

# Religious and Philosophical Exemptions from Vaccination Requirements and Lessons Learned from Conscientious Objectors from Conscriptio

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## SYNOPSIS

All jurisdictions in the US require proof of vaccination for school entrance. Most states permit non-medical exemptions. Public health officials must balance the rights of individuals to choose whether or not to vaccinate their children with the individual and societal risks associated with choosing not to vaccinate (i.e., claiming an exemption). To assist the public health community in optimally reaching this balance, this analysis examines the constitutional basis of non-medical exemptions and examines policies governing conscientious objection to conscription as a possible model.

The jurisprudence that the US Supreme Court has developed in cases in which religious beliefs conflict with public or state interests suggests that mandatory immunization against dangerous diseases does not violate the First Amendment right to free exercise of religion. Accordingly, states do not have a constitutional obligation to enact religious exemptions.

Applying the model of conscientious objectors to conscription suggests that if states choose to offer nonmedical exemptions, they may be able to optimally balance individual freedoms with public good by considering the sincerity of beliefs and requiring parents considering exemptions to attend individual educational counseling.

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Immunizations are among the most cost-effective and successful of all public health interventions. Because of the high contagion, morbidity, and mortality associated with most vaccine-preventable diseases (VPDs); the frequency of VPD transmission in school settings; and the safety, effectiveness, and potential financial savings offered by vaccines; all jurisdictions in the United States have introduced and actively enforce laws that require proof of immunization for school entrance.<sup>1,2</sup> Many of the laws were written with specific reference to smallpox and were later amended to include other VPDs.<sup>3</sup>

Although no federal laws mandate immunization, the US Supreme Court has upheld the constitutionality of state vaccination laws. In 1905, the Court ruled in favor of a Massachusetts law; in 1922, the Court specifically addressed vaccination as a prerequisite for school attendance.<sup>4</sup> These federal rulings have served as precedents for state court rulings. State immunization laws permit certain exemptions: All states allow medical exemptions (e.g., for people who are immunocompromised, those who have allergic reactions to vaccine constituents, and those who have moderate or severe illness); 48 states offer religious exemptions, and 17 states offer philosophical or personal exemptions.<sup>3</sup> The distinction between religious and philosophical/personal exemptions varies from state to state, depending primarily on the manner in which the laws are implemented and enforced.<sup>4</sup> In many states the process of claiming a nonmedical exemption requires less effort than fulfilling the immunization requirements, and often there is no contact between the parent and health personnel. The reasons that parents forgo vaccination altogether have not been well explored, but the ease of obtaining an exemption has been quantitatively associated with the frequency of exemptions.<sup>6</sup>

Data from Colorado suggest that the rate of exemptions is increasing.<sup>5</sup> Between 1987 and 1998, the percentage of personal exemptions among school-aged children in Colorado increased from 1.25% to 2.05% ( $p < 0.001$ ). Although the percentage of medical exemptions remained unchanged at 0.12% and religious exemptions decreased from 0.23% to 0.19% ( $p < 0.001$ ), the rate of philosophical exemptions increased from 1.02% to 1.87% ( $p < 0.001$ ). Nationally, a 1999 survey of state and territorial immunization program managers found that 11 programs (18%) reported an increase in the number of persons claiming exemptions, and only one program (1.6%) reported a decrease in the number of people claiming exemptions (personal communication: Beth Hibbs, RN, MPH,

National Immunization Program, Centers for Disease Control and Prevention; August 2000).

The health consequences of claiming religious and philosophical exemptions have recently been explored. A study of measles in the late 1980s and early 1990s found that children (5 to 19 years old) for whom religious and philosophical exemptions had been claimed were at greater risk (relative risk [RR] = 35) of contracting the disease than vaccinated children. In the same study, mathematical modeling suggested that those exempted represent a risk to the non-exempt population.<sup>6</sup>

