


RESEARCH ARTICLE

Vaccination, conscientious objection and human rights

Ian Leigh*[†] 

Durham University, Durham, UK

*Author e-mail: ian.leigh@durham.ac.uk

(Accepted 20 May 2022)

Abstract

This paper discusses the extent to which conscientious objections to vaccination qualify for protection under the European Convention on Human Rights (ECHR). Drawing on an examination of the nature of conscience and the ethics of vaccine refusal, it argues that a narrow category of reasons for refusal to be vaccinated can be differentiated from more general ‘vaccine hesitancy’. In relation to conscience objections of this kind, it engages in a systematic analysis of the applicability of the ECHR, both in relation to compulsory vaccination, and so-called ‘vaccine passports’. It concludes that states can – and in some situations must – recognise conscientious objections under the ECHR.

Keywords: human rights; freedom of conscience; medical law; vaccination; European Convention on Human Rights

Introduction

The Covid-19 pandemic, first detected in late 2019, has refocused attention in a startling new way on one of the perennial questions of human rights law – the collision between individual behaviour and communal interests. Rarely has it been so clear how personal decisions can potentially affect others’ wellbeing and, indeed, the community as a whole.

The problem is far from new. When, in 1905, the US Supreme Court upheld a local regulation imposing compulsory smallpox vaccination, Harlan J wrote of the community’s right of ‘self-defense’ against an epidemic threatening the safety of its members¹ and argued that:

Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.²

This paper discusses one pertinent aspect – conscientious objections to vaccination – from the perspective of the European Convention on Human Rights (ECHR). The objective is to assess whether compulsory vaccination contrary to a person’s conscientious beliefs violates the right of freedom of conscience under the ECHR.³ The development, licensing and use of several vaccines against Covid-19 makes the issue a timely and pressing one of international policy significance. The issue

[†]This work was undertaken with the assistance of the British Academy and the Wolfson Foundation under a British Academy Wolfson Professorship. I am grateful to my colleagues Emma Cave and Shaun Pattinson and to two anonymous referees for helpful comments on earlier drafts.

¹*Jacobson v Massachusetts* 197 US 11 (1905), 27 and 29. The Supreme Court held that the regulation fell within the police power of the state, which included making reasonable regulations to protect public health and safety.

²*Ibid.*, at 26.

³‘Everyone has the right to freedom of thought, conscience and religion...’: Art 9(1) ECHR.

is not, however, confined to vaccines against Covid-19: similar concerns have arisen in relation to earlier vaccination campaigns, going as far back as vaccination against smallpox in the nineteenth century.⁴ This paper therefore addresses the Convention-compatibility of vaccination requirements in general, notwithstanding that the current pandemic has given rise to many relevant examples.

In the current Covid-19 pandemic, when faced with disappointing vaccination rates several European countries have resorted to increasingly stringent measures (de facto or explicit restrictions) on individuals who are unvaccinated and who do not qualify for medical exemption.⁵ Although much of the human-rights concern has focused on the effect of vaccination requirements and restrictions on personal autonomy, privacy and discrimination, there are also effects on freedom of conscience that are relevant, as can be seen by brief reference to US experience.

A number of US states recognise conscience exemptions to requirements for infant vaccination⁶ and in other contexts, such as higher education and employment, whether imposed directly through legislation or policy directives or indirectly on public or private sector employees. Predictably, during the Covid-19 pandemic both federal⁷ and some state schemes and conscience exemptions have become highly politicised, with controversy over attempts both to broaden or to narrow the existing exemptions, and litigation brought by individuals claiming to be conscientious objectors.⁸ In Europe, however, the impact of vaccine mandates on freedom of conscience and the corresponding question of non-medical exemptions has been largely overlooked⁹ – an omission that this paper seeks to redress.

The discussion below deals first, with what is meant by vaccine mandates. Part 1 distinguishes between forcible vaccination, direct penalties for failure to vaccinate, and conditional policies (those both implemented by the state and permitted by others by the state). Part 2 explores how conscientious objections to vaccination relate to freedom of conscience. It argues that genuine conscience claims should be differentiated, on the one hand, from objections based on mere strength of feeling and, on the other hand, from vaccine hesitancy. Part 3 argues that there is a plausible rationale for distinguishing these claims from the general protection of personal autonomy. It contends that the distinctive integrity-protecting character of some conscience-based vaccine refusals gives stronger reasons for upholding them. Part 4 analyses in detail whether such objections fall within the right of freedom of conscience protected under the Article 9 of the ECHR and how conscience claims fare when ranged against the public health arguments for compulsory vaccination. Part 5 considers whether the Convention jurisprudence requires conscience exemptions. The conclusion summarises why, based on this analysis, conscientious refusal of vaccination should be given additional protection under the ECHR.

⁴On the history of the anti-vaccination movement in England and the US respectively: N Durbach *Bodily Matters: The Anti-Vaccination Movement in England, 1853–1907* (Durham NC: Duke University Press, 2005); J Colgrove *State of Immunity: The Politics of Vaccination in Twentieth-Century America* (Berkeley: University of California Press, 2006).

⁵Part 1 below.

⁶States with religious and philosophical exemptions from school immunization requirements' <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> (last accessed 2 August 2022).

⁷In *National Federation of Independent Businesses v Occupation Health and Safety Administration* 595 US 2022 the US Supreme Court stayed implementation of federal legislation to require all government employees to be vaccinated against Covid-19 or to undergo weekly testing at their own expense on the grounds that it would probably be found ultra vires.

⁸In *US NAVY SEALs 1-26 v Joseph R Biden Jr*, Civil Action No 4:21-cv-01236-O the US District Court Northern District of Texas granted a preliminary injunction in respect of implementation in the Navy of a policy of mandatory vaccination because the Navy's policy of blanket denial of religious exemption violated the Religious Freedom Restoration Act and the 1st Amendment. For unsuccessful emergency applications by health workers in Maine and New York objecting to the absence of religious exemptions in state vaccine mandates: *Does 1-6 v Mills* --F.4th--., 2021 WL 4860328 (19 October 2021); *We The Patriots, US Inc v Hochele*, 21-2179 (2d Cir 4 November 2021), respectively.

⁹An exception was the concern expressed by UK Christian leaders about the impact on those unwilling to receive vaccines because of 'serious issues of conscience': 'Open Letter to the Prime Minister Concerning Vaccination Passport Proposals', April 2021, <https://vaccinepassportletter.wordpress.com/> (last accessed 2 August 2022).

1. The nature of vaccination requirements

Legal requirements to be vaccinated take several different forms and the portmanteau term ‘vaccine mandate’ requires closer analysis. A distinction can be drawn between forcible vaccination, direct penalties for failure to vaccinate, and conditional policies, ie the imposition of requirements to be vaccinated as a pre-condition to undertaking an activity (whether imposed by the state or by private actors at the state’s command or with its permission).¹⁰

No European country engages in forcible adult vaccination per se¹¹ but the category is useful as a theoretical marker against which to gauge the severity of other vaccination requirements. Thus, the Grand Chamber in *Vavříčka v Czech Republic* drew a distinction between compulsory and forcible vaccination related to the proportionality analysis under Article 8 (the right to respect for private life)¹² but did not refer to any countries that practised the latter. Although forcible vaccination might seem like a fanciful idea because of the severe interference with bodily integrity involved, it should be borne in mind that ‘prevention of the spreading of infectious diseases’ is nonetheless one of the grounds for lawful deprivation of liberty under Article 5(1)(e) of the ECHR.

Compulsory vaccination schemes impose legal duties either on adults or, more commonly, on parents or guardians with regard to children, and corresponding penalties for failure to vaccinate. Mandatory infant vaccination applies in around a dozen European countries.¹³ Compulsory adult vaccination was introduced during the Covid pandemic in Greece and Austria¹⁴ and other EU countries were urged to consider its introduction by the President of the European Commission in December 2021.¹⁵

Under the conditional approach there are no direct legal penalties for failure or refusal, but vaccination is a legal or de facto pre-requisite or ‘passport’ to undertaking certain forms of employment or other activities.¹⁶ For example, in many countries, including the UK, Covid vaccination became a requirement for front-line work with vulnerable elderly persons or in the health service.¹⁷ Particularly significant was the introduction by a number of countries of ‘vaccine passes’ or ‘passports’, requiring individuals to demonstrate their vaccination status not just for international travel¹⁸ (and in some countries on all public transport) but also in order to undertake everyday activities, such as attending a restaurant, café, nightclub, cinema, or theatre, or using non-essential shops. The French President, Emmanuel Macron, stated explicitly in January 2022 that the purpose of such legal

¹⁰Details of the measures in EU countries and Iceland, Liechtenstein and Norway are published by the European Centre for Disease Prevention and Control: <https://covid-statistics.jrc.ec.europa.eu/RMeasures> (last accessed 2 August 2022).

¹¹Arguably, however, schemes for compulsory vaccination of infants rely on parents forcing or otherwise persuading their children to overcome instinctive resistance to inoculation; cf Dissenting Opinion of Judge Wojtyczek in *Vavříčka and Others v Czech Republic* App no 47621/13 (Grand Chamber, 8 April 2021) para 12.

¹²*ibid*, paras 235, 276 and 293.

¹³Belgium, Bulgaria, Croatia, Czech Republic, France, Hungary, Italy, Latvia, Malta, Poland, Slovakia and Slovenia (Vaccine Scheduler. European Centre for Disease Prevention and Control, [Vaccine Scheduler | ECDC \(europa.eu\)](https://ecdc.europa.eu/en/vaccine-scheduler) (last accessed 2 August 2022).

