the global moral panic and has given a hand to disproportionately trampling human rights. It refused to recognize an alternative means of submitting negative COVID-19 tests as a condition of working with vulnerable people and as a less restrictive means of reaching the goal of protecting vulnerable people. It did not give weight to the autonomy of the individual, including vulnerable people, to take risks. It did not accord the due weight to the injury to livelihoods, career losses, the interruption of academic studies, and the breach of bodily integrity. It needed to adequately address the

---

\* Professor Rinat Kitai-Sangero is a staff member at the Law School and the head of the Multidisciplinary Studies, Zefat Academic College, Israel. She also teaches at Ono Academic College. I thank Orna Alyagon-Darr, Samantha M. Davis, Gabriel Lanyi, Jayden Kitai-Sangero, Boaz Sangero, Christopher C. Spinosa, Jr., the participants of the conference “Trial in the Age of Coronavirus” held at Zefat Academic College, and the participants of the 2022 ICON•S Annual Conference on “Global Problems and Prospects in Public Law” for their helpful comments.

legitimacy of the sacrifice of the individual for the collective good. The failure to satisfy the requirement of proportionality could indicate the underlying intention of the ruling—putting pressure on people to get vaccinated.

The COVID-19 pandemic crisis illustrates the great potential of coercive public health powers to infringe on civil liberties and the fragility of human rights when faced with danger to health. This Article advances the case for demonstrating greater respect for peoples' autonomy to take health risks before establishing coercive measures—which curtail fundamental rights—to prevent or reduce the spread of infectious diseases. The Article sets forth principles the state should consider before limiting constitutional rights and claims that people around the world should not be deprived of their choices.

## I. INTRODUCTION

This Article discusses the limitation of rights due to pandemics. It analyzes from a constitutional standpoint the holding of the German Federal Constitutional Court (Das BUNDESVERFASSUNGSGERICHT) from April 2022 as a symptom of moral panic disguised through analytical analysis. Though it focuses on this case, it sheds light on the moral panic that characterized many countries' approaches during the COVID-19 pandemic.

On April 27, 2022, the German Federal Constitutional Court ruled that a provision compelling to provide proof of immunization against COVID-19, recovery from COVID-19, or a medical exemption to COVID-19 vaccination as a condition of employment in the health and care sectors until the end of December 2022, passes constitutional muster.<sup>1</sup> Consequently, it dismissed the petitions of fifty-four complainants.<sup>2</sup> These complainants were required by their professions or studies to interact with health and care sectors, and they alleged personal harm due to this provision.<sup>3</sup> The complainants came from diverse fields, including physicians, dentists, psychotherapists, medical students, firefighters serving as emergency medical technicians or paramedics, an educator at a residential youth care facility for those with mental disabilities, a social worker in a supported living facility for the mentally ill, cleaning staff and a kitchen manager.<sup>4</sup> The Court held that the legislature had struck an adequate balance between the interests at stake.<sup>5</sup> On the one hand, vulnerable people have a higher risk of a severe or fatal course of illness.<sup>6</sup> On the other side of the equation stands the freedom of occupation of the petitioners and their right to physical integrity. People may suffer far-reaching occupational disadvantages, which for some of them can mean changing a career they worked hard to attain.<sup>7</sup> Some of them would not be able to continue their medical studies.<sup>8</sup> Also, the vaccinations can cause side effects,

---

<sup>1</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 27, 2022, 161 Entscheidungen des Bundesverfassungsgerichts [BVERFGE], 1 BvR 2649/21, [http://www.bverfg.de/e/rs20220427\\_1bvr264921.html](http://www.bverfg.de/e/rs20220427_1bvr264921.html) (Ger.).

<sup>2</sup> For the complainants' backgrounds, see *id.* paras. 21-28.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* para. 205.

<sup>6</sup> *Id.* para. 11.

<sup>7</sup> *See id.* para. 169.

<sup>8</sup> *Id.* para. 28.

including death, albeit these severe side effects are infrequent.<sup>9</sup> Given all the considerations, the potential harm of COVID-19 infection regarding vulnerable persons exceeds the potential risk of its vaccination regarding the whole population.<sup>10</sup> In addition, persons obliged to provide proof of immunization or recovery as a condition of employment are not forced to be vaccinated, but persons who do not provide them are solely disallowed to work in high-risk settings.<sup>11</sup> Their constitutionally secured rights are offset by the risk of life and severe physical impairments of vulnerable persons.<sup>12</sup> For the sake of the necessity to protect life—which is undoubtedly the supreme value—the German Federal Constitutional Court was dragged after the global moral panic and has given a hand to disproportionately trampling human rights.<sup>13</sup> It refused to recognize an alternative means of submitting negative COVID-19 tests as a condition of working with vulnerable people and as a less restrictive means of reaching the goal of protecting them.<sup>14</sup> It did not attribute the proper importance to the injury to livelihoods, career losses, and the interruption of academic studies. It needed to adequately address the legitimacy of the sacrifice of the individual for the collective good.

The judgment of the German Federal Constitutional Court radically expresses the global approach of disproportionately violating fundamental rights in order to protect people from being infected with COVID-19. This approach is driven by moral panic, and fails to adhere to fundamental constitutional principles accepted worldwide, such as the need for proportionality<sup>15</sup> and respect for autonomy.<sup>16</sup> “Moral Panic” is a term used to describe a widespread and exaggerated reaction from society or a specific group of people in response to

---

<sup>9</sup> *Id.* para. 231.

<sup>10</sup> *Id.* paras. 241-42.

<sup>11</sup> *Id.* para. 209.

<sup>12</sup> *Id.* para. 188.

<sup>13</sup> For an exploration of the limitations of the principle of proportionality as a key instrument for constitutional control—particularly in balancing the restriction of individual rights against public interests under conditions of factual uncertainty, as spotlighted by the COVID-19 crisis—see Borja Sanchez Barroso, *Beyond the Principle of Proportionality: Controlling the Restriction of Rights under Factual Uncertainty*, 9 OSLO L. REV. 74, 77-80 (2022).

<sup>14</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, paras. 231-32 (2022) (Ger.).

<sup>15</sup> See generally Aharon Barak, *Proportionality and Principled Balancing*, 4 L. & ETHICS HUM. RTS. 1, 4 (2010).

<sup>16</sup> See generally James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 2-3 (1995).

perceived threats to societal norms, values, or morals.<sup>17</sup> It often involves an irrational fear or concern over a particular issue or group, leading to public outrage, moral judgments, and calls for action to address the perceived threat.<sup>18</sup> Moral panics can be amplified by media coverage, misinformation, or political motivations.<sup>19</sup> The German Federal Constitutional Court's failure to satisfy the requirement of proportionality could indicate the underlying intention of the ruling—putting pressure on people to get vaccinated. However, while persuading persons to vaccinate is legitimate, exerting pressure at the cost of losing jobs and financial security unduly impairs their autonomy to refuse medical treatment.

As is well known, the world is still amid ongoing health, economic, and social crisis following the outbreak of the COVID-19 pandemic caused by a new virus named SARS-COV-2.<sup>20</sup> The global pandemic caused by this coronavirus has controlled our lives to varying extents since the spring of 2020.

On January 30, 2020, the World Health Organization declared the outbreak of COVID-19 as a public health emergency of international concern,<sup>21</sup> and in March of the same year, officially classified it as a pandemic.<sup>22</sup> Since the onset of the COVID-19 pandemic, the infection process has followed a dynamic course, characterized by distinct infection waves, each influenced by various virus variants

---

<sup>17</sup> STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS* xxxiv (3d ed. 2002).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See Patrick D. N. Perkins, *Crisis Legislation: Analyzing the Noble Quest of the Paycheck Protection Program to Save Small Businesses*, 101 NEB. L. REV. 945, 947 (2023).

<sup>21</sup> Conrad Nyamutata, *Do Civil Liberties Really Matter During Pandemics? Approaches to Coronavirus Disease (COVID-19)*, 9 INT'L HUM. RTS. L. REV. 62, 63 (2020); Shigenori Matsui, *Pandemic: COVID-19 and the Public Health Emergency*, 38 ARIZ. J. INT'L & COMPAR. L. 139, 143 (2021).

<sup>22</sup> Stephen Thomson & Eric C. Ip, *COVID-19 Emergency Measures and the Impending Authoritarian Pandemic*, 7 J.L. & BIOSCIENCES 1, 2 (2020).

shaping the respective infection process.<sup>23</sup> The number of infection cases has been steadily increasing, occurring in waves.<sup>24</sup>

Towards the end of 2021, the pandemic situation worsened with the emergence of the fourth wave of infections.<sup>25</sup> This new wave not only increased the number of cases, but also the number of severe illnesses and deaths.<sup>26</sup> At that point it was estimated that the pandemic had not yet reached its peak, and that an aggravation of the pandemic situation had to be expected due to an assumed rapid spread of the Omicron virus variant.<sup>27</sup>

Although the mortality rate of persons infected with the virus is relatively low, and most are not in a dangerous medical condition,<sup>28</sup> it is undisputed that the COVID-19 pandemic is contagious and that its risks are severe and real. It has so far claimed the lives of nearly seven million people worldwide.<sup>29</sup> Not surprisingly, the COVID-19 pandemic elicits deep concern.

The remainder of this Article proceeds in five parts. The second part deals with violating fundamental rights in the face of epidemics or pandemics. It addresses the restrictions imposed during the

<sup>23</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, para. 134 (2022) (Ger.); *see also* Medicare Program, 86 Fed. Reg. 63458, 63831 (Nov. 16, 2021) (to be codified at 45 C.F.R. pts. 412, 416, 419, and 512); James G. Hodge Jr. et al., *COVID's Constitutional Conundrum: Assessing Individual Rights in Public Health Emergencies*, 88 TENN. L. REV. 837, 881-82 (2021).

<sup>24</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, para. 240 (2022) (Ger.); *see also* Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. 4338, 4350 (Jan. 27, 2022) (to be codified at 31 C.F.R. pt. 35).

<sup>25</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, para. 217 (2022) (Ger.).

<sup>26</sup> *Id.* para. 5.

<sup>27</sup> *Id.* para. 157.

<sup>28</sup> Deirdre T. Little et al., *COVID-19 Vaccination: Guidance for Ethical, Informed Consent in a National Context*, 36 ISSUES L. & MED. 127, 134 (2021). *But see* Michele Goodwin & Erwin Chemerinsky, *The Trump Administration: Immigration, Racism, and COVID-19*, 169 U. PA. L. REV. 313, 326 (2021) (stating that “[i]n the first three months, when fatalities were roughly 100,000, COVID-19 had killed more people in the United States than what Americans have witnessed in the past fifty years of war and disease combined”); Gabrielle Muniz, *Herd Immunity Requires a Herd Mentality: Eliminating Religious and Philosophical Vaccine Exemptions Nationwide*, 55 NEW ENG. L. REV. 153, 153 (2021) (stating that COVID-19 “is a deadly and debilitating disease,” and noting the death toll of COVID-19 surmounting service member deaths in the Vietnam War).

<sup>29</sup> *COVID-19 Coronavirus Pandemic*, WORLDOMETER, [https://www.worldometers.info/coronavirus/?utm\\_campaign=homeAdUOA?Si%23countries](https://www.worldometers.info/coronavirus/?utm_campaign=homeAdUOA?Si%23countries) (last visited July 22, 2023).

COVID-19 pandemic and describes the phenomenon of moral panic. The third part distinguishes between paternalistic grounds (prevention of causing harm to oneself) and grounds aimed at preventing damage to others. It also describes the symbiosis between the individual and the public when imposing restrictions on individuals to avoid or limit the spread of contagious diseases. The fourth part sets forth considerations for balancing the need for an effective response to the pandemic and the protection of fundamental rights and addresses the inherent danger of trampling individuals' free will to protect the collective good. Finally, the fifth part concludes by suggesting that the trade-off between fundamental rights and public health and welfare should allocate more to one's autonomy to take health risks and by recalling the need to satisfy constitutional tests before violating fundamental rights.

## II. VIOLATIONS OF FUNDAMENTAL RIGHTS IN THE FACE OF CONTAGIOUS DISEASES

The outbreak of the COVID-19 pandemic created a worldwide situation that has been lifted right out of an implausible fictional story. It has plunged countries into an unprecedented and extreme crisis in its scope and created far-reaching consequences such as the disruption of life. It has claimed lives, harmed health, and ruined the livelihoods of many people. The COVID-19 pandemic has profoundly changed our behavior patterns, and it will likely affect our life patterns even after the crisis is over for years to come.<sup>30</sup>

During the COVID-19 crisis, places of work, restaurants, movie theatres, gyms, schools, daycare centers, libraries, shopping malls, and places of religious worship were shut down,<sup>31</sup> harming the

---

<sup>30</sup> Mark Hill, *Coronavirus and the Curtailment of Religious Liberty*, 9 LAWS, no. 27, Nov. 26, 2020, at 1, 1-2; Julia Puaschunder & Martin Gelter, *The Law, Economics, and Governance of Generation COVID-19 Long-Haul*, 19 IND. HEALTH L. REV. 47, 60 (2022).

