

6 Mandatory Childhood Vaccination and Legal Exemptions

In chapter 4, we offered a principled argument claiming that governments are justified in imposing liberty-limiting vaccination policies when this is necessary to prevent harm to others. We introduced Mill's harm principle, which offers a basic justification for justifying liberty-limiting vaccination policies, even if this involves a restriction of such basic rights as freedom of conscience, thought, or religion and the right to family life. In chapter 5, we explained what this implies for vaccination programs for young children. We translated the more general "harm principle" into the "harm threshold" and concluded that under specific circumstances, government is allowed (and required) to interfere in parental prerogative.

However, the question remains in which situations such infringement of the fundamental rights of parents is necessary and proportionate. If herd protection can still be established or maintained in ways that leave parental freedoms intact, this will certainly be preferable. In this chapter, we explore a first possible way for states to opt for a proportionate policy—namely, by making childhood vaccination compulsory (enforced by punitive sanctions) or mandatory (by, for example, requiring it for school entry) while tolerating a small group of refusers by allowing them to apply for *nonmedical exemptions*.

The maintenance of herd protection, like that of many other public goods, does not require that every person in the target group complies. To prevent or contain outbreaks and stop the transmission of a highly contagious pathogen, it will be sufficient to have an approximately 95 percent immunization coverage. This figure applies to measles, which is one of the diseases that spreads most easily within a naive population. Other pathogens are less infectious, and for these, herd protection is possible at a somewhat lower vaccination rate, such as 80–86 percent for diphtheria (RIVM, 2019).

If robust herd protection is established, everyone enjoys protection, including vulnerable persons who are not (yet) vaccinated or for other reasons are susceptible to infection. If incomplete coverage, say 95 percent, is sufficient, this leaves room to accommodate noncompliance and tolerate people who have deeply held convictions that require them to refuse vaccination. This can be done by allowing them to be exempted from the otherwise compulsory program. Is this a viable and justifiable policy option for constitutional liberal-democratic regimes?

6.1 Rule-and-Exemption Policies

Over time, liberal political orders have endorsed and implemented *rule-and-exemption* policies as a way of dealing with legal obligations regarding morally sensitive issues. This is a legal arrangement that imposes a uniform rule on all citizens to do specific things, while simultaneously granting exemptions to designated minorities who can show that complying with the rule would severely burden them by requiring them to act against their conscience or prevent them from engaging in important symbolic practices (Miller, 2014, p. 438). A well-known example is the exemption from compulsory military service for conscientious objectors. Childhood vaccination is a similarly sensitive issue. Even though a large majority of parents participate voluntarily—and often wholeheartedly—in childhood vaccination programs, a minority has strong objections to such programs. Could there be a way to maintain collective protection through herd immunity and simultaneously accommodate the interests of those who deeply object to vaccination?

Historically, these legal exemptions originated in Western liberal democracies as religious exemptions available only to a very limited category of members of recognized religions. In 1928, the Dutch government created the option for parents to be exempted from smallpox immunization, which at that time was compulsory and backed up by financial penalties. The exemption could be granted by the mayor of their municipality, who was expected to consider the trustworthiness of parents' religious grounds for objection. Over time, the policy shifted from compulsory to mandatory, and the exemption became available to a wider category of parents. In many countries, however, governments still distinguish religious from secular (or "philosophical") objections.

Maybe the best-known existing examples of immunization *rule-and-exemption* policies are those allowing waivers in the United States. There is no federal regulation, but all US states legally require the vaccination of children prior to school or day care entry.¹ These mandatory policies began at the end of the nineteenth century, when some US states started to require schoolchildren to be vaccinated against smallpox. By the late 1960s, many states also required schoolchildren to be vaccinated against measles. Over the following decades, states added to the list of vaccines that were mandated for children enrolling in school (and, later, day care) (Navin, 2018, p. 186). This requirement was accompanied by a system of medical, religious, and philosophical exemptions. The US federal exemption jurisprudence allows states to give vaccination waivers but does not mandate it (Reiss, 2014, p. 1563).