¹⁴Austria to go into full lockdown as COVID surges’ *BBC News*, 20 November 2021, <https://www.bbc.co.uk/news/world-europe-59343650> (last accessed 2 August 2022).

¹⁵Covid Omicron: time to consider mandatory jabs, EU chief says’, *BBC News*, 1 December 2021, <https://www.bbc.co.uk/news/world-europe-59497462> (last accessed 2 August 2022).

¹⁶See, for example, details of the historical requirements concerning use of the NHS Covid Pass in England, Scotland and Wales: <https://www.gov.uk/guidance/nhs-covid-pass> (last accessed 2 August 2022).

¹⁷For outstanding applications to European Court of Human Rights against such requirements see n 69 below. For the UK, see *R (on the application of Peters) v Secretary of State for Health and Social Care* CO 3118/2021, 2 November 2021. Whipple J held, inter alia, that requirements in the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 on proprietors to prevent unvaccinated staff entering care homes unless medically exempt were compatible with Art 8 ECHR.

¹⁸Eg Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic (Digital Green Certificate) COM/2021/130 final.

requirements in France was to incentivise vaccination by making life difficult for the unvaccinated.¹⁹ In the most extreme example – introduced in November 2021 in Austria – people who had not received vaccination against Covid-19 were prevented from leaving their residence except for strictly prescribed purposes.

Human rights concerns have been raised both about the use of personal data involved in such schemes²⁰ and about the ‘denial of liberties’ to those without a vaccine passport and, relatedly, about the need to clearly articulate the justifications for and purposes of such schemes.²¹ Vaccination requirements relating to school attendance engage the right to education and of respect for parental religious and philosophical convictions,²² but the relevance of human rights law to restrictions on other activities is less clear. Denial of access to public buildings could in some instances (for example, courts) potentially impact on the right of fair trial (Article 6 ECHR) and the exercise of other legal entitlements; preventing travel may engage freedom of movement,²³ but access to non-essential shops, entertainment, leisure and cultural facilities are less clearly protected in themselves. Numerous human rights concerns led the Parliamentary Assembly of the Council of Europe to adopt Resolution 2361 (2021), which states that vaccinations in member states should not be mandatory, unvaccinated persons should not be discriminated against in any way and that vaccine certificates should be used only to monitor vaccine efficacy and side-effects.²⁴

The requirement to show proof of vaccination under conditional approaches also raises questions because of the impact on conscientious vaccine refusers and it is this largely neglected question that is the focus here. Under conditional schemes, both negative and positive obligations may be involved – the former because of legislative conditions and the latter where a private person is permitted by domestic law to impose such conditions. Employers could, for example, make vaccination a condition of entry to workplace premises for the protection of other employees and customers.²⁵ Others have introduced different terms and conditions for employees who are unvaccinated, for example, by paying less sick pay.²⁶ From the point of view of human rights law, the effect of the balance struck on conscientious vaccine refusers would fall to be determined through the lens of Article 9(2).²⁷ In the case of state employers this question would arise directly²⁸ and in the case of private employers it would do so because of the responsibility of the state’s courts or by way of positive obligation.²⁹ Part 4 below explores the applicability of Article 9 in greater depth.

¹⁹French COVID vaccine pass becomes law’ *Forbes Magazine*, 17 January 2022, <https://www.forbes.com/sites/alexledsom/2022/01/17/french-covid-vaccine-becomes-law-what-this-means-for-travel-plans/?sh=3abfb20e34a1> (last accessed 2 August 2022).

²⁰Disclosure of personal health data engages the right to respect for private life (Art 8): *Z v Finland* 25 EHRR 371. See further ‘Liberty responds to “vaccine passport” plans’ <https://www.libertyhumanrights.org.uk/issue/liberty-responds-to-vaccine-passport-plans/> (last accessed 2 August 2022). Big Brother Watch ‘Access denied: the case against a two-tier Britain under COVID certification’, <https://bigbrotherwatch.org.uk/wp-content/uploads/2021/04/Access-Denied-Big-Brother-Watch.pdf> (last accessed 2 August 2022).

²¹Ida Lovelace Institute ‘What place should COVID-19 vaccine passports have in society?’ <https://www.adalovelaceinstitute.org/report/covid-19-vaccine-passports/> (last accessed 16 August 2021).

²²Protocol 1, Art 2 of the ECHR.

²³But note that Art 2(3) Protocol 4 of the ECHR allows for restrictions for the protection of health.

²⁴*Assembly debate* on 27 January 2021 (5th Sitting) (see Doc 15212, report of the Committee on Social Affairs, Health and Sustainable Development, rapporteur: Ms Jennifer De Temmerman). *Text adopted by the Assembly* on 27 January 2021 (5th Sitting).

²⁵eg ‘Pimlico plumbers to make workers get vaccinations’ *BBC News*, 14 January 2020, <https://www.bbc.co.uk/news/business-55654229> (last accessed 2 August 2022).

²⁶IKEA cuts sick pay for unvaccinated staff forced to self-isolate’ *BBC News*, 10 January 2022 <https://www.bbc.co.uk/news/business-59930206> (last accessed 2 August 2022).

²⁷cf *Eweida and Others v United Kingdom* (2013) 57 EHRR 8.

²⁸cf *Halford v UK* 24 EHRR 523, re Art 8.

²⁹In the UK the most likely route would be an indirect discrimination claim under Equality Act 2010, s 19 on grounds of religion or belief, with the protective nature of the scheme being evaluated as a matter of proportionate justification.

2. How conscientious objections to vaccination relate to freedom of conscience

Although refusal of vaccination is often described as based on ‘conscience’, care needs to be taken in using that term in a legal context, especially since objections to vaccination are commonly based on an amalgam of principled and pragmatic considerations. Before examining the ethical character of vaccine refusal and the arguments that are made about the recognition of conscientious objection, it is helpful first to set out what is meant here by conscience.

Conscience can be understood in a variety of overlapping senses: self-knowledge and self-assessment; a faculty for, or body of, moral knowledge or beliefs; a motivation to act morally; and self-identifying moral commitments.³⁰ It is the final category that is most closely associated with contemporary freedom of conscience. In Heiner Bielefeldt’s words ‘[W]hat is at stake in freedom of conscience is no less than the nucleus of moral agency among human beings’.³¹

In this vein Jocelyn Maclure and Charles Taylor refer to conscience as the ‘core beliefs that allow individuals to structure their moral identity’, which aid them in giving direction for life and in exercising a faculty for judgement when faced with conflicts of values, and which cannot be transgressed without violating their sense of moral integrity.³²

Moral integrity. ...depends on the degree of correspondence between, on the one hand, what the person perceives to be his duties and preponderant axiological commitments and, on other, his actions. A person whose acts do not satisfactorily correspond to what he judges to his obligations and core values is in peril of findings his sense of moral integrity violated.³³

They refer to this as ‘moral harm’,³⁴ (or what others call moral distress) arguing, for example, that forcing a vegetarian to eat meat inflicts moral harm.³⁵ It is important to clarify at this point that, contrary popular usage, beliefs are not based on conscience by reason only of being strongly-held: core beliefs related to an individual’s identity are likely to be strongly held but strength of conviction is neither a necessary nor sufficient criterion. As McClure and Taylor point out, preferences – even strongly-held ones – are in a different category to decisions based on an individual’s core commitments (ie beliefs that are ‘intimately connected to my self-understanding as a moral agent’).³⁶ Political theorist Cécile Laborde argues that such ‘integrity protecting commitments’ are candidates for legal exemption because they ‘cannot be sacrificed without feelings of remorse, shame or guilt’.³⁷

Some of those who object to vaccination do so for such reasons of conscience, motivated by their religious or ethical beliefs, as discussed below. Hesitant vaccine refusers, however, do not apply moral understanding to determine how to act in particular circumstances, but rather apply their understanding, however accurate or erroneous, of the science or medicine. Put differently, if their understanding of the medical advantages changed, they would have no *moral* objection to vaccination and they would not suffer moral harm or distress if vaccinated, although some might remain anxious about the long-term effects. In all probability, many share the same moral beliefs about the policy as vaccine

³⁰Stanford Encyclopedia of Philosophy, entry ‘Conscience’ (first published 14 March 2016), available at <https://plato.stanford.edu/entries/conscience/> (last accessed 2 August 2022).

³¹H Bielefeldt et al *Freedom of Religion or Belief, An International Law Commentary* (Oxford: Oxford University Press, 2016) p 294.

³²J Maclure and C Taylor *Secularism and Freedom of Conscience* (Cambridge, Mass: Harvard University Press, 2011) pp 89–90 and chs 8 and 10 more generally.

³³Ibid, p 76 (fn omitted); cf C Laborde *Liberalism’s Religion* (Cambridge, Mass: Harvard University Press, 2017) pp 203–205 (‘integrity protecting commitments’); and J Raz *The Authority of Law* (Oxford: Oxford University Press, 1979) p 264 (discussing conscientious objection).

³⁴Maclure and Taylor, above n 32, pp 77, 91 and 92.

³⁵Ibid, p 77.

³⁶Ibid, pp 92–93.

³⁷Laborde, above n 33, p 204. See further Part 3 below.

proponents. Nonetheless, a narrower category of vaccine refusers can be regarded as conscientious objectors and it is these who are of primary interest in this discussion.

By way of illustrating genuine conscientious objection, the next section discusses religious approaches to vaccine objection, not to argue for giving them priority over other conscience-based reasons, but rather because religious teachings are well documented, and can help illustrate the conscientious nature of some non-medical objections.