<sup>31</sup> Nyamutata, *supra* note 21, at 78; April Xiaoyi Xu, *But What if Big Brother's Surveillance Saves Lives? - Comparative Digital Privacy in the Time of Coronavirus*, 54 CREIGHTON L. REV. 147, 148 (2020); Ricardo N. Cordova, *Lockdowns and Lost Liberties: Nevada's Experiment in One-Man Rule*, 49 N. KY. L. REV. 41, 41, 44, 48 (2022); *see also* Joseph J. Amon, *COVID-19 and Detention: Respecting Human Rights*, 22 HEALTH & HUM. RTS. J. 367, 367 (2020).



economy,<sup>32</sup> the right to work,<sup>33</sup> the right to education, and freedom of religion, and wreaking havoc on leisure and cultural life.<sup>34</sup> The suspension of international flights, which prevented citizens from returning to their countries and separated families,<sup>35</sup> violated the right to movement and the right to family life.<sup>36</sup> Quarantines and the closure of workplaces prevented people from earning a living and imposed financial burdens.<sup>37</sup>

Deadly infectious diseases pose a clear threat to health in the modern era. Countries often face actual or potential epidemic or pandemic danger.<sup>38</sup> For example, in the middle of the 19th century, tuberculosis was the primary cause of death.<sup>39</sup> In addition, lethal infectious diseases have also broken out in the 20th and 21st centuries,<sup>40</sup> and contagious diseases are a leading cause of death worldwide.<sup>41</sup>

---

<sup>32</sup> Juan Pablo Bohoslavsky, *COVID-19, the Economy and Human Rights*, 30 SUR - INT'L J. ON HUM RTS. 85, 88 (2020).

<sup>33</sup> Deepa Das Acevedo, *Essentializing Labor Before, During, and After the Coronavirus Pandemic*, 52 ARIZ. ST. L.J. 1091, 1132 (2020).

<sup>34</sup> Vanessa Ratten, *Coronavirus (Covid-19) and Entrepreneurship: Cultural, Lifestyle and Societal Changes*, J. ENTREPRENEURSHIP IN EMERGING ECONOMIES (2020), at 1, available at researchgate.net; William L. Rice et al., *Changes in Recreational Behaviors of Outdoor Enthusiasts during the COVID-19 Pandemic: Analysis Across Urban and Rural Communities*, J. URBAN ECOLOGY 1, 1 (2020).

<sup>35</sup> Guofu Liu, *COVID-19 and the Human Rights of National Abroad*, 114 AJIL UNBOUND 317, 318-19 (2020).

<sup>36</sup> See also *Human Rights and Human Trafficking*, UNITED NATIONS HUMAN RIGHTS, OFFICE OF THE HIGH COMMISSIONER, Fact Sheet No. 36, at 4 available at [https://www.ohchr.org/documents/publications/fs36\\_en.pdf](https://www.ohchr.org/documents/publications/fs36_en.pdf).

<sup>37</sup> Jane Speakman, Fernando Gonzalez-Martin & Tony Perez, *Quarantine in Severe Acute Respiratory Syndrome (SARS) and Other Emerging Infectious Diseases*, 31 J.L. MED. & ETHICS 63, 63 (2003).

<sup>38</sup> Michael R. Ulrich & Wendy K. Mariner, *Quarantine and the Federal Role in Epidemics*, 71 SMU L. REV. 391, 393 (2018).

<sup>39</sup> Carlos A. Ball & Mark Barnes, *Public Health and Individual Rights: Tuberculosis Control and Detention Procedures in New York City*, 12 YALE L. & POL'Y REV. 38, 41 (1994).

<sup>40</sup> Joseph Dute, *Tooth of Time: Legislation on Infectious Diseases Control in Five European Countries*, 12 MED. & L. 101, 102 (1993); David L. Heymann, *The Fall and Rise of Infectious Diseases*, 2 GEO. J. INT'L AFF. 7, 7-8 (2001); Duane J. Gubler, *Silent Threat - Infectious Diseases and U.S. Biosecurity*, 2 GEO. J. INT'L AFF. 15, 15 (2001).

<sup>41</sup> Lawrence O. Gostin et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 97 (1999); Joseph Dute, *Communicable Diseases and Human Rights*, 11 EUR. J. HEALTH L. 45, 45 (2004); Miron Mushkat & Roda Mushkat, *The Challenge of COVID-19 and the World*

Therefore, it is no wonder that public health officials possess broad powers to order the mandatory quarantine of infectious patients.<sup>42</sup> Indeed, the imposition of restrictions that infringe on fundamental rights by the state to limit the spread of contagious diseases is not new. States took preventive means that restricted fundamental rights in the face of infectious diseases throughout human history.<sup>43</sup> Thus, quarantine is an ancient means of dealing with such infections.<sup>44</sup> It was even mentioned in the Bible.<sup>45</sup> Italy used quarantines to control the great plague during the 14th century<sup>46</sup> and dealt with infectious diseases in the 15th century by establishing isolation hospitals.<sup>47</sup> In England during the 16th century, people who got sick in a house and were found outside could have been hanged to death.<sup>48</sup> Nordic countries marked infected places with a big cross during the 17th century.<sup>49</sup> Tuberculosis was treated in the past mainly by isolating patients,<sup>50</sup> and involuntary quarantine was implemented throughout early American history.<sup>51</sup> Fundamental rights have also been restricted in the face of the SARS epidemic, about which scientific information was lacking.<sup>52</sup>

---

*Health Organization's Response: The Principal Agent Model Revisited*, 36 AM. U. INT'L L. REV. 487, 534-36 (2021).

<sup>42</sup> Gostin et al., *supra* note 41, at 91; B. Bennett, *Legal Rights during Pandemics: Federalism, Rights and Public Health Laws – A View from Australia*, 123 PUB. HEALTH 232, 233 (2009) (regarding Australia); Andres F. Quintana & Mikayla R. Quintana, *Surviving the COVID-19 Pandemic of 2020: A Constitutional and Policy Review of Involuntary Medical Quarantine*, 11 WAKE FOREST J.L. & POL'Y 327, 346 (2021).

<sup>43</sup> Dute, *supra* note 40, at 46.

<sup>44</sup> Erin Pauley, *Human Rights in the Midst of Quarantine*, 13 LOY. U. CHI. INT'L L. REV. 71, 76-77 (2016); Goodwin & Chemerinsky, *supra* note 28, at 340.

<sup>45</sup> Thus, Miriam was shut out of the camp seven days after being stricken with leprosy, until her recovery. *Numbers* 12:10-15. It may be claimed, however, that Miriam's leprosy was not contagious—it was instead a punishment; she was kept out of the camp to shame her. King Azariah was a leper and lived in isolation until his death, leaving the task of governing to his son. *2 Kings* 15:1-5.

<sup>46</sup> Mika Kallioinen, *Plagues and Governments*, 31 SCANDINAVIAN J. HIST. 35, 37 (2006).

<sup>47</sup> David P. Fidler, *Microbialpolitik: Infectious Diseases and International Relations*, 14 AM. U. INT'L L. REV. 1, 8 (1998).

<sup>48</sup> Kallioinen, *supra* note 46, at 38.

<sup>49</sup> *Id.* at 39.

<sup>50</sup> Gostin et al., *supra* note 41, at 107.

<sup>51</sup> Quintana & Quintana, *supra* note 42, at 329.

<sup>52</sup> Dute, *supra* note 40, at 46.

New infectious diseases and biological terrorism that threaten life and health will likely emerge and challenge the international community in the future.<sup>53</sup> In a global age, an epidemic in one country can have global effects.<sup>54</sup> Viruses know no borders, and their spread worldwide is only a matter of time.<sup>55</sup>

Scholars have already cautioned against the great potential of coercive public health powers to infringe on fundamental rights in the past.<sup>56</sup> Indeed, the COVID-19 crisis has illustrated the gravity of the danger and highlighted the acute need to regulate the relations between government and citizens in times of health hazards.

Prima facie, the COVID-19 pandemic generated a health and economic crisis with no precedent in the last hundred years.<sup>57</sup> Governments had to make rapid decisions in the face of the new and unknown virus under conditions of scientific uncertainty regarding its nature and the magnitude of the harm it poses.<sup>58</sup> At the onset of the pandemic, no adequate medication or vaccines were available to address it.<sup>59</sup>

Under these conditions, governments invoked invasive powers to control the pandemic. They took public health measures that, among others, imposed limits on fundamental rights.<sup>60</sup> It seems that the nightmare of democratic states has materialized during the pandemic. Citizens in democratic nations now realize how fragile their taken-for-granted freedoms are, and the strength of the government's power to

---

<sup>53</sup> *Id.* at 51.

<sup>54</sup> Dute, *supra* note 40, at 48; April Thompson, *The Immigration HIV Exclusion: An Ineffective Means for Promoting Public Health in a Global Age*, 5 HOUS. J. HEALTH L. & POL'Y 145, 148 (2004).

<sup>55</sup> Scott Burris, *Law as a Structural Factor in the Spread of Communicable Disease*, 36 HOUS. L. REV. 1755, 1762 (1999); Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 BUFF. L. REV. 1, 5 (2010).

<sup>56</sup> *See generally* Bennett, *supra* note 42, at 235; Dute, *supra* note 40, at 46.

<sup>57</sup> Goodwin & Chemerinsky, *supra* note 28, at 314 (regarding the health crisis in the United States).

<sup>58</sup> Daniel Farber, *The Long Shadow of Jacobson v. Massachusetts: Public Health, Fundamental Rights, and the Courts*, 57 SAN DIEGO L. REV. 833, 859 (2020).

<sup>59</sup> *Id.*

<sup>60</sup> Oona A. Hathaway et al., *The COVID-19 Pandemic and International Law*, 54 CORNELL INT'L L.J. 151, 221 (2021); Cordova, *supra* note 31, at 41-42; Hodge Jr. et al., *supra* note 23, at 881.

strip them of those freedoms.<sup>61</sup> Individuals received a painful reminder about the enormous powers of the state to restrict their liberty. They also realized that the effective protection of fundamental rights depends on being part of a community that recognizes those liberties.<sup>62</sup>

In the last two-and-a-half years, states have exercised extensive powers aimed at the entire population to control the disease.<sup>63</sup> They fined the owners of businesses like hair salons for declining to close their businesses.<sup>64</sup> They placed restrictions on the population's freedom of movement in public spaces.<sup>65</sup> Healthy people were disallowed to leave their homes under stay-at-home orders.<sup>66</sup> Thus, the fictional quarantine imposed on *the Algerian City of Oran*, in Albert Camus' novel, *The Plague*,<sup>67</sup> became a reality. Even Camus, however, had not imagined a global health pandemic.

In addition, travelers arriving in a state from other destinations or people whom there was reason to believe were exposed to the virus were involuntarily isolated for a specified period in their own homes

---

<sup>61</sup> On the necessity of community recognition for the practical realization of fundamental rights, see, e.g., Rainer Forst, *The Basic Right to Justification: Toward a Constructivist Conception of Human Rights*, 6 CONSTELLATIONS 35, 52-53 (1999). See generally HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 290-302 (1958). See also Cordova, *supra* note 31, at 60 (stating that “[a]ccording to the lockdown lobby, politicians have the power to prohibit us from breathing fresh air—the power to criminalize our very existence”).

<sup>62</sup> See also Cordova, *supra* note 31, at 41-42.

<sup>63</sup> Thomson & Ip, *supra* note 22, at 2.

<sup>64</sup> LaVendrick Smith, *Dallas Salon Owner Jailed for Reopening in Violation of Court Order*, DALL. NEWS (May 5, 2020), <https://www.dallasnews.com/news/courts/2020/05/05/dallas-salon-owner-ordered-to-spend-a-week-in-jail-for-keeping-salon-open/>; Kevin Philip Donovan, *Infecting Constitutional Precedent: An Analysis of Federal Intrastate Quarantine Power through the Lens of the COVID-19 Pandemic*, 59 HOUS. L. REV. 431, 437 (2021); Katherine Drabiak, *The Intersection of Epidemiology and Legal Authority: COVID-19 Stay at Home Orders*, 18 RUTGERS J. L. & PUB. POL’Y 1, 26 (2021); Cordova, *supra* note 31, at 47.

<sup>65</sup> Kelly J. Deere, *Governing by Executive Order During the Covid-19 Pandemic: Preliminary Observations Concerning the Proper Balance between Executive Orders and More Formal Rule Making*, 86 MO. L. REV. 721, 746 (2021); Afrim Krasniqi, *Impact on Democracy of Emergency Measures against Covid-19: The Case of Albania*, 8 IALS STUDENT L. REV. 28, 32 (2021); Cordova, *supra* note 31, at 46.

