MY BODY BROKEN FOR YOU: THE CASE FOR OVERRIDING RELIGIOUS MEDICAL EXEMPTIONS FOR MINORS

Eva Quinones[*]

---

[*] Eva Quinones is a Ph.D. candidate at Yale University, where she studies the political economy of voting behavior and democratic backsliding, and a 2L and Furman Academic Scholar at NYU School of Law. Special thanks to Yale Law School professors Anthony Kronman and Bryan Garsten, and NYU School of Law professors Samuel Issacharoff, Emma Kaufman, and Barry Friedman for their guidance, as well as to the staff of the Virginia Journal of Social Policy and the Law for their keen attention to detail and helpful edits.

MY BODY BROKEN FOR YOU: THE CASE FOR OVERRIDING RELIGIOUS MEDICAL EXEMPTIONS FOR MINORS

Eva Quinones

The United States has few theories of collective rights or children's rights and a robust framework for religious liberties. In keeping with this tradition, forty-five states allow religious vaccine exemptions for schoolchildren, while only fifteen allow personal belief exemptions. Yet at times when a child's life is threatened by a lack of medical treatment (either directly, by abstaining from a likely life-saving course of treatment such as a blood transfusion or an organ transplant, or indirectly, by negatively affecting the sphere of public health and general welfare through choices such as vaccination refusal), it is only just that the rights of the child outweigh the religious convictions of their parents. In this Note, I argue that that the state may compel parents with religious objections to their child receiving medical treatment that has been widely assessed by the scientific community to be either critical for maintaining public health or necessary for continued survival, to provide that procedure regardless of their views. I defend both ethical and normative justifications for compulsion under various frameworks that the Founding Fathers took under consideration when writing the Constitution, and legal precedent. Finally, I propose a four-part balancing test to assess the circumstances under which a parent's First Amendment rights can be overridden for the sake of public safety and a minor's health.

INTRODUCTION

At times when a child's physical well-being is threatened so that a parent can ensure continued spiritual well-being, or when a parent prioritizes the spiritual well-being of their own child above larger public safety, does the state have the right to intervene and violate a religious decision in order to establish a threshold for the minimum physical well-being of either a child or that child's community?

In fall 2018, what would ultimately become the largest measles outbreak since 1994 began in Brooklyn, New York City at the epicenter of the Hasidic Jewish population.[1] Between January and April 29, 2019, more than 700 individuals contracted measles in the United States,

---

[1] *Measles Cases and Outbreaks*, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 3, 2019), https://www.cdc.gov/measles/cases-outbreaks.html (last visited July 27, 2022); Robert McDonald et. al, *Notes from the Field: Measles Outbreaks from Improted Cases in Orthodox Jewish Communities - New York and New Jersey, 2018-2019*, 68 MMWR MORBIDITY & MORTALITY WKLY. REP. 2019, 444 – 445, https://www.cdc.gov/mmwr/volumes/68/wr/mm6819a4.htm (May 17, 2019).

including 102 individuals in Rockland County and 362 individuals in Kings and Queens Counties, over half of whom were under the age of five.[2] Many Hasidim are vaccinated, but a significant minority goes unvaccinated for largely religious reasons: some argue that vaccines developed using DNA from non-kosher animals are not kosher (most ultra-Orthodox rabbis dispute this perspective),[3] while others carry more secular concerns including the risk of autism and other side effects. This is complicated by the sect's high levels of mistrust in the government, and the economic difficulty of comprehensive vaccination in a community with a high poverty rate.[4] In response to the disease's rapid spread and in an effort to halt transmission, the City of New York first banned childcare centers and yeshivas from allowing unvaccinated children, then issued a series of states of emergency.[5] Unvaccinated residents had to receive MMR vaccines or pay a $1,000 fine in Williamsburg, and individuals with measles were barred from places of public assembly under threat of a $2,000 per day fine in Rockland County.[6] A prior Measles Outbreak Emergency