Another study of measles and pertussis occurring in Colorado between 1987 and 1998 found excluders to be 22 times more likely than vaccinated children to acquire measles and 5.9 times more likely to acquire pertussis. The same study found the rate of exemptions in a given county to be associated with the incidence rate of measles (RR = 1.6) and pertussis (RR = 1.9) in vaccinated children; further, schools with pertussis outbreaks had more excluders (4.7% students) than schools without outbreaks (1.3% students,  $p < 0.001$ ). At least 11% of vaccinated children in measles outbreaks were infected through contact with an excluder. An international study of pertussis found that changes in public perception and policy toward vaccination led to decreases in pertussis immunization, resulting in a major resurgence in disease incidence in many developed countries.<sup>7</sup>

Public health officials at state and local levels, who are responsible for maintaining and implementing state immunization laws, must balance the rights of individuals to choose whether or not to vaccinate their children against the individual and societal risks associated with choosing not to vaccinate (i.e., claiming an exemption). The aforementioned studies assist in quantifying the health risks of not vaccinating, but they do not address how to balance these risks with individual freedoms concerning vaccination choice. In 1999, legislation was introduced and debated in at least eight states to ease state vaccination laws or to add a philosophical exemption if one did not already exist. One state, Arizona, passed legislation permitting philosophical exemptions (personal communication: Rachel Woods, MPH, National Immunization Program, Centers for Disease Control and Prevention; August 2000). In 1997, the National Vaccine Advisory Committee (NVAC), which advises the Assistant Secretary for Health and the Director of the National Vaccine Program Office on immunization policy, formed a working group to examine the issue of philosophical exemptions. The NVAC Philosophical Exemption Working

Group issued a report that summarized existing data and reflected a variety of viewpoints on the issue, but the group did not make specific recommendations regarding states permitting nonmedical exemptions.<sup>8</sup> Thus, states continue to be confronted with these issues without policy recommendations from the federal government or its advisory committees.

To assist the public health community and those responsible for maintaining and implementing state immunization laws in reaching an optimal balance between individual rights and public health risk, this analysis examines the constitutional basis of religious and philosophical exemptions from state laws and considers issues pertaining to conscientious objectors from conscription as a possible model.

### THE CONSTITUTIONALITY OF RELIGIOUS-BASED EXEMPTIONS

It is well established as a matter of constitutional law that police powers authorize states to compel vaccination in the interest of public health.<sup>9,10</sup> However, the US Supreme Court has never ruled on the constitutionality of religious exemptions from vaccination requirements. There are two central constitutional questions: (a) Does the First Amendment right to free exercise of religion require states to provide religious exemptions from vaccination? (b) Do states have the constitutional authority to enact religious exemptions from compulsory vaccination?

The Court has developed jurisprudence in cases where religious beliefs conflict with public or state interests; the Court rulings suggest that mandatory immunization against dangerous diseases does not violate the First Amendment right to free exercise of religion. In a recent case the Court stated, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."<sup>11</sup> The Court held that a law does not interfere with the right to free exercise of religion as long as it is religion-neutral and generally applicable. The Court specifically weighted the balance in favor of public health concerns where they were in conflict with religious beliefs, and the Court further underscored the importance of protecting children from the potentially harmful consequences of parental decisions based on those beliefs: "The right to practice religion freely does not include the liberty to expose the community or the child to communicable disease or the latter to ill health or death . . . . Parents may be free to become martyrs themselves. But it does not follow that they are

free in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."<sup>12</sup>

A number of state courts have applied this reasoning in holding that mandatory vaccination of school children does not interfere with the right to religious freedom. As the Arkansas Supreme Court noted in one such instance, "In cases too numerous to mention, it has been held, in effect, that a person's right to exhibit religious freedom ceases where it overlaps and transgresses the rights of others."<sup>13</sup>

Although it is widely agreed that states do not have a constitutional obligation to enact religious exemptions, it is somewhat less settled whether states have the constitutional authority to enact such exemptions in the context of mandatory vaccination. The Mississippi Supreme Court has held that religious exemptions to compulsory vaccination violate equal protection of the laws under the Fourteenth Amendment inasmuch as the exemptions "require the great body of school children to be vaccinated and at the same time expose them to the hazard of associating in school with children exempted . . . who had not been immunized as required by the statute."<sup>14</sup> Mississippi is one of two states that do not permit nonmedical exemptions.