Around 2015, these exemptions became subject to scrutiny in California as it became clear that the Disneyland measles outbreak was caused by substandard vaccination compliance due to high numbers of nonmedical exemptions. In reaction to the outbreak and the public outrage it generated, the state of California passed a bill that eliminated all nonmedical exemptions. Legislators in some other states also introduced bills that would make it harder for parents to opt out of vaccinating their kids. As a result, these exemptions, which were virtually undisputed for a long time, have now become the subject of intense public and political discussion.

6.2 Three Requirements for Rule-and-Exemption Policies

How should the accommodation of exemptions be judged in the context of constitutional liberal democracies? At first sight, allowing exemptions seems to contradict a basic requirement of the idea of constitutional democracy. After all, clear application of the law, equal treatment, and the rule of law are paramount; law ought to be administered impartially and should have no favorites (Barry, 2001; Trigg, 2012). At the same time, the liberal state should acknowledge that apparently neutral laws might nevertheless be disproportionately more burdensome for certain citizens than for others. Even though most parents comply voluntarily with the duty to vaccinate, some parents have deep objections to the practice. Nonvoluntary vaccination implies that these parents must go against their conscience or have to sacrifice deep commitments. And even though most other citizens do not share

these convictions—or might even object to them—they might nevertheless understand the importance of the convictions for the individual person that holds them and acknowledge the pain it will inflict on parents if they have to act against their deepest commitments about what is best for their child.

The question, then, is when universal application of law must be paramount and under which circumstances exemptions should prevail. This has been a central question in the political-theoretical debates of the past two decades on legal exemptions. So-called muscular liberals rally around the idea of universal egalitarian law and argue that law, as the outcome of democratic deliberation and political processes, should, in principle, be administered impartially and be universally binding. Brian Barry's *Culture and Equality* (2001) is arguably the best-known placeholder for this position. Other liberal authors, however, see legal exemptions to universal laws as the contemporary interpretation of the ancient liberal ideal of toleration (Dobbernack & Modood, 2013; Forst, 2012; Williams, 1996). They would argue that a blanket application of state law sometimes unduly burdens citizens who deeply disagree with the law because it fundamentally contradicts their conscience and deepest convictions. Allowing exemptions recognizes this fact by alleviating the particular burden of the members of these minority groups.

We do not aim to take a firm theoretical position in this more political-theoretical debate.² We assume that the idea of accommodation fits, *ipso facto*, with the central tenets of constitutional liberal democracy, especially in cases in which granting exemptions does not directly violate the fundamental rights and basic interests of others.³ The fact that herd immunity can be maintained at a vaccination rate of approximately 95 percent implies that there might be quite some room for exemptions from compulsory vaccination without endangering public health and the rights of others. We agree with Mahoney (2011, p. 311) that government should seek to accommodate minority practices in the most generous manner possible. It should be clear, though, what kind of entitlement the granting of vaccine exemptions involves. It is not a straightforward and inviolable right of parents that nullifies the duty to vaccinate; instead, it is a toleration-based and conditional right to an *exemption* from a general legal duty, which can and should be revoked when robust herd immunity is endangered (Nehushtan, 2012). Thus, in the rest of the chapter, we take for granted that *rule-and-exemption* policies are not necessarily required by central liberal-democratic values but,

in principle, also do not contradict liberal-democratic values. However, when they are implemented, they should not undermine the very same principles.

Indeed, to be feasible, rule-and-exemption policies need to comply with three requirements simultaneously: the limitation requirement, the justice requirement, and the distinctiveness requirement. Let us discuss these three requirements in turn. The *limitation requirement* determines that the number of exemptions allowed is limited; these should not be so numerous that they undermine or nullify the goal for which the specific legal duty has been introduced. Exemptions to legal duties can only be maintained if a large majority of citizens have sufficient reason to endorse and abide by the law (Vallier, 2016) and only a small minority seeks an exemption. Second, the *justice requirement* acknowledges that exemptions are scarce goods that are given to some and withheld from others. This distribution of exemptions should not be unjust, for example, by privileging or discriminating against certain religious or nonreligious doctrines or by unduly undermining the ideal of state neutrality.⁴ Third, a policy needs to satisfy the *distinctiveness requirement*, which implies that exemptions can only be granted if it is possible for government agencies, in the judicial fact-finding process, to distinguish between sincere and deeply held objections against the requirement that is imposed on people and mere “exemptions of convenience.” Moreover, to be transparent and to avoid making arbitrary decisions, government agencies should be able to make such distinctions by applying relatively straightforward legal rules.