<sup>66</sup> Drabiak, *supra* note 64, at 26; see also Lawrence O. Gostin et al., *Quarantine: Voluntary or Not*, 32 J.L. MED. & ETHICS 83, 84 (2004) (regarding SARS epidemic).

<sup>67</sup> See ALBERT CAMUS, *THE PLAGUE* (Stuart Gilbert trans., Vintage Books 1991) (1948).

or places designated for their isolation.<sup>68</sup> Other measures limited gatherings, imposed travel restrictions, and set obligations to maintain physical distance from others.<sup>69</sup> Persons were required to wear face coverings in public places.<sup>70</sup> Some workers were required to present proof of vaccination against COVID-19 as a condition of employment.<sup>71</sup> As demonstrated by the German case discussed in this article, some persons could not have continued their work unhindered or secure their livelihood without proven vaccination or recovery.<sup>72</sup> Moreover, many countries have imposed criminal sanctions, including imprisonment and suspended imprisonment, for breaching the imposed restrictions.<sup>73</sup>

The restrictions imposed have severely affected a large part of the population. Thus, for example, more than a quarter of a billion people in Europe,<sup>74</sup> 200 million people in twenty-one states in the

---

<sup>68</sup> Benjamen Franklen Gussen, *On the Constitutionality of Hard State Border Closures in Response to the COVID-19 Pandemic*, 35 J.L. & HEALTH 1, 4 (2021) (regarding travelers in Australia); Zoe Niesel, *The AOC in the Age of COVID - Pandemic Preparedness Planning in the Federal Courts*, 53 ST. MARY'S L.J. 157, 196 (2021); Matsui, *supra* note 21, at 172 (regarding Japan).

<sup>69</sup> Sergii Starodubov et al., *Liability for Violation of Quarantine: Novelties of Administrative and Criminal Legislation*, 9 IUS HUMANI REVISTA DE DERECHO 137, 144 (2020); Xu, *supra* note 31, at 153; Noah Smith-Drelich, *The Constitutional Right to Travel under Quarantine*, 94 S. CAL. L. REV. 1367, 1390 (2021); Cordova, *supra* note 31, at 46.

<sup>70</sup> Steve G. Parsons, *Is a Requirement to Wear a Mask Economically Valid During COVID-19?*, 6 U. BOLOGNA L. REV. 76, 77 (2021); Marie-Eve Couture-Menard et al., *Answering in Emergency: The Law and Accountability in Canada's Pandemic Response*, 72 U.N.B.L.J. 1, 11 (2021); Ileana Denisa Stirbulescu, *Obligation to Wear a Mask in Open Spaces. A Violation of a Person's Rights and Freedoms?*, 2020 L. ANNALS TITU MAIORESCU U. 265, 266 (2020); Robert A. Kahn, "My Face, My Choice?" -- *Mask Mandates, Bans, and Burqas in the Covid Age*, 14 N.Y.U. J.L. & LIBERTY 651, 653 (2021); Israel M. Del Mundo, *Face Masks and Freedom of Speech: The Constitutionality of Illinois Face Mask Mandates amidst the COVID-19 Pandemic*, 71 DEPAUL L. REV. 115, 115-16 (2021); Cordova, *supra* note 31, at 54.

<sup>71</sup> Brad Taylor, *Dark Before the Dawn: The Coming Constitutional Conflict Surrounding Mandatory COVID-19 Vaccination*, 68 DEC FED. LAW. 44, 48 (2021).

<sup>72</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, para. 209 (2022) (Ger.).

<sup>73</sup> Starodubov et al., *supra* note 69, at 144-45; Hill, *supra* note 30, at 6, 99; Aram Terzyan, *Russia and Covid-19: Russian Adaptive Authoritarianism during the Pandemic*, 7 J. LIBERTY & INT'L AFF. 345, 348 (2021). *see also* Smith-Drelich, *supra* note 69.

<sup>74</sup> *COVID-19 Pandemic in Europe*, WIKIPEDIA, [https://en.wikipedia.org/wiki/COVID-19\\_pandemic\\_in\\_Europe](https://en.wikipedia.org/wiki/COVID-19_pandemic_in_Europe) (last visited Apr. 23, 2023); *see also*

United States,<sup>75</sup> and fifty million people in Hubei Province in China<sup>76</sup> were placed under lockdowns by stay-at-home orders. Many people have lost their sources of livelihood.<sup>77</sup> Many people felt helpless and lacked control because of the disconnection from family, friends, and the workplace.<sup>78</sup>

Unfortunately, it seems that all fundamental rights became subject to health considerations.<sup>79</sup> The imposition of health measures attempting to address the pandemic and limit its spread at the cost of substantial incursion on civil liberties was considered a “necessary evil.”<sup>80</sup> Nevertheless, restrictions on freedom were *prima facie* the default measure rather than the last resort.<sup>81</sup> Moreover, these restrictions resulted from moral panic.<sup>82</sup> States failed to ascribe due weight to persons’ autonomy and to respect individuals’ choice to take health risks before implementing coercive measures—which curtail fundamental rights—to prevent or to slow down the spread of infectious diseases.<sup>83</sup> Indeed, in times of a national crisis, courts may fail to adequately protect human rights.<sup>84</sup> However, especially in times of emergency,

---

Rob Mawby, *Coronavirus, Crime and Policing: Thoughts on the Implications of the Lockdown Rollercoaster*, 20 EUR. POLICE SCI. & RES. BULL. 13, 13-14 (2020).

<sup>75</sup> Starodubov et al., *supra* note 69, at 144; *see also* Farber, *supra* note 58, at 833.

<sup>76</sup> Nyamutata, *supra* note 21, at 77.

<sup>77</sup> Cordova, *supra* note 31, at 45; Marika Dias, *Paradox and Possibility: Movement Lawyering during the COVID-19 Housing Crisis*, 24 CUNY L. REV. 173, 191 (2021).

<sup>78</sup> Olivia Ash & Peter H. Huang, *Loneliness in COVID-19, Life, and Law*, 32 HEALTH MATRIX 55, 62 (2022).

<sup>79</sup> *See also* Cordova, *supra* note 31, at 41-42, 47.

<sup>80</sup> *See also* Nyamutata, *supra* note 21, at 83.

<sup>81</sup> Thomson & Ip, *supra* note 22, at 3 (stating that “[a] public health emergency does not, however, give license to governments to cast aside their obligations to uphold fundamental rights and liberties, for governments are under scarcely disputable moral, and often legal, obligations to take seriously the burdens imposed on affected individuals . . .”). On the rule according to which fundamental rights should be violated only as a last resort when it is impossible to prevent harm to others in a less invasive means, *see* R. v. Oakes, [1986] 1 S.C.R. 103, 170 (Can.); Alastair Mowbray, *Compulsory Detention to Prevent the Spreading of Infectious Diseases*, 5 HUM. RTS. L. REV. 387, 390 (2005); Starodubov et al., *supra* note 69, at 147.

<sup>82</sup> *See also* Cordova, *supra* note 31, at 43.

<sup>83</sup> *See* Sharifah Sekalala et al., *Health and Human Rights are Inextricably Linked in the COVID-19 Response*, BMJ GLOBAL HEALTH 1, 1 (2020); Amanda B. Edgell et al., *Pandemic Backsliding: Violations of Democratic Standards During Covid-19*, SOCIAL SCIENCE AND MEDICINE 285, 285-86 (2021).

<sup>84</sup> Michael Vitiello, *The War on Drugs: Moral Panic and Excessive Sentences*, 69 CLEV. ST. L. REV. 441, 443 (2021).

people need more protection from the court regarding their civil liberties.<sup>85</sup> The German Federal Constitutional Law has reflected this approach. Its ruling curbs fundamental rights and disguises paternalistic considerations intended to pressure persons to be vaccinated.

Moral panic has led to a disproportionate violation of fundamental rights. The reaction towards the COVID-19 pandemic meets the critical features of moral panic, deep concern, and anxiety about a specific behavior or threat.<sup>86</sup> There is a consensus regarding its undesirability or dangerousness,<sup>87</sup> a sense of emergency and crisis,<sup>88</sup> and hostility toward “evil” forces or people.<sup>89</sup> The COVID-19 pandemic involves drama, reactions, and concerns disproportionate to the real threat.<sup>90</sup> Moreover, society perceives certain behaviors or expected consequences as a threat to its fundamental values and way of life.<sup>91</sup> Causing moral panic is a means through which the silent majority’s support for the legitimacy of coercive measures is gained.<sup>92</sup>

Diseases may generate moral panic accompanied by stigma.<sup>93</sup> However, as long as the concern and hostility are not directed toward people deemed responsible for spreading the disease, it is more appropriate to speak of public panic rather than moral panic.<sup>94</sup>

The COVID-19 pandemic causes both public and moral panic. Persons who disobey orders are perceived as uncaring and selfish.<sup>95</sup> Getting vaccinated against COVID-19 is even considered by many people as a moral obligation that individuals owe to the entire

<sup>85</sup> William I. Amberger, *Between Scylla and Charybdis: The Courts, the Constitution, and COVID-19*, 55 IND. L. REV. 113, 134 (2022); see also Cordova, *supra* note 31, at 88.

<sup>86</sup> ERICH GOODE & NACHMAN BEN-YEHUDA, *MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE* 37 (2d ed. 2009); COHEN, *supra* note 17, at xxxiv.

<sup>87</sup> GOODE & BEN-YEHUDA, *supra* note 86, at 38-40; see also David Garland, *On the Concept of Moral Panic*, 4 CRIME MEDIA CULTURE 9, 11 (2008).

<sup>88</sup> COHEN, *supra* note 17, at xxxiv.

<sup>89</sup> GOODE & BEN-YEHUDA, *supra* note 86, at 38; COHEN, *supra* note 17, at xxxiv. Panic may be directed towards people and a given practice or institution. *Id.* at 59.

<sup>90</sup> Terzyan, *supra* note 73 at 345; see also Sekalala, *supra* note 83, at 1, 5; Edgell, *supra* note 83, at 285-86.

<sup>91</sup> COHEN, *supra* note 17, at xxxiv; Garland, *supra* note 87, at 11.

<sup>92</sup> David L. Altheide, *Moral Panic: From Sociological Concept to Public Discourse*, 5 CRIME MEDIA CULTURE 79, 86 (2009).

<sup>93</sup> Sander L. Gilman, *The Art of Medicine: Moral Panic and Pandemics*, 375 THE LANCET: PERSPECTIVES 1866, 1867 (2010).

<sup>94</sup> See GOODE & BEN-YEHUDA, *supra* note 86, at 42.

<sup>95</sup> See Cordova, *supra* note 31, at 50 (stating humorously “if you just wanted to live your life as normal, then you were selfishly willing to kill grandma”).

community.<sup>96</sup> In this way, people who have not been vaccinated against COVID-19 have been perceived as endangering their environment, even if they are not sick and do not carry within their bodies any virus that can be spread.<sup>97</sup>

### III. PATERNALISM AND CAUSING HARM TO OTHERS

The prevention of harm to others is the underlying principle of criminal law.<sup>98</sup> This is also the premise of the public health law to a great extent.<sup>99</sup>

Criminal law should seek to refine the principle of harm and separate it from paternalism and the enforcement of morality.<sup>100</sup> The Millian harm principle,<sup>101</sup> opposing enforcement of morality by the state, has been endorsed as the justification for criminalization in *Lawrence v. Texas*.<sup>102</sup>

A liberal view does not allow the imposition of a criminal ban to prevent people from harming themselves or to improve their situation.<sup>103</sup> Paternalism is a philosophical and ethical concept that refers to the practice of individuals or authorities making decisions or taking actions for the supposed benefit or well-being of others without their consent. It involves restricting a person's freedom or autonomy in an attempt to protect them from perceived harm or to promote their own

<sup>96</sup> Noelle N. Wyman & Sam Heavenrich, *Vaccine Hesitancy and Legal Ethics*, 35 *Geo. J. Legal Ethics* 1, 6 (2022).

<sup>97</sup> Regarding the restrictions imposed on the unvaccinated as a group, without individually examining their health, see Govind Persad, *Considering Vaccination Status*, 74 *HASTINGS L.J.* 399 (2023).

<sup>98</sup> JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 1 (6th ed. 2012); Thomas L. Hines, *Morality Enforcement through the Criminal Law and the Modern Doctrine of Substantive Due Process*, 126 *U. Pa. L. Rev.* 344, 373 (1977).

<sup>99</sup> Nyamutata, *supra* note 21, at 73-74; John Coggon & José Miola, *Autonomy, Liberty, and Medical Decision-Making*, *CAMBRIDGE L.J.* 523, 531 (2011).

<sup>100</sup> JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 14-15 (1984); JOEL FEINBERG, *HARMLESS WRONGDOING* 3 (1988).