---

[2] Donald G. McNeil Jr., *Measles Cases Surpass 700 as Outbreak Continues Unabated*, N.Y. TIMES (Apr. 29, 2019), https://www.nytimes.com/2019/04/29/health/measles-outbreak-cdc.html?module=inline. The Measles-Mumps-Rubella (MMR) vaccine is estimated to have prevented 74.5 million cases of measles and 7,450 deaths. *See* Amanda Z. Naprawa, *Don't Give Your Kid That Shot!: The Public Health Threat Posed by Anti-Vaccine Speech and Why Such Speech Is Not Guaranteed Full Protection under the First Amendment*, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 473, 481–487 (2013).

[3] Tyler Pager, *'Monkey, Rat and Pig DNA': How Misinformation Is Driving the Measles Outbreak Among Ultra-Orthodox Jews*, N.Y. TIMES (Apr. 9, 2019), https://www.nytimes.com/2019/04/09/nyregion/jews-measles-vaccination.html?module=inline (citing a handbook "targeted at ultra-Orthodox Jews" produced by a magazine whose editor referred to vaccine ingredients such as monkey, rat, and porcine DNA as well as "cow-serum blood" as not kosher, in addition to other anti-vaccine materials distributed throughout ultra-Orthodox neighborhoods in Brooklyn).

[4] *See* Michele Chabin, *Measles Outbreaks Are Sickening Ultra-Orthodox Jews. Here's Why Many of Them Go Unvaccinated,* WASH. POST (Apr. 3, 2019), https://www.washingtonpost.com/religion/2019/04/03/measles-outbreaks-are-sickening-ultra-orthodox-jews-heres-why-many-them-go-unvaccinated/?utm_term=.95550d105c6a.

[5] Lindsay Bever, *Orthodox Jewish Yeshivas Banned from Sending Unvaccinated Students to School in New York*, WASH. POST (Apr. 9, 2019); Susan Scutti, *New York City Declares a Public Health Emergency amid Brooklyn Measles Outbreak,* CNN (Apr. 9, 2019) https://www.cnn.com/2019/04/09/health/measles-new-york-emergency-bn/index.html.

[6] NEW YORK CITY DEP'T OF HEALTH & MENTAL HYGIENE, *Order of the Comm'r* (Apr. 9, 2019) https://www1.nyc.gov/assets/doh/downloads/pdf/press/2019/emergency-orders-measles.pdf; *see also* Tim Fleischer, *Rockland County Threatens Measles Patients with $2,000-a-Day Fine*, ABC7NY (Apr. 16, 2019), https://abc7ny.com/measles-rockland-county-religion-parents/5253540/; Matt Spillane et. al, *Rockland Declares State of Emergency for*

Directive in Rockland County banned unvaccinated minors from entering public spaces but was struck down after a judge ruled the outbreak had not reached epidemic levels.[7] The 2019 measles crisis illustrates a problem in boundary-drawing: if it is the case that the state has the right to intervene and compel medical procedures for minors, where is the appropriate limit for state action? Why was it appropriate to levy an exorbitant fine on parents who overwhelmingly could not pay, but not appropriate to exclude unvaccinated children from restaurants and preschools?

This ethical and legal quandary has been brought into much greater public scrutiny during the Covid-19 pandemic. In winter 2022, California and Louisiana both began the process of implementing a mandate for minors to have the Covid-19 vaccine to enter school, though efforts have largely halted or been rescinded since then.[8] Six states have allowed "vaccine or terminate" approaches where healthcare employees who refuse to vaccinate may be fired regardless of personal belief.[9] New York City, Washington, D.C., Los Angeles, and Chicago previously required proof of vaccination to enter most indoor venues for all adults and some children, effectively excluding the unvaccinated from public life outside parks and outdoor dining.[10] Yet as vaccine mandates have increased with the continuance of the pandemic, they have also become increasingly politicized: six states attempted to ban vaccine mandates for healthcare workers, while fifteen states ban public-sector worker mandates and twenty-four ban proof of vaccine requirements.[11] Lockdown protests, fiercely contentious school board meetings, and anti-vaccine marches have become de jure,

---

Measles, Bans Unvaccinated Minors from Schools, Houses of Worship, Shopping Centers, ROCKLAND/WESTCHESTER JOURNAL NEWS (Mar. 26, 2019).