When applied to immunization policies, the limitation requirement implies that coverage should be sufficient to ensure a group-level protection that is necessary to prevent outbreaks and protect vulnerable persons. Moreover, the average vaccination rate should not only be high enough to protect vulnerable individuals within the population as a whole, but coverage should also be such that local pockets of undervaccination are small enough to minimize the risk of outbreaks within such pockets. Whereas the limitation requirement is linked to the core objectives of the policy, the other two are general requirements for fair policies. If vaccine exemptions are granted, the separation of sincere objections and less-sincere objections should not violate central liberal values, for example, by discriminating against specific religious doctrines, and the process of granting exemptions must be based on verifiable legal rules. Only if all three requirements are met is a mandatory vaccination scheme with waivers, all things considered, justifiable.

In the next section, we argue that this leads to a paradox for liberal-democratic exemption policies for mandatory childhood vaccination law, because it appears to be impossible to satisfy all three requirements simultaneously. The policy of accepting categories of objectors is neutral, which would open the door to too many exemption claims that would in turn endanger robust herd immunity. Or the number of categories of objectors must be limited, which cannot be done in a neutral and feasible way, thus violating the other two requirements. This leads to the conclusion that it is *impossible* to maintain a system of vaccine waivers for the measles vaccination that is both consistent with central liberal-democratic tenets and also leaves robust herd immunity intact.

6.3 The Impossibility of Satisfying All Requirements

The limitation requirement sets limits on the number of exemptions that can be granted. In our assessment of a threshold vaccination rate, we should take into consideration that part of the “space” is already taken up by persons who cannot (yet) undergo vaccination for medical reasons: infants who have not yet completed the recommended childhood immunization schedule and persons who cannot undergo vaccination for medical reasons because they have certain forms of cancer, have a compromised immune system, or are likely to have a serious allergic reaction. These exemptions are medical necessities and should be given priority over non-medical exemptions: persons who have a medical condition that does not allow them to be vaccinated cannot reasonably be required to do so, but everyone else can be. Protecting the health of the former should be given priority above allowing the latter an exemption to what they are normally required to do anyway. The number of medical exemptions will be low, however: a recent study in Arkansas found only 0.01 percent of medical vaccine exemptions among students from preschool to college (Safi et al., 2012). This suggests that there is still ample room for allowing nonmedical exemptions.

However, we should also take into account that vaccination rates are not distributed evenly across a nation; each state or region may contain local pockets of undervaccination. Moreover, these requests for exemptions will also not be distributed evenly across a society but will be concentrated precisely within these pockets of undervaccination. There is therefore an

increased risk of local breakdowns of herd protection and disease outbreaks within these “hotspots” (May & Silverman, 2003; Yang & Debold, 2014).⁵

In theory, this could imply that, somewhat counterintuitively, fewer exemptions can be granted in areas in which the number of people who object to immunization for religious or other reasons is relatively high. On the other hand, it is obvious that at the same time, the more groups opposing vaccination have their exemption claims legally accepted, the more unlikely it becomes that the limitation requirement is fulfilled. A historical analysis of US jurisprudence regarding the waiver system can illuminate that.⁶ Historically, the number of exemptions granted was limited because only a very specific category of objectors was eligible: members of nationally recognized and established religious denominations. In 1971, several state courts widened the domain of exemptions “to everyone and anyone who claims a sincerely held religious belief.”⁷ Only in 1979 was the privileged position of religion disputed in court, because religious exemptions “discriminate against the great majority of children whose parents have no such religious convictions.”⁸