Religious teaching and objections

Most teaching by organised religions clearly supports vaccination, accepting it as a gift of God, a wise precautionary step and a moral duty for the protection of other people.³⁸ Nonetheless, since the development of the smallpox vaccine at the end of the eighteenth century there have often been religious concerns or objections, either to vaccination in general or to specific vaccines. As John Grabenstein notes in a comprehensive survey, these fall into three categories: ‘violation of prohibitions against taking life. ... violation of dietary laws, or ... interference with natural order (sic) by not letting events take their course’.³⁹ The only major religious group officially theologically opposed to vaccination in general would appear to be Scientology, because of its beliefs about the nature of disease. Scientologists have also lobbied extensively, with considerable success in the US, for religious exemption of vaccination requirements. Most other ostensibly religious objections are philosophical rather than theological, or based on tradition or social mores in a particular group.⁴⁰ For example, opposition among some Amish communities reflects their concern over modernity and a number of Dutch reformed congregations in the Netherlands also have a tradition of declining vaccination, originating from adverse reactions to early smallpox vaccinations.⁴¹

Objections from religious adherents to *specific* vaccines have mainly come from two groups. The first group, mainly comprising Roman Catholics opposed to abortion, object to use of material indirectly derived from aborted human foetuses in the development of certain vaccines. Their concern is whether vaccination would make them morally complicit in abortion, through indirectly benefiting from these procedures, even very tenuously.⁴² Arguably the claim of moral complicity claim is weak: the foetuses in question were not aborted with the purpose of advancing vaccine development and vaccine users are not involved in producing the vaccine from the cell-lines derived⁴³ but, rather, are indirect beneficiaries of the research. Some theologians argue that, despite such ethical concerns, Catholics should accept these vaccines where there are grave health risks, because of community benefit, and direct their objections to future research instead.⁴⁴ The second line of objection is to the use in vaccines of animal products (gelatine, especially) that are forbidden by religious dietary laws (porcine products for Jews

³⁸J Grabenstein ‘What the world’s religions teach, applied to vaccines and immune globulins’ (2013) 31 *Vaccine* 2011.

³⁹*Ibid.*, at 2013.

⁴⁰*Ibid.*, at 2019.

⁴¹*Ibid.*, at 2015.

⁴²A group of US navy personnel with such objections successfully argued that compulsory vaccination against Covid-19 violated their rights under the Religious Freedom Restoration Act and the 1st Amendment in *US NAVY SEALs 1-26 v Joseph R Biden Jr* Civil Action No 4:21-cv-01236-O (US District Court Northern District of Texas). For relevant Catholic moral teaching on ‘cooperation with evil’: see A Fisher *Catholic Bioethics for a New Millennium* (Cambridge: Cambridge University Press, 2012) p 70.

⁴³A number of vaccines have been grown in two cell cultures (WI-38 and MRC-5) that ultimately derive from cells taken from two identifiable foetuses. Likewise, the RA 27/3 strain of rubella virus was developed from the tissue of an aborted foetus whose mother was infected with rubella: Grabenstein, above n 38, at 2017; H Watts ‘Covid-19 vaccines and the use of foetal cell-lines’ (The Anscombe Bioethics Centre, 2020) <https://www.bioethics.org.uk/media/5qw1513c/covid-19-vaccines-and-use-of-foetal-cell-lines-dr-helen-watt.pdf> (last accessed 16 August 2022).

⁴⁴*Pontifical Academy for Life, Moral Reflections on Vaccines Prepared From Cells Derived From Aborted Human Foetuses* (2005) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6699053/> (last accessed 2 August 2022); Congregation for the Doctrine of the Faith *Instruction Dignitas Personae on Certain Bioethical Questions* (2008), para 35 https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20081208_dignitas-personae_en.html (last accessed 2 August 2022).

and Muslims and bovine material for Hindus). Similarly, vegans may oppose the use of vaccines tested on animals or containing such products.⁴⁵

Undoubtedly some religious objectors base their refusal on incorrect information about the contents, development or effects of particular vaccines. For example, although the vaccines currently approved for use against Covid-19 do not contain animal products, misunderstanding has led to some reluctance to accept them in the relevant groups.⁴⁶ The question of conscientious decisions based on error has an important place in the history of conscience⁴⁷ that would require fuller discussion than is possible here.

3. Distinguishing autonomy and conscience in vaccine refusal

This section addresses the question of whether such ethical/religious arguments can be differentiated from the general respect due to personal autonomy.

In the case of competent adults who object to vaccination, protection for conscientious objection is often seen as merely one dimension of the general protection given to individual patient autonomy.⁴⁸ The decision over whether to consent to vaccination is similar to other medical decisions, ie it is for the patient to weigh the risks and benefits on the basis of medical advice and, if they are competent, then their refusal – even if based on a perverse view – cannot be overridden. Patient autonomy does not distinguish between ethical and pragmatic reasons for withholding consent. Adult vaccine refusers are not obliged to offer reasons for their autonomous decisions and the courts have no basis to question or override these in any event.

The connection between autonomy and refusal of vaccination is at its clearest in the case of forcible vaccination, because of the direct violation of bodily integrity where consent is absent. Where compulsory vaccination is concerned, however, the connection is arguably weaker.⁴⁹ Human rights challenges are likely to arise following the imposition of penalties for non-compliance and these could be described equally plausibly as punishment for acting on or manifesting anti-vaccination beliefs. In those cases, therefore, autonomy and conscience arguments overlap. With vaccine passports any connection to autonomy arguments is arguably too far removed for this to be a helpful legal characterisation of the facts. The operative reason why an unvaccinated individual who is prevented from an undertaking an activity suffers detriment is because of their *omission*. From the perspective of human rights law this raises the questions of whether such omission is based on a protected right, such as manifesting a belief under the right of freedom of religion or conscience, or whether to punish it amounts to a form of impermissible discrimination (*inter alia*, because of such beliefs).

In view of the potential overlap of rationales, it is tempting to ask whether conscience arguments add anything to patient autonomy. It might seem that patient autonomy arguments give sufficient protection for the exercise of freedom of conscience and that no further justification is required. Moreover, autonomy type arguments are also often advanced in favour of freedom of religion and belief, ie that these rights allow an individual to be the author of their own story.⁵⁰ This autonomy-based view of conscience is not, however, universally accepted. Alternatively, conscience can be

⁴⁵See eg *Chenzira v Cincinnati Child's Hosp Med Ctr* 2012 WL 6721098 (SD Ohio 27 December 2012), equating such beliefs with sincerely-held religious beliefs.

⁴⁶Covid: fake news “causing UK South Asians to reject jab”, <https://www.bbc.com/news/uk-55666407> (last accessed 2 August 2022).

⁴⁷R Sorabji *Moral Conscience through the Ages* (Oxford: Oxford University Press, 2014) pp 68–71.

⁴⁸This paper does not attempt to address decision-making about infant vaccination, where consideration of the child's ‘best interests’ arise and where (in relation to conditional schemes) the right to education (Art 2, Protocol 1 ECHR) is relevant. Somewhat artificially, the European Court of Human Rights in *Vavříčka* approached these questions through the lens of the parents’ Art 8 rights (see eg para 264).

⁴⁹In *Vavříčka* the European Court of Human Rights concluded without further analysis ‘... the consequences borne by the applicants cannot be meaningfully dissociated from the underlying duty. ... they flow immediately and directly from the applicants’ attitude towards it and are therefore intrinsically connected to it’ (para 259).

⁵⁰For discussion see F Ahmad ‘The autonomy rationale for religious freedom’ (2017) 80(2) MLR 238.

understood as a matter of duty, where the individual is reluctantly compelled to act (or abstain) by his or her convictions, even if it is to his or her own detriment. As the political philosopher Robert George points out:

The right to follow one's conscience and the obligation to respect conscience. ...obtain not because people as autonomous agents should be free to do as they please; they obtain, and are stringent and are sometimes overriding because people have duties and the obligation to fulfil them. The duty to follow one's conscience is a duty to do things or refrain from doing things not because one wants to follow one's duty but even if one strongly does *not* want to follow it. The right of conscience is a right to do what one judges oneself to be under an obligation to do, whether one welcomes the obligation or must overcome an aversion to fulfil it.⁵¹

On this account it is the obligatory nature of conscience that the right of freedom of conscience protects – in recognising the ‘anguished choice’ that individuals are put to between legal and moral duties.⁵²

Other writers to some extent bridge these differences. In her treatment of conscience in *Liberalism's Religion*⁵³ political theorist Cecile Laborde appeals to integrity as a value prized and recognised by both religious and non-religious citizens. Laborde argues that the state should generally refrain from infringing integrity-related liberties and should, as a matter of justice, provide a fair framework for individuals to pursue their ‘integrity-protecting commitments’ (IPCs).⁵⁴ Integrity attaches even if individuals acting in accordance with their conscience are mistaken about their moral duties. Laborde argues that the approach of judges to exemption claims for IPCs should be based on ‘thick sincerity’ (ie restricted, minimal inquiry into the consistency of the contested practice with the IPC) and ‘thin acceptability’. The latter approach rules out entirely a very restricted category of morally abhorrent claims (eg infant sacrifice), while permitting ‘morally ambivalent’ claims⁵⁵ to reach a second stage, to be given a hearing and weighed against other interests. Most conscience claims affecting third parties would fall within Laborde’s ‘morally ambivalent’ category. Whether or not morally ambivalent integrity protecting claims are ultimately granted exemption should depend, she argues, on the application of a ‘disproportionate burden’ principle (weighing up the interests of pursued by the law, the severity of the IPC burden and the costs of alleviating it).⁵⁶ This is to be assessed according to four criteria: the directness and severity of the burden; whether the burden is proportionate to the aim pursued by the law; and whether the burden can be alleviated without excessive cost-sharing. ‘Directness’ relates to the costs incurred by individuals in avoiding the legal obligation. Unavoidable obligations such as those imposed on all citizens of a certain age or sex (such as military service) or on those under compulsory control of the state (for example, prison inmates) are paradigmatically directly related to the obligation, whereas obligations that apply to certain professions or businesses are less direct.⁵⁷ Laborde acknowledges, however, the greater the costs attached to forgoing an opportunity, the more the burden is a direct one. ‘Severity’ relates to the nature the IPC and the way in which

⁵¹R George *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (Wilmington: ISI Books, 2013) p 112.

