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DECOUPLING VACCINE LAWS

DORIT RUBINSTEIN REISS*

Abstract: School immunization requirements are an effective way of increasing vaccine rates and reducing outbreaks, but they may have a dark underside. Although such mandates protect the general public, the availability of exemptions may be open to exploitation as a tool to try to undermine other avenues for protecting the vaccine-deprived children themselves. This essay argues that exemptions from school immunization requirements should not be understood to limit the protections available to children due to a decision to withhold vaccines. The existence of an exemption should, however, prevent criminal prosecution if a child dies from a preventable disease, because a parent can justifiably believe they were acting legally.

INTRODUCTION

Consider the following set of facts: parents decide based on their religious beliefs that they will not vaccinate their newborn baby.¹ Although they have vaccinated their older child, this is their decision. The child is taken for routine pediatric visits at two, four, and six months of age; the doctor tries unsuccessfully to persuade the parents to vaccinate on each occasion. Their state requires certain vaccines to attend daycare but allows a religious exemption, which the parents have obtained, and the child begins daycare at the age of six months. At eleven months of age, the child develops meningitis caused by *Streptococcus pneumoniae*. The particular strain of bacteria that causes the meningitis is contained in the pneumococcal vaccine normally required for daycare attendance, and the infection could have been prevented had the parents chosen to immunize. The case is severe, causing the baby's brain to press down on the brainstem. The child stops breathing but is successfully resuscitated and survives. However, the child will never see, walk, speak, or hear again.

School immunization requirements are an effective way of increasing vaccine rates and reducing outbreaks,² but they may have a dark underside.

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¹ This scenario is based on discussions and anecdotes of practicing physicians. For a discussion of the position of various religions' positions on vaccination, see Dorit R. Reiss, *Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements*, 65 HASTINGS L.J. 1551 (2014).

² See Nina R. Blank et al., *Exempting Schoolchildren from Immunizations: States with Few Barriers Had Highest Rates of Nonmedical Exemptions*, 32 HEALTH AFFAIRS 1282, 1282 (2013); James

Although such mandates protect the general public, the availability of exemptions may be open to exploitation as a tool to try to undermine other avenues for protecting the vaccine-deprived children themselves. The argument of the exempting parent in the case above would be that by providing an exemption from school immunization requirements, the state is accepting refusal to vaccinate as a legitimate choice and thereby creating an individual parental right. That right, goes this argument, overrides the right of the child to be protected from disease and the rights of other individuals to be protected from the risks of nonvaccination. Other legal avenues—including civil and criminal actions against the nonvaccinating parents over the decision not to vaccinate—would therefore be precluded.

Taken as an overarching principle, this argument could imply that:

- a child could not bring suit in tort for harm due to a parent's refusal to vaccinate, so long as the parent has an exemption;
- hospital personnel could not go to court to seek a judicial order to vaccinate if they think a child was at risk of direct harm from not vaccinating if the parent has an exemption;
- a parent who wanted to vaccinate would be unable to obtain a judicial order to vaccinate over the opposition of the other parent if there is a legitimate exemption available;
- if a child died because of parental nonvaccination, no criminal action would be available against the parents; and
- other parents could not sue a nonvaccinating parent if their child were demonstrably harmed by that parent's decision not to vaccinate.

Such an argument could severely limit the tools available to protect children from vaccine-preventable diseases—and, with the exception of criminal law, is incorrect. Legally, the argument is faulty because school immunization requirements are generally predicated on public health—that is, achieving high enough rates of vaccination to preserve community immunity—not on protecting individual children from parental refusals to vaccinate. Specifically, it is incorrect in relation to tort liability because acting legally is not always acting reasonably. Furthermore, this argument is incorrect in relation to injunctions in the context of healthcare providers and family law because such injunctions provide judges with wide discretion to act in a child's best interest, beyond that which is explicitly spelled out in statute. Acceptance of this argument would also represent poor public policy, because it implies that children should be deprived of potential compensation and protection against disease on the basis

of statutes passed without in-depth consideration of the children's interests and individual situations.