It makes sense to remove the distinction between religious and secular claims for exemptions, because it does not fit with current, more secular ideals that suggest governments should be neutral toward various (religious and secular) ideas of the good life (Pierik & Van der Burg, 2014). Moreover, the original distinction led to many odd exceptions. For example, although many secular claims were not even taken into consideration, an exemption claimed by a Jewish parent was allowed by a US court, even though nothing in Judaism supports objections to vaccinations (Calandrillo, 2004, p. 414, n 388). Another example is the fact that thousands of parents have qualified for religious exemptions by joining sham mail-order religions such as the Congregation of Universal Wisdom, through a contribution of \$75 and a \$15 fee for the official notification necessary to qualify for the exemption. The main article of faith of the Congregation, quite characteristically, is that the injection of any medication or other humanmade substance would violate the sanctity of the body (McNeil, 2003).

From the perspective of the justice requirement, this historical development of an ever-more inclusive approach can only be encouraged. The growing focus on state neutrality and secular law in the past few decades affects the way such claims to exemptions are assessed. The more secular the assessment of exemption claims becomes, the more difficult and problematic it is to distinguish religious from nonreligious convictions and, more important, to

distinguish “strong beliefs” from “mere preferences.” In the liberal tradition, one that is determined so much by inter-Christian strife in Europe after the Reformation, such strong beliefs and the mere concepts of “conscience” and “conscientious objections” were limited to the quite contingent category of members of nationally recognized and established Christian denominations and very much understood in terms of Christian terminology and symbolism (Spinner-Halev, 2005; Waldron, 1987). In current, more secular times, we need a more inclusive conception of the “strong beliefs” and “deep commitments” that provides a normative status to convictions that individuals closely identify with and recognize as theirs, on the grounds of their “deep,” “serious,” and “spiritual” nature. After all, it is because these religious and secular commitments meet the criterion of deep commitments that they justify exemptions from universal law.⁹

This more inclusive approach can be recognized in current jurisprudence of the US Supreme Court and the European Court of Human Rights. In *US v. Seeger*, the US Supreme Court abandoned, for matters concerning conscientious objection to military service, the religious/secular distinction by holding that an objection can be understood as “religious” when it is based on a “sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those.”¹⁰ Following this jurisprudence, it is remarkable that several US states still only accept religious exemptions and deny secular exemptions; one would expect the distinction to have collapsed as soon as a secular parent in one of these states made a case before the Supreme Court. However, it turns out that *Seeger* was an exception because the Supreme Court was interpreting the narrow terms of a statute rather than addressing the constitutional question of what should count as protected belief for purposes of the Free Exercise Clause of the First Amendment. As a result, judges have been reluctant to extend the constitutional protection of nonreligious deep, serious, moral commitments beyond narrowly circumscribed cases of conscientious objection to military service (Laborde, 2014, p. 68). Mark Navin concludes that the separation between religious and nonreligious claims has lost much of its relevance in US jurisprudence because more systematic nonreligious commitments are also considered religious—whether they are based in a theistic belief or moral conscience. The only condition is that they must play “an important role in a person’s ability to realize personal integrity” (Navin, 2018, p. 196). For many who reject vaccination, this is only one element of a larger set of practices that also includes

extended breastfeeding, organic cooking, and homeschooling. Therefore, this way of parenting is best described as a comprehensive life project that plays an important role in a person's idea of integrity. In a similar way, Micah Schwartzman (2012, p. 1421) argues that we have good reason to endorse a "definitional expansion" of religion to also include nontheistic commitments. If the US Constitution prioritizes exemptions for religious objectors, this expansion might be needed to achieve state neutrality toward theistic and nontheistic commitments.

The European Court of Human Rights, which was established only in 1959, never provided a comprehensive definition of the term "religion" or "belief." Mainstream religions were always accepted as belief systems; the court merely employs formal criteria to other religions and personal belief systems: the conviction must display "a certain level of cogency, seriousness, cohesion, and importance."¹¹ These terms have never been spelled out in case law, but Murdoch (2007, p. 11) explains that a specific act, that is, objecting to vaccination, must relate to a weighty and substantial aspect of human life and behavior and be deemed worthy of protection in European democratic society.¹² But nothing in these formulations separates religious from secular convictions.