⁵²The European Court of Human Rights has recognised the obligatory nature of conscience when rejecting a defence of superior orders by state officials in repressive regimes: *Polednová v Czech Republic* App no 2615/10, (21 June 2011); *K-H W v Germany* GC App no 37201/97 (22 March 2001). See G Puppincis *Conscientious Objection and Human Rights: a Systematic Analysis* (Brill, 2017) p 14.

⁵³Laborde, above n 33.

⁵⁴An integrity-protecting commitment is a commitment, manifested in practice, ritual or action (or refusal to act), that allows an individual to live in accordance with how she thinks she ought to live ... Integrity requires that persons act out of their own convictions, that is, out of the commitments with which they deeply identify. Ultimately the value of integrity is grounded in the values of identity, autonomy, moral agency, and self-respect’: Laborde, above n 33, pp 203–204.

⁵⁵*Ibid*, pp 210–211.

⁵⁶*Ibid*, p 220.

⁵⁷*Ibid*, p 222.

the claimant perceives it. ‘The more an IPC is perceived as an obligation, the more severe the burden is.’⁵⁸

Drawing on Laborde’s account, my argument is that the ethical character of conscientious vaccine refusal is better recognised under freedom of conscience as a question of moral integrity, rather than as an exercise of bare autonomy. To do so better fits the motivation of these vaccine refusers and their own account of the reasons for their actions. It also shows why their reasons for refusal are more *deserving* of recognition than, for example, others who find it personally inconvenient to attend a vaccination appointment, or who avoid the minor transitory pain of an injection or who simply object to compulsory vaccination. Those and other reasons, such as an unorthodox view of the science or of the medical risks, are better treated as an exercise of autonomy.

Note, my argument is not that conscientious refusals are conclusory; rather it is that they are different in nature and that the difference gives *stronger* reasons for upholding them in the face of countervailing public health concerns. A person may be convinced of the medical benefits of vaccination but, nonetheless, regard it as their duty to forgo those benefits. A conscientious objector of this kind is in a different position to someone whose vaccine hesitancy is based on doubts about the medical efficacy of a vaccine or associated risks.⁵⁹ Their preparedness to forgo the direct medical benefits of vaccination both attests to the genuineness of their beliefs and weakens any fairness-type argument for compulsory vaccination.

Some objectors might undoubtedly feel anxiety or resentment that their personal autonomy had to some extent been overwritten by requirements to be vaccinated under compulsory vaccination or vaccine pass or passport schemes. It might be argued that interference with personal autonomy in this way is itself a conscience question. A very similar argument was examined by the US Third Circuit of Appeals in *Fallon v Mercy Catholic Medical Center*.⁶⁰ The Court rejected a Title VII claim of religious discrimination brought by a hospital psychiatrist who had been refused religious exemption by his employer from their requirement to undergo flu vaccination. After considering a substantial essay that the plaintiff had submitted to the hospital to support his claim for exemption, the court found that his beliefs were not religious because they did not amount to a comprehensive system of beliefs addressing fundamental and ultimate questions.⁶¹ In a key passage the court rejected attempts to recast vaccine hesitancy as religious beliefs:

... he simply worries about the health effects of the flu vaccine, disbelieves the scientifically accepted view that it is harmless to most people, and wishes to avoid this vaccine ... [T]he basis of his refusal. ... his concern that the flu vaccine may do more harm than good – is a medical belief, not a religious one. He then applies one general moral commandment (which might be paraphrased as, ‘Do not harm your own body’) to come to the conclusion that the flu vaccine is morally wrong. This one moral commandment is an ‘isolated moral teaching’; by itself, it is not a comprehensive system of beliefs about fundamental or ultimate matters.⁶²

While the legal tests applied by the court are not directly transferrable to a European context, the fundamental distinction between vaccine hesitancy and matters of conscience is nonetheless pertinent.

At a doctrinal level the difference between bare autonomy arguments and conscience-based refusals is reflected in the architecture of the ECHR: whereas Article 8 (the right to respect for private life) protects the former, the latter fall within Article 9. Irrespective, however, of whether Article 9 affords stronger protection, individuals have legally protected rights to freedom of conscience under that provision

⁵⁸Ibid, p 225.

⁵⁹cf the analogous question in *X v Y*, Employment Tribunal Case No 2413497/2020 (13 December 2021), in which an employment tribunal found that fear of contracting of coronavirus did not amount to a protected ‘belief’ under the Equality Act 2010.

⁶⁰*Fallon v Mercy Catholic Medical Center* 877 F3d 487 (3d Cir 2017).

⁶¹Applying the well-known definition of religion from *Africa v Com of Pa*, 662 F 2d 1025, 1031 (3d Cir 1981).

⁶²*Fallon*, above n 60, at 492.

and are entitled to exercise them in addition to or instead of those under Article 8 and, where they do, the courts must determine the claim.

4. Article 9 and conscientious objection to vaccination

This section examines the question of compatibility under the Article 9 of the ECHR of two of the main approaches that member states may take towards vaccination: compulsory and conditional programmes. A third approach, where vaccination is entirely voluntary, does not involve interference with the right of freedom of conscience since persons are free to accept or refuse vaccination according to their beliefs.⁶³ This is uncontentious and is not examined in detail here.

Preliminary

Before engaging in detailed examination there is an important preliminary question that needs to be addressed. Under Article 9(2) ECHR restrictions on the manifestation of religion or beliefs must be prescribed by law and necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. The inclusion of the right of freedom of conscience in Article 9(1) and the omission from Article 9(2) of reference to limitations on conscience raises a conundrum. Several explanations are possible, but each is problematic to some degree. First, it could be argued that the reference to conscience in Article 9(1) refers only to the so-called ‘inner forum’, which is absolute and inviolable, but that (unlike religion and belief) there is no protected right to manifest one’s conscience. The implication would be that whereas qualifying beliefs about vaccination are protected under Article 9, conscientious objection and refusal per se are not. Early Convention jurisprudence suggested that protected manifestations of religion and belief were strictly limited,⁶⁴ but the European Court of Human Rights has, however, gone on to recognise that acts of conscientious objection and refusal are protected manifestations (at least of religious beliefs).⁶⁵ Alternatively, it might be argued that freedom of conscience includes conscientious objection and that once it is engaged under Article 9(1) a state cannot lawfully restrict it to pursue other legitimate interests. Although this second view has attracted some minority support,⁶⁶ it does not fit the way the ECtHR has approached conscientious objection in practice.⁶⁷ A third alternative would be to distinguish between manifestations of conscience according to whether they were religious or not. However, bearing in mind that the Convention must be interpreted as a whole, this approach cannot be reconciled with Article 14, which prohibits discrimination in the enjoyment of Convention rights on grounds of ‘religion, political or other opinion’. It seems likely that the absence of instances in which the Court has recognised a right to manifest non-religious conscientious objection is due to the accidental nature of litigation, rather than by design; a convinced secular pacifist objector to military service, for example, would now be likely to receive the same protection as a Jehovah’s Witness. Overall, the best approach seems to be to treat conscientious objection as a manifestation of conscience falling within Article 9(2), whether the conscience-based objection is religious or not. This is the approach followed here.

Numerous applications relating to emergency restrictions imposed by member states during the Covid-19 pandemic have been lodged with the European Court of Human Rights.⁶⁸ However, so

⁶³An early admissibility decision concerned a voluntary vaccination scheme: *Association X v UK* App no 7154/75 (12 July 1978), 14 DR 31 (complaints of violations of Arts 2 and 8 by a group objecting to quality of information about vaccination risks manifestly ill-founded). See also *Baytüre and Others v Turkey* App no 3270/09 (12 March 2013).

⁶⁴See especially *Arrowsmith v UK* (1981) 3 EHRR 218.

⁶⁵*Eweida v United Kingdom* [2013] ECHR 37, (2013) 57 EHRR 8, para 103 (treating the refusal of a marriage registrar to officiate at civil partnership ceremonies as ‘directly motivated’ by her religious beliefs); *Bayatyan v Armenia* App no 23459/03 (Grand Chamber, 7 July 2011), paras 110–112 (failure to report for military service treated as a ‘manifestation’ of the applicant’s religious beliefs).

⁶⁶*Eweida*, Partially Dissenting Opinion of Judges Vucinic and De Gaetano, [2].

⁶⁷Above n 65.

⁶⁸European Court of Human Rights Press Unit, *Factsheet COVID-19 health crisis* (Strasbourg, January 2022).

far only a handful relate to vaccination requirements⁶⁹ and none of these allege infringement of freedom of conscience per se. Conversely, those that allege interference with freedom of religion or belief relate, rather, to restrictions imposed on access to places of worship⁷⁰ – a question that has also been litigated extensively in national courts.⁷¹ The relevant question here is different and largely untested, namely, how to weigh public health arguments against the claim that vaccination contrary to an individual's fundamental beliefs (whether religious or non-religious) would cause them moral harm.