[7] W.D. ex rel. A. & J. v. Cty. of Rockland, 101 N.Y.S.3d 820, 824 (N.Y. Sup. Ct. 2019).

[8] NAT'L ACADEMY FOR STATE HEALTH POL'Y, *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports* (July 11, 2022), https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/; *see also* NAT'L ACADEMY FOR STATE HEALTH POL'Y, *States Address School Vaccine Mandates and Mask Mandates* (Aug. 19, 2022), https://www.nashp.org/states-enact-policies-to-support-students-transition-back-to-school/.

[9] NAT'L ACADEMY FOR STATE HEALTH POL'Y, *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports: Private Employer Mandates* (July 11, 2022), https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/; NAT'L ACADEMY FOR STATE HEALTH POL'Y, *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports: State Employer Mandates* (July 11, 2022), https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/.

[10] NAT'L ACADEMY FOR STATE HEALTH POL'Y, *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports: Proof of Vaccine* (July 11, 2022), https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/.

[11] *Id.*

and this polarization has likewise contaminated the judiciary and resulted in a disjointed patchwork of rulings across the states.[12] As the spate of cases reviewing Covid-19 laws, executive orders, and corporate policies rise through the appellate division, it is increasingly clear the judiciary's lack of uniform standard for assessing which medical decisions warrant state intervention regardless of religious burden and which do not warrant state intervention will create a piecemeal system that stymies recovery.

Hasidim and other religious groups who cite concerns with vaccines are more protected than those who oppose vaccination due to personal belief: while personal belief exemptions for school-aged children who would otherwise be required to be vaccinated exist in fifteen states, forty-four states and the District of Columbia allow religious exemptions.[13] Only two states generally ban Covid-19 vaccine mandates by private employers, but nine require exemptions for medical conditions or sincerely held religious belief.[14] While much of the modern anti-vax movement takes root in Andrew Wakefield's 1998 Lancet publication correlating the MMR vaccine with autism (which has since been thoroughly debunked and resulted in Wakefield being struck off the medical register),[15] religious exemptors cite a myriad of other reasons to oppose vaccination and other medical procedures, including the belief that supplementing faith healing reflects a lack of confidence in God.[16] Concern with vaccines is not unique to any

---

[12] *See* Toby Bolsen & Risa Palm, *Politicization and COVID-19 Vaccine Resistance in the U.S.*, 188 PROGRESS IN MOLECULAR BIOLOGY AND TRANSLATIONAL SCI., no. 1, at 81 (2022); *e.g.*, Efthimios Parasidis, *COVID-19 Vaccine Mandates at the Supreme Court: Scope and Limits of Federal Authority*, HEALTH AFFAIRS FOREFRONT (Mar. 8, 2022) (noting that prior to the Supreme Court's decision in NFIB v. OSHA, 595 U.S. ____ (2022), "One appellate court issued a stay that put the [vaccine mandate] on pause, but a separate court lifted the stay and allowed the rule to take effect.").

[13] NAT'L CONFERENCE OF STATE LEGISLATURES, *States with Religious and Philosophical Exemptions from School Immunization Requirements* (May 25, 2022), https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx (last visited Jul. 8, 2022).

[14] NAT'L ACADEMY FOR STATE HEALTH POL'Y, *supra* note 8.