For liberal governments to comply with the contemporary demands of state neutrality—and for the US government to comply with the Free Exercise Clause of the First Amendment—the earlier theistic and substantial interpretation of the term "religious" must be abandoned and replaced by a more inclusive and formal one. This is also clear when we analyze the myriad of claims to exemptions from childhood vaccination today. Should modern objectors who, in one spiritual way or another, still adhere to Wakefield's debunked claim that vaccination causes autism as discussed in section 3.3, be treated differently from Christians who argue that vaccination is an inappropriate meddling in the work of God, or from those who argue that diseases should be healed through prayer instead of medication, or from metaphysical thinkers who argue that vaccines undermine "purity" or hamper "spiritual growth of the person"? Yes, the commitment of the "modern objector" is based on a factual claim that contradicts evidence-based medicine, while the more clearly religious objections cannot be refuted scientifically at all, but this is as such not sufficient as a criterion that can be employed by a neutral state for distinguishing the two types of claims or to conclude that one justifies an exemption while the other does not. Moreover, modern

antivaccination beliefs are usually embedded in a broader worldview that includes normative and metaphysical beliefs about what is natural and how living according to nature is conducive to health, as well as strong opinions about health risks and the trustworthiness of mainstream science and “Big Pharma.” This further undermines a clear-cut distinction between comprehensive views of life, such as a religion, and personal judgments about the necessity and safety of vaccines.

This is all very much in line with the justice requirement described earlier. Exemptions are scarce goods, and their distribution should not privilege or discriminate against certain religious or nonreligious doctrines or unduly undermine the ideal of state neutrality.

The discussion so far also shows that there are severe tensions between the three requirements just discussed. First, the justice requirement and the limitation requirement cannot be held simultaneously. The justice requirement demands an inclusive and formal approach to religious and nonreligious ideas of the good life. However, as more categories of exemption claimers are accepted, more persons can claim exemptions and the more the limitation requirement is endangered. It appears that the requirements cannot all be satisfied simultaneously. This leads to a paradox: the pre-1971 substantial formulation limiting exemptions to members of nationally recognized and established religious denominations might comply with the limitation requirement but falls short on the justice requirement; conversely, the approach focusing on the level of cogency, seriousness, cohesion, and importance does comply with the justice requirement but might not satisfy the limitation requirement.

Moreover, there are good reasons to assume that the justice requirement no longer fits well with the distinctiveness requirement, which demands that government agencies should be able to *distinguish* between sincere objections against vaccination and so-called exemptions of convenience. The more formal—rather than substantive—the criteria become, the more the distinction between religious and philosophical convictions evaporates. That is in line with the justice requirement, but it has an unintended effect. Once the distinction between religious and secular objections cannot be made meaningfully, separating sincere objections and mere exemptions of convenience is also “beyond the practical and institutional competence of courts” (Dane, 1980, p. 350). If law, policy, and adjudication can no longer rely on substantial criteria and have to fall back on formal criteria like sincerity, cogency,

or cohesion, it will become impossible for government agencies to separate genuine claims from those of consistent free riders, and this means that the distinctiveness requirement is not met.

Moreover, if only formal criteria are employed, the waiver system will comply with the justice requirement, but it will also have to accept much more exemption claims. It will therefore be difficult to meet the limitation requirement: that a waiver system must be capable of limiting the number of exemptions to such an extent that herd immunity is not jeopardized. Again, when that distinction falls apart, it is also much harder to separate sincere objections from free rider claims disguised as sincere objections. This, in turn, makes it even more difficult to meet the limitation requirement. The more categories of exemption claimers that are acknowledged, the larger the number of (potential) claimants. If a liberal government aims to maintain herd immunity and if there is no neutral way of distinguishing insurmountable objections to vaccination from more superficial preferences, it will become very difficult to design a waiver system that is neutral toward different religious and secular ideas about the good life and is capable of maintaining robust herd immunity.

