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# Unvaccinated risk exclusion from ordinary joys of life

HENRY ERGAS

Follow @HenryErgas

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By **HENRY ERGAS**, COLUMNIST

12:00AM JULY 30, 2021 •

Last Sunday Helge Braun, the head of Germany's powerful federal chancellery and a close ally of Angela Merkel, suggested it was only a matter of time before restrictions were imposed on access to public venues by "people who are not vaccinated, even if they have been tested for Covid, because the risks of infection are too high".

While Braun's comments have provoked a heated debate, there is little doubt that they reflect an increasingly widespread trend. In effect, with the Delta variant causing Covid cases to surge, a growing number of countries are implementing or considering vaccination passes, which would be required for entry into places as diverse as shopping centres, cinemas and airports.

The lead in that respect was taken by French President Emmanuel Macron who, earlier this month, announced measures that will eventually exclude the unvaccinated from many activities that are integral to ordinary life, such as entering a cafe, working in a supermarket or going to a soccer game. Those measures have two goals: to encourage vaccination, bringing France closer to herd immunity; and given that the disease will inevitably continue to circulate, to reduce the risk of major outbreaks by limiting the likelihood of transmission in crowded spaces.

That at least the first of those goals is already <sup>Page 3 of 4</sup>being met in France seems clear: nearly twice as many people received their first dose of the vaccine following the announcement as in the period immediately preceding it, while the fully vaccinated proportion of the population soared to over 50 per cent, blunting the impact of the still high case numbers on hospital admissions.

There must nonetheless be a question about whether those effects excuse so heavy-handed an intrusion on individual autonomy. Obviously, that question will need to be assessed in the light of experience, but it would be wrong to dismiss the points that have been made in the measures' favour.

Thus, supporters of the measures argue that any harms arising from the restrictions are more than justified by the benefits achieving a reasonable degree of herd immunity will bring, not only in reducing fatalities and ending the stop-go cycle that has crippled France's economy but also in allowing a durable return, much sooner than would otherwise have occurred, to a far freer way of life.

It is true that the unvaccinated may not gain as much from the renewed freedoms as the vaccinated. However, the unvaccinated would be no better off – and might well be worse off – were the country forced to shut down again, in which case the venues from which they are being excluded (as well as many others to which they will retain access) would be completely closed and their livelihoods, along with their families' wellbeing, would be at risk.

They therefore contend that compared with the relevant alternative – a continuation of the past 18 months, with all the damage its convulsions have wreaked – the measures are clearly

preferable, including for the unvaccinated.

Nor do the measures' advocates accept the claim they infringe on individual liberties. No one, they point out, has a right to negligently inflict harm on others; but those who could be vaccinated yet refuse to do so are far more likely to act as transmitters of the disease, not only to the vaccinated but also to highly vulnerable populations such as the immunocompromised (who will continue to enjoy unfettered access to public places).

Normally, the law of tort, or its civil law equivalent, would deter most negligent conduct. However, the difficulties involved in identifying long chains of transmission, and the potentially severe consequences of acting only after, rather than before, infection has occurred, mean its application to Covid is utterly impractical.

As a result, the restrictions on the ability of the unvaccinated to access venues where the risk of contagion is high are the only feasible way of securing the outcome that would otherwise, but in this case cannot, be obtained by the law of tort; and they are therefore no more invasive of individual rights than tort law itself.

Moreover, securing that outcome through a uniform approach across the economy as a whole should be vastly more efficient than allowing a proliferation of private schemes, as employers and service providers scramble to reduce their legal liability and reassure consumers by imposing a hodgepodge of regulations of their own.

There are, in short, both equity and efficiency arguments for the restrictions. Naturally, whether one finds those arguments convincing depends, at least in part, on whether one shares their underlying premises: that Covid is a serious, potentially fatal disease that it is easier to prevent than to cure; that vaccination provides prevention without undue risk to those who choose it; and that once mass vaccination is achieved, lockdowns can be avoided if some barriers are imposed on continued transmission.

But even accepting those premises does not imply that Australia should rush to imitate France's vaccinal Jacobinism.

In the short run, the still limited access to vaccines makes imposing restrictions on the unvaccinated infeasible and undesirable; over the longer term, those restrictions may prove unnecessary if very high levels of vaccination can be achieved voluntarily – as some opinion polls, but not others, suggest. In that event, the mere fact a small percentage of the population remained unvaccinated would not create a risk of widespread outbreaks, particularly if there were effective safeguards against importing the disease from overseas.

Underscoring the need to wait and see is the fact coercion has considerable costs of its own. Some of those costs would be incurred in securing compliance.

Every bit as important, however, is the likelihood that measures similar to the ones being implemented in France would fuel the anger of those who already resent the many restrictions the pandemic has brought, cementing their hostility to vaccination. The perverse outcome of adding yet another layer of restrictions might therefore be to make herd immunity even more difficult to achieve.

Last but by no means least, reliance on coercion would weaken our already enfeebled sense of individual responsibility for our own fate and that of our community, with compulsion further displacing comprehension, compassion and concern as the basis for mutual obligation.

Ultimately, the harder we find it to act wisely by choice rather than by law, the less likely it is that our laws themselves will be wise ones.

No doubt, views on all that will differ; but what is certain is that as vaccination passes become more common internationally, Australia cannot avoid the debate over their role. Let it at least be held intelligently.