<sup>101</sup> JOHN STUART MILL, *ON LIBERTY AND OTHER WRITINGS* 13 (Stefan Collini ed., 1989); *see also* FEINBERG, *HARM TO OTHERS*, *supra* note 100, at 11.

<sup>102</sup> 539 U.S. 558, 567 (2003); *see also* Peter Brandon Bayer, *Deontological Originalism: Moral Truth, Liberty, and Constitutional Due Process: Part II - Deontological Constitutionalism and the Ascendancy of Kantian Due Process*, 43 *T. MARSHALL L. REV.* 165, 435 (2017).

<sup>103</sup> *See* MILL, *supra* note 101, at 13; *see also* Arielle Goldhammer, *A Case Against Consensual Crimes: Why the Law Should Stay Out of Pocketbooks, Bedrooms, and Medicine Cabinets*, 41 *BRANDEIS L.J.* 237, 244 (2002).



good, often based on the belief that those in authority know what is best for the individual.<sup>104</sup>

Paternalism has a negative connotation. The term is derived from parenting and refers to treating adults as if they were children.<sup>105</sup> The paternalistic state “helps” mature, sane people who do not seek help and who have the ability to make decisions for themselves.<sup>106</sup> Individuals subjected to paternalism may feel humiliated and belittled. They may respond with anger at being told what to do with their life.<sup>107</sup> Peoples’ personal lives are not the state’s business. Indeed, a state’s intervention for the benefit of its citizens may lead to unacceptable overreach. An example of this is when the state compels individuals to exercise or restrict their consumption of white sugar or flour to promote their health.<sup>108</sup> It may lead to a ban on smoking, given the connection between smoking and lung diseases.<sup>109</sup>

However, individuals can harm themselves. They have the right to make unreasonable decisions. Scholars have asked rhetorically: “Isn’t the ultimate in personal freedom the freedom to destroy oneself?”<sup>110</sup> One may wonder why sane people would consent to harming themselves, but many examples of destructive legal acts, such as smoking and excessive alcohol consumption, exist.<sup>111</sup> There is something absurd about restricting a person’s freedom for their so-called benefit. In the United States, drivers may be arrested for failing to buckle their seat belts.<sup>112</sup> This state is exclusively paternalistic. Convicting, punishing, and jailing mature and sane persons for their own good is an odd and immoral way of protecting them from harming themselves.<sup>113</sup> Indeed, attempted suicide is no longer a crime under

---

<sup>104</sup> JOEL FEINBERG, HARM TO SELF 3-6 (1986).

<sup>105</sup> *Id.* at 4.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 27.

<sup>108</sup> *See also id.* at 24.

<sup>109</sup> On the effects of smoking, see generally Ian McKay, *Up in Smoke: Why Regulating Social Media like Big Tobacco Won’t Work (Yet!)*, 97 NOTRE DAME L. REV. 1669, 1682-83 (2022).

<sup>110</sup> Louis A. Cancellaro & B. Lynn Harriman, *Narcotic Addiction and Legal Responsibility: A Dilemma*, 19 WAYNE L. REV. 1041, 1044 (1973).

<sup>111</sup> FEINBERG, HARM TO OTHERS, *supra* note 100, at 115.

<sup>112</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); *see also* Eric Luna, *The Overcriminalization Phenomenon*, 54 AM. U.L. REV. 703, 707 (2005).

<sup>113</sup> Thomas L. Hindes, *Morality Enforcement Through the Criminal Law and the Modern Doctrine of Substantive Due Process*, 126 U. PA. L. REV. 344, 384 (1977).

the common law.<sup>114</sup> The prevention of voluntary self-destruction of sane individuals is not a matter of the state.<sup>115</sup> Individuals are not merely instruments in the service of society.

The idea of autonomy rests on human dignity; a human can set goals and act according to them as a rational person who bears free will.<sup>116</sup> Some scholars elevate autonomy to the level of a principle that underlies human rights.<sup>117</sup> Although human rights are and should also be granted to people deprived of the capability of choosing, such as infants or people in a vegetative state, there is no doubt that human beings' sense of their ability to choose and shape their destiny to some extent is a significant component of their self-definition.

Yet, preventing harm to others and paternalism are often firmly entwined. The COVID-19 crisis illustrated the thin boundary between caring for oneself and caring for the health of others. Thus, according to the prevailing view, vaccinations do not only protect the vaccinated person themselves but at the same time reduce the spread of COVID-19.<sup>118</sup> Vaccinated (and recovered) individuals are less likely to become infected and thus less likely to transmit the virus.<sup>119</sup>

No person is an island. Our actions affect others as well. From a public health perspective, willingness to take personal risks may cause harm to society; it may increase the spread of the virus and harm others.<sup>120</sup> Steps that individuals take either endanger or benefit the

---

<sup>114</sup> William Ll. Parry-Jones, *Criminal Law and Complicity in Suicide and Attempted Suicide*, 13 MED., SCI., & L. 110, 110 (1973); Ananya Ghosal & Babu Sarkar, *Is it Time to Decriminalize Attempted Suicide in India? - A Review*, 7 INDIAN J.L. & JUST. 66, 67 (2016).

<sup>115</sup> Cancellaro & Halliman, *supra* note 110, at 1044 (asking rhetorically: "Isn't the ultimate in personal freedom the freedom to destroy oneself?").

<sup>116</sup> Luna, *supra* note 112, at 734; Yvonne F. Lindgren, *Personal Autonomy: Towards a New Taxonomy for Privacy Law*, 31 WOMEN'S RTS. L. REP. 447, 449 (2010) (stating that courts "must recognize personal autonomy as a fundamental right of personhood").

<sup>117</sup> See Gideon Parchomovsky & Alex Stein, *Autonomy*, 71 U. TORONTO L.J. 61, 63-65 (2021) (stating that "autonomy is a core component of every legal right"); see also FEINBERG, HARM TO SELF, *supra* note 104, at 27 ("[P]hilosophers have long had an expression to label the realm of inviolable sanctuary most of us sense in our own beings. That term is *personal autonomy*.").

<sup>118</sup> Alexander A. Gates, *Legal and Ethical Implications of Mandatory COVID-19 Vaccination Programs*, 25 QUINNIPIAC HEALTH L.J. 125, 134 (2022).

<sup>119</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, para. 12 (2022) (Ger.).

<sup>120</sup> Xu, *supra* note 31, at 158.

community.<sup>121</sup> Massive absenteeism from work due to illness or even death can result in a shortage of essential infrastructures and products.<sup>122</sup> Moreover, society must care for the welfare of individuals and cover their medical and treatment expenses.<sup>123</sup> Indeed, suicide is harmful to the public because people who commit suicide may leave their dependents with no sources of livelihood.<sup>124</sup> This reasoning, however, is not persuasive. People who commit suicide may leave behind wealthy adult survivors, and those who die of other causes may leave needy ones. Their deaths can even benefit their survivors financially.<sup>125</sup> At any rate, the expected public financial burden does not cause sufficient harm to justify imposing restrictions on persons not to harm themselves under the guise of preventing public harm.<sup>126</sup> Moreover, this harm is negligible and indirect compared to the harm to the affected persons themselves.<sup>127</sup>

Furthermore, some activities that harm the health of others are not restricted out of respect for persons' autonomy to conduct their life. Thus, smoking affects the health of those in the proximity of smokers, including children exposed to smoking by their parents.<sup>128</sup> But there is no serious suggestion to ban people from smoking in their houses.

In the case of concern about the spread of the COVID-19 disease, it is argued that too many ill patients can lead to the collapse of the healthcare system, given the lack of medical facilities and staff.<sup>129</sup> The community needs certain percentages of vaccinated people to

---

<sup>121</sup> Daniel Wei Liang Wang et al., *Is Mandatory Vaccination for COVID-19 Constitutional under Brazilian Law?*, 23 HEALTH & HUM. RTS. J. 163, 167 (2021).

<sup>122</sup> Bennett, *supra* note 42, at 233.

<sup>123</sup> See FEINBERG, HARM TO SELF, *supra* note 104, at 22 (regarding self-harm in general).

<sup>124</sup> See Cancellaro & Harriman, *supra* note 101, at 1045.

<sup>125</sup> FEINBERG, HARM TO SELF, *supra* note 104, at 22.

<sup>126</sup> *Id.*

<sup>127</sup> See generally Thaddeus Mason Pope, *Is Public Health Paternalism Really Never Justified? A Response to Joel Feinberg*, 30 OKLA. CITY L. REV. 121, 179 (2005). See also FEINBERG, HARM TO SELF, *supra* note 104, at 22.

<sup>128</sup> Steven Wisotsky, *Exposing the War on Cocaine: The Futility and Destructiveness of Prohibition*, 1983 WIS. L. REV. 1305, 1406 (1983); Carrie-Anne Tondo, *When Parents are on a Level Playing Field, Courts Cry Foul at Smoking: Smoking as a Determining Factor in Child Custody Cases*, 40 FAM. CT. REV. 238, 247 (2002).

<sup>129</sup> Xu, *supra* note 31, at 150; BVerfG, 1 BvR 2649/21, *supra* note 1, para. 5 (2022) (Ger.) (stating that the fourth wave made it necessary in some regions to transfer patients to other regions); see also Howell E. Jackson & Steven L. Schwarcz, *Protecting Financial Stability: Lessons from the COVID-19 Pandemic*, 11 HARV. BUS. L. REV. 193, 226 (2021).

achieve herd immunity and to be protected from the virus.<sup>130</sup> The slogan “[m]y mask protects you, your mask protects me”<sup>131</sup> illustrates the firm connection between individuals and the community.<sup>132</sup> Only a collective effort would allow the community to return to everyday life.

Hence, it is impossible to disconnect the paternalistic considerations, which protect a person from contracting the disease, and considerations concerning preventing harm to others, which is likely to be caused by a person carrying the virus. Despite the blurred lines, harm to others and paternalism should be separated. Criminal and health laws should not typically protect people against choices that will cause them harm.

#### IV. CONSIDERATIONS FOR BALANCING THE NEED FOR AN EFFECTIVE RESPONSE TO THE PANDEMIC AGAINST THE PROTECTION OF FUNDAMENTAL RIGHTS

The COVID-19 pandemic threatens life, health, and ordinary existence. The state’s authority to take coercive measures to protect public health from the spread of diseases is beyond dispute.<sup>133</sup> The concept that the state must preserve society from diseases is not new.<sup>134</sup> After all, the precise role of the state is to protect the lives, security, and health of its citizens.<sup>135</sup> Prevention of harm is the main reason for submitting to the regime of the state.<sup>136</sup> Accordingly, states must implement measures necessary to protect the public from harm to life, security, and health. Therefore, it is essential to delineate rules that

---

<sup>130</sup> Wang et al., *supra* note 121, at 170; Eddie Bernice Johnson & Lawrence J. Trautman, *The Demographics of Death: An Early Look at COVID-19, Cultural and Racial Bias in America*, 48 HASTINGS CONST. L.Q. 357, 366 (2021).

<sup>131</sup> Tina Hesman Saey, *Why Scientists Say Wearing Masks Shouldn’t Be Controversial*, SCIENCE NEWS (June 26, 2020).

<sup>132</sup> *Id.* (stating that “more mask wearing means greater protection for everybody”).

<sup>133</sup> Dute, *supra* note 40, at 101.

<sup>134</sup> Fidler, *supra* note 47, at 8; Goodwin & Chemerinsky, *supra* note 28, at 341-42, 344.

<sup>135</sup> See also U.S. CONST. amend. X (stating that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”). This amendment ensures that powers not explicitly given to the federal government are reserved for the states to exercise.

<sup>136</sup> THOMAS HOBBS, *LEVIATHAN* 109-10 (Michael Oakeshott ed., 1946); JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* ch. 9, 123-24, 62, 64, 131 (1946); JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 30 (1954); Steven D. Smith, *Is the Harm Principle Illiberal?*, 51 AM. J. JURIS. 1, 1 (2006).

would guide a balance between public safety in times of health crisis and the protection of human rights.

In upholding the constitutionality of a policy imposing fines on those who refuse to get vaccinated against smallpox, the United States Supreme Court in 1905 declared in *Jacobson v. Massachusetts*<sup>137</sup> that “upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”<sup>138</sup> Many courts adopted this line of thinking while upholding restrictions, such as restrictions on gatherings imposed on citizens to address the COVID-19 pandemic.<sup>139</sup>

The right and even the burden imposed on the state to protect the public from infectious diseases may exact a toll expressed in violations of fundamental rights.<sup>140</sup> Thus, article 5(1)(e) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides for the detention of persons who spread contagious diseases.<sup>141</sup> States have broad powers to place in isolation and quarantine persons to prevent or slow down the spread of infectious diseases,<sup>142</sup> and for purposes of conducting medical examinations and diagnostic testing.<sup>143</sup> Detention for preventing and limiting the spread of diseases is the most severe violation of civil liberties that

---

<sup>137</sup> 197 U.S. 11 (1905).

