

Legal Issues Raised by the Growing International Movement Away From Mass Mandatory Immunization

“There is no evidence whatsoever of the ability of vaccines to prevent any diseases. To the contrary, there is a great wealth of evidence that they cause serious side effects.” Viera Scheibner, Ph.D., retired senior researcher for the Australian government and author of *Vaccination: 100 Years of Orthodox Research shows that Vaccination represents a Medical Assault on the Immune System*, following analysis of more than 30,000 pages of the medical literature on vaccinations.

“BE IT THEREFORE RESOLVED: That AAPS calls for a moratorium on vaccine mandates and for physicians to insist upon truly informed consent for the use of vaccines.” Resolution to Congress by unanimous vote of the Association of American Physicians and Surgeons at its 57th annual convention in St. Louis, October, 2000.

There is a growing international movement away from mass mandatory immunization, in response to a growing body of evidence suggesting that vaccines may be of little true benefit yet the cause of widespread injury and a substantial number of deaths.¹ The evidence has fueled a highly emotional controversy. This paper introduces some of the legal issues raised by this controversy in the U.S., with a focus on legal exemptions.

I. Background

Vaccines are licensed by the FDA. The Advisory Committee on Immunization Practices (ACIP), whose members are appointed by the CDC, makes recommendations concerning the addition of vaccines to the Childhood Immunization Schedule, which are generally enacted into law by state legislatures (or public health departments where such power has been delegated by the state legislature). Currently, 36 vaccinations are recommended by age five, and CDC plans include many additional requirements not only for early childhood, but also for older people, ranging from teenage vaccination for STDs and AIDS to adult revaccination for childhood infectious diseases. With over 200 vaccines under development, some 100 of which are already in clinical trials, and with every man, woman and child in the world a potential recipient of vaccinations periodically throughout their lives, the vaccine market is, in a word, gargantuan. The tension between the powerful financial incentives and the growing faction of people who believe that current vaccine policies and trends cause more harm than good is a highly emotional one that has contributed to the emergence of a wide spectrum of legal issues.

II. Exemptions and Exceptions to Vaccination Requirements

The Supreme Court first addressed vaccine mandates in Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905). Jacobson challenged the constitutionality of Massachusetts' vaccination requirement; he had suffered a severe adverse re-

¹ Alan Phillips, “*Dispelling Vaccination Myths*” at <http://www.unc.edu/~aphillip/www/chf> (1997), reprinted in *EPIDEMICS, OPPOSING VIEWPOINTS*, Greenhaven Press 99-108 (1999).

action to a previous vaccine and so refused revaccination, despite a local outbreak. The Supreme Court answered: “While we do not decide and cannot decide that vaccination is a preventive of smallpox², we take judicial notice of the fact that this is the common belief of the people of the State, and with this fact as a foundation we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power.”³ History has, of course, repeatedly shown us that widely held beliefs can be wrong. That a common belief of the people (which today may be greatly influenced by those who control the media) may alone form the basis for a “reasonable and proper exercise of the [state’s] police power” is a chilling thought, for despite common beliefs, a compelling case can be made that vaccines offer little benefit and cause substantial harm.⁴ A narrower reading of Jacobson is that states are not constitutionally required to provide vaccine medical exemptions during an outbreak. Today, all 50 states *do* provide statutory medical exemptions, 48 provide religious exemptions, and some 19 or so have philosophical exemptions. A brief introduction to each of these follows.

A. Medical Exemptions

Licensed physicians must sign a certificate indicating a medical contraindication to the vaccine(s) from which they determine a patient should be exempted. Medical exemptions have some limitations, including the following:

- 1) For a person to qualify for a medical exemption, the person’s prior adverse reaction must fall within specific parameters designated within a vaccine injury chart. Such charts specify eligible reactions and time frames within which the reaction must have occurred. However, documented vaccine neurological and immunological damage manifests in a wide range of symptoms, many of which fall outside of vaccine-injury chart specifications.
- 2) Medical exemptions may be temporary, applicable only as long as a specific contraindication exists.
- 3) Medical exemptions may apply only to the vaccine(s) believed to have caused a severe reaction. However, determining which vaccine caused a reaction may be a difficult proposition. Many ingredients common to multiple vaccines (stabilizers, enhancers, preservatives) are toxic; vaccines are often administered in combinations (how do you determine which one, or combination, caused the event?); and there is virtually no research on the specific mechanisms of vaccine damage. Furthermore, different vaccines have been associated with the same injuries; e.g., autism is known to have resulted from DPT, MMR, Hep B and Hep A vaccines. Eliminating one suspect vaccine is thus itself a suspect process that may or may not prevent future damage from other vaccines.

