

**NONMEDICAL EXEMPTIONS TO PUBLIC SCHOOL
VACCINATION MANDATES IN A POST-PANDEMIC WORLD:
SOLUTIONS WITHIN EXISTING U.S. FRAMEWORKS**

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ORIGINS OF THIS PAPER

This is not an Anti-Vaccination Paper

The Law Dude Gets the Measles - February 1960

The Equivalence of Religion and Conscience, 31 NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY 253 (2017)

Contended that religion and conscience are moral equivalents and are entitled to equal treatment under the law

A completely theoretical piece with no discussion of implications

Critiqued by Hanna Torline, *Setting Our Feet: The Foundations of Religious and Conscience Protections*, 95 NOTRE DAME LAW REVIEW 475 (2019)

“Dhooge’s conclusion that conscience and religion are ‘moral equivalents’ *might be right*. After all, it is a normative (and complicated) claim. Thus, it’s possible that Dhooge’s conclusion does not miss the mark. But instead of accounting for the wind, setting his feet, nocking the arrow, and taking a calculated shot, Dhooge runs straight for the bullseye, arrow in hand. The result may be desirable, but it also may have been forced.”

The pandemic provided the opportunity to revisit my research and test it in the real world

VACCINE HESITANCY IN THE UNITED STATES

Pew Research Center (2019)

25% of parents of school age children and 16% of all adults oppose school vaccination requirements

Kaiser Family Foundation (2022)

33% of parents of school age children and 28% of all adults oppose school vaccination requirements

44% of self-identified Republicans oppose mandates; 88% of self-identified Democrats support mandates

Increasing Number of Outbreaks of Vaccine-Preventable Disease

Measles outbreak in Minnesota and Ohio in 2017 and 2022 sickening 178 people

U.S. Centers for Disease Control reported 1294 cases of measles in 2019 - the highest number of cases since 1994 - 75% of which occurred among Orthodox Jewish communities in New York City

Two outbreaks of varicella in South Carolina in 2022 sickening 70 people

One case of paralytic polio in New York in 2022

OVERVIEW OF PAPER

Examines issues relating to nonmedical exemptions to vaccination as a condition of U.S. public school attendance

Contends that the public health impacts of exemptions may be mitigated through the application of existing U.S. state frameworks relating to:

- Procedural tightening

- Counseling and persuasion

- Assessments of sincerity and good faith

- Application of public emergency laws

- Transparency

Identifies best practices in each of these frameworks

Concludes that nonmedical exemptions are unlikely to be eliminated

Public health and educational authorities must act to prevent further erosion of the benefits associated with vaccination



PUBLIC SCHOOL VACCINATION REQUIREMENTS IN THE UNITED STATES

MMR (measles, mumps, and rubella) - All states

Polio - All states

DTaP (diphtheria, tetanus, and pertussis) - All states

Varicella (chickenpox) - All states except South Dakota

Pneumococcal Conjugate (PCV targeting streptococcus pneumoniae) - 41 states

MenACWY (meningococcal disease) - 33 states

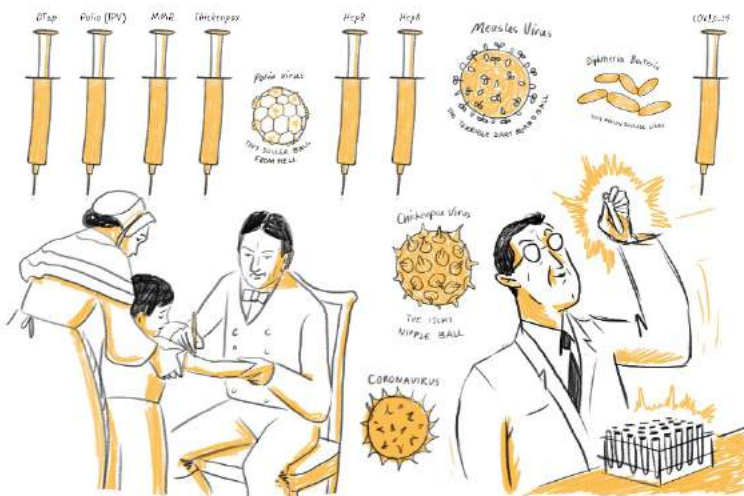
Hepatitis A - 23 states

Hepatitis B - 15 states as a condition of university attendance

Rotavirus (diarrheal disease) - 8 states as a condition of attendance at childcare and pre-K

Influenza - 7 states as a condition of attendance at childcare and pre-K

HPV - 4 states



RELIGIOUS EXEMPTIONS TO VACCINATION BY U.S. STATE

Religious beliefs or convictions

Arkansas, Delaware, District of Columbia, Georgia, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Texas, Utah, Vermont, Washington