<sup>138</sup> *Id.* at 27.

<sup>139</sup> Erwin Chemerinsky & Michele Goodwin, *Civil Liberties in a Pandemic: The Lessons of History*, 106 CORNELL L. REV. 815, 836 (2021); Farber, *supra* note 58, at 834; Josh Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts*, 70 BUFF. L. REV. 131, 135 (2022). *But see* Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 663 (2022) (per curiam).

<sup>140</sup> Robyn Martin, *The Exercise of Public Health Powers in Cases of Infectious Disease: Human Rights Implications*, 14 MED. L. REV. 132, 140 (2006).

<sup>141</sup> *European Convention of Human Rights*, COUNCIL OF EUROPE, [https://www.echr.coe.int/documents/d/echr/Convention\\_ENG](https://www.echr.coe.int/documents/d/echr/Convention_ENG) (last visited, July 29, 2023).

<sup>142</sup> Carrie Lacey, *Abuse of Quarantine Authority: The Case for a Federal Approach to Infectious Disease Containment*, 24 J. LEGAL MED. 199, 199 (2003); David J. Carter, *The Use of Coercive Public Health and Hyman Biosecurity Law in Australia: An Empirical Analysis*, 43 UNSW L. REV. 117, 129 (2020). The concepts are considered the same, but some use “quarantine” for healthy people and “isolation” for sick people. Speakman, Gonzalez-Martin & Perez, *supra* note 37, at 63. In practice, these terms are often used interchangeably.

<sup>143</sup> Ball & Barnes, *supra* note 39, at 62 (regarding individuals who have or are suspected of having active tuberculosis); Carter, *supra* note 142, at 129.

governments can resort to.<sup>144</sup> Although persons infected with contagious diseases cannot be quarantined in correctional facilities like jails,<sup>145</sup> they may be (and have been) involuntary placed in hospitals, other facilities, or in isolation at home.<sup>146</sup>

The vaccines developed by private drug companies, together with the great hope placed in them to fight the pandemic and end its risk, do not mark the end of the violation of fundamental rights following the COVID-19 crisis. Quite the contrary, they provoke another wave of human rights abuses concerning people who choose not to get vaccinated.<sup>147</sup> Even if unvaccinated persons increase the chances of people in closed areas contracting a potentially fatal disease, questions arise as to whether the state can exclude unvaccinated individuals from indoor settings. If it is possible to prevent unvaccinated people from entering places of entertainment and leisure, malls, and even their workplaces, places of education,<sup>148</sup> or serving in the army, let alone if

---

<sup>144</sup> Ball & Barnes, *supra* note 39, at 39 (stating that “coercive measures, such as compulsory DOT and detention, traditionally have been used to attain public health goals when less restrictive alternatives have failed to result in the completion of treatment”).

<sup>145</sup> Lacey, *supra* note 142, at 200.

<sup>146</sup> Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT’L SEC. J. 85, 172 (2011) (stating that “[m]ost states have TB control statutes specifically authorizing public health authorities to isolate carriers in their homes or in hospitals under such circumstances”).

<sup>147</sup> Michael Conklin, *Desperate Measures for Desperate Times: Can Physicians Refuse to Treat Unvaccinated Patients?*, 56 NEW ENG. L. REV. F. 1, 1 (2022) (relating to a refusal by physicians to treat unvaccinated patients); John A. Kuzora, *Vaccine Passports and the Right to Exclude: How the Court’s Holding in Cedar Point Nursery v. Hassid Could Light Fire to the Debate on the Constitutionality of Vaccine Passport Requirements and Bans*, 44 CAMPBELL L. REV. 395, 399 (2022) (precluding unvaccinated players from playing games); Monica Florentina Popa, *Law, Economy and Ideology in the Western Democracies Today: A Typical Carrot and Stick Interaction*, 11 PERSP. L. PUB. ADMIN. 88, 97 (2022) (relating to EU Member States and stating that the media has labeled the efforts of EU Member States to encourage vaccination as a “carrot and stick approach.” The “carrot” includes incentives like easing travel restrictions and resuming commercial activities for the vaccinated, while the “stick” refers to financial penalties and legal restrictions imposed on those who refuse vaccination).

<sup>148</sup> See *Zucht v. King*, 260 U.S. 174, 177 (1922) (upholding the validity of ordinances in Texas that prevent children or other persons from attending a place of education without presenting a certificate of vaccination); Muniz, *supra* note 28, at 154 (stating regarding the United States that “[a]ll states require public school students to be vaccinated”).

the state would impose a legal obligation to get vaccinated,<sup>149</sup> as a condition of employment, for specific groups, or the entire population, the consequences of incursions on fundamental rights due to the COVID-19 crisis will be long-term. The ruling of the German Federal Constitutional Court has, in fact, given a green light to the exclusion of the unvaccinated from society. Despite limiting these restrictions to specific institutions and organizations in the health and care sectors where vulnerable individuals usually reside,<sup>150</sup> the Court's decision gave no reason to assume that the restrictions on the unvaccinated would not be extended beyond the context of the healthcare system. Regarding the prevention of harm to others, people may claim that errors should fall on the side of individual life rather than liberty.<sup>151</sup> Moreover, allowing unvaccinated people to enter closed public places violates everyone else's fundamental right to protection from the disease.<sup>152</sup> Therefore, such a ban is a proportionate action compared to the danger posed by the COVID-19 disease.

Thus, the German Federal Constitutional Court held that the incursion on the right to physical integrity is justified.<sup>153</sup> It serves a legitimate state purpose and is suitable and necessary to attain this purpose.<sup>154</sup> In addition, it does not unreasonably burden fundamental rights. Particularly, it is not disproportionate, given the need to protect vulnerable individuals,<sup>155</sup> and aligns with the crucial public interest of safeguarding life and health, which are constitutionally legitimate statutory objectives.<sup>156</sup>

---

<sup>149</sup> For support of such an obligation, see, e.g., Muniz, *supra* note 28, at 155; Julian Savulescu, *Good Reasons to Vaccinate: Mandatory or Payment for Risk?*, 47 J. MED. ETHICS 78, 78 (2021). See WEN W. SHEN, CONG. RSCH. SERV., R46745, STATE AND FEDERAL AUTHORITY TO MANDATE COVID-19 VACCINATION 1 (2022) (providing an overview of state and federal authority to mandate vaccination).

<sup>150</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, para. 172 (2022) (Ger.).

<sup>151</sup> This assumption is the basis for denying the freedom of accused individuals based on their dangerousness. Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 556 (1986) (stating that "sensible people usually do not allow murderers and highwaymen to roam among them").

<sup>152</sup> Donna M. Gitter, *First Amendment Challenges to State Vaccine Mandates: Why the U.S. Supreme Court Should Hold That the Free Exercise Clause Does Not Require Religious Exemptions*, 71 AM. U. L. REV. 2243, 2314 (2022).

<sup>153</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, para. 149 (2022) (Ger.).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* para. 155.

Yet, violations of human rights are subject to constitutional requirements. Firstly, an incursion of fundamental rights should serve a legitimate purpose.<sup>157</sup> The German Federal Constitutional Court highlighted that while COVID-19 might cause mild symptoms for most individuals, certain groups, particularly the elderly and immunocompromised, face an increased risk of severe or fatal disease as well as infection due to reduced vaccine effectiveness.<sup>158</sup> For instance, the mortality rate for those over eighty who were hospitalized was 40%.<sup>159</sup> Despite the generally milder course of the disease with the dominance of the omicron variant, the composition of risk groups and their significantly higher vulnerability remains unchanged.<sup>160</sup> Obviously, there is no dispute that preserving human life and health is a worthy goal.

Secondly, under rational-basis review, any protective measures the state or other authorities implement must be reasonably related to the goal of protecting public health and safety.<sup>161</sup> Thus, for example, it should be recalled, as Ulrich and Mariner put it, that “in practice, quarantining a population has never stopped an epidemic. Involuntary quarantine or isolation of an individual is necessary only in rare instances and is certainly not enough to control the spread of disease.”<sup>162</sup>

Regarding vaccinations, states often do not force vaccinations on unwilling people but impose secondary burdens on the unvaccinated, such as their exclusion from work or leisure activities.<sup>163</sup> Such restrictions must be justified on epidemiological grounds. Thus, there is no justification for imposing such restrictions if it turns out that the vaccinated and unvaccinated can spread COVID-19 equally.

The Court noted that when the law was passed, a clear scientific majority assumed that vaccinated and recovered people were less likely to become infected with the SARS-CoV-2 coronavirus and to transmit the virus less frequently than unvaccinated or unrecovered people.<sup>164</sup> They also assumed that if vaccinated people became

---

<sup>157</sup> *Id.* paras. 150-51.

<sup>158</sup> *Id.* para. 154.

<sup>159</sup> *Id.* para. 162.

<sup>160</sup> *Id.* paras. 164, 241.

<sup>161</sup> *See* *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905).

<sup>162</sup> Ulrich & Mariner, *supra* note 38, at 444; *see also* Cordova, *supra* note 31, at 63 (asking rhetorically, “[b]ut if lockdowns are effective, then why was it necessary to keep repeating them?”).

<sup>163</sup> SHEN, *supra* note 149, at 5.

<sup>164</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, para. 173 (2022) (Ger.).



infected, they would be less infectious than persons who have not been vaccinated and would be contagious for a shorter period of time.<sup>165</sup>

However, the provision in Germany approved by the Federal Constitutional Court excluded people with a medical exemption to COVID-19 vaccination from its application.<sup>166</sup> The aim of the exclusion is clear—to prevent those persons from facing health risks as a result of the vaccinations.<sup>167</sup> Yet, it's worth noting that such exempted individuals are not any less contagious than other unvaccinated individuals.<sup>168</sup> Therefore, this exclusion indicates the underlying assumption of blaming unvaccinated persons and of the hidden intent of the provision to exert pressure to get vaccinated.

Thirdly, infringement on fundamental rights should be employed solely as a last resort to prevent or slow down the spread of the disease. Incursions on fundamental rights must only go as far as what is necessary to achieve the purpose of the law.<sup>169</sup> These infringements are not justified if there exists an equally effective alternative to achieve the legislative goal while imposing fewer interferences on fundamental rights.<sup>170</sup>

Thus, the state should not impose detention when less right-restrictive means could achieve the goal of avoiding or limiting the spread of the disease.<sup>171</sup> Such detention deprives individuals of liberty without guilt.<sup>172</sup> Some believe that detention is especially justified

---

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* para. 129.

<sup>167</sup> See *id.* para. 145; Julie Fekete, *Required Protections for the Right of Medical Exemption from Vaccine Mandates: A Modern Analysis of a Deeply Rooted Fundamental Right*, 15 CHARLESTON L. REV. 821, 823 (2021).

<sup>168</sup> By the same token, see Clara C. Sporrer, *College Athletes Rolling up Their Sleeves: Is a Mandatory COVID Vaccine Policy Constitutional?*, 33 MARQ. SPORTS L. REV. 803, 813 (2023) (mentioning that unvaccinated students pose a comparable risk to student-athletes with religious exemptions); see also Fekete, *supra* note 167, at 861 (relating to a general conception of the California court according to which a law permitting exemptions, regardless of the exemption rate, would not achieve the objective of total immunization).

<sup>169</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, para. 187 (2022) (Ger.).

<sup>170</sup> *Id.* para. 187; see also Eva Brems & Laurens Lavrysen, 'Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights, 15 HUM. RTS. L. REV. 139, 142 (2015).

<sup>171</sup> *Enhorn v. Sweden*, App. No. 56529/00, ¶ 46 (Jan. 25, 2005), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-68077%22%7D>; Ball & Barnes, *supra* note 39, at 39, 55-56.

<sup>172</sup> Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1172 (1984).

when a patient with an infectious disease—who may spread the disease to others—refuses to receive treatment.<sup>173</sup> The availability of treatment is, indeed, a weighty consideration for denying liberty to individuals who refuse to accept it, knowing that they may spread a fatal disease.<sup>174</sup>

The European Court of Human Rights' landmark ruling in *Enhorn v. Sweden*<sup>175</sup> is a guiding ruling regarding the need to use detention as a last resort, even in times of health crisis. In this case, the applicant transmitted HIV to a 19-year-old person with whom he had sexual relations;<sup>176</sup> the applicant was unaware of his illness.<sup>177</sup> After he became aware of it, he failed to follow the instructions of the county medical officer.<sup>178</sup> There was no evidence that he infected any person after becoming aware that he was a carrier of HIV.<sup>179</sup> Sweden ordered the compulsory isolation of the applicant in a hospital for a cumulative period of nearly one and a half years under a County Administrative Court order.<sup>180</sup> The European Court of Human Rights treated involuntary isolation in a hospital as detention, although Enhorn was not held in a detention facility and was allowed to leave the hospital daily, accompanied by the medical staff.<sup>181</sup> The Court made it clear that “[t]he detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained.”<sup>182</sup> Under the circumstances of the case, the Court held that “the compulsory isolation of the applicant was not a last resort in order to prevent him from spreading the HIV virus because less severe measures had not been considered and found to be insufficient to safeguard the public interest.”<sup>183</sup> Moreover, the Court held that given the long period of the involuntary placement in a hospital, “the authorities failed to strike a

---

<sup>173</sup> Ball & Barnes, *supra* note 39, at 50.