Our jurisprudence revolves around three questions: first, if a child harmed by his or her parents' decision not to vaccinate—personally, or through a guardian or next friend—sued the parents for damages in tort, would the existence of a religious exemption prevent compensation? Second, what if, before the harm occurred, one parent wanted to vaccinate and appealed to the courts; would the existence of a religious exemption to school immunization requirements prevent granting that parent's request even if the court concluded that vaccinating was in the child's best interests? Last, if the state wanted to criminally prosecute the parents for the preventable harm to the child, would the religious exemption provide a defense, and should it? I will argue that exemptions from school immunization requirements should not be understood to limit the protections available to children due to a decision to withhold vaccines. These are two separate issues that should be treated separately. The existence of an exemption should, however, prevent criminal prosecution if a child dies from a preventable disease, because a parent can justifiably believe they were acting legally. Our courts have in the past rejected attempts to criminally prosecute parents exercising such exemptions—and rightly so.³

This Essay proceeds in three parts. The first reviews the history of exemptions, explaining that the discussions focused on the risk to the public from the unvaccinated children, not on protecting children themselves from their parents' decisions. The second part explains why such laws should not prevent liability in tort or prevent courts from requiring immunization in appropriate cases. The final part explains why criminal law is different, and why a parent using an exemption should be protected from criminal prosecution if a child (whether theirs or another's) is harmed, and suggests that if this is to change, legislative action is needed, including clear notice to exempting parents.

I. WHY EXEMPTIONS?

It is important to keep in mind that exemptions from school immunization requirements are not based on any in-depth consideration of the rights of the child. This is reflected in both legislative debates and jurisprudence. Similarly, the rationale for school immunization requirements has generally been the public good, not the individual health of unimmunized children.⁴ Neither were

³ See *In re Maria R.*, 366 N.Y.S.2d 309, 311 (Fam. Ct. 1975); see also *State v. Miday*, 140 S.E.2d 325, 329 (N.C. 1965) (holding that conviction under North Carolina's compulsory school attendance statute was improper where defendant father kept his son out of school in the good faith belief that he was within the rights provided him by the statute's religious exemption from inoculation requirements).

⁴ In the 1960s, the focus was sometimes on fiscal health. See JAMES COLGROVE, *STATE OF IMMUNITY: THE POLITICS OF VACCINATION IN TWENTIETH-CENTURY AMERICA* 174–75 (2006).

exemptions added out of concern for the health of individual children. The argument for exemptions in the 1960s and 1970s, when most school immunization laws and the accompanying exemptions were passed, was to protect parents' religious scruples, "largely in response to the lobbying efforts of Christian Scientists."⁵ The interests of children left unvaccinated were not the focus of these discussions.

Attention was only paid to the effects on unvaccinated children when events dramatically and vividly demonstrated the risk to such children from the existence of exemptions, and even then, only to a limited degree. This happened, for example, in a 1972 outbreak of polio at Daycroft, a Christian Scientist boarding school in Connecticut, after years in which the nation had seen very few cases. Eleven unvaccinated children aged seven to eighteen were afflicted, with nine left paralyzed.⁶ This outbreak led to at least one reply calling into question the legitimacy of the exemption.⁷

Exemptions, in other words, were not created to protect children. Their passage did not involve serious discussion of whether they do or do not protect the exempted children. They were part and parcel of an effort to protect the public health and were a political judgment that the public health would not be endangered by accommodating the beliefs of a minority of parents—even if those beliefs were mistaken, without basis, or against the interests of the children left unvaccinated. The effect on unvaccinated children was an incidental matter.

A look at the related jurisprudence reinforces this. In *Zucht v. King*, the first case to address school immunization mandates, the Supreme Court of the United States focused on the state's power to protect the public health, not the health of the child—the latter interest, again, was secondary.⁸ No case has interpreted exemptions as existing to protect children. In *Workman v. Mingo County Board of Education*, the U.S. Court of Appeals for the Fourth Circuit highlighted that the jurisprudence emphasized community welfare over individual rights.⁹ Most recently, in *Phillips v. New York*, the U.S. Court of Appeals for the Second Circuit stated the following:

The [Supreme] Court rejected the claim that the individual liberty guaranteed by the Constitution overcame the State's judgment that mandatory vaccination was in the interest of the population as a

⁵ *Id.* at 180.