[15] *See* Sarah Bosely, *Andrew Wakefield Struck Off Register by General Medical Council*, THE GUARDIAN (May 24, 2010) https://www.theguardian.com/society/2010/may/24/andrew-wakefield-struck-off-gmc; Clare Dyer, *Lancet Retracts Wakefield's MMR Paper,* 340 BRITISH MED. J. 281 (Feb. 2, 2010). For the original investigation uncovering the fraudulent research, *see* Brian Deer, *MMR: The Truth Behind the Crisis,* THE SUNDAY TIMES (Feb. 22, 2004); Brian Deer, *Hidden Records Show MMR Truth*, THE SUNDAY TIMES (Feb. 8, 2009). *See also* Matthew Motta & Dominik Stecula, *Quantifying the Effect of Wakefield et al. (1998) on Skepticism about MMR Vaccine Safety in the U.S.*, 16 PLOS ONE, no. 8 (Aug. 19, 2021).

[16] *See* Santiago Almanzar, *Christianity and Mental Illness: Evil or Sickness?*, 4 EC PSYCH. & PSYCHIATRY, no. 5, 2017, at181, 183 (reporting "a third of US citizens and nearly half of evangelical, fundamentalist, and born-again Christians believed that only prayer and Bible study could dispel serious mental illness");

religion, though there is a general trend in which members of the faith are more vaccine-hesitant than their clergy and official organizations: the Amish have no doctrinal opposition to vaccination but many parents refuse vaccination due to cultural reasons, Christian Scientists traditionally rely solely on prayer for healing (though the church made an exception and encouraged vaccination in response to the measles outbreak),[17] some Muslims refuse gelatin-derived vaccines due to concerns over the level of pork in such immunizations, and some Catholics refuse vaccines due to the historic development of vaccinations using tissue from fetuses procured via elective abortion (however, the Vatican encouraged vaccination itself in "Moral Reflections on Vaccines Prepared from Cells Derived from Aborted Human Fetuses" despite opposing the creation of vaccines using such materials).[18]

The law is similarly dire when it comes to medical treatment with more individual and acute implications. Critically, religious exemptions exempt parents from medical neglect charges: ten states define medical neglect as "failing to provide any special medical treatment or mental health care needed by the child" and an additional five define medical neglect as the "withholding of medical treatment or nutrition from disabled children with life threatening conditions"[19] but thirty-one states, the District of Columbia, and Puerto Rico have exceptions in child abuse statutes for parents who refrain from seeking medical care for their children due to religious belief. Only sixteen of these states and Puerto Rico authorize the courts to mandate medical treatment for the child when medical intervention is necessary, and three states further provide an exception for Christian Science healing, such as Arizona's statute that, "[a dependent

---

see also Gloria Copeland, *Not Receiving the Flu Shot*, FACEBOOK, https://www.facebook.com/CopelandNetwork/videos/1783790631672334/ (urging people to not receive the flu vaccine because "We've already had our shot: [Jesus] bore our sicknesses and carried our diseases … He redeemed us from the curse of flu, and we receive it, and we take it, and we are healed by his stripes, amen"). Though no religion explicitly condemns seeking modern medical treatment, more fundamentalist adherents may interpret doctrine to bar medical treatment.

[17] Press Room, *A Christian Scientist's Perspective on Vaccination and Public Health*, CHRISTIAN SCIENCE (May 13, 2019), https://www.christianscience.com/press-room/a-christian-scientist-s-perspective-on-vaccination-and-public-health.

[18] Pontifical Academy for Life, *Moral Reflections on Vaccines Prepared from Cells Derived from Aborted Human Fetuses*, 6 NAT'L CATHOLIC BIOETHICS Q. 541–550 (2006).