<sup>174</sup> *Id.* at 51.

<sup>175</sup> *Enhorn v. Sweden*, 41 Eur. Ct. H.R., App. No. 56529/00 (2005).

<sup>176</sup> *Id.* para. 8.

<sup>177</sup> *Id.* para. 11.

<sup>178</sup> *Id.* paras. 10, 13.

<sup>179</sup> *Id.* para 31.

<sup>180</sup> *Id.* para. 47.

<sup>181</sup> *Id.* para. 15.

<sup>182</sup> *Id.* para. 36.

<sup>183</sup> *Id.* para. 55.

fair balance between the need to ensure that the HIV virus did not spread and the applicant's right to liberty."<sup>184</sup>

Regarding the conditioning of employment on submitting proof of vaccination or recovery, the German Federal Constitutional Court stressed the importance of allowing the legislature some leeway in assessing and evaluating the actual circumstances, making future prognoses, and choosing the appropriate means to achieve the goal of protecting vulnerable individuals.<sup>185</sup> Hence, a provision that was initially deemed constitutional may later be deemed unconstitutional if the initial assumptions made by the legislature are no longer valid.<sup>186</sup> The Court emphasized that the measures' suitability does not necessarily demand unequivocal empirical evidence of their effect or effectiveness,<sup>187</sup> and that the legislature generally enjoys a considerable degree of discretion in assessing the merits and drawbacks of specific measures.<sup>188</sup> The Court further held that if the incursion protects vital constitutional interests, given the uncertainties, the Court's constitutional examination is limited to the general justifiability of the legislative prognosis.<sup>189</sup> The constitutional review of the justifiability of the provision solely includes examining whether the legislative forecast is sufficiently reliable, and there is no reason for a stricter, more extensive examination of suitability.<sup>190</sup> For the constitutional assessment, it is not essential whether the legislature has chosen the best possible means but rather whether the means promote the achievement of their purpose.<sup>191</sup>

Moreover, the Court concluded that there were no other means available that were clearly equivalent in terms of effectiveness but less severely restrictive of the fundamental rights in the constitutional sense to protect vulnerable people, besides the obligation to provide proof of vaccination or recovery.<sup>192</sup> The Court declined to accept the petitioners' suggestion to subject the employees who work in these institutions and organizations to a PCR (nucleic acid detection) test several times a week and to recognize that periodic COVID-19 testing can be a

---

<sup>184</sup> *Id.*

<sup>185</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, paras. 166, 168 (2022) (Ger.).

<sup>186</sup> *Id.* para. 167.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* para 187.

<sup>189</sup> *Id.* para. 167.

<sup>190</sup> *Id.* para. 187.

<sup>191</sup> *Id.* para. 183.

<sup>192</sup> *Id.* para. 186.

substitute for vaccination or recovery.<sup>193</sup> It stated that requiring a SARS-CoV-2 test before entering a facility is not effective as vaccination for safeguarding vulnerable individuals.<sup>194</sup> This is because test cannot offer the same level of protection as vaccines, particularly when it comes to interactions with high-risk populations.<sup>195</sup> Furthermore, it held that antigen tests are not reliable enough in detecting an infection.<sup>196</sup> Thus, a negative antigen test result does not completely rule out a SARS-CoV-2 infection or contagiousness.<sup>197</sup> Rapid tests may not always provide reliable results, especially in the early stages of the disease when the viral load is still low.<sup>198</sup> Even when administered professionally, there is a chance of false negatives, and individuals could still be at risk of infection despite testing negative.<sup>199</sup> PCR tests, although more reliable and capable of earlier infection detection, may not be a practical requirement in healthcare and support sectors due to their time-intensive processing and limited immediate availability.<sup>200</sup> Additionally, the availability of necessary test capacities cannot be assured, as data indicates that laboratories were already operating at their maximum capacity when the law was passed.<sup>201</sup>

The Court emphasized that the legislature was justified in taking into account the potential adverse effects of limited and increasingly strained laboratory capacities on other aspects of life, while acknowledging that the time, organizational effort, and costs associated with conducting two to three PCR tests per week would place a significant burden on the public.<sup>202</sup> Regarding recovered persons, the Court noted that scientific uncertainties as to how long recovery can still provide sufficient immunity from infection do not compel the legislature to allow those who had recovered to show antibodies in a serology test at their own expense as a milder means in order to be considered recovered for longer than three months.<sup>203</sup> Furthermore, there are no

---

<sup>193</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, para. 192 (2022) (Ger.).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* para. 193.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* para. 194.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* para. 195.

<sup>203</sup> *Id.* para. 201.

reliable findings on what level of immunity can be deemed sufficient in this context.<sup>204</sup>

The refusal to choose less restrictive means to achieve the same purpose indicates the true intent behind the violation of fundamental rights.<sup>205</sup> Indeed, nowhere throughout its long verdict did the Court assert that the likelihood of an unvaccinated or unrecovered but negative-testing person to be contagious is higher than the likelihood of a vaccinated or recovered but untested one. This omission undermines the obligation to avoid violations of fundamental rights if less offensive measures can achieve the goal and—in this case—protect vulnerable people from COVID-19 infection. Therefore, despite the absence of definitive science on COVID-19 spread and vaccine efficacy at the time the law was enacted,<sup>206</sup> the Court should have evaluated the risk of transmission from unvaccinated individuals with negative test results in comparison to untested but vaccinated or recovered individuals. Regarding recovered persons, by the same token, the Court should have assessed the likelihood that vaccinated persons will not contract COVID-19 compared to the probability that recovered persons (who have proven they carry antibodies at a sufficient level) will not contract the virus.

The Court proceeded to rule out the equality of a PCR test to vaccination or recovery by stating that the time window between a PCR test and the available test result must also be considered.<sup>207</sup> Very short intervals before the onset of contagiousness are also conceivable because infecting other people is possible the day after the infection or even on the same day.<sup>208</sup> Therefore, even after receiving a negative PCR test result, it is important to recognize that a person can still be infectious since they can potentially contract the virus at any time after the sample was taken.<sup>209</sup> But, again, what is the probability based on the knowledge available at the relevant time when the law was passed that a person who submits a recent negative PCR test is more

---

<sup>204</sup> *Id.* para. 195.

<sup>205</sup> See generally Rinat Kitai, *A Custodial Suspect's Right to the Assistance of Counsel – The Ambivalence of Israeli Law Against the Background of American Law*, 19 *BYU J. PUB. L.* 205, 226 (2004).

<sup>206</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, para. 170 (2022) (Ger.).

<sup>207</sup> *Id.* para. 196.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

contagious than a vaccinated person who has not been tested? After all, vaccinated persons can also spread the virus.<sup>210</sup>

The vaccinations do not protect the vaccinated hermetically—far from this—and only protect for a relatively short period.<sup>211</sup> The Court acknowledged that vaccinations do not guarantee complete protection against all variants of COVID-19, necessitating individuals to receive multiple vaccinations for optimal protection due to the vaccine’s declining efficacy over time.<sup>212</sup> The Court noted that the prevailing expert opinion assumes that the vaccinations will be effective against the omicron variant but with a reduced level of efficacy compared to the previous variants.<sup>213</sup>

However, the Court did not consider the rapid tests’ reliability percentages. Additionally, even if the laboratories are busy, there is no reason not to allow people who present an up-to-date PCR test to enter their workplace. On the contrary, before infringing on individuals’ rights to prevent the spread of a contagious disease, an individualized assessment should be made of the risk they pose of spreading it.<sup>214</sup> Significant efforts should be made to distinguish between contagious and non-contagious people.

Regarding the costs of the tests, the fee can be imposed on employees as a lesser evil. It is not a risk to the lives of vulnerable people compared to the loss of a job for persons who decline vaccination. Instead, these are economic costs that the legislature does not want to impose on the public in the face of the loss of jobs of workers—who have sometimes spent a considerable amount of time in their professional training—and the termination of the studies of talented students who, undoubtedly, can contribute to society in the future.

---

<sup>210</sup> Dale B. Thompson et al., *What Should Ethical and Strategic Employers Do About COVID-19 Vaccines?*, 56 U. S.F. L. REV. 219, 262 (2021).

<sup>211</sup> See also Dorit Rubinstein Reiss, *The COVID-19 Vaccine Dilemma*, 6 ADMIN. L. REV. ACCORD 49, 76-77 (2020).

<sup>212</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, paras. 82, 175, 177-78 (2022) (Ger.) (noting that during the legislative process in December 2021, there was a knowledge that vaccination protection would decrease over time and a booster vaccination would be necessary. The protective effect of the available COVID-19 vaccines decreases over time, according to the data available at the beginning of December 2021, and it can be increased again with a booster vaccination.).

<sup>213</sup> *Id.* para. 184 (stating that there is a protection of 40% to 70% for the omicron variant in those fully vaccinated).

<sup>214</sup> Ball & Barnes, *supra* note 39, at 53; see also Gostin et al., *supra* note 41, at 114.

Moreover, the Court admitted that vulnerable people rarely visit individual institutions and organizations.<sup>215</sup> Also, concrete encounters with vulnerable people in certain constellations can be designed to reduce risk significantly. But, according to the Court's holding, even if a hazard to vulnerable people is ruled out in individual cases, the legislature is not obligated to conduct a risk assessment that accommodates every possible individual scenario.<sup>216</sup> But why not? Why is the legislature not obligated, as part of its constitutional duty to reduce the violation of fundamental rights, to establish a mechanism that will allow certain people to prove that they have no contact with vulnerable people?

Naturally, the state should compensate people who are encouraged not to open their businesses or who are forced to stay away from work when the income of those affected has been harmed.<sup>217</sup> However, the Court did not state that offering compensation to unvaccinated individuals facing job loss or study delays due to the workplace entry ban is a prerequisite for the constitutionality of this ban. It seems that the arbitrary ruling out of reasonable alternative means that infringe less on fundamental rights testifies to the hidden intent of the provision—to exert pressure on persons to get vaccinated.

Fourthly, state authorities need to examine whether there is a proportionate balance between the positive effects of achieving social goals and the adverse effects of violating fundamental rights; the restriction of fundamental rights should be proportional to the benefit.<sup>218</sup> The Court determined that while severe outcomes, including death, from COVID-19 vaccination couldn't be entirely discounted, they were rare, isolated incidents.<sup>219</sup> Meanwhile, as of early December 2021, the fourth infection wave was well underway but had not yet peaked.<sup>220</sup> Therefore, the legislators reasonably assumed that the pandemic would deteriorate and that rapid legislative action was required.<sup>221</sup> In the given situation, the legislature decided that vaccination was the most effective means of preventing or at least reducing an

---

<sup>215</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, para. 191 (2022) (Ger.).

<sup>216</sup> *Id.*

<sup>217</sup> See also Ulrich & Mariner, *supra* note 38, at 431.

<sup>218</sup> Wang et al., *supra* note 121, at 165; Marie Sutton, *Forced Quarantine & Isolation: Does the Law Adequately Balance Individual Rights and Societal Protection?*, 39 U. LA VERNE L. REV. 98, 120 (2017).

<sup>219</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, para. 231 (2022) (Ger.).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

expected number of severe or even fatal illnesses in vulnerable people.<sup>222</sup> Hence, from a practical and constitutional standpoint, one can argue that the benefits of vaccines to the public outweigh the risks to health they entail.<sup>223</sup> It may be claimed that the measures implemented were not disproportional given the interests at stake, especially the risk of death. However, the sanctity of life cannot justify imposing unbridled restrictions on civil liberties, such as the right to autonomy, the right to bodily integrity, the right to travel and the right to work.<sup>224</sup> Violation of fundamental rights also exacts a heavy toll.<sup>225</sup> Thus, Justices Marshall and Brennan, dissenting in the *Salerno* ruling concerning detention based on future dangerousness, ironically stated that imposing a curfew at night on the unemployed would decrease violent crime rates.<sup>226</sup> However, imposing a curfew for the purpose of decreasing violent crimes is incompatible with the Due Process Clause.<sup>227</sup> Indeed, an order directed at the entire population to stay at home can save lives because potential offenders may be less likely to commit offenses. But this hypothetical and unacceptable measure to curb crime in democratic states became a reality and was imposed by democratic states on the entire population to curb the spread of the COVID-19 virus.<sup>228</sup>

As curfews imposed by several countries were seen as disproportional measures to reduce the spread of Covid-19, the analysis of the German Constitutional Court regarding the ban imposed on

---

<sup>222</sup> *Id.*

<sup>223</sup> See also Miranda Wheeler, *Vaccination Altercation: The Constitutionality of Mandatory Influenza Vaccination for Students*, 30 S. CAL. INTERDIS. L.J. 851, 856 (2021); Jonathan Pugh et al., *Vaccine Suspension, Risk, and Precaution in a Pandemic*, 9 J.L. & BIOSCIENCES 1, 14 (2022).