More directly concerning vaccination, in *Vavříčka and Others v the Czech Republic*⁷² the Grand Chamber of the European Court of Human Rights has recently decided a group of six cases from the Czech Republic (predating the Covid pandemic) brought by applicants claiming that the country's policy of compulsory infant vaccination infringed their human rights. The applications concerned both direct punishment under Czech legislation for failure to vaccinate and the indirect consequences – the exclusion of the children concerned from nursery school. In a complex series of overlapping claims all of the applicants invoked Article 2 Protocol 1 (the right to education), three of them invoked Article 9 (freedom of thought, conscience and religion), and one of them Article 14 (discrimination in the enjoyment of Convention rights), in addition to other claims under Articles 8, 6 and 13. The Grand Chamber found by 16 votes to one, that there had been no violation of Article 8 of the Convention and, in the light of that finding, that there was no need to examine the applications of the child applicants separately under Article 2 of Protocol No 1. A majority found that the complaints under Article 9 of the Convention were inadmissible. The Grand Chamber declared, unanimously, that the complaints under Articles 2, 6, 13 and 14 of the Convention were inadmissible. Although the majority judgment focused on the Article 8 claims, it is the challenges relating to interference with the right to freedom of thought, conscience and religion that are of most relevance in the discussion here.

Although *Vavříčka* is the ECtHR's most detailed consideration of vaccination programmes to date, the decision is of limited utility in the current discussion for two reasons. Firstly, it concerns infant vaccination only and not adult vaccination. Secondly, the decision focused primarily on the Article 8 claims and skirted the conscience question, because the Article 9 claims from the applicants were found not to be admissible on the facts. That finding leaves unaddressed whether Article 9 could be engaged in the case of applicants with different beliefs.⁷³ The judgment does, however, address both direct and indirect compulsion in relation to vaccination and the Grand Chamber's approach to balancing signals how public health grounds for restricting *other* Convention rights would be evaluated where vaccination campaigns are concerned.⁷⁴ Nonetheless, to tackle the question that is central to this paper, of whether there is a Convention argument for protecting freedom of conscience against vaccination, it is also necessary to venture into uncharted territory and to apply more general principles from the jurisprudence.

A more detailed and structured examination follows of: (i) whether conscientious objection to or refusal of vaccination engages Article 9 ECHR; (ii) whether compulsory or conditional schemes amount to an interference with the right; (iii) whether there is a legitimate aim for such interference; and (iv) whether restrictions are necessary in a democratic society having regard to the severity of the

⁶⁹Applications have been made against France and Greece concerning compulsory vaccinations of health and other public employees: *Abgrall and 671 Others v France* App no 41950/21; *Thevenon v France* App No 46061/21; *Kakaletri and Others v Greece* App no 43375/21; *Theofanopoulou and Others v Greece* App no 43910/21. The Court has rejected applications for interim measures in these cases.

⁷⁰*Magdić v Croatia* App no 17578/20; *Association of orthodox ecclesiastical obedience v Greece* App no 52104/20; *Spînu v Romania* App no 29443/20.

⁷¹(UK) *R (on the application of Hussain) v Secretary of State for Health* [2020] EWHC 1392 (Admin); (France) CE, Ord, 7 novembre 2020 *Association Civitas et autres*, req n° 446930; (Germany) 1 BvQ 44/20, 29 April 2020.

⁷²*Vavříčka and Others v Czech Republic* App no 47621/13 (Grand Chamber, 8 April 2021) (hereafter *Vavříčka*).

⁷³Nor does it deal with whether the right of parents to have their children educated in accordance with their religious and philosophical convictions could apply (the applicants' claim under Art 2 of the First Protocol was considered solely in relation to the right to education under the first limb of the article). Lack of space precludes further discussion of this question.

⁷⁴Permitted limitations for the protection of public health apply also under Arts 9(2), 10(2), and 11(2).

impact on conscientious objectors, proportionality with regard to any legitimate aim and the margin of appreciation. This structured approach follows that taken under the ECHR jurisprudence to restrictions under Article 9 more generally.⁷⁵

Conscience, vaccination and Article 9

Under Article 9, beliefs must attain a certain level of cogency, seriousness, cohesion and importance in order to qualify for protection⁷⁶ and there must be a sufficiently close and direct nexus between the act purportedly manifesting the belief and the underlying belief.⁷⁷ Either test could be an obstacle for conscientious objectors to vaccination.

The cogency, seriousness, cohesion and importance test could potentially debar objectors to vaccination with beliefs based on unorthodox medical or scientific opinion, as occurred in *Vavříčka*.⁷⁸ The applicant's argument was that he could not in good conscience consent to vaccination when he believed it would damage his children's health.⁷⁹ Noting his inconsistency in articulating this claim in the domestic proceedings and his failure to further explain or substantiate it, the majority in Grand Chamber applied the cogency threshold test and found his complaint to be inadmissible.⁸⁰ The implication is that beliefs about vaccination are not protected by Article 9 simply because they are strongly held⁸¹ if they are otherwise unsupported with reference an applicant's broader religious or ethical beliefs, since 'not all opinions or convictions constitute beliefs in the sense protected by Article 9'.⁸²

The nexus test could also prove hazardous for applicants to navigate. In *Boffa v San Marino*⁸³ the Commission found that compulsory vaccination did not engage the right of freedom of thought, conscience and religion, applying the approach then often used to find claims inadmissible, that the protection for 'practice' in Article 9(1) 'does not cover each and every act which is motivated or influenced by religion or belief'.⁸⁴ It added that 'the obligation to be vaccinated, as laid down in the legislation at issue, applies to everyone, whatever their religion or personal creed'. There was no analysis or discussion of the applicant's reasons for claiming a violation of his conscience. This brief and dated admissibility decision is unlikely, however, to deter the ECtHR from more detailed examination in future, since in recent years the Court has taken a more expansive view of Article 9(1) so that the need for interference is tested under Article 9(2). It has found that other facially neutral legal restrictions such as dress requirements and public holidays interfere with the right to manifest one's religion or beliefs.⁸⁵ Vaccination is likely to be regarded in the same light. Indeed, despite its findings on the applicant's claims, the Grand Chamber in *Vavříčka* seemed to confirm that Article 9 could apply to other instances of vaccine objection in appropriate circumstances, comparing the question to that of conscientious objection to military service.⁸⁶

It was argued in Part 2 that objections based on the use of material derived indirectly from human foetuses and on use of animal products in vaccine preparation are at least plausibly based on conscience. In relation to the former, it is notable that conscientious objections to abortion have been

⁷⁵ cf *Fernandez Martinez v Spain* (2015) 60 EHRR 3.

⁷⁶ *Eweida v UK*, above n 65, para 81.

⁷⁷ *Ibid*, para 82.

⁷⁸ But see Dissenting Opinion of Judge Wojtyczek in *Vavříčka*, above n 11, para 14.

⁷⁹ *Vavříčka*, above n 72, para 321. Similar Art 9 complaints by two of the other applicants were held to be inadmissible for non-exhaustion of domestic remedies: *ibid*, paras 322 and 336.

⁸⁰ *Ibid*, para 335.

⁸¹ cf n 36 above.

⁸² *Vavříčka*, above n 72, para 331, drawing an analogy with the treatment of firmly held beliefs about assisted suicide (*Pretty v UK* App no 2346/02 (29 April 2002), paras 82–83). None of applicants had made Art 9 claims based on religious beliefs (*Vavříčka*, above n 72, para 330).

⁸³ *Boffa v San Marino* App no 26536/95 (15 January 1998) (admissibility decision).

⁸⁴ From *Arrowsmith v UK* (1981) 3 EHRR 218.

⁸⁵ Respectively, *Leyla Şahin v Turkey* (2007) 44 EHRR 5; *Kosteski v FYR of Macedonia* (2007) 45 EHRR 720.

⁸⁶ *Vavříčka*, above n 72, para 332, citing its decision in *Bayatyan v Armenia*, above n 65.

held to meet the Article 9 threshold.⁸⁷ While some actions motivated by pro-life beliefs may fail to satisfy the nexus test, eg withholding taxes and distributing leaflets outside an abortion clinic,⁸⁸ refusal of vaccination is arguably more closely connected. As regards use of animal products, it is well-established also from a series of decisions concerning various religious groups that dietary requirements fall under Article 9.⁸⁹ Concerning non-religious dietary beliefs, The European Commission of Human Rights treated vegan convictions regarding animal products as falling within Article 9 ECHR as long ago as 1993.⁹⁰

The various antecedents point, therefore, towards conscience-based objections to vaccination falling within the scope of Article 9.

Interference

Penalties imposed for non-vaccination under compulsory vaccination schemes will amount to an interference with freedom of conscience. For conditional vaccination schemes, however, a preliminary question is how the negative consequences flowing from non-vaccination are to be treated. The Grand Chamber's analysis of the comparable question in *Vavříčka* showed it to be somewhat ambivalent about the loss of pedagogical, social and developmental opportunities resulting from the non-admission of the children to nursery school. Although it referred to non-admission as an interference with the right under Article 8,⁹¹ in its discussion of proportionality it also referred to these detriments as a direct consequence of the parental decision not to comply with a protective duty, rather than as a punishment for non-compliance.⁹² Moreover, in its assessment, the parents could provide these opportunities by alternative means and the effect was limited to the period up until when children could be enrolled in infant school.⁹³ A similar approach to conscientious refusal might perhaps suggest that the burden should fall primarily on the objector to offset the consequences of their moral choices. However, vaccination requirements can also be seen in a different light – as imposing conditions for certain activities that make them incompatible with the manifestation of conscience-based refusal or which discriminate against those holding such beliefs. There is a parallel here with restrictions on the wearing of religious dress in public which in effect force Muslim women, in particular, to choose between unveiling or forgoing employment and educational opportunities that are only available outside the home. Such restrictions are rightly approached unequivocally as an interference with the right to manifest one's beliefs and the argument focuses on the state's case for limitation, rather than on how the applicant can avoid the negative consequences.⁹⁴ Both conditional schemes and compulsory vaccination schemes risk leaving a group of persons perpetually alienated and excluded from opportunities available to the rest of society. The question arises of whether there is a justifiable limitation for reasons of public health.