6.4 Procedural Approaches

In the previous sections, we concluded that it is very hard to substantively identify genuine objections to vaccination and, consequently, to design law and policies to distinguish genuine objections from exemptions of convenience. One way to hold on to a waiver system is to give up the attempt to substantively assess parental convictions and, instead, to employ a reasonable procedure to determine who can legitimately claim exemptions. The alternative service for conscientious objectors to the military service can serve as an example here. Recognized objectors must contribute to the public good in another way, for example, by serving in educational or health care institutions. In addition, the alternative service usually takes a longer period than the military service, up to twice as long, to deter insincere objectors from taking the alternative route. In our case of exemptions from vaccination, a similar path can be taken. Vaccinating one's children contributes to a public good and is burdensome to the parents and the child, although, as we argued in the previous chapter, for individuals, the burdens of vaccination are minor compared to the benefits. Alternative trajectories for vaccine

objectors should contribute in a different way to the public good and/or should, in one way or another, be at least as onerous for parents as going through the vaccination procedure, to eliminate the easy way out of vaccination. The question is to what extent such an approach can comply with the requirements just formulated.

Let us discuss three procedural approaches. The first option is to require parents to follow a certain procedure before they are eligible for a vaccine waiver: to complete a set of educational sessions and to present their substantive opposition to vaccination before a formal review board. In this approach, the content of the objection is not substantially assessed; it is only marginally evaluated on whether it satisfies some basic formal requirements to qualify for an exemption from mandatory vaccination. The basic idea is that even though there is no substantive assessment of parents' arguments, the procedure forces them to become informed about the dangers of non-vaccination and to formulate their objections against vaccination explicitly and defend them in a formal setting. Even though undergoing this procedure might not substantially alter parents' beliefs about vaccination, at least it would make it harder for them to forgo vaccination without being confronted with information on the possible dangers involved. Mark Navin argues that it could be helpful to "redirect our attention away from the reasons people have for objecting, and focusing instead on the burdens they are willing to withstand in order to receive waivers" (Navin, 2016, p. 198). He argues that such measures may be burdensome enough to deter some parents from completing an application for a vaccine waiver. Moreover, he assumes that the "people who are most likely to be discouraged by more burdensome waiver application processes are likely to be people who have the least claim to receive exemptions in the first place" (Navin, 2016, p. 198).

The second procedure moves away from the problematic distinction between sincere objections and mere preferences by requiring that everyone should, in one way or another, contribute to the public good of herd immunity. The most obvious contribution is to vaccinate one's children (and oneself). Those with objections to vaccinations must contribute in another way, for example, through paying a tax that could finance vaccination schemes and thereby support vaccinations for low-income families. One advantage of this is that such a tax would be much less intrusive and might therefore be more acceptable for those with religious or philosophical objections. A second advantage is that such an approach would avoid the problem of

assessing the true nature and depth of the objections. Your willingness to pay is taken as a proxy for the depth of your objections, and given the difficulty of determining sincere conscientious objections, willingness to pay might be the most neutral alternative. The level of taxation should yield a burden that is at least comparable with participating in a vaccination schedule to make sure that opting out is not less burdensome than participating. Perhaps the charge could be based on the expected damage, according to the *polluter pays principle*. Another calculation method would link the tax rate to the extent to which herd immunity is ensured in a certain area. If the number of objectors within a specific community is small, the tax rate can be low, only covering the administrative fee required to uphold the system of exemptions and monitor levels of herd immunity and possible outbreaks of infectious diseases. However, the larger the number of objectors in a specific area, the more the tax rate will rise. Willingness to pay could, in a way, be the most neutral way to separate the wheat from the chaff.

Lotteries might provide a third procedural approach. Peter Stone (2011) argues that lotteries are appropriately employed when it is essential to prevent irrelevant considerations affecting decisions about allocation of a certain good. If we conclude from the discussion so far that it is impossible to distinguish sincere objections from superficial preferences by relatively straightforward legal norms, we could distribute exemptions among parents who seek them through a lottery.