<sup>224</sup> See, e.g., Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J. F. 1106, 1110 (2021-2022) on the fundamental rights implicated in the Covid vaccine mandates.

<sup>225</sup> See generally David McNamee, *Fundamental Law, Fundamental Rights, and Constitutional Time*, 55 IND. L. REV. 319, 344 (2022).

<sup>226</sup> *United States v. Salerno*, 481 U.S. 739, 760 (1987) (Marshall & Brennan, JJ., dissenting).

<sup>227</sup> *Id.*

<sup>228</sup> See, e.g., *Greece: Authorities Impose 01:00-06:00 Nightly Curfew on Mykonos Through July 26 Amid Surge in COVID-19 Cases/Update 66*, CRISIS24 (Jul. 17, 2021 12:11PM), <https://www.garda.com/crisis24/news-alerts/503161/greece-authorities-impose-0100-0600-nightly-curfew-on-mykonos-through-july-26-amid-surge-in-covid-19-cases-update-66> (reporting that “Greek authorities have imposed a nightly curfew on the island of Mykonos amid efforts to combat a surge in COVID-19 cases; the curfew is in effect July 17-26 between the hours of 01:00-06:00”).



unvaccinated individuals to work in health and care sectors also exhibited several shortcomings in terms of proportionality. It did not address the question of sacrificing individuals in favor of the collective good.<sup>229</sup> Thus, the Court emphasized that there is no obligation imposed on persons to get vaccinated, and hence there is no violation of people's autonomy not to get medical treatment.<sup>230</sup> The Court noted that when assessing the depth of the intervention, it must be considered that the legislature not order any compulsory vaccination, but ultimately leaves the decision to the persons working in specific sectors to decide whether to carry out the necessary immunization.<sup>231</sup> Nor does it force people to give up their job.<sup>232</sup>

However, some people are expected to get vaccinated only for professional and economic pressures not to lose their jobs.<sup>233</sup> They may suffer harm to their health as a result of the vaccinations.<sup>234</sup> Persons may feel unwell for a few days after getting the vaccinations.<sup>235</sup> Thus, the German Constitutional Court stated that vaccination triggers specific physical responses such as headaches and body aches, which can significantly impact the physical well-being of those affected, even over several days.<sup>236</sup> Furthermore, in specific individual cases, there may be instances of severe and/or prolonged side effects or complications arising from vaccination.<sup>237</sup> However, the severe reported side effects were rare and usually not permanent.<sup>238</sup> Nevertheless, it must be acknowledged that in extremely rare situations, vaccination can also

---

<sup>229</sup> See generally BVerfG, 1 BvR 2649/21, *supra* note 1 (2022) (Ger.).

<sup>230</sup> *Id.* para. 209.

<sup>231</sup> *Id.* para. 246.

<sup>232</sup> *Id.* para. 209.

<sup>233</sup> Jasper L. Tran, *Of Vaccine and Hesitancy*, 77 FOOD DRUG L.J. 176, 207 (2022).

<sup>234</sup> I (2021) *Vaccinations and the Economic Recovery: Virtual Hearing before the Joint Economic Committee, Congress of the United States, One Hundred Seventeenth Congress, First Session*, at 75 (mentioning that “the federal government establishes a fund like the Smallpox Vaccine Injury Compensation Program to compensate people who have serious adverse reactions attributable to COVID vaccination”).

<sup>235</sup> *Side Effects of COVID-19 Vaccines*, WORLD HEALTH ORGANIZATION (Mar. 31, 2021), <https://www.who.int/news-room/feature-stories/detail/side-effects-of-covid-19-vaccines>; Nicole Lurie, Jakob P. Cramer & Richard J. Hatchett, *The Vaccine Revolution: How mRNA Can Stop the Next Pandemic Before it Starts*, 100 FOREIGN AFF. 128, 131 (2021).

<sup>236</sup> See BVerfG, 1 BvR 2649/21, *supra* note 1, para. 207 (2022) (Ger.).

<sup>237</sup> *Id.* para. 208.

<sup>238</sup> *Id.*

result in a fatal outcome.<sup>239</sup> This risk further amplifies the extent of the intervention since vaccinations are typically administered in multiple doses to individuals in good health.<sup>240</sup>

Although the risk of serious injury to one's health, including death,<sup>241</sup> as a result of receiving the vaccine is rare, it still exists. Taking into account the data from Germany, which includes a total of 1,802 reports of suspected deaths occurring at various intervals after vaccination (equating to 0.02 per 1,000 vaccinations),<sup>242</sup> and assuming that this risk is present in any country, how can any country put pressure on persons to get vaccinated when it acknowledges that there is a certain chance, however slim, that the vaccination will end in death. Is our society justified in the subjugation of people to the severe and irreversible side effects of a vaccine in order to potentially save the lives of others who may or may not have a life-threatening reaction when contracting the virus?<sup>243</sup> Regrettably, the ruling of the German Court did not address this intricate and universal philosophical question.

Additionally, the more serious the violation of individual rights is, the state should prove its effectiveness in preventing or reducing the spread of the disease to a greater degree.<sup>244</sup> Indeed, in some cases, the possibility of the legislature getting a sufficiently reliable picture is limited due to the lack of scientific knowledge.<sup>245</sup> But a state of ambiguity operates in both directions; it also requires avoiding violations of fundamental rights.<sup>246</sup>

---

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* para 224.

<sup>242</sup> *See id.* Even when acknowledging that a causal relationship between the vaccine and death is possible or probable in just 78 out of the 1,919 reported cases of suspected fatalities, *id.* para. 225, the overall risk of death due to vaccination remains relatively low.

<sup>243</sup> *See generally* Cordova, *supra* note 31, at 45 (stating that “[e]veryone belongs to everyone now, you see. But I didn’t sign up for the collective, did you?”). For the general problem of sacrificing individuals for the sake of others, see Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395 (1985).

<sup>244</sup> Gostin et al., *supra* note 41, at 122; *see also* Ball & Barnes, *supra* note 39, at 47-48.

<sup>245</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, para. 152 (2022) (Ger.).

<sup>246</sup> For the ban imposed on the state to violate an individual’s constitutional rights see, e.g., Rene Nunez, *Calibrating the Scales of Justice: Balancing Fundamental Freedoms in United States and Canada*, 14 ARIZ. J. INT’L & COMP. L. 551, 551 (1997).

Amid the risk of illness and death, the restrictions imposed during COVID-19 impacted fundamental rights and the well-being of individuals. Thus, the loneliness created by quarantine may negatively affect both physical and mental health.<sup>247</sup> The ban on occupation may create or exacerbate economic hardship and devastatingly affect families of low socioeconomic status. Many employees, especially employees with special skills, feel a sense of satisfaction in their work and view it as a part of their identity and the center of their life.<sup>248</sup> The exclusion from their work may result in severe psychological distress and financial damage.<sup>249</sup> It is worth noting in this context that employees who follow a regular work routine experience less stress, are more engaged at work, and report higher levels of job satisfaction compared to those with irregular work schedules.<sup>250</sup> If an individual's work routine is crucial for their satisfaction and well-being, then the significance of being able to work without disruptions cannot be underestimated.

The German Federal Constitutional Court acknowledged that obligation to provide proof of vaccination or recovery as a condition to work encroaches with considerable weight on the right to physical integrity under Article 2(2) sentence 1 of the German Basic Law.<sup>251</sup> This requirement effectively puts those affected in a position where they must make a choice between giving up their current job or consenting to a compromise on their physical integrity.<sup>252</sup> The right to bodily autonomy and integrity is also fundamental in constitutional and health law,<sup>253</sup> and lies at the hard core of the right to dignity.<sup>254</sup> Introducing a substance into the body necessitates securing their

<sup>247</sup> Quintana & Quintana, *supra* note 42, at 392; Ash & Huang, *supra* note 78, at 58.

<sup>248</sup> See generally Philip H. Mirvis & Douglas T. Hall, *Psychological Success and the Boundaryless Career*, 15 J. ORGANIZATIONAL BEHAV., 365, 367 (1994).

<sup>249</sup> Danijela Godinic et al., *Effects of Economic Uncertainty on Mental Health in the COVID-19 Pandemic Context: Social Identity Disturbance, Job Uncertainty and Psychological Well-Being Model*, 6 INTERNATIONAL JOURNAL OF INNOVATION AND ECONOMIC DEVELOPMENT 61, 61 (2020).

<sup>250</sup> See, e.g., Muhammad Jamal & Vishwanath V. Baba, *Shiftwork and Department-Type Related to Job Stress, Work Attitudes and Behavioral Intentions: A Study of Nurses*, 13 J. ORGANIZATIONAL BEHAV. 449, 458 (1992).

<sup>251</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, para. 206 (2022) (Ger.).

<sup>252</sup> *Id.* para. 209.

<sup>253</sup> Coggon & Miola, *supra* note 99, at 523.

<sup>254</sup> See Jonathan Herring & Jesse Wall, *The Nature and Significance of the Right to Bodily Integrity*, 76 CAMBRIDGE L.J. 566, 566 (2017).

consent, as it upholds their inherent right to self-determination over their own corporeal domain.<sup>255</sup>

The refusal of a competent person to make decisions regarding their medical treatment that interferes with their body or touches their body should be respected.<sup>256</sup> The significance of this right stems from the fact that, as Herring and Wall put it, “the body is where we experience states of well-being, it is the way in which we flourish as humans, it is the medium through which we interact with others, and it is the way in which we execute our agency . . . .”<sup>257</sup>

In this respect, the occupational freedom of persons working in the health and care sectors is also regularly affected.<sup>258</sup> Declining vaccination leaves them unable to pursue their vocation, particularly if it involves a typical and specialized role within the healthcare and caregiving domains.<sup>259</sup> The Court acknowledged the distressing nature of the situation, particularly during the law’s active period, as it may force individuals to either lose their jobs or halt their extended professional qualification process required for obtaining a dental or medical license.<sup>260</sup> Additionally, due to the absence of vaccination or recovery proof, not only their current job but practically every position within their learned field across Germany was off-limits until December 31, 2022, severely restricting their freedom to pursue their chosen occupation.<sup>261</sup> Obviously, a change of work or even a specific position may be irreversible.<sup>262</sup>

Moreover, and beyond violating the freedom of occupation, the state should recognize and respect the autonomy of people to decide for themselves. We noted above the significance of autonomy.<sup>263</sup> Even during pandemics, it is crucial not to deprive individuals of their autonomy and make them feel like children whose parents make decisions for them. Some individuals do not consent to wearing face coverings for various reasons. Some individuals doubt their effectiveness

---

<sup>255</sup> See BVerfG, 1 BvR 2649/21, *supra* note 1, para. 207 (2022) (Ger.).

<sup>256</sup> Herring & Wall, *supra* note 254, at 567-68.

<sup>257</sup> *Id.* at 580.

<sup>258</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, para. 209 (2022) (Ger.).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* para. 260.

<sup>262</sup> *Id.* para. 210.

<sup>263</sup> See *supra* notes 118-24 and accompanying text. See Parchomovsky & Stein, *supra* note 117, at 63-65; FEINBERG, HARM TO SELF, *supra* note 104, at 27.

in protecting against the transmission of the virus.<sup>264</sup> The refusal of vaccination stems from multiple causes. Some refuse to introduce foreign substances into their bodies, believing that vaccines weaken the immune system.<sup>265</sup> Many people doubt the efficacy of the COVID-19 vaccines.<sup>266</sup> Many are afraid of the adverse effects of vaccinations.<sup>267</sup> Mature and sane people are entitled to make careless decisions regarding their health.<sup>268</sup> Different views and behaviors should also be respected. Moreover, given the uncertainty surrounding the long-term effects of both the disease and the vaccines,<sup>269</sup> it cannot be said that choosing not to vaccinate is irrational.

Although the state imposes certain protections on people against their will and violates their autonomy, there are limits to this power.<sup>270</sup> Thus, confining harmless mentally ill persons against their will for their benefit is unconstitutional.<sup>271</sup> Likewise, there are limits to the state's ability to coerce people to promote their health.<sup>272</sup> As stated, imposing a ban on the consumption of white sugar or white flour would be unacceptable paternalism.<sup>273</sup>

It should be further noted that people can protect themselves to some degree against infection. They can undertake preventive behaviors like voluntarily staying home and avoiding unnecessary contact with others. Also, working from home when feasible widens the possibility of avoiding contact with others. Although self-quarantine is

<sup>264</sup> Cordova, *supra* note 31, at 55-57.