⁸⁷*Knudsen v Norway* (1985) 42 DR 247; *Van Schijndel v Netherlands* App no 30936/ 96 (10 September 1997).

⁸⁸*Bouessel du Bourg v France*, App no 2074/92 (18 February 1993) and *Van Den Dungen v Netherlands* App no 22838/93 (22 February 1995), respectively.

⁸⁹*Cha'are Shalom v Tsedek v France* App no 27417/95 (7 June 2000) paras 73–74; *Jakóbski v Poland* App no 18429/06 (7 December 2010); *Vartic v Romania (No 2)* App no 14150/08 (17 December 2013).

⁹⁰*CW v UK* (1993) 16 EHRR CD 44. Contrast the substantially weaker description of parental vegan beliefs as 'a valid lifestyle choice' in *Re M and N (Parental Responsibility: Immunisations)* [2016] EWFC 69, para 67. In an employment discrimination context, however, ethical veganism has been held to amount to a philosophical belief which should be treated as a 'protected characteristic' under the Equality Act 2010: *Casamatjani v League Against Cruel Sports* [2020] UKET 3331129/2018.

⁹¹*Vavříčka*, above n 72, para 263.

⁹²*Ibid*, para 306; cf *R (on the application of Peters) v Secretary of State for Health and Social Care*, above n 17, where Whipple J held that regulations limiting work in care homes to workers who had been vaccinated did not interfere with individual autonomy so as to compel vaccination, rather they provided for the consequence of the individual's choice (*ibid*, para 9).

⁹³*Ibid*, para 307.

⁹⁴This has been the approach of the European Court of Human Rights since *Leyla Şahin v Turkey*, above n 85.

Legitimate aim

The protection of public health is one of the legitimate aims for permissible restrictions under Article 9(2). Moreover, the European Court of Human Rights has found in some contexts that states have positive obligations to take preventative health measures. For example, in prisons, to prevent the spread of contagious diseases (such as tuberculosis and hepatitis), so as to require the introduction of a screening system for prisoners upon admission and to guarantee prompt and effective treatment.⁹⁵ Unsurprisingly, however, other such decisions have recognised a wide margin of appreciation, giving discretion over the adoption of specific health policies.⁹⁶

In the case of vaccination, the jurisprudence under Article 8 indicates how compulsory preventative measures might be regarded. The Court has accepted that a vaccination duty aimed at protecting both children who are vaccinated and others who cannot be vaccinated (and who therefore rely on herd immunity) from contagious diseases falls within the legitimate aims of protection of health and the protection of the rights of others, recognised by Article 8(2).⁹⁷ Likewise, when considering medical negligence claims by adults who have suffered serious side effects, it has found that public health considerations can justify a compulsory vaccination programme, under Article 8(2), despite the interference with physical integrity.⁹⁸ A similar general same approach would apply to Article 9.⁹⁹

The arguments for opposing or overriding conscientious objection centre on the public health case for achieving high rates of inoculation in order to establish ‘herd immunity’ against infectious diseases.¹⁰⁰ Mark Navin argues in favour of compulsion to the minimum extent to necessary to maintain herd immunity.¹⁰¹ This approach has been termed the Principle of the Least Restrictive Alternative (PLRA). The implication is that conscientious objection would be tolerated within limits up to the tipping point where it threatens the overall effectiveness of vaccination in the population.

For its part the European Court of Human Rights has accepted the international scientific consensus in support of maximising national vaccination levels against infectious diseases.¹⁰² In *Vavříčka* the Grand Chamber treated this as a legitimate objective of health policy in its own right,¹⁰³ so that attention was then focused on whether it was within the state’s margin of appreciation to adopt compulsory vaccination in order to achieve this objective.¹⁰⁴ It accepted that

... where the view is taken that a policy of voluntary vaccination is not sufficient to achieve and maintain herd immunity. ... [a member state] may reasonably introduce a compulsory vaccination policy in order to achieve an appropriate level of protection against serious diseases.¹⁰⁵

It would appear then that the PLRA was accepted as common ground, ie compulsion could be justified if voluntary vaccination would not result in a sufficiently high level of vaccinations. Importantly,

⁹⁵*Poghosyan v Georgia* App no 9870/07 (24 February 2009), paras 69–70; *Ghavidze v Georgia* App no 23204/07 (3 March 2009), paras 105–106.

⁹⁶*Shelley v UK* App no 23800/06 (4 January 2008) (needle-exchange programmes); *Florea v Romania* App no 37196/03 (14 September 2010) (passive smoking, although the conditions in that case were severe enough to breach Art 3).

⁹⁷*Vavříčka*, above n 72, para 272. See also *Boffa v San Marino* App no 26536/95 (15 January 1998) (admissibility decision); cf *Acmanne v Belgium* App no 10435/83 (10 December 1984), concerning compulsory screening for tuberculosis.

⁹⁸*Solomakhin v Ukraine* App no 24429/03 (15 March 2012), paras 33–39 (re diphtheria injections where hospital staff tested for contraindications before vaccination). See also *Matter v Slovakia* App no 31534/96 (5 July 1999), para 64; *Salveti v Italy* App no 41297/98 (9 July 2002) (admissibility decision).

⁹⁹In *Vavříčka*, above n 72, the Art 9(2) question did not arise as the complaints were found to be inadmissible.

¹⁰⁰These arguments do not apply therefore to vaccinations for non-communicable diseases (eg tetanus) or to vaccines that prevent the symptoms of disease in the person vaccinated but which do not prevent transmission.

¹⁰¹M Navin *Values and Vaccine Refusal: Hard Choices in Ethics, Epistemology and Healthcare* (New York: Routledge, 2015).

¹⁰²*Vavříčka*, above n 72, paras 135 and 277.

¹⁰³*Ibid.*

¹⁰⁴*Ibid.*, para 285 (treated as ‘relevant and sufficient reason’) and para 288.

¹⁰⁵*Ibid.*, para 288.

the majority in the Grand Chamber accepted that the state was to be given a wide margin in making that assessment.¹⁰⁶

Arguments in favour of compulsory vaccination are sometimes also grounded on fairness or, closely-related, on the objective of promoting civic duty or solidarity in common cause in the fight against an infectious disease.¹⁰⁷ This is primarily an argument against ‘free-riding’, ie benefiting from herd immunity while making no contribution to it. Thus, in *Vavříčka* the majority opinion accepted that compulsory vaccination could protect the rights and freedoms of others and referred explicitly to social solidarity in this regard, particularly maintenance of high levels of societal vaccination for the protection of those unable for medical reasons to be vaccinated.¹⁰⁸ ‘Social solidarity’, however, also evokes the much-criticised ‘vivre ensemble’ (living together) justification applied by the European Court of Human Rights in its decisions on the French and Belgian bans on full-face veils.¹⁰⁹ While mention of solidarity of this kind is notably absent from the text of Article 9(2) as a legitimate aim for restriction, there is no question that it resonates with much contemporary discourse in the Covid-19 pandemic. It seems obvious, nonetheless, that the pursuit of social solidarity or fairness in vaccination policy must be a *secondary* aim, ie one that follows on from an initial determination of the benefits of vaccination on health grounds and that it concerns the distribution of burdens and benefit following such a determination. So, if it is regarded as a distinctive objective of policy – as Alberto Giubilini, for example, has argued¹¹⁰ – that does not give it the same presumptive weight as the initial decision. In line with this approach, the majority judgment’s reference to in *Vavříčka*¹¹¹ treated social solidarity as a relevant consideration relating to proportionality, rather than as a distinct aim.¹¹²

Proportionality

As noted above, there are several questions to be considered in evaluating whether restrictions are necessary in a democratic society: the severity of the impact on conscientious objectors, proportionality with regard to any legitimate aim and the margin of appreciation.

As regards the effect on the applicant, the severity of penalties for non-vaccination under compulsory schemes will be relevant. For example, in *Vavříčka* the Grand Chamber had regard to the relatively minor nature of the fine imposed for non-compliance with the vaccination duty.¹¹³ By contrast, a Greek law imposing a monthly fine of €100 on adults over 60 who are unvaccinated for Covid-19 from February 2022¹¹⁴ is comparable to a continuing tax on medical status.

Arguably, however, in conscience cases, more is at stake than the scale of direct penalties. Any evaluation should also take account of the moral harm or distress to the applicant. The requirement to obey the law at the cost of acting against one’s core beliefs presents an agonising and costly choice,

¹⁰⁶*Vavříčka*, above n 72, para 310.

¹⁰⁷*cf Re M and N (Parental Responsibility: Immunisations)*, above n 90, at [68] per HHJ Mark Rogers, arguing that this could play a minor role in consideration of the best interests of the child.

¹⁰⁸*Vavříčka*, above n 72, paras 279 and 306.