⁶ See Louis Weinstein, *Poliomyelitis—A Persistent Problem*, 288 NEW ENG. J. MED. 370, 370 (1973).

⁷ See Stanley W. Ferguson, *Mandatory Immunization*, 288 NEW ENG. J. MED. 800 (1973).

⁸ See *Zucht v. King*, 260 U.S. 174, 177 (1922) (noting that compulsory vaccination ordinances confer on municipalities the broad discretion necessary to protect public health).

⁹ See *Workman v. Mingo Cnty. Bd. of Educ.*, No. 09–2352, 2011 WL 1042330 at **4–6 (4th Cir. 2011).

whole. Plaintiffs argue that a growing body of scientific evidence demonstrates that vaccines cause more harm to society than good, but as *Jacobson* made clear, that is a determination for the legislature, not the individual objectors.¹⁰

On the rare occasions in which examinations of school immunization requirements have explicitly addressed the interests of the child, the courts strongly supported the child being vaccinated. In *Prince v. Massachusetts*, the Supreme Court's explanation of why mandatory vaccination is constitutional even in the face of parental religious objections relied in part on protecting the child from being exposed "to communicable disease or . . . to ill health or death."¹¹ The Mississippi Supreme Court's decision in *Brown v. Stone* striking down the state's religious exemption was also based in part on protecting children from disease.¹² In no case has an exemption been upheld on the grounds that it is fundamentally in the interest of the child in question—quite the opposite. Exemptions have been upheld as part of the state's power to *balance* public health with the rights of parents, but each case that has confronted the issue has emphasized the public health rationale.

In short, the focus of legal considerations of nonmedical exemptions to school immunization requirements has clearly not been the protection of individual children, much less allowing parents to harm their children. To infer a parental right to leave children unvaccinated, and thus at risk of disease, is to read more into statute and judicial interpretations than is plausible. Moreover, any attempt to use such a hypothetical right to deny children protection from other bodies of law would be unfair, as addressed below.

II. EXEMPTIONS AND THE CIVIL PROTECTIONS OF UNVACCINATED CHILDREN

While a detailed discussion of the legal tools available to protect children from the harms of withholding vaccination is beyond the scope of this Essay,¹³ this section outlines why exemptions should preclude neither tort liability nor court intervention in favor of vaccination, whether at the request of one parent against the other or against the will of both, in appropriate circumstances.

¹⁰ *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir.) (per curiam) (citations omitted), *cert. denied*, 136 S.Ct. 104 (2015).

¹¹ *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

¹² See *Brown v. Stone*, 378 So. 2d 218, 221 (Miss. 1979) (“Is it mandated by the First Amendment to the United States Constitution that innocent children, too young to decide for themselves, are to be denied the protection against crippling and death that immunization provides because of a religious belief adhered to by a parent or parents?”).

¹³ See generally Dorit R. Reiss & Lois A. Weithorn, *Responding to the Childhood Vaccination Crisis: Legal Frameworks and Tools in the Context of Parental Vaccine Refusal*, 63 *BUFF. L. REV.* 881, 952–79 (2015).

Because the interests of the child have not historically been part of the discussion of school immunization requirements, using exemptions to deny children compensation from tort liability is inappropriate. I have previously argued that there is no reason to presume any legislative intent to shield such parents from tort liability:

[T]he legislature, in allowing parents to send children to public school without immunization, may not have intended to shield them from liability if another is harmed by the parents' choice. The considerations are different. In allowing religious or philosophical exemptions, the state is deciding which reasons justify allowing the child to attend school, even at the risk of exposing others. The child's right to an education and the interest of the state in having educated citizens are important considerations Those rights are not at stake when deciding whether to compensate those hurt by failure to vaccinate.¹⁴

Furthermore,

[A]cting legally is not necessarily acting reasonably. It is legal to have a pile of hay on your property, but it might be unreasonable. It was legal to use non-tempered glass in shower enclosures in New York before 1973, but that did not make it reasonable.¹⁵

Similar rationales apply to courts' authority to order vaccination against the parents' will. The available rationale in such a case is finding the harm from not vaccinating to be high enough to override the medical choice of otherwise competent guardians—a rare event.¹⁶ Imagine, for example, parents refusing to protect a child with cystic fibrosis from respiratory illnesses. Parents have a duty to provide medical aid to their children, which courts can and have enforced, up to the point of appointing a guardian or overruling parental

¹⁴ Dorit R. Reiss, *Compensating the Victims of Failure to Vaccinate: What Are the Options?*, 23 CORNELL J.L. & PUB. POL'Y 595, 617–18 (2014) (footnotes omitted).