Religious grounds

Arizona, Idaho, Illinois, Kentucky, Pennsylvania, Wisconsin

Adherents to religious practices

Alabama, Florida, Hawaii, Tennessee, Virginia

Adherents to a religious belief

Colorado, Kansas, South Dakota

Active membership in a religious congregation

Alaska, Iowa, Nebraska

Dissent or objections

Louisiana, Oklahoma, Wyoming

Religious exemptions are not recognized or are chronologically limited in California, Connecticut, Maine, Mississippi, New York, and West Virginia



CONSCIENCE-BASED EXEMPTIONS TO VACCINATION BY U.S. STATE

Philosophical objections/personal objections

Arkansas, Oregon, Washington (includes personal objections but inapplicable to measles, mumps, and rubella)

Personal belief

Arizona (requires explicit statement), Colorado (prohibits state from requiring explanations), Utah, Wisconsin

“Conscientiously held” beliefs

Minnesota (limited to diphtheria, hepatitis B, pertussis, polio, and tetanus), Ohio, Texas (limited to diphtheria, mumps, polio, rubeola, rubella, and tetanus)

Objection to vaccination

Oklahoma, Michigan (must be “actual,” and local health departments are empowered to require explanations and determine if an exemption has been properly claimed)

“Sincerely-held philosophical beliefs that are not a pretense to avoiding legal requirements”

North Dakota

“Strong moral or ethical conviction similar to a religious belief”

Pennsylvania

“Other grounds”

Idaho

“Written dissent”

Louisiana



CRITICISMS OF NONMEDICAL EXEMPTIONS

Negatively impact public health and achievement and preservation of herd immunity

Negatively impact individual and social well-being including society's most vulnerable members - children, the immunocompromised, and those medically unable to be vaccinated

Enforcement difficulties arising from the creation and application of appropriate tests for determining who may qualify for an exemption

Case law, regulations, and AG opinions concluding that exemptions are not constitutionally required

Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (in dicta)

“Parents cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. Free exercise of religion does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death”

Conscience-based objections lack connection to widely accepted religious doctrines and teachings

Vagueness may lead to more conscience claims as compared to religious claims and the consequent spread of disease and harm to non-claimants

SHOULD NONMEDICAL EXEMPTIONS BE ELIMINATED?

Exemptions are too well-established under existing state law to be easily uprooted

Many states have sought to expand existing exemptions despite the pandemic

Individual interests such as voluntariness, consent, and the primary right and responsibility of parents to make determinations regarding the perceived well-being of their children

Parental interests may not be sufficient in and of themselves, but elimination of exemptions negates voluntariness and consent and treats recipients as a collective manner rather than individuals worthy of particularized assessment

Elimination of exemptions will not prevent all future outbreaks of vaccine preventable disease which will result from a combination of failure or inability to vaccinate and vaccine failure

Limitation of exceptions to religion may require courts, local school administrators, and health department officials to delve into personal beliefs in a quest to separate sincere beliefs from claims asserted in bad faith or without adequate justification, which they may be ill-equipped to make

Religion and conscience share sufficient “critical core characteristics” such as belief, categorical demands on action, and intent to serve a higher good or ultimate end as to be moral equivalents and thus subject to equal treatment under the law

PROCEDURAL TIGHTENING

Focus on enhancing rigor with respect to processes by which individuals seek exemptions

Goal is to increase vaccination rates by creating more complex and rigorous processes which in turn deter objectors from seeking exemptions

Documentation

Utilization of required state forms is preferable approach as promoting uniformity

Texas - form obtained only through a written request to the state, must be notarized, and submitted to school officials within ninety days of notarization

Illinois - must describe objection in detail including identification of the conflicting belief and be signed by a health care provider describing information provided to the objecting party

Identification of specific vaccinations or universal objections

Hawaii - prohibition upon ala carte exemptions

Wisconsin - required disclosure of past receipt of a vaccine that is subject to request for exemption

Periodic renewal

Annual renewal - Arkansas, Nevada, Vermont

Renewal every two years - Texas, Utah

Renewal every nine months - New Mexico

COUNSELING AND PERSUASION

Counseling consists of a review of educational materials provided by the federal or state government, an acknowledgement that the failure to be vaccinated increases the risk of personal infection as well as infection of others, and that such infections may prove to be life-altering or life-threatening

- Could be provided by medical personnel and comprehension determined through quizzes

- Even if fails as a deterrent, counseling enhances accuracy by requiring documentation and bolstering informed decision-making