¹⁰⁹*SAS v France* App no 43835/11 (Grand Chamber, 1 July 2014), paras 121–122 and 151–159; *Dakir v Belgium* App no 4619/12 (11 July 2017); *Belacemi and Oussar v Belgium* App no 37798/13 (11 July 2017). See M Hunter-Henin ‘Living together in an age of religious diversity: lessons from *Baby Loup* and *SAS*’ (2015) 4 Oxford Journal of Law and Religion 94; J Adenitire ‘Has the European Court of Human Rights recognised a legal right to glance at a smile?’ (2015) 131 Law Quarterly Review 43.

¹¹⁰A Giubilini *The Ethics of Vaccination* (Palgrave, 2019).

¹¹¹*Vavříčka*, above n 72, paras 279 and 306.

¹¹²This is an intermediate position between two poles. Judge Lemmens stressed the principle, perhaps to the extent of treating it as freestanding (*Vavříčka*, above n 72, Concurring Opinion of Judge Lemmens, para 2) whereas Judge Wojtyczek, dissenting, was highly sceptical, regarding state-enforced solidarity as an oxymoron (ibid Dissenting Opinion of Judge Wojtyczek, above n 11, para 15).

¹¹³*Vavříčka*, above n 72, para 293.

¹¹⁴‘Greece to fine over-60s who refuse Covid-19 vaccine’, *BBC News*, 30 November 2021. <https://www.bbc.co.uk/news/world-europe-59474808> (last accessed 2 August 2022).

and conformity with the legal duty may cause an individual to experience long-lasting dissonance with those beliefs and continuing remorse or shame. Parallels can be drawn with: overriding the refusal of Jehovah's Witnesses, because of their beliefs, to accept blood transfusions in relation to which the Court itself has noted '... [S]uch interference can only lessen and not enhance the value of life'.¹¹⁵

The question of whether the state's positive obligation could justify the wide margin of appreciation accorded concerning compulsory vaccination divided the Grand Chamber in *Vavříčka*. The majority argued that:

While a system of compulsory vaccinations is not the only, or the most widespread, model adopted by European States. ... in matters of health-care policy, it is the domestic authorities who are best placed to assess priorities, the use of resources and social needs.¹¹⁶

However, Judge Wojtyczek, dissenting, argued that it was inappropriate to apply a standard taken from cases in which the substantive issue was denial of access to healthcare. For him, the more pertinent factor was the extent of the interference with an intimate aspect of private life that compulsory vaccination involved, and this suggested a narrower margin of appreciation.¹¹⁷

Public health arguments also take account of the strain that preventable increased infection rates may cause on national health resources (for example, hospital capacity) and, consequently, the indirect impact on others whose medical treatment may be delayed or denied. These factors would be instrumental to some extent irrespective of arguments about herd immunity and 'free-riding'. In theory, hard choices about distribution of patient treatment could be averted by devoting greater or more flexible resources to healthcare. In reality, however, only the most activist court would second-guess such public health arguments to require the state to devote additional resources so that conscientious refusal of vaccination could be given higher priority. The implication is then that proportionality arguments about freedom of conscience are likely to play out in a space constrained by limited judicial enquiry into the goals of health policy. A degree of judicial deference to national health policies is perhaps inevitable.¹¹⁸

The proportionality test under Article 9(2) will be especially relevant where conscience objections to conditional vaccination schemes (using vaccine certificates or passports) are concerned. This test can help to safeguard against the risk that disclosure of health data or personal beliefs become a routine pre-condition to undertaking everyday activities, especially where such restrictions would be unnecessary if a public body or commercial provider took additional steps or incurred expenditure to safely accommodate people who are unvaccinated. Equally in the employment context, proportionality can differentiate between instances where vaccination of employees is necessary to protect those especially vulnerable to contagious disease (for instance, hospital patients or the elderly residents of a care home) from those where the purpose is to give the employer a marginal commercial advantage by reassuring potential customers about its services. The impact of such restrictions on conscientious vaccine refusers may be disproportionate if less restrictive alternatives are not especially onerous either for the provider, employer and third persons or if the restrictions are inflexible (for example, of unlimited

¹¹⁵*Case of Jehovah's Witnesses of Moscow and Others v Russia* App no 302/02 (10 June 2010), para 136. In the same passage, however, the Court left open the question of whether compulsory vaccination to protect third parties during an epidemic could be justified.

¹¹⁶*Vavříčka*, above n 72, para 285. Apart from the Czech Republic, the Grand Chamber identified six Council of Europe member states where compulsory vaccination policies (France, Hungary, Italy, Serbia, North Macedonia, and Slovakia) had been upheld in the respective constitutional courts and one (Moldova) where a school admission requirement had been upheld: *ibid*, paras 94–127.

¹¹⁷*Ibid*, Dissenting Opinion of Judge Wojtyczek, above n 11, para 8.

¹¹⁸*Vavříčka*, above n 72, para 274, citing *Hristozov and Others v Bulgaria* App nos 47039/11 and 358/12, § 119, ECHR 2012; see also *Acmanne v Belgium*, above n 97. For equivalent dicta in EU and UK law see *R v Secretary of State for Health, ex p Eastside Cheese Co* [1999] 3 CMLR 123, para 47 and *R (Dolan & Others) v Secretary of State for Health and Social Care & Another* [2020] EWCA Civ 1605, para 90.

or excessive duration). The same approach will apply as regards disclosure of conscientious beliefs if conscience exemptions are provided. So far as the inherent discrimination against conscientious objectors of conditional schemes under Article 14 ECHR is concerned, provided such arrangements satisfy the proportionality requirement under Article 9, the difference in treatment would likely also be found to be reasonable and objectively justified.

5. Are conscience exemptions required?

As noted in the introduction, conscience exemptions are an established feature of North American vaccine mandates. There is also a historical precedent in the UK relating to infant smallpox vaccination: under the Vaccination Act 1898, parents who conscientiously believed that the vaccination would be prejudicial to the health of the child could apply for exemption.¹¹⁹

The implications of granting exemptions for conscientious objections are, of course, controversial. Liberal democratic states do not routinely allow individuals to opt out of legal duties with which they disagree. They do, on the other hand, often recognise that on a small number of questions involving profound moral disagreement limited exemptions for conscience are appropriate (for example, compulsory military service) or are a pragmatic solution to otherwise insoluble moral disagreements (the position of healthcare professionals with regard to abortion being a case in point). John Adenitire argues that exemptions for conscience from legal duties promote personal autonomy by making it easier for individuals to follow their own conception of a good life in line with their moral convictions.¹²⁰

Some critics, however, are opposed to conscientious objection on principle, for reasons of fairness. In the case of vaccination, Alberto Giubilini argues that there is a collective moral obligation to contribute to the public good of herd immunity and that a fair individual contribution towards this goal entails a personal responsibility to submit to vaccination.¹²¹ On Giubilini's analysis the reason why an individual opposes vaccination (except where there are medical contraindications) is irrelevant – even genuine conscientious objections would be excluded by reason of unfairness.¹²² Unlike the PLRA, which operates as at the proportionality stage with regard to human rights limitations (in this context, under Article 9(2) of the ECHR),¹²³ Giubilini's 'in principle' argument treats fairness as a basic objective of vaccination policy that takes priority over liberty so that it is not open to being balanced in this way.¹²⁴

The fairness argument raises a potentially important point for legal analysis – the deference to be shown to objectives of vaccination policy in the event of a conflict between conscience and public health. Overall, however, the fairness argument is a better reason to override non-conscientious refusals than conscientious ones. For most vaccine refusers the medical benefit derived from vaccination outweighs doubts about their efficacy¹²⁵ and when confronted with hard choices, such as foregoing recreational, educational or career opportunities, many of the vaccine hesitant reach the same conclusion for themselves, as the marked increase in take up of Covid-19 vaccination rates in some countries and sectors when greater incentives or penalties are attached suggests. But to override a person's

¹¹⁹Vaccination Act 1898, s 2. A certificate issued by magistrates acted as a defence to prosecution of the parent for failure to have the child vaccinated. The procedure was abolished in 1946 when infant vaccination became voluntary. See further Durbach, above n 5, ch 7; C Braithwaite *Conscientious Objections to Compulsions under the Law* (York: William Sessions, 1995) ch 2.

¹²⁰J Adenitire *A General Right to Conscientious Objection: Beyond Religious Privilege* (Cambridge: Cambridge University Press, 2020) ch 8.

¹²¹Giubilini, above n 110.

¹²²Ibid, pp 115–121.

¹²³Above n 101.

¹²⁴cf the argument of the UK government that conscience exemptions to compulsory vaccination requirements for health-care workers would, inter alia, cause tension between vaccinated and exempted workers: Department of Health and Social Care *Making vaccination a condition of deployment in health and wider social care sector: Government response to public consultation* (9 November 2021) pp 20–21.

¹²⁵Some may, however, experience continuing anxiety about the effects of vaccination,

conscience inflicts moral harm or distress by compelling them to behave contrary to the beliefs at the core of their identity¹²⁶ whatever the medical benefits, in much the same way as forcible blood transfusion of an adult Jehovah's Witnesses would.¹²⁷ In the case of an infectious disease a decision of this kind might be justifiable *on balance*, since individuals cannot be protected from all moral harm or distress under all circumstances where the interests of other people are concerned. However, to rule out consideration of moral harm in principle in such cases looks arbitrary and indefensible. By contrast, there are good reasons under the Convention jurisprudence to treat conscience-based vaccine refusals as candidates for exemption.

First, a significant contextual factor in *Vavříčka* was that the Czech Constitutional Court had recognised a conscience exemption to the general duty of infant vaccination. In its judgment ÚS 1253/14¹²⁸ the Czech Constitutional Court laid down a four-limb test for recognising conscientious objection to vaccination (which applied both to secular and religious objections). These are:

- (1) constitutional relevance of justifications of conscientious objection, (2) urgency of justifications provided by the individual appealing to conscientious objection, (3) consistency and cogency of these justifications (4) societal impact of a secular (or religious) conscientious objection recognized in the individual case.