Even if it is assumed—as it generally is—that states possess the constitutional authority to enact religious exemptions from vaccination, there remains an issue concerning what limitations a legislature can place on the scope of such exemptions. There is some disagreement among courts concerning whether exemptions tied to membership in a recognized or established religious organization violate the First Amendment prohibition against laws "respecting an establishment of religion." Some courts have upheld exemptions for the children of parents with "sincere religious beliefs" but found the requirement for parental membership in an established or recognized religious organization to entail preferential treatment for certain religious views and thus to stand in violation of the Establishment Clause of the First Amendment.<sup>15</sup> Other courts have held that such requirements are compatible with the Establishment Clause.<sup>16</sup>

The issue of the limits of a state's constitutional authority to enact religious exemptions will not be resolved until the US Supreme Court addresses it. For the time being, individual states have the de facto power to decide the matter for themselves. We do not offer a view on whether it is constitutionally (or morally) appropriate to provide for religious exemptions from vaccination; however, we do believe that it is

important to identify some principles to guide the application of these exemptions where they exist. The identification of such principles can usefully be informed by the considerable legislative and judicial thought that has been given to mandatory military conscription and the permissibility of conscientious objector status.

In general, there are many commonalities between conscientious objectors from conscription and non-medical exemptions from vaccination. To protect the national interests from external threats, Congress has at times (legislatively) required a portion of the public to bear arms and fight an external enemy. Likewise, to fight the war on infectious diseases, states legislatively require their citizens to be vaccinated. These duties (to bear arms and to be vaccinated) are generally considered a potential obligation that goes hand in hand with enjoying the benefits of citizenry. With this potential obligation come associated individual risks and individual and societal benefits. Furthermore, because the individual risks associated with both wars (e.g., battle injuries and vaccine injuries) are real but unpredictable, society has found general mandates in the form of the draft for conscription and school entry laws for immunization to be the most equitable way to share these risks. To accommodate the beliefs of a small minority of people who have strong personal conviction against war (or vaccination), states legislatively permit certain persons to be exempted from military duties (or immunization). Those exempted enjoy societal benefits resulting from others who serve active duty (who get immunized), and yet they do not share the associated risks. Another small group is exempt from military service or vaccination for medical reasons.

Of course, there are qualitative differences between conscription and vaccination. The magnitude of risk associated with vaccination pales in comparison to the risk associated with conscription, and the benefits of vaccination are substantially individual as well as societal. In comparison, the benefits of conscription are primarily societal. Thus, assessment of individual risks and benefits associated with vaccination generally favors vaccination, whereas assessment of the risks and benefits to the individual may not favor conscription. In addition, adults incur the risks associated with conscription, whereas children incur the risks associated with vaccination, and the expressed beliefs being considered for exemptions are those of parents, not children. Moreover, successful immunization campaigns require very high levels of participation (vaccination coverage) for optimal success, whereas conscription entails enlisting the number of people needed to fill

the rolls of conscription (which could require universal participation, as in some countries, although this has not happened in the US to date). People who have strongly held beliefs against armed conflict are likely not good candidates for military service; in contrast, the beliefs of individual parents regarding vaccination do not alter their children's candidacy for vaccination.

Notwithstanding the differences between conscription and vaccination issues, the many similarities and considerable legislative and judicial thought invested in the issue of conscientious objectors make this model particularly useful in a consideration of efforts by the state to balance individual freedoms with societal interests in enforcing mandatory vaccination. Moreover, the public is apt to recognize the similarities between immunization exemptions and conscientious objectors from conscription.<sup>17</sup>

### CONSCIENTIOUS OBJECTORS FROM CONSCRIPTION

Conscientious objector status has been an issue associated with conscription in America since the Revolutionary War, as illustrated in a letter written by the commander of the Revolutionary Armies, George Washington: "As . . . the principal object of the enemy is . . . the City of Philadelphia, it is absolutely necessary, that every person able to bear arms (except such as are conscientiously scrupulous against in every case), should give their personal service."<sup>18</sup>