[19] *See* Child Welfare Information Gateway, *Definitions of Child Abuse and Neglect*, CHILDREN'S BUREAU 3 (2019), https://www.childwelfare.gov/pubpdfs/define.pdf. The ten states with the quoted definition are Arkansas, Connecticut, Florida, Mississippi, North Dakota, Ohio, Oklahoma, Tennessee, Texas, and West Virginia, while the five states with the latter definition are Illinois, Indiana, Kansas, Minnesota, and Montana.

child] [d]oes not include a child who, in good faith, is being furnished Christian Science treatment by a duly accredited practitioner."[20] Thus, parents who deny their sick children medical treatments ranging from infant MMR vaccination to life-saving blood transfusions and surgery are protected from any charges of abuse if they are religious, and the Court has extremely limited power to act in accordance with common science principles to save these children's lives. For example, the insular Followers of Christ denomination, primarily active in Oregon and Idaho, has a mixed record regarding conviction for child deaths due to lack of medical treatment. In 2011, parents were convicted of second-degree manslaughter after their infant died of a highly treatable infection, but the parents of a teen who died in 2012 after her esophagus ruptured during a bout of food poisoning were shielded by the belief exemption, though she had been unconscious several hours before she bled to death.[21]

In this paper, I argue that the state has both the right and the obligation to compel parents who have a religious or other ethical objection to their child receiving treatment that is widely assessed by the scientific community to be either critical for maintaining public health or medically necessary for continued survival, to provide that procedure regardless of their views. Procedures that do not significantly impact public health or would merely enhance quality of life rather than being lifesaving would not be included under this model. Under this view, laws like New York State's 2019 state of emergency requiring parents to vaccinate their children against measles do not violate the establishment clause of the First Amendment, and neither would exemption-free vaccine mandates for minors, even if they went beyond financial consequences and social exclusion.

In Part One, I conduct a literature review on the relevant academic scholarship and broadly review the history of compulsory medical treatment in the face of religious objection. In Part Two, I review the legal precedent for the view that compelling medically necessary action at both the federal and state level does not violate the First Amendment, and the ethical and philosophical views justifying these rationales. In Part Three, I argue it is both ethical and normatively desirable for the state to compel medically necessary action under various frameworks that the Founding Fathers took under consideration when writing the Constitution, which are additionally considered to be foundations of the relationship between religion and the secular state in Western liberal democracies. I find that even if compelling medically necessary procedures is an abrogation of religious rights, this violation is outweighed by the collective interest of public safety. Further, religious exemptions to neglect and abuse statutes breach

---

[20] ARIZ. REV. STAT. ANN. § 8-201.15(b).01 (2022).

[21] Jason Wilson, *Letting Them Die: Parents Refuse Medical Help for Children in the Name of Christ,* THE GUARDIAN (Apr. 13, 2016), https://www.theguardian.com/us-news/2016/apr/13/followers-of-christ-idaho-religious-sect-child-mortality-refusing-medical-help.

the Court's general principle of refusing to legislate intent and may violate the Equal Protection clause by uniquely immunizing religious parents. Given that no medical treatment is absolute in its efficacy, I propose a four-part balancing test to assess the circumstances under which a parent's (and potentially a teenage child's) First Amendment rights can be overridden for the sake of public safety and a minor's health. While any medical treatment, from blood transfusion to organ donation, falls under this premise, I pay special attention to vaccination given its usefulness in boundary-drawing: vaccines only indirectly prevent future harm rather than directly remedying present malady, do not have a perfect efficacy rate, and some improve quality of life but are unlikely to be lifesaving, and therefore present the weakest case for compulsion.

