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Vaccine Exemptions and the Church-State Problem

Dena S. Davis

ABSTRACT

All of the 50 states of the United States have laws governing childhood vaccinations; 48 allow for religious exemptions, while 19 also offer exemptions based on some sort of personal philosophy. Recent disease outbreaks have caused these states to reconsider philosophical exemptions. However, we cannot, consistent with the U.S. Constitution, give preference to religion by creating religious exemptions only. The Constitution requires states to put religious and nonreligious claims on equal footing. Given the ubiquity of nonreligious objections to vaccination, I conclude that the best response is to remove all exemptions, as two states have already done. But removing exemptions should not end our concern for children. Removing exemptions only bars children from public schools; it still leaves them unvaccinated, a danger to others, and reliant on whatever nonpublic schooling is available. If public school attendance is not enough of an incentive for vaccine reluctant parents, perhaps we should look into stronger measures.

The 2014 measles outbreak in the U.S. brought public attention to the ease with which vaccine exemptions are available. According to the U.S. Centers for Disease Control and Prevention, the U.S. experienced a "record number" of measles cases that year, the majority in people who had not been vac-

inated against the disease. This was the largest number since measles had been declared "eliminated" in the U.S., in 2000.¹ The 2015 outbreak, originating in California's Disneyland theme park, was blamed on "substandard vaccination compliance" that shone "a glaring spotlight on our nation's growing antivaccination movement and the prevalence of vaccination-hesitant parents."²

Given that vaccination is required for entrance to public school in all states, how do so many children remain unvaccinated? Part of the answer lies in a system of exemptions: 48 states allow for religious exemptions, while 19 states also offer exemptions based on some sort of personal philosophy.³

In this essay I make two claims. First, I argue that we cannot, consistent with the U.S. Constitution, give preference to religion by creating religious exemptions only. Using the historical parallel of religious exemptions to the military draft, I argue that it is constitutionally required to put religious and nonreligious claims on equal footing, if they fulfill certain requirements. Given the ubiquity of nonreligious objections to vaccination, I conclude that the best response is to remove all exemptions, as two states have already done. Second, I argue that removing exemptions should not end our concern for children. Removing exemptions only bars children from public schools; it still leaves them unvaccinated and reliant on whatever nonpublic schooling is available. If public school attendance is not enough of an incentive for vaccine reluctant parents, perhaps we should look into stronger measures.

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The Problem with Religious Exemptions

The Religion Clauses of the First Amendment to the U.S. Constitution consist of two parts: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Beginning with the "incorporation" of these clauses in the middle of the 20th century, from the U.S. Congress alone to all federal, state, and local government entities, the clauses have been the topic of much scholarly analysis. Many scholars agree that, when pushed to their limits, the clauses are inherently in conflict.⁴ If "establishment" means government preference and support for religion, then the accommodation of religion to allow for free exercise can be seen as an establishment. For example, a public university that gives students extra "cuts" for religious holidays, without also acknowledging the need to miss class to care for sick children and other serious commitments, is arguably "establishing" religion.

From one perspective, religious exemptions would seem to be about free exercise, that is, not forcing persons to do something that is against their religion. But any time the state offers an exemption, it runs into Establishment Clause issues as well. If the state is supposed to be neutral on issues of religion, why should it offer exemptions based on religious grounds and not on equally serious philosophical or personal grounds? Should the state be labeling religious reasons as "better"? And if religious reasons really are better, then what counts as religion? Should you have to bring a note from your imam, pastor, or rabbi? Brian Leiter suggests that privileging religious exemption is attractive because religions usually have "texts, doctrines, and commands . . . practices, rituals, and ceremonies,"⁵ that make it easier for the state to sort out legitimate claims from self-serving ones. But what if your religious practice doesn't include joining an official church? Or what if your denomination supports vaccination but you believe otherwise—are your religious reasons still legally valid? Pretty soon the state is acting like some sort of religious certification board. Not only is that untenable, but it is in itself a violation of the Establishment Clause; the state should not be acting as an arbiter of religious orthodoxy. As the Supreme Court wrote in 1981, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."⁶

Church-state scholar Winnifred Fallers Sullivan, drawing upon her extensive experience as an expert witness, has concluded that at this point in time, the beginning of the 21st century, it is almost im-

possible for the law to "get it right," because the religious life of most people "resists legal definition in a fundamental way."⁷ She is speaking here primarily of religion in the U.S., with all its pluralism and individuality, what some people call "cafeteria religion," in which individual persons choose what elements of a religion they wish to adopt, perhaps even choosing from more than one religion. "Ordinary religion," says Sullivan, "that is, the disestablished religion of ordinary people, fits uneasily into the spaces allowed for religion in the public square and in the courtroom."

