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GUIDANCE FROM VACCINATION JURISPRUDENCE

Michael R. Ulrich, J.D., M.P.H.

Antommara (2013) steps outside of traditional ethical analysis for compulsory vaccination programs for health care personnel (HCP) by utilizing an ethics framework for public health to provide a broader examination of justification not only for obligations but implementation as well. Yet, as the author notes, the primary issue in implementing these programs is determining the role and scope of exemptions. While medical exemptions are accepted as necessary, Antommara (2013) insists that conscientious objections, both religious and nonreligious, should be allowed after a thorough evaluation of their sincerity to ensure their allowance is not exploited. If the authors had utilized the lengthy history of case law covering compulsory vaccination policies they may have seen that including conscientious exemptions and evaluating their validity can be difficult, administratively cumbersome, and potentially unconstitutional. Furthermore, vaccination jurisprudence has suggested that nonmedical exemptions are not legally required to pass constitutional muster due to the public health threat they address and their neutral applicability.

In the case *Lemon v. Kurtzman*, the Supreme Court established a three-pronged test that has been consistently used to evaluate the constitutionality of laws that are challenged under the Establishment Clause, which prohibits the government from passing a law respecting an establishment of religion (1971). To be deemed constitutional the law (1) must have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) must not result in an excessive entanglement of government with religion (Sherr 1987). While this test was created in the context of religious exemptions, the Court's warning of the difficulties that arise with evaluating and establishing what beliefs are "bona fide" or "sincerely held" seem applicable to all conscientious exemption claims. Indeed, the complexity in evaluating exemption claims without endorsing certain beliefs and not others, or inappropriately entangling the state in religion is why many courts have found laws providing exemptions that make the type of evaluations that Antommara is calling for unnecessary at the very least.

Antommara (2013) proposes that the evaluative process distinguish between sincere and insincere beliefs, and admits that this largely rests of the individual's credibility and will require the provision of sufficient evidence. As the court in *Sherr v. Northport-East Northport Union Free School District* stated, this type of evaluation "in essence puts the individual on trial for heresy" (1987). The court accepted that the state may desire to limit improper evasion of immunization, but they were troubled by the notion that some may be able to avoid the burden simply because the state deemed their beliefs more worthy than another's (Sherr 1987).

The court in *LePage v. State Department of Health* found no statutory authority to allow the state to judge the sincerity of a conscientious objection, while they made a point to question the wisdom in doing so (2001). For example, they wondered whether a belief that had not been held consistently over time should be deemed insincere and merit a denial of an exemption request. After all, does a person need to be able to prove over a sustained period of time a particular belief for it to be valid at that moment? If so, for how long and what type of evidence would be deemed sufficient?

While Antommara (2013) suggests mechanisms to establish sincerity, they do not provide a definitive barometer for what is and is not in fact sincerely held beliefs. To be sure, the difficulty in doing so is why many states have adopted requirements to simply file the proper paperwork without evaluating the validity of the beliefs. Another likely factor is the extreme administrative burden created by requiring each individual exemption request be evaluated for sincerity. For hospitals, this would require setting up their own tribunals to request and interpret evidence and testimony in determining the validity of personal beliefs. In a hospital, where people need medical attention, it begs the question of whether this is the best use of the resources that are likely to be demanded to implement this requirement effectively.

As the court in *LePage* (2001) stated, to make this type of determination and scrutinize personal beliefs, as Antommara has suggested should be done, calls into question the constitutionality of the provision. In fact, the assessment of sincerity, which amounts to endorsing the beliefs of certain individuals and not others, has not been found to be legally required and, in some courts, has been labeled unconstitutional. Throughout the compulsory vaccination jurisprudence, courts consistently focus on the public's

health and the need and constitutionality to take measures to protect it. For example, in the seminal case *Jacobson v. Massachusetts*, the Supreme Court held compulsory vaccinations constitutional because there is no “absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint” (1905). The Court highlighted the appropriateness for the common good to outweigh individual liberties in circumstances where the loss is minimal and the risk of harm is extremely small (Jacobson 1905).

In *Zucht v. King*, the Supreme Court held that regulations that were reasonable and created little risk of harm while promoting a legitimate state interest do not confer arbitrary power, even if exercised by local officials (1922). Meanwhile, *Boone v. Boozeman* established that as long as the immunization required had a real and substantial relation to the protection of the public’s health, the regulation was valid (2002). Little, if anything, is mentioned in these cases of the necessity to provide exemptions for those who wish to avoid vaccination due to their personal beliefs, sincere or otherwise. In fact, the Supreme Court, in *Prince v. Massachusetts*, stated that the right to practice religion freely does not also grant one the right to expose the community to communicable diseases (1944). Indeed, it seems unclear why even personal, nonreligious beliefs would grant someone the right to expose others to infection.

The Supreme Court of Mississippi would most likely reject Antommaria’s proposal for exemptions, just as it rejected the exemption policy in *Brown v. Stone* (1979). In this case the court held that allowing exemptions did not avoid violations of the First Amendment but instead violated the Equal Protection Clause of the Fourteenth Amendment (Brown 1979). The court felt that the policy of allowing exemptions for certain individuals discriminated against those who did not have objections and, therefore, underwent the risks of vaccination for the benefit of themselves and others (Brown 1979). This type of result conforms to prior doctrine that states that individuals cannot avoid complying with valid and neutral laws of general applicability simply because the conduct it requires does not comply with their religious beliefs (Employment Division 1990).

After careful examination of the decades of compulsory vaccination doctrine discussing exemptions for personal beliefs, the question is whether they are truly

necessary and worth the difficulties and hindrances that are inherent with their use? The desire to incorporate mechanisms for allowing conscientious objections, both religious and nonreligious, is certainly laudable and understandable. It is difficult to grasp the ethical justification for forcing individuals to succumb to medical procedures against their beliefs, and is anathema to the individual liberties that play a primary role in the foundation of this country's Constitution. Yet, under this same umbrella of embracing and protecting autonomy, courts have again and again maintained that exemptions are unnecessary and likely unconstitutional themselves. While the authors claim to be utilizing an ethical framework for public health, the courts' focus on public health is what has unfailingly led them to an opposing conclusion that exemptions are not required.

Ethics and the law are certainly different, and do not necessarily require the same analysis. Yet, in a country where individual liberty and autonomy are held in such high value and protected in almost any way possible, it seems worth mentioning the lack of judicial requirements for exemptions and the reasoning behind it. The practicalities of implementing the author's suggested assessments of conscientious exemption requests further suggest the necessity to heed the warnings of the judicial precedent. Truly following the principles of public health would intimate that while individuals have rights of autonomy and liberty, those rights cannot endanger the health and wellbeing of others when there is so much to gain and so little risk of harm.

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