² Though in apparent contradiction, the opinion went on to cite numerous examples of smallpox vaccine “successes,” while failing to address plaintiff-in-error’s ample evidence of vaccine failure and the rejection of smallpox vaccination by many U.S. states and foreign countries.

³ Jacobson v. Massachusetts, 197 U.S. 11, 35, 25 S.Ct. 358, 365, 49 L.Ed. 643 (1905).

⁴ See Alan Phillips, *supra* note 1.

In North Carolina, the Commission for Health Services has adopted rules for medical contraindications for required immunizations.⁵ A licensed physician may issue a medical exemption if one of these contraindications is met, for as long as the contraindication persists. The statutes do provide some flexibility: “The State Health Director may, upon request by a physician licensed to practice medicine in this State, grant a medical exemption to a required immunization for a contraindication not on the list adopted by the Commission.”⁶

B. Religious Exemptions

1) Statutes

All states but Mississippi and West Virginia have religious exemption statutes. These vary from state to state, ranging from North Carolina’s liberally worded statute, “[i]f the bona fide religious beliefs of an adult or the parent, guardian or person in loco parentis of a child are contrary to the immunization requirements contained in this Part, the adult or the child shall be exempt from the requirements,”⁷ to more restrictive statutes such as that of Texas, which requires “an affidavit...stating that the immunization conflicts with the tenets and practice of a recognized church or religious denomination of which the applicant is an adherent or member...”⁸ New York had a similar law struck down in federal district court; it was held to violate the First Amendment’s establishment and free exercise clauses for excluding legitimate religious beliefs of people who are not members of a recognized church or religious denomination.

Religious exemptees are subject to limitations in the event of a local outbreak. Section 232.032 (1995)(4)(a) of the Florida Statutes is a typical example: “Those children identified as not being immunized against the disease for which the emergency has been declared shall be temporarily excluded from school by the district school board, or the governing authority, until such time as is specified by the county public health unit director or administrator.” Such laws are not necessarily rational. For one thing, if vaccinations work, then vaccinated children have nothing to fear from being exposed to unvaccinated children. Also, since most diseases today occur in vaccinated children; it may actually be that vaccinated children pose more of a threat to unvaccinated children than the other way around. A parent once reported to me that her unvaccinated child contracted a disease at daycare from a vaccinated child; the unvaccinated child had a milder illness

⁵ N.C. ADMIN. CODE tit. 15, 19A.0404 (June 1999) (“Medical contraindications for which medical exemptions may be certified by a physician for immunizations are included in the most recent general recommendations of the Advisory Committee on Immunizations Practices, Public Health Services, U.S. Department of Health and Human Services, published in the Centers for Disease Control and Prevention publication, the Morbidity and Mortality Weekly Report, which is adopted by reference including subsequent amendments and additions. A copy is available for inspection in the immunization section at 1330 St. Mary’s Street, Raleigh, North Carolina. Internet access is available by searching www.cdc.gov/nip.”).

⁶ N.C. GEN. STAT. § 130A-156 (2001).

⁷ N.C. GEN. STAT. § 130A-157 (2001).

⁸ TEX. EDUC. CODE § 38.001(c)(1)(B) (2000).

and recovered more quickly.

2) New York Case Law:

A series of federal court cases in New York have set a precedent that is being following by courts around the country (there do not appear to be federal court cases in other jurisdictions). Allanson v. Clinton Central School District, No. CV 84-174, slip op. at 5 (N.D.N.Y. May 10, 1984), held that New York “must offer the exemption to all persons who sincerely hold religious beliefs,” overriding the statutory requirement of membership in a recognized religion. Sherr and Levy vs. Northport East-Northport Union Free School District, 672 F. Supp. 81, 89 (E.D.N.Y., 1987), held that New York had violated the plaintiff’s civil rights by denying their claim to a religious exemption, and awarded money damages. The court also took the unprecedented step of directing the state to modify the law to make it constitutional. In Fishkin v. Yonkers Public Schools, 710 F. Supp. 506 (S.D.N.Y. 1989), the plaintiffs’ claim to a religious exemption was based on their lifestyle change following an experience of religious prayer and worship with members of the Navajo and Hopi tribes; the exemption was upheld. Berg v. Glen Cove City School District, 853 F. Supp. 651 (E.D.N.Y. 1994) suggests that membership in a conventional religion not opposed to vaccination need not preclude one from claiming a religious exemption; the court upheld a Jewish couple’s religious exemption claim.