Congress has included a conscientious objector exemption for military service since 1864.<sup>19</sup> Congressional enactment of conscientious objector status has specific conditions: individuals must meet the burden of proof by establishing that they (*a*) are conscientiously opposed to war in any form; (*b*) this opposition is based on religious training; and (*c*) the objection is sincere.<sup>20</sup> Once people claiming such status have fulfilled these three conditions, the government must prove an overwhelming need to draft such individuals. One definition of "overwhelming need," in this context, is that the government must have a compelling interest in universal enforcement of the regulation.<sup>14</sup> It is generally agreed that the US government has never met this burden of proof.<sup>21</sup>

The US Supreme Court has directly addressed the question of the conditions under which conscientious objections to war are grounded in "religious belief." In its most recent ruling on the issue, the Court held that federal legislation that excludes those with "essentially political, sociological, or philosophical views or a merely personal moral code" from exemption applies to "those whose beliefs are not deeply held and those whose

objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency.”<sup>22</sup> Thus, a sincere objection based on “moral, ethical, or religious beliefs about what is right or wrong” would be allowed because it falls within the Court’s definition of “religion.”

The Court’s finding is, however, controversial. In his concurring opinion, Justice John M. Harlan states that the Court “performed a lobotomy and completely transformed the statute by reading out of it any distinction between religiously acquired beliefs and those deriving from ‘essentially political, sociological, or philosophical views or a merely personal moral code.’” Harlan nonetheless concurs in the Court’s ruling because he holds that it is unconstitutional to permit exemptions for religious reasons only: “However, having chosen to exempt, it (Congress) cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment.”<sup>21</sup> Thus, even if we reject that philosophically based beliefs count as religious beliefs, permitting religious but not philosophical exemptions may be unconstitutional.

### **POLICY CONSIDERATIONS RAISED BY CONSCIENTIOUS OBJECTORS**

Legislative and judicial decisions regarding conscientious objectors offer a useful model for considering issues related to mandatory vaccination and nonmedical exemptions and the fair allocation of burdens and benefits. The burden of proof as established by Congress for conscientious objectors has not been universally or comprehensively applied to exemptors from mandatory immunization requirements. Immunization exemptions are granted through the state legislature. Doctors verify the sincerity of medical exemptions by providing needed documentation. Some states allow only religious exemptions and require applicants to provide a letter from a religious leader who explicitly states that immunizations are contrary to that religion’s doctrine. This is a partial application of the burden of proof for individuals claiming exemption. However, other states require no substantiation of beliefs. For example, in California a clause printed on the back of the immunization form raises the question of whether immunizations are contrary to the “personal beliefs” of the individual to be immunized (or more appropriately, to the parents). Signing this clause qualifies as an exemption, but no burden of proof has been required. In such a case, the parent, by signing, may

simply be pursuing the path of least resistance. It is certainly easier to sign your name than to make an appointment with a doctor or at a clinic, arrange to take a child to the clinic, and spend time (and perhaps money) to have a child immunized.

It is particularly difficult to address sincerity of beliefs: How does one prove sincerity? One approach that can be considered is the willingness of an individual to overcome barriers to achieving the goal (of claiming an exemption). If the process is very simple, as is in some states, anyone with even the slightest desire to claim an exemption can easily do so. Conversely, if the state demands more proof of sincerity for claiming an exemption, those whose beliefs are not as strong may decide not to pursue an exemption. What would have been the frequency of conscientious objectors from conscription had the Selective Service granted conscientious objector status as easily as California grants immunization exemptions?

The Supreme Court expansion of conscientious objector status to include people with strongly held philosophical beliefs poses some difficult issues for immunization exemptions. In principle, scrutinizing the sincerity of a parent’s beliefs based on a perhaps arbitrary boundary (religion vs. philosophy) may not be just and risks public backlash. Moreover, as Justice Harlan argued, such a boundary may fail to be neutral and thus violate the Establishment Clause of the First Amendment. Yet, expansion of philosophical exemptions could easily lead to more exemptions and, consequently, greater risk of disease.<sup>6-10</sup> If states are able to expand the definition of nonmedical exemptions to include philosophically based beliefs, and at the same time ensure a system that requires individuals who are applying for exemptions to meet carefully constructed criteria demonstrating strong sincerity of belief, it may be possible that the expanded definition will have little or no effect on the overall number of exemptions. This approach, if successful in changing the criteria for permitting exemptions without affecting the frequency of exemption, would have zero effect on total disease incidence but would assist in fair and equitable allocation of exemptions. This approach presents a very fine line for legislators to walk; yet it may offer state legislatures a strategy in addressing these difficult and often controversial issues.