<sup>265</sup> Marc Debus & Jale Tosun, Political Ideology and Vaccination Willingness: Implications for Policy Design, 54 POLICY SCIENCES 477, 481 (2021).

<sup>266</sup> Rubinstein Reiss, *supra* note 211, at 73-74 (relating to the lack of sufficient data regarding the vaccines).

<sup>267</sup> See, e.g., BVerfG, 1 BvR 2649/21, *supra* note 1, para. 25 (2022) (Ger.), for a declaration of persons that they are afraid of vaccination. On the possible side effects of the vaccines see Little, Seman & Walsh, *supra* note 28, at 139, 143-45. Indeed, studies indicate adverse effects as a result of the vaccines. See, e.g., Stephane Le Vu et al., *Age and Sex-Specific Risks of Myocarditis and Pericarditis following Covid-19 Messenger RNA Vaccines*, NATURE COMMUNICATIONS, <https://rotter.net/forum/scoops1/749760.shtml> (last visited Apr. 23, 2023) (finding an association between mRNA vaccines of Pfizer and Moderna and an increased risk of myocarditis and pericarditis).

<sup>268</sup> Coggon & Miola, *supra* note 99, at 540; see also FEINBERG, HARM TO SELF, *supra* note 104, at 62.

<sup>269</sup> Little et al., *supra* note 28, at 161.

<sup>270</sup> FEINBERG, HARM TO SELF, *supra* note 104, at 24.

<sup>271</sup> O'Connor v. Donaldson, 422 U.S. 563, 574 -75 (1975).

<sup>272</sup> FEINBERG, HARM TO SELF, *supra* note 104, at 24.

<sup>273</sup> *Id.*

not a long-term solution, and at-risk populations cannot be expected to protect themselves from diseases by refraining from contact with others indefinitely, voluntary avoidance of specific actions can reduce the risk of contracting the disease. For example, going to a hairdresser or a beauty salon is unnecessary during an epidemic. A hairdresser who opens their business does not directly endanger those who do not patronize their business.

Obviously, total protection from COVID-19 is impossible. It is not easy for people to protect themselves against COVID-19 because the virus does not require physical contact with an infected person.<sup>274</sup> It can survive outside the human body and be transmitted through exposure to accumulated infectious particles in the air, mainly indoors, caused by coughing, sneezing, or talking.<sup>275</sup> Therefore, every infected person may place others in their vicinity at risk. Furthermore, unlike tuberculosis patients,<sup>276</sup> for example, individuals infected with COVID-19 can be contagious and asymptomatic; therefore, individuals who do not feel ill and exhibit no symptoms of illness can be carriers of the virus and transmit the disease without their knowledge.<sup>277</sup> Additionally, there are no fully effective vaccines.<sup>278</sup> As a result, vaccinated people can be infected with the disease. President Joseph

---

<sup>274</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, para. 180 (2022) (Ger.); *see also* Evan Starkman, *How Does Coronavirus Spread?*, WEBMD, <https://www.webmd.com/lung/coronavirus-transmission-overview#1> (last visited Apr. 23, 2023).

<sup>275</sup> Starkman, *supra* note 274.

<sup>276</sup> Ball & Barnes, *supra* note 39, at 42.

<sup>277</sup> Little et al., *supra* note 28, at 137-38; *see also* Pauley, *supra* note 44, at 74-75 (regarding Ebola); Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 185 (2020); Kristen Nelson & Jeanne Segil, *The Pandemic as a Portal: Reimagining Crime and Punishment in Colorado in the Wake of COVID-19*, 98 DENV. L. REV. 337, 376 (2021). *But see* Cordova, *supra* note 31, at 50 (stating that "asymptomatic spread is nonsense").

<sup>278</sup> This is true regarding Covid-19 vaccines and vaccines in general. *See* Marc C. Shamier et al., *Virological Characteristics of SARS-CoV-2 Vaccine Breakthrough Infections in Health Care Workers*, MEDRXIV (2021), <https://www.medrxiv.org/content/10.1101/2021.08.20.21262158v1> (last visited July 29, 2023) ("SARS-CoV-2 vaccines are highly effective at preventing COVID-19-related morbidity and mortality. As no vaccine is 100% effective, breakthrough infections are expected to occur.").

Biden, who has contracted COVID-19 despite four vaccinations,<sup>279</sup> is one of many examples.

As noted, people cannot refrain from contact with others forever. People who must work from a specific place cannot afford the luxury of risk avoidance. They may have to reach their work by public transportation.

Vulnerable people would find it especially hard to protect themselves effectively.<sup>280</sup> They are not free to take adequate precautions to save their life and health. The vulnerability of particular groups of people is based precisely on the lack or limited possibility of effectively protecting themselves against infection and its consequences through vaccination. Individuals who are vulnerable not only face an elevated risk of either not responding to immunization or having a diminished response, but their initial protection also diminishes more rapidly over time.<sup>281</sup> As a result, these vulnerable individuals primarily rely on the protection offered by those who are treating, looking after, or caring for them, to mitigate their heightened risk of contracting COVID-19 with severe or even fatal consequences when compared to the general population.<sup>282</sup> Additionally, they often find themselves unable to avoid utilizing the services of specific institutions and organizations.<sup>283</sup> This is especially true regarding persons who live in assisted living settings.<sup>284</sup> However, among the petitioners to the German Federal Constitutional Court were persons treated by unvaccinated doctors, dentists, or other medical service providers.<sup>285</sup> Therefore, these individuals argue that their constitutionally protected freedom of contract has been violated, which grants them the right to freely choose their doctor and receive treatment from unvaccinated individuals.<sup>286</sup> At least, persons who consent to be treated by unvaccinated persons should have the right to do so.

---

<sup>279</sup> Maegan Vazquez et al., *Biden Tests Positive for Covid-19 and is Experiencing Mild Symptoms*, CNN POLITICS (July 21, 2022), <https://edition.cnn.com/2022/07/21/politics/joe-biden-covid-19/index.html>.

<sup>280</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, para. 155 (2022) (Ger.).

<sup>281</sup> *Id.* para. 199.

<sup>282</sup> *Id.* paras. 199, 229.

<sup>283</sup> *Id.* para. 228.

<sup>284</sup> See also Elizabeth Edwards et al., *Retaining Medicaid COVID-19 Changes to Support Community Living*, 14 ST. LOUIS U. J. HEALTH L. & POL'Y 391, 393 (2021).

<sup>285</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, para. 42 (2022) (Ger.).

<sup>286</sup> *Id.*

The Court held that the interference at hand is constitutionally justified.<sup>287</sup> The severity of the interference was not disproportionate to the weight of the purpose pursued to prevent significant dangers to the life and health of vulnerable persons.<sup>288</sup>

However, as we have shown, the Court refused to recognize measures that are less harmful to the individual and potentially protect the lives and health of vulnerable people. The Court neither tried to soften the violation of people's right to work and occupation nor the violation of their right to be free from unreasonable pressure to undergo medical treatment against their will. Nor did it show the moral justification for forcibly exposing people to the possible harms of vaccinations. It also needed to accord due respect to the autonomy of persons.

A disproportionate social reaction to a problem is a firm indication of moral panic.<sup>289</sup> For example, jailing a hairdresser for opening their business<sup>290</sup> when their clients are aware of the COVID-19 risks and prefer to get a haircut and take the risk of contracting the disease is a disproportionate reaction. The deportation of the unvaccinated (and healthy) tennis star Novak Djokovic from Australia provides another example of moral panic.<sup>291</sup>

Even when the state imposes restrictions on lifestyles to prevent or reduce the spread of disease, creative solutions to decrease the violation of autonomy should be devised. For example, days can be set aside for theater performances for unvaccinated people or for people who do not wear face masks. That way, people's freedom to determine how to protect themselves from infection and what degree of risk to their health they want to take to safeguard their life routine is preserved as much as possible.

The German Federal Constitutional Court was not required to be creative. Instead, it should have just held that the provision prohibiting unvaccinated or recovering workers from working in particular institutions or organizations is unconstitutional, mainly because it fails

---

<sup>287</sup> *Id.* para. 244.

<sup>288</sup> *Id.* para. 232.

<sup>289</sup> Jock Young, *Moral Panics and the Transgressive Other*, 7 *CRIME MEDIA CULTURE* 245, 251 (2011).

<sup>290</sup> Smith, *supra* note 64.

<sup>291</sup> BBC, *NOVAK DJOKOVIC: TENNIS STAR DEPORTED AFTER LOSING AUSTRALIA VISA BATTLE* (2022), <https://www.bbc.com/news/world-australia-60014059> (last visited July 29, 2023).



to recognize alternative measures that protect vulnerable populations from endangering their lives or health.<sup>292</sup>

## V. CONCLUSION

The COVID-19 pandemic shows the fragility of human rights in the face of a health risk. Unfortunately, it has been and is still coped with at the cost of a heavy personal toll in fundamental rights infringements.

Many junctures in human experience necessitate striking the right balance between fundamental rights and the collective good. This difficult task is exacerbated under conditions of uncertainty when it is difficult to assess the expected harm of a pandemic.<sup>293</sup> Decisions, however, should not be driven by hysteria and moral panic. The state should not simply discard the autonomy of individuals to direct their lives as an insignificant principle and treat persons who think differently as uncaring or even as enemies of society.

While the risks posed by the COVID-19 pandemic to the public at large should not be underestimated, they do not always justify imposing broad and sweeping restrictions on fundamental rights or bending the will of mature and sane individuals who may prefer to risk illness rather than to submit to restrictions on liberties, loneliness, loss of livelihood, and unknown health hazards of the new vaccines.

Compulsive powers against sane people should be free from paternalistic considerations. As Feinberg pointed out, because our behavior always affects others one way or another, relying exclusively on the principle of harm to others can lead to boundless intervention by the state in our liberties.<sup>294</sup> While maintaining a balance between the public good and fundamental rights is not strictly a matter of individual choice, greater weight should be granted to the autonomy of individuals to make their own choices regarding the conduct of their

---

<sup>292</sup> For the requirement of using the least restrictive alternative in German law, see Georg Notle, *General Principles of German and European Administrative Law - A Comparison in Historical Perspective*, 57 MOD. L. REV. 191, 193 (1994).

<sup>293</sup> See Martin, *supra* note 140, at 141-42.

<sup>294</sup> FEINBERG, HARM TO OTHERS, *supra* note 100, at 12.

lives during a pandemic. Persons should not be deprived of the ability to make their own choices.

Placing restrictions on liberties should be a health measure of last resort after less restrictive means have proven or are estimated ineffective in coping with infectious diseases and preventing imminent harm.<sup>295</sup> The state can influence the conduct of individuals by urging them to stay at home and disseminating information about the importance of maintaining physical distancing, wearing face masks, and getting vaccinated. Naturally, people want to preserve their health and lives.

Even during a pandemic, people can control their behavior and protect themselves to some extent by avoiding physical contact with others as much as possible. However, for those unable to do so, let them at least have the power to choose whether to be treated by unvaccinated persons, especially if those unvaccinated individuals have undergone testing to confirm their health.

Situations of social insecurity create public panic, which may breed overreaction. When society perceives a phenomenon as a threat, it wages war against it. But health pandemics should not be accompanied by pandemics of human rights violations. Times of crisis should not jettison basic constitutional principles but instead strengthen them.

The German Federal Constitutional Court held the constitutionality of a law that conditions work in particular institutions and organizations on providing proof of vaccination or recovery.<sup>296</sup> It contrasts the very low probability of serious harm due to vaccination with the significantly higher likelihood of harm to the life and health of vulnerable people.<sup>297</sup> However, the Court rejected all alternative measures offered by unvaccinated workers, by employers who wanted to employ unvaccinated workers, and by patients seeking the services of unvaccinated people.<sup>298</sup> It refused to enable workers to prove that they do not threaten public health through weekly tests. Its refusal indicates the illegitimate purpose of putting pressure on people to vaccinate against COVID-19.<sup>299</sup> The Court's failure to state that the probability of a tested unvaccinated or unrecovered person being

---

<sup>295</sup> Gostin et al., *supra* note 41, at 119.

<sup>296</sup> BVerfG, 1 BvR 2649/21, *supra* note 1, para. 205 (2022) (Ger.).

<sup>297</sup> *Id.* para. 230.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* paras. 192-97.

contagious is higher than an untested vaccinated or recovered person challenges the constitutionality of the ruling.

The continuous scientific uncertainties regarding the COVID-19 pandemic should not have been a reason to violate human rights. On the contrary, as a society, we must do everything in our power to ensure that after the health crisis passes, we can continue our lives without a portion of the population feeling alienated for insisting on maintaining their fundamental rights.