¹⁵ *Id.* at 618 (footnotes omitted).

¹⁶ One such case is a Kings County Family Court decision out of New York in 1992. *See In re Christine M.*, 595 N.Y.S.2d 606, 618 (Fam. Ct. 1992) (finding that a parent's failure to vaccinate his child against measles in the midst of an outbreak caused the child to become a "neglected child" within the statutory meaning, but ultimately declining to "utilize its discretionary power to order inoculation" because the "urgency" of the outbreak had subsided). Another case, this one in Philadelphia in the 1990s, is mentioned in PAUL A. OFFIT, *BAD FAITH: WHEN RELIGIOUS BELIEF UNDERMINES MODERN MEDICINE* 110 (2015) (describing an order by a Philadelphia judge to vaccinate children over parental objection after several children died in a religious group that opposes vaccination). There may conceivably be additional cases—for example, cases of children whose mother was hepatitis B positive and refused to vaccinate her newborn, who is at high risk; or cases of children bitten by an unknown dog whose parents refuse the rabies vaccine.

decisions.¹⁷ There is no reason to think that a school immunization requirement, passed with a focus on public health, was aimed at denying children life-saving vaccines in high-risk situations or at providing support to a parent who, against the scientific evidence, wants to deny a child protection from disease when the other parent objects.

Similarly, when there is a custody issue, the interests of the child support allowing vaccination when there is a dispute. The risks of vaccines are real, but very small, and for each vaccine on the recommended schedule, the risks of not vaccinating outweigh those of the disease.¹⁸ Despite this, one could argue that the very existence of an exemption justifies not vaccinating. But using an exemption aimed at school age children to refuse vaccinating infants is unpersuasive and, even at school age, there is no basis to claim that the legislature intended to deny custodians the ability to make this medical particular decision that serves the child's interest. Most courts have correctly been supportive of vaccinating when there exists cause to allocate power and examine guardianship. In one line of cases across states, courts have found that if a parent loses custody of a child and the child becomes a ward of the state, the state can vaccinate over the parent's objection even if there is a legal exemption otherwise available to the parent.¹⁹ The same logic should apply when one parent seeks to vaccinate and the other opposes.²⁰ The existence of an exemption should not lead courts to act in a way that goes against the child's best interest, and being protected from the much larger risk of not vaccinating is in the child's best interest.

III. CRIMINAL LAW IS DIFFERENT

In the early 1950s and 1960s, criminal law was used against parents who did not vaccinate their children by means of truancy statutes.²¹ But even then,

¹⁷ See *In re Sampson*, 317 N.Y.S.2d 641, 659 (Fam. Ct. 1970), *aff'd*, 323 N.Y.S.2d 253 (App. Div. 1971), *aff'd*, 278 N.E.2d 918 (N.Y. 1972); *In re S.H.*, No. 13CA0066–M, 2013 WL 5519847, at *11 (Ohio Ct. App. 2013) (holding that when parents cannot or will not consent to a minor's potentially life-saving treatment, someone may be appointed by the court to approve the procedure in the interest of the child's life and health).

¹⁸ See Reiss & Weithorn, *supra* note 13, at 886–88; see also Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?* 37 MICH. J. L. REFORM 353, 392–93 (2004).

¹⁹ These states include Oregon, *Dept. of Human Serv. v. S.M.*, 323 P.3d 947, 954–55 (Or. 2014); North Carolina, *In re Stratton*, 571 S.E.2d 234, 238 (N.C. Ct. App. 2002), *rev. den.*, 573 S.E.2d 512 (N.C. 2002); and Georgia, *In re C.R.*, 570 S.E.2d 609, 611 (Ga. Ct. App. 2002). The only exception, to this author's knowledge, is a 2–1 Arizona Court of Appeals decision over a strong dissent. See *Diana H. v. Rubin*, 171 P.3d 200, 209 (Ariz. Ct. App. 2007).