The courts have not rubber-stamped every religious exemption claim that has come their way. In Mason v. General Brown Cent. School Dist., 851 F.2d 47 (2d Cir. 1988), the court noted that religious exemption claims citing “medical or purely moral considerations,” “scientific and secular theories,” or “philosophical and personal” beliefs are not sufficient. In Galinsky v. Board of Education of New York, 213 F.3d 626 (2d Cir. 2000), the Court of Appeals affirmed the District Court’s finding that the plaintiffs claim for a religious exemption was motivated by their personal fears for their daughters’ well being, and not by religious beliefs.

Some have criticized religious exemptions as giving parents the freedom to impose unnecessary harm upon their children and society. However, states with religious and philosophical exemptions have neither lower overall vaccination rates nor higher disease rates than other states, so the concerns as applied to vaccine exemptions, at least, are not substantiated. Such criticisms also overlook the lack of evidence supporting the assumption that vaccines provide a net benefit to society.⁹

C. Philosophical Exemptions/Conscientious Objection

⁹ Bart Classen, MD, MBA, founder and CEO of Classen Immunotherapies, developer of vaccine technologies:

My data proves that the studies used to support immunization are so flawed that it is impossible to say if immunization provides a net benefit to anyone or to society in general. This question can only be determined by proper studies that have never been performed. The flaw of previous studies is that there was no long term follow up and chronic toxicity was not looked at. The American Society of Microbiology has promoted my research...and thus acknowledges the need for proper studies.

Philosophical or personal exemptions enable citizens to refuse immunizations for themselves or their children without resort to religious or medical justification. Again, statutes vary from state to state. Washington state has (probably uniquely) a ‘pick and choose’ statute: “Any child shall be exempt in whole *or in part* [emphasis added] from the immunization measures required...upon the presentation of...[a] written certification...that the signator has either a philosophical or personal objection to the immunization of the child.”¹⁰ Ohio also has a liberally worded statute: “A pupil who presents a written statement of the pupil’s parent or guardian in which the parent or guardian objects to the immunization for good cause, including religious convictions, is not required to be immunized.”¹¹ Such statutes implicitly recognize (or at least one may so infer) that the government’s “one size fits all” approach to vaccination may have legitimate limitations.

D. General Exemption Issues

- 1) Local school and health officials are often unaware of or misinformed about exemption requirements, and seldom offer information about them to parents unsolicited.
- 2) As a practical matter, proper claim to a legal exemption may not prevent a school from refusing admission to an unvaccinated child. If parents are forced to seek remedy in the courts, the child may have outgrown the daycare or school before the matter is judicially resolved.
- 3) Some parents inadvertently get themselves into legal trouble. They learn about possible adverse events, and choose an alternative vaccine schedule, not realizing that their schedule is not supported by state law until they are challenged by local authorities.

III. Other Vaccine Legal Issues

The range of vaccine legal issues is vast. Some of these include:

- 1) Grassroots lobbying efforts:
 - a) For enactment of religious and philosophical exemptions;
 - b) To block mandatory vaccine registries designed to require state tracking of all residents’ vaccination status to facilitate higher compliance by “encouraging” (or perhaps as some fear, “coercing”) non-vaccinees to vaccinate;
- 2) Class action suits following widespread damage from vaccine campaigns:
 - a) England: 1500 families whose children suffered injury or death following an MMR campaign a few years ago are currently involved in litigation;
 - b) U.S.: 400 US families (so far) with children who developed autism following immunizations are currently organizing such a suit;
- 3) Custody issues, where divorcing parents have opposing positions on vaccination; parents with an alternative vaccine position may lose custody;
- 4) Compensation for vaccine injury through the federal government’s National Vaccine Injury Compensation Program;

¹⁰ WASH. REV. CODE § 28A.210.090(3) (2001).

¹¹ OHIO REV. CODE ANN. § 3313.671(A)(3) (Anderson 2000).

- 5) Cases of “Shaken Baby Syndrome” where the medical evidence implicates vaccines as the cause of internal injuries—some experts believe that some parents and caretakers are being mistakenly convicted of child abuse when in fact vaccines are to blame;
- 6) Third world citizens and children are the unwitting subjects of vaccine experimentation which in some documented instances has had deleterious effects;
- 7) Contamination of vaccines, such as flu vaccines recently recalled by the U.K. Department of Health after it was discovered that the vaccines contained material from British cattle potentially contaminated with mad cow disease;
- 8) Military personnel are increasingly refusing the anthrax vaccine, believing it is responsible for Gulf War Syndrome (there is scientific evidence to support this);
- 9) Exemptions for the military, immigrants, and international travelers: these exist, but exercising them can be problematic, especially since information about them can be difficult to find.