To understand the constitutional issues, consider the military draft and the exemption for conscientious objectors. Congress was not constitutionally required to include an exemption in the draft law, but once it did, it was required to do so in a fair and constitutional manner. At first, the exemption was open only to members of established peace churches, such as Mennonites and Quakers. That made it easy for draft boards, but was obviously unfair. To use legal jargon, it was both under- and overinclusive. One could be a Mennonite or Quaker and not be a pacifist (as Quaker history during the Civil War shows, for example) or be a devout pacifist but not belong to an historic peace church. Eventually, the exemption was broadened to include pretty much anyone who could make a case for being a pacifist (defined as opposed to fighting in any and all wars) and who also believed in a Supreme Being.

In 1958, Dan Seeger, a young man on a spiritual journey from Roman Catholicism to Quakerism, claimed to be a sincere pacifist, but not too sure about a Supreme Being. He took his case all the way to the Supreme Court, which, quoting theologian Paul Tillich, adopted a more expansive view of religion as the "ground of being," without requiring belief in a Supreme Being.⁸ In 1970 the other shoe dropped, when Elliott Welsh successfully argued that the law could not privilege religious beliefs over purely secular, philosophical ones.⁹ On the other hand, a young man who opposed only some wars, in line with the Roman Catholic belief in "just war theory," did not win his case, despite his religious orthodoxy. The Supreme Court upheld the right of Congress to offer the exemption only to pacifists who opposed all wars.¹⁰

It is worth considering the probable outcome if a young man who identified as Roman Catholic nonetheless rejected just war theory in favor of pacifism. Would the Court have rejected his claim because he wasn't being a consistent or orthodox Roman Catholic? Almost certainly not. In 1981, faced with a Jehovah's Witness whose beliefs differed from

the majority of his co-religionists, the Court “declined to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”¹¹

Returning to vaccination, we now see that trying to separate religious from philosophical or “personal” reasons won’t work, either as a neat way to draw a line, or by using “religious” as a proxy for “serious.” And we have not even discussed the problem of people who pretend to be religious objectors to invoke an exemption to which they are not entitled. Parents who remain convinced of the (disproven) connection between vaccines and autism, for example, may recast their objection as religious in order to win an exemption. That is already happening in Vermont, which repealed its philosophical exemption in 2015. “I will become religious, if need be, to get a religious exemption,” said one parent. “I will believe whatever I have to believe to not have my kids vaccinated.”¹²

Although the Supreme Court decided in 1905, in *Jacobson v. Massachusetts*, that states have the power to require vaccination as a condition of school enrollment,¹³ litigation at the state level continues. In 1979, the Mississippi Supreme Court followed *Jacobson* and other cases in holding that the state’s interest in public health was sufficient to override the religious rights of parents seeking religious exemptions. However, the Mississippi court found the state’s exemption law unconstitutional because it violated the equal protection rights of parents who wanted the exemption but did not qualify on religious grounds.¹⁴ Mississippi responded by dropping the exemption altogether.¹⁵ In 2001, a U.S. District Court in Arkansas found that state’s law unconstitutional because it exempted only members of a “recognized church or religious denomination,” thus violating both the free exercise and the Establishment Clauses.¹⁶ Arkansas responded by rewriting the law in a much more permissive fashion, including exemptions based on philosophical belief.¹⁷ “Religious exemptions that require only a “sincerely” held religious belief are more likely to prevail against a constitutional challenge, although they may still be found to discriminate against those with “sincerely” held nonreligious beliefs about vaccination.¹⁸

WHERE DO WE GO FROM HERE?

If we acknowledge that no constitutionally defensible line can be drawn between religious and philosophical beliefs, we can either give exemptions to practically every parent who asks, or make vacci-

nation mandatory with virtually no (nonmedical) exemptions. Given the anti-scientific suspicion of vaccines, propagated by Hollywood celebrities and even by some political candidates—including those who are physicians themselves¹⁹—and given that most people who are parents today have never seen a case of diphtheria or polio, the number of parental refusals under a permissive system would probably be quite high.

There are a number of suggestions as to how to push more parents toward vaccination, without completely closing the current loopholes. One way in which we could tweak the present system is to make the process of getting an exemption a bit more onerous, although not so much as to be a “burden” upon free exercise. At the very least, parents could be expected to undergo a counseling session with a health-care provider, or to watch a video or in some other way to show that they have seriously considered the health consequences to their children and to others in the community. In New York State, for example, parents wishing the religious exemption must write an annual letter explaining in their own words “the religious principles that guide [your] objection to immunization.”²⁰ In Vermont, parents are required to read a three-page educational leaflet on the safety and benefit of immunization.²¹

A legal scholar has hypothesized that tort law “has the potential to be the best method of preventing religious and philosophical exemption abuse and compensating victims of vaccine-preventable disease outbreaks. . . .”²² However, our goal should be deterrence to avoid injury, not compensation after the fact, and it is unlikely that parents would be deterred from leaving their child unvaccinated by the farfetched scenario of a class-action suit by those who believe they have been harmed because of vaccine-refusers’ subversion of herd immunity.