The Grand Chamber appeared to endorse this approach since the availability of this 'secular objection of conscience', arising from the Constitutional Court's jurisprudence – albeit in restrictive terms – was treated as relevant to establishing the proportionality of the legislation under Article 8.¹²⁹

Secondly, although the Grand Chamber in *Vavříčka* did not find Article 9 to be engaged, that ruling turned on the evidential weakness of the applicant's case rather than a reasoned conclusion that conscience exemptions were inappropriate. In its submissions the French government (intervening) had argued against conscience exemptions in general, but the Court showed no inclination to adopt this reasoning.¹³⁰ Overall, the decision shows that the Grand Chamber considers conscience relevant to the proportionality of compulsory vaccination requirements and its specific findings on Article 9 and Article 2 Protocol 1 do not in any way preclude more credible conscientious objection claims. It remains an open question whether a compulsory vaccination scheme which made no provision for conscience would be found to be a proportionate interference with Article 8 or could be impugned under Article 9 in its own right.¹³¹

Noting the novelty of considering objections to vaccination in the context of Article 9, in *Vavříčka* the Grand Chamber cited its own recognition of the right of conscientious objection to military service in *Bayatyan v Armenia*¹³² as potentially relevant.¹³³ If a similar approach were taken to vaccination under Article 9, then it would suggest that a bare assertion that 'fairness' requires there to be no non-medical exemptions to vaccination (as argued by Guibilini)¹³⁴ would be insufficient. In *Bayatyan* the ECtHR rejected a similar argument put forward by the Armenian government regarding exemption from compulsory military service,¹³⁵ analogous to 'free rider' vaccination objections. The government's argument that to allow an exemption for Jehovah's Witness conscientious objectors to undertake alternative service would be unfair to those who underwent military service and constitute

¹²⁶Part 2 above.

¹²⁷Above n 115.

¹²⁸Constitutional Court, 22 December 2015, I. ÚS 1253/14.

¹²⁹Ibid, para 291 (and see *ibid* paras 28 and 93). See also *ibid*, Dissenting Opinion of Judge Wojtyczek, above n 11, para 17, citing this consideration in relation to Art 9.

¹³⁰Ibid, para 325.

¹³¹The Dissenting Opinion of Judge Wojtyczek, above n 11, para 17, referred to the Czech constitutional jurisprudence in relation to Art 9 also.

¹³²*Bayatyan v Armenia*, above n 65.

¹³³*Vavříčka*, above n 72, para 332.

¹³⁴Above n 110.

¹³⁵*Bayatyan*, above n 65, para 126.

religious discrimination on its part. The Court, however, was sceptical about whether this argument, framed in terms of a legitimate aim of public order (and, implicitly, the rights and freedoms of others), was a plausible reason for limiting the applicant's rights under Article 9. However, assuming that it was, the government's position did not pass the test of being necessary in a democratic society in the Court's view:

[R]espect on the part of the State towards the beliefs of a minority religious group like the applicant's by providing them with the opportunity to serve society as dictated by their conscience might, far from creating unjust inequalities or discrimination as claimed by the Government, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society.¹³⁶

This reflects the common response to equality objections, namely that conscientious objectors bear different moral burdens and so are not 'like cases' to those who do not share their beliefs.

Indeed, the implication of recognition of differential burdens is to turn the fairness argument on its head. Exemptions promote fairness by alleviating the moral conflict that some individuals experience due to their beliefs and which others do not face. According to this line of reasoning it is unfair *not* to differentiate when people have material differences in their beliefs that result in some experiencing unequal burdens. The European Court of Human Rights has in effect accepted this line of reasoning under Article 14 (non-discrimination in the enjoyment of Convention rights) in *Thlimmenos v Greece* – a case in which a Jehovah's Witness was debarred from becoming an accountant due to his criminal conviction for disobedience of an order to wear a military uniform. It found that 'the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'.¹³⁷ The Grand Chamber found that failure to grant an exemption for convictions in the case of conscientious objectors to military service was in breach of Art 14 in conjunction with Art 9, in not acknowledging material differences between those who are in breach of rules for reasons of religion and others. Identical reasoning would apply to conscientious vaccine refusal. Whereas under Article 9 the test in relation to such requirements is whether the penalties or disadvantages arising from non-vaccination reach the level of 'interference' with freedom of conscience or religion, under Article 14 the standard is weaker – whether they are within the 'ambit' of Article 9.¹³⁸ If difference in treatment is shown, the question arises of whether there is a reasonable and objective justification for it related to public health.¹³⁹ Essentially this is a similar question to proportionality of the limitation, but with regard to the difference in treatment.

If exemptions are provided, either to compulsory vaccination requirements or to conditional access schemes, the requirement to in effect disclose one's beliefs to take advantage of them is potentially problematic. The Convention jurisprudence recognises a right not to disclose one's beliefs that has been applied to other types of exemptions for conscience, for example the right to affirm (rather than to swear a religious oath) in various contexts.¹⁴⁰ Especially apposite to 'vaccine passports' is the related jurisprudence on religion and identity cards. To record the bearer's religion on an identity card exposes them 'to the risk of discriminatory situations in their relations with the administrative authorities or even in their professional relations'.¹⁴¹ Moreover, in the Court's view, even the inclusion of an optional 'religion' box violates Article 9 since the decision to leave the box blank could make the carrier stand out and carry negative connotations for minority religious groups.¹⁴² It seems probable then that any vaccine passport scheme that involved declaration of a conscientious objection to obtain the document or, a fortiori, visibly

¹³⁶Ibid para 12.

¹³⁷*Thlimmenos v Greece* (2001) 31 EHRR 15, para 4.

¹³⁸Ibid, para 40.

¹³⁹cf *ibid* paras 46–47.

¹⁴⁰*Alexandridis v Greece* App no 15116/06 (21 February 2008); *Dimitras v Greece* App no 42837/06 (3 June 2010).

¹⁴¹*Sofianopoulos, Spaidiotis, Metallinos and Kontogiannis v Greece* App nos 1988/02, 1997/02, 1977/02 (12 December 2002).

¹⁴²*Sinan İşik v Turkey* App no 21924/05 (2 February 2010), para 51.

recorded or raised the inference that the bearer was entitled to an exemption would engage Article 9. This militates against imposing duties that infringe conscience in the first place.

Conclusion

This paper has argued that the European Convention jurisprudence recognises a limited right of conscientious objection to vaccination to protect individuals from the moral harm of vaccination against their core beliefs.

The argument depends on the following steps: that a small core of vaccine objectors have genuine conscience-based reasons for refusal that differentiate them from the much larger number of those who are hesitant because of their scientific or medical beliefs or knowledge about particular vaccines; that for this small group compulsory vaccination would cause significant moral harm; that protection from such moral harm falls within the right of freedom of conscience; but that it has to be balanced against public health arguments in favour of maximising vaccination to achieve ‘herd immunity’, where that is relevant, against contagious diseases. Where vaccination rates in the population are otherwise high it is likely that recognition of small-scale conscientious refusal of this kind will not significantly impair the general effectiveness of a vaccination programme. In these circumstances the pluralism and tolerance which are at the heart of the Convention system suggest that protection of conscience should prevail over counterarguments against ‘free riding’, based on social solidarity.

As argued in Part 3, therefore, conscience-based vaccine refusals should weigh more heavily against public health considerations than bare autonomy. In the context of Article 8, the European Court of Human Rights has found compulsory vaccination to be a proportionate restriction on individual autonomy, in deference to government policy and taking account of expert medical and scientific evidence and the need to protect the vulnerable. However, when freedom of conscience under Article 9 is at stake the calculus is potentially different. The impact on herd immunity of accommodating small numbers of genuine conscientious objectors is likely to be minimal. This should tip the balance against compulsion so that compulsory vaccination is seen as a disproportionate interference with freedom of conscience when set alongside other measures that have a lesser impact. Those measures are likely to include conditional restrictions that allow the objector the opportunity to act consistently with their conscience without incurring moral harm, albeit at some personal cost.

Even this modest and carefully modulated argument in favour of conscientious objection is likely to invoke opposition and cause alarm in the current climate of the Covid-19 pandemic. It is therefore worth reiterating the limiting factors implicit in the argument. The Convention jurisprudence under Article 9 is capable of winnowing out objections to vaccination that are not genuinely conscience-based, as the Grand Chamber’s decision in *Vavříčka* demonstrates. This is a safeguard against the risk of a right of conscientious objection becoming a trojan horse that undermines the entire vaccination programme. Moreover, there is nothing to prevent a state introducing additional procedures to examine the genuineness of conscience objections.¹⁴³

Overall, when it comes to assessing the proportionality of vaccination policies the protection of those who are unable to be vaccinated for medical reasons may often prevail over accommodation of conscientious vaccine refusers, where the scientific evidence shows that a choice between these two objectives is necessary. Much religious teaching about vaccination reaches the same conclusion. However, where there is insufficient evidence that those with medical contraindications would be harmed by an exemption, then conscience should prevail over social solidarity arguments. There is no need to make a false choice between protecting public health and toleration of minority beliefs

¹⁴³cf the recognition by the European Court of Human Rights of the compatibility with Art 9 and the value of such procedures in assessing genuine conscientious objections to military service: *Dyagilev v Russia* App no 49972/16 (10 March 2020); *Papavasiliakis v Greece* App no 66899/14 (15 September 2016), para 54.