These procedures have several advantages. If they work, we can hold on to an exemption policy to ascertain that the mandatory vaccination scheme is proportionate. A second advantage is that government is discharged from the impossible task of substantively assessing the content or the depth of an objection to vaccination. At the same time, any policy that avoids a substantive assessment will probably be imperfect: it will allow too much if waivers are granted to parents who are only moderately opposed to vaccination, or it might exclude too much if waivers are denied to parents with genuine objections to vaccination who were unable to successfully pass the procedure (Navin, 2018, p. 201).

The first approach might not provide enough of a barrier to exemption claims to secure robust herd immunity. After all, if parents know they have to meet formal requirements but are in the end not assessed substantially, they know they just have to go through the motions to succeed. In addition, this approach will be biased in favor of educated people, who will

find it easier to formulate their substantive opposition than less-educated people.

The second procedure might have the ability to limit the number of exemptions by raising the tax to the threshold level, but it has the disadvantage of being biased in favor of wealthier people, which arguably violates the justice requirement. In an unequal society, the tax will not distinguish sincere objections from reasons of convenience. Instead, it will just identify who is able to pay. If the tax is low, then we have done nothing to block the worries about exemptions of convenience for the better-off. If the tax is high, then only the better-off will be able to apply for exemptions. To the extent that we consider current socioeconomic inequalities unjust, this proxy only reinforces such injustices. Moreover, it might be considered insulting because it entails buying one's right to follow one's conscience.

The third option, a lottery, does offer a feasible way to distinguish between persons who should get an exemption and who should not, as this would be reduced to what the lottery decided, but it does not offer any distinction at all between sincere and insincere objections, and that is what the decision procedure should be about. Consequently, it does not take seriously the depth of some people's objections to vaccination. Genuine objectors seek an exemption because they want their convictions to be taken seriously, not because they have won a lottery. So, although a lottery might grant exemptions to some people with deep objections, this method may be deemed so insulting that it will be despised and may therefore even be rejected by people with deep objections.

6.5 Conclusion: The Impossibility of Fair and Feasible Exemption Policies

In this chapter, we argued that to be feasible, *rule-and-exemption* policies need to comply with three requirements simultaneously: the limitation requirement, the justice requirement, and the distinctiveness requirement. The US pre-1971 rule complied with the limitation requirement but not with the justice requirement as we would interpret it nowadays. The European approach that emphasizes the "level of cogency, seriousness, cohesion, and importance" complies with the justice requirement but not with the limitation requirement. The justice requirement cannot be met in such a way that the distinctiveness requirement is satisfied as well: government agencies should be able to *distinguish* between sincere objections to vaccination

and so-called exemptions of convenience. The more formal—instead of substantive—the criteria become, the more the distinction between religious and philosophical convictions collapses. That is desirable from the point of view of state neutrality, which must be endorsed in a pluralistic democracy. However, there is a second effect: the more formal the criterion, the harder it is for government agencies to separate genuine claims from plain free riders, endangering the distinctiveness requirement.

We can now conclude that in a liberal democracy, it is hard, maybe even impossible, to combine compulsory or mandatory immunization policies with policies that allow for nonmedical exemptions. To be feasible and justified, exemption policies for childhood vaccination should meet all three requirements simultaneously, and this appears to be impossible. The limitation requirement, limiting the number of exemptions, can only be satisfied when the justice requirement is violated. And complying with the justice requirement undermines the distinctiveness requirement. This implies that many countries (at least almost all states in the US) have immunization policies that are inconsistent with basic democratic principles and generally held objectives of public health. The 2015 legal change in California that abolished all nonmedical exemptions not only is to be applauded, as it has led to a better control of vaccine-preventable diseases, but is also much more in line with basic democratic principles.

Allowing nonmedical exemptions would have been one way to build a more reasonable and proportionate policy on the basis of the principled argument for nonvoluntary vaccination that we developed in the previous chapter. What other options do we have to find an optimal balance between protecting public health and respecting individual liberties?

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Inducing Immunity?

Justifying Immunization Policies in Times of Vaccine Hesitancy

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