A controversial suggestion put forth by a group of pediatricians, including a past chair of the American Academy of Pediatrics (AAP) Committee on Bioethics, argues for singling out the measles vaccine because that disease is uniquely contagious and dangerous, and because of the relative ease of vaccine administration (a two-shot series with no booster shots required).²³ They suggest eliminating all non-medical exemptions for the measles vaccine, while retaining exemptions for the others. The authors’ goal is “to see as many children immunized as possible,” and they believe that this “least restrictive compromise” is the best way to proceed, given that states are unlikely to repeal all exemptions. This plan is roundly criticized by another group of pediatricians, who dispute this view of the facts, and who

appear to be in favor of repealing all laws that grant religious *and* nonreligious exemptions.²⁴

These and other proposals are unlikely to make a serious dent in vaccination refusals. Routine vaccination (in the absence of an epidemic) presents an interesting ethical conundrum. From the perspective of parents, whose primary concern usually is and arguably ought to be, their child's well-being, the best possible outcome would be if everyone *except* their child were vaccinated. Due to herd immunity, a small fraction of people can remain safely unvaccinated if most of the "herd" is protected.²⁵ However, for very infectious diseases such as measles, that fraction is quite small, and there are always people who, due to age or medical conditions, cannot safely be vaccinated. Thus, the number of "free riders" who can act in this self-serving fashion, without bringing the system down, is relatively small. That suggests that a permissive attitude is not congruent with children's safety and public health.

A different tack would be to refuse virtually all nonmedical exemptions. From a legal viewpoint this is an attractive position because it removes the difficulties of adjudicating religious versus philosophical versus personal reasons. "If we are not to unfairly privilege religious claims of conscience by allowing their adherents to opt out of neutral legal requirements while nonreligious conscientious claimants must bear the burden of defeat . . . then perhaps it is time to say, the law is the law, and there will be no exemptions for claims of conscience, religious or otherwise?"²⁶ This position is also attractive from a medical point of view, at least at first glance. The AAP "advocate[s] for school entry immunization policies that ensure full immunization in the school setting."²⁷ An AAP "Advocacy Flash" from February 2015 asks state chapters to contact governors and legislatures to urge them to "rescind or restrict" personal belief exemptions:²⁸ "religious exemptions are not required by the First Amendment. . . . Rather, they are the product of legislative activity in the 1960s and 1970s, and thus can be repealed. Indeed, one could argue that nonmedical exemptions are themselves unethical and represent shortsighted policy, as they allow families a free ride on the immunization decisions of others while placing others at risk."²⁹

THE PROBLEM WITH TIGHTENING EXEMPTIONS

Removing virtually all nonmedical exemptions is quite problematic, for a number of reasons. By

focusing on tightening exemptions but ignoring the implications of the penalty for nonvaccination—exclusion from school—we satisfy a superficial yearning for consistency without thinking through the consequences for children. First, children encounter other children and vulnerable people all of the time in playgrounds, swimming pools, grocery stores, *et cetera*, so barring them from public schools and day care does not protect the public. Some states extend the vaccination requirement to private schools, but others do not.³⁰ Thus more unvaccinated children would be clustered in some private schools, further endangering each other. Further, vaccination requirements tied to school enrollment ignore the large numbers of home-schooled children in the U.S.. According to a 2013 report of the National Center for Education Statistics, between one and one-half and two million children are home-schooled, representing between 3 and 4 per cent of the school-aged population.³¹ "More children are educated at home than are educated in the public schools of Wyoming, Vermont, Delaware, North Dakota, Alaska, Rhode Island, Montana, and Hawaii combined. In fact, the total number of children educated in home schools outnumbers the aggregate of children educated in the public schools of 41 states."³²

Second, while I acknowledge parents' rights to home school their child, I would not support any policy that made home schooling more attractive. It is true that vaccine refusers are likely to be affluent and well educated,³³ but one can't help wondering how well these parents will teach science education and basic logic.

So that leads to a somewhat draconian position, one that I confess makes me uncomfortable: to make vaccination legally required, with no (nonmedical) exemptions. Failure to vaccinate a child would subject the parent to the same penalties as failing to enroll a child in school. I understand how terrible and overreaching that must seem to parents who honestly believe that vaccines are introducing poisons into the vulnerable body of their young children. It may be that, in one or two generations, this will come to seem so routine that it will go virtually unremarked, like fluoride in the public water supply. Meanwhile, we need to think about the whole child. To allow children to remain unvaccinated as long as they don't enroll in public school is a disfavor to them and to other children as well.

NOTES

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