²⁰ In at least one case, that was not done. See *Grzyb v. Grzyb*, 79 Va. Cir. 93 (2009). Other cases have found differently. See *Welker v. Welker*, 129 N.W.2d 134, 138 (Wis. 1964).

²¹ See *Anderson v. State*, 65 S.E.2d 848, 852 (Ga. Ct. App. 1951); *State v. Drew*, 192 A. 629, 632 (N.H. 1937).

if a parent had a legitimate exemption available, no conviction would ensue.²² There is good reason for this, at least for parents who actively obtained an exemption.²³ Every state has procedures to obtain an exemption from school vaccination requirements. A parent who has gone through those procedures and obtained an exemption could justifiably believe that they are acting fully within the law when refusing to vaccinate their children. For the state that issued the exemption to then turn around and bring a criminal prosecution against exemption-holding parents is intuitively unfair.

On a related issue—whether a faith healing exemption from murder or manslaughter statutes protected a parent from criminal prosecution—courts have been split. Some courts have found that due process requires exonerating the parents, who did not have fair warning that their choice was criminal.²⁴ Others have found that the parent using faith healing acts at her peril, and may be prosecuted if the child dies.²⁵ Here, however, the case against prosecution is even stronger. Non-vaccinating parents can claim—with some justification—that they have been led by the state to believe their actions were not criminal. They cannot make such a claim in tort, because one is presumed to know that what is legal is not always reasonable. Injunctions to vaccinate are prospective and do not carry the same after-the-fact penalty, but criminal prosecutions seem unfair in these circumstances—at least, without something more. For example, a parent participating in a so-called chicken pox party might be vulnerable to prosecution, because the exemption does not cover intentionally sickening one's child.²⁶

Legislatures can, of course, choose to deviate from this scheme and allow for criminal prosecution by explicitly including language in the exemption law which clarifies that the grant of an exemption does not preclude criminal prosecution, and mandating inclusion of such language on the documents required to obtain an exemption. Without explicit warning, however, criminal prosecution is unfair.

²² See *In re Maria R.*, 366 N.Y.S.2d 309, 309 (Fam. Ct. 1975); *State v. Miday*, 140 S.E.2d 325, 329 (N.C. 1965).

²³ A separate but interesting question is presented by parents who qualify for an exemption but fail to seek or obtain one.

²⁴ See *Hermanson v. State*, 604 So. 2d 775, 782 (Fla. 1992); *State v. McKown*, 475 N.W.2d 63, 69 (Minn. 1991); *State v. Miskimens*, 490 N.E.2d 931, 937–38 (Ohio C.P. 1984).

²⁵ *Walker v. Superior Court*, 763 P.2d 852, 871–72 (Cal. 1988); *Hall v. State*, 493 N.E.2d 433, 435 (Ind. 1986); *Commonwealth v. Barnhart*, 497 A.2d 616, 624–25 (Pa. Super. Ct. 1985).

²⁶ Christine Vara, *Think Chickenpox Is Party Worthy? Think Again*, SHOT OF PREVENTION (Aug. 13, 2013), <http://shotofprevention.com/2013/08/13/think-chickenpox-is-party-worthy-think-again> [<https://perma.cc/Z33V-ARV3>].

CONCLUSION

Vaccines protect children's lives at very low risk compared with the diseases they protect against. When parents, in the absence of a bona fide medical contraindication, choose not to vaccinate—whatever their reasons, and however much they think they are acting for the benefit of their child—they are choosing the greater risk. The legal tools available to protect children from paying the often-high price of that choice are limited, but they do exist. They should not be artificially limited or barred because legislatures, balancing parental rights with preventing outbreaks, have allowed limited belief-based exemptions from school immunization requirements. Exemption statutes are not predicated on the interests of unvaccinated children, who are incidental to the discussion. Because the child's interest is not the focus, using those statutes to undermine the routine civil protections available to such children is unfair and should not be done. Children are vulnerable as it is; the law should protect them more, not less.

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