Persuasion emphasizes “interventions that strive to change attitudes and minds” through information, logic, and reason to empower an individual to make his or her own wise choices”

- Focus on benefits of vaccination, the remoteness of associated risks, and avoidable risks that unvaccinated persons impose on themselves and others

- Could include approval process for vaccines and safety profiles for specific vaccines

- Should be personal to objector and avoid giving publicity to vaccine misinformation

Required in several states but could be improved by including required review and signature by an independent individual (Florida, Illinois, Oregon, Washington) and review of compliance with exemption processes by school administrators and local health departments (Oregon, Michigan)

SINCERITY AND GOOD FAITH

Sincerity required in small group of states

“Sincerity of belief” - Massachusetts, North Dakota

“Bona fide” belief - Hawaii, Maryland, North Carolina

“Held in good faith” - D.C., Michigan

“Strongly held” - Pennsylvania

Emphasis on burden of objector to articulate belief and demonstrate sincerity

Allow for inquiry into sources of belief, the level of detail, and connection to the vaccination from which an exemption is sought

Qualifying beliefs should not include mistrust of government, fear, and reliance upon misinformation

Length of time objector has held the belief and whether such belief has changed over time

Allow for inquiry into objector’s words and actions and willingness to suffer negative consequences

Could include past health care decisions, prior receipt of vaccines and medical interventions, diet, and other aspects of objector’s lifestyle

Whether objector began pursuit of a conscience-based exemption after the rejection of a medical or religious exemption (“exemption shopping”)

EPIDEMICS, OUTBREAKS, AND PUBLIC EMERGENCIES

Several states contain explicit exceptions for epidemics (11 states) and outbreaks (9 states) of vaccine-preventable diseases or public health emergencies (3 states)

Problems include differing definitions, the possibility of spread outside of an affected locality or state, the absence of explicit statutory exceptions in several states, and continued attacks upon the ability of authorities to respond to outbreaks and epidemics in some states

One solution is grafting Model State Emergency Health Powers Act (MSEHPA) onto state laws granting exemptions

Defines “public health emergency,” in part, as “an occurrence or imminent threat of an illness or health condition that is believed to be caused by the appearance of a novel or previously controlled or eradicated infectious agent” presenting a “high probability” of a large number of deaths, serious or long-term disabilities, or widespread exposure posing a significant risk of substantial future harm

Allows for vaccination mandates and quarantines in limited circumstances

MSEHPA is widely accepted by numerous states, is broader than the standards currently in use, and recognizes that exemptions are intended to be the exception and not the rule

Non-recognition of exemptions in times of emergency is a reasonable limitation upon a privilege which states are not constitutionally compelled to grant

TRANSPARENCY

Transparency “focuses on publicizing information regarding non-vaccination, identifying children who are unvaccinated, and perhaps also publishing rates of vaccination of individual schools or other facilities, and localities”

- Allows parents to make informed choices about schools

- Provides information to nongovernmental organizations and health care providers which may prove useful to their efforts to increase vaccine uptake

- Potential stigmatizing impact and pressure to conform individual behavior

Several states require document retention by local school districts or the filing of annual reports

- Problems include privacy considerations and cumbersome procedures for accessing information

Preferable approach is one in which school districts actively engage interested parties

- Colorado’s approach requires school districts to annually disclose to all parents the exemption rates for measles, mumps, and rubella vaccinations, and any other required vaccinations in the district’s discretion

 - Exemption information reaches even the most passive of parents, does not require active searches, and maintains the privacy of persons seeking exemptions

CONCLUSIONS

The elimination of nonmedical exemptions is unrealistic, and the recognition of this reality by public health authorities and school administrators sooner than later is the preferable course

Recognition does not mean those responsible for the health and safety of students and the general public must surrender their authority to those who oppose vaccination for whatever reason

State and local officials must act to discourage, if not actively impede, exemptions utilizing the methods suggested in this paper which are already in place in existing state law

It is best to accept what cannot be changed, act to limit that which already exists, and prevent further erosion of the benefits associated with vaccination

In so doing, the interests of current public school students and future generations may best be protected

QUESTIONS, COMMENTS, CURSES, COMPLAINTS?

“If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content . . . those beliefs certainly occupy in the life of that individual a place parallel to that filled by God in traditionally religious persons.” *Welsh v. United States*, 398 U.S. 333, 340 (1970)

“Liberty of conscience is one thing. License to endanger the lives of others by practices contrary to statutes passed for the public safety and in reliance upon modern medical knowledge is another.” *Anderson v. State*, 65 S.E.2d 848, 852 (Ga. Ct. App. 1951)