Another approach that states can consider is to require parents who are seeking philosophical or religious exemptions for their children to attend individual educational counseling provided by a nurse or health educator. In this way the parents can be made aware of vaccine issues and be told of the individual and societal risks of not vaccinating. This approach

will ensure that parents understand the health consequences of the choice they are considering, resulting in better informed parents able to make meaningful choices that take into account not only their children's best interests but the interests of society as well. The proposed counseling process would also ensure rigor and uniformity in administering nonmedical exemptions, features that often are lacking in the current process.<sup>6</sup> Such a process would also make it less likely that a parent would make the exemption choice simply because it is easier, and could ensure that the exemption process not be perfunctory, as it often is now.

Whereas the state (historically) likely could not meet the burden of proof demonstrating overwhelming need for universal enforcement of conscription, this may not be the case for universal enforcement of immunization requirements. If the state maintains a zero tolerance for societal risk due to exemptions, the state could likely demonstrate the need for universal application of mandatory vaccination. In addition, disease eradication efforts may constitute a situation requiring universal coverage of vaccination, as illustrated by the fact that the last significant outbreaks of polio in the US occurred in religiously exempt communities (although elimination of polio was achieved in the US without compelling complete immunization of these groups). Conversely, the present success of the US immunization program in reaching record low rates of most VPDs, and the relatively small frequency of exemptions, suggest that universal coverage may not be necessary. The question is: How much societal risk is required to prove the need for universal application? Policies on exemptions from conscription do not assist us in understanding this issue because the state has never tried to demonstrate overwhelming need for universal application.

It is critical to recognize the importance of flexibility in the state administration of immunization exemptions. All school immunization requirements are state-based; there are no federal laws mandating vaccination. As indicated by a representative of the Association of State and Territorial Health Officers, "variations in state laws reflect differing constituencies and political cultures among the states, and decisions regarding the balance of individual vs. state rights are best left at the state level."<sup>11</sup> State autonomy is critical. The strategies proposed in our analysis preserve considerable flexibility in state implementation of immunization exemptions.

These policy considerations are consistent with available data. A recent study by Rota and associates found that states that easily permitted exemptions had sig-

nificantly more exemptions than states that made the process more difficult.<sup>6</sup> Furthermore, this study found that about half of the states that did not offer philosophical exemptions never denied an exemption request. These states are de facto permitting philosophical exemptions. States and localities may find that carefully monitoring and evaluating the process by which exemptions are granted, rather than focusing on the basis for granting exemptions (religious vs. philosophical), may more fairly balance the rights of individuals with the protection of the community from VPDs. Additionally, the Rota study found that only nine states (19%) reported having a written policy to inform parents requesting an exemption of the risks of not immunizing. This is clearly a missed opportunity for vaccine risk communication.

## CONCLUSIONS

This review of legal issues pertaining to non-medical exemptions from mandatory immunization requirements indicates that states do not have a constitutional obligation to offer individuals exemptions. If states choose to offer nonmedical exemptions in an effort to accommodate the beliefs of a small minority of parents, they may be able to successfully balance individual freedoms with the public good by considering the sincerity of beliefs, rather than the source of such beliefs, and by requiring parents considering exemptions to prove the sincerity of beliefs, including attending individual educational counseling provided by a nurse or health educator knowledgeable of vaccine issues.

Immunization programs in the US are at a critical threshold: their success has never been more apparent, yet that very success endangers appreciation by the public. As we are now experiencing all-time low rates of most VPDs, reported post-vaccination adverse events, whether or not causally linked to vaccination, outnumber cases of most VPDs. Under these conditions, public attention can easily shift from preventing disease to vaccine safety. This change in focus can lead to complacency on the part of parents and potentially increase the number of exemptions. History tells us that such a shift can result in resurgence of disease and needless morbidity and mortality.<sup>9,10</sup>

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