PART ONE: BACKGROUND & LITERATURE REVIEW

An extensive body of literature on the relationship between public health and the First Amendment already exists, although few of these pieces examine how the relationship between state obligation and religious exemption changes when children are involved. Allowing religious and philosophical exemptions to vaccinations and other medical procedures indisputably produces negative health outcomes. In a survey of 1,527 parents with children under eighteen, residence in states that permitted philosophical exemptions to vaccine laws was negatively correlated with intention to have their youngest child vaccinated.[22] Salmon et al. found the negative health outcomes of religious exemptions to vaccines extend beyond the exemptors: not only were exemptors thirty-five times more likely to contract measles, a doubled exemptor population increased the incidence of measles in those that did not claim exemption by 5.5 % (20% intergroup mixing ratio[23]), 18.6% (40% mixing), or 30.8% (60% mixing).[24]

Put simply, herd immunity in its most basic model can be estimated by calculating that the proportion of the population that must be vaccinated is $1 - \frac{1}{R_0}$, where R_0 represents the number of secondary infections (i.e., the number of people an infected person further infects). Measles is

---

[22] Allison M. Kennedy et al., *Vaccine Beliefs of Parents Who Oppose Compulsory Vaccination*, 120 PUB. HEALTH REP. 252 (2005).

[23] Mixing is a concept whereby children mix with a population not like their own–i.e., unvaccinated children interacting with vaccinated children. With a mixing rate of 0, there is no contact between exemptors and nonexemptors, while with a mixing ratio of 0.6 [60%], 60% of an unvaccinated child's contacts are random members of the entire community, including fellow exemptors, while 40% are only exemptors. *See* Daniel A. Salmon et al., *Health Consequences of Religious and Philosophical Exemptions from Immunization Laws: Individual and Societal Risk of Measles*, 281 JAMA 47 (1999).

[24] *Id.*

estimated to have an R_0 of 12-18,[25] where the Delta variant of Covid-19 is thought to have an R_0 of 5.08 (the original SARS-CoV-2 disease had a median R_0 of 2.79),[26] so in order to gain herd immunity against measles a minimum of 91.67% of the population would have to be immune in the most conservative estimate, while 80.31% of the population would need to be immune from Covid-19 in the median estimate.[27] Given that vaccines are not 100% effective in causing immunity, and generally are less effective in preventing infection by mutations, the vaccination rate typically needs to be significantly higher than the vaccinated population in order to establish herd immunity. The results are similarly severe for occurrences in which parents reject lifesaving conventional medical treatment in favor of faith-based healing. 172 children whose parents withheld medical care for religious reasons died in the period between 1975 and 1995, and 140 of the 172 cases (81.4%) involved illnesses for which survival rates in the presence of medical care exceed ninety percent (for example, diabetes, epilepsy, and pneumonia).[28] Eighteen additional cases involved diseases with survival rates in excess of fifty percent when accompanied by medical care.[29]

1A. The History of Compelling Medical Treatment

Since Edward Jenner's cowpox inoculation in 1796 introduced the field of vaccinology,[30] opposition to mandatory vaccination (the most common form of medical mandate, given the commonly recognized principle that adults may place themselves in danger) has formed a twin movement with scientific progress. The United Kingdom's Vaccination Act of 1853 required infants three months and older to be vaccinated, before the age requirement was raised to fourteen in the Vaccination Act of 1867.[31]

---

[25] Fiona M. Guerra, et. al, *The basic reproduction number (R_0) of measles: A systematic Review,* 17 THE LANCET INFECTIOUS DISEASES 12 (2017).

[26] Ying Liu & Joacim Rocklov, *The Reproductive Number of the Delta Variant of SARS-CoV-2 is Far Higher Compared to the Ancestral SARS-CoV-2 Virus*, 28 J. TRAVEL MED. 7 (2021).

[27] There is increasing dissent in the medical community whether R_0 is the best figure to calculate infectiousness. Some professionals now recommend calculations instead rely on R, the effective reproduction number (which considers lower susceptibility to infection within a population due to vaccination, whereas R_0 implies complete susceptibility), or R_t, susceptibility at a given point in time.

[28] Seth M. Asser & Rita Swan, *Child Fatalities from Religion-Motivated Medical Neglect,* 101 PEDIATRICS 625 (1998).

[29] *Id.*

[30] Stefan Riedel, *Edward Jenner and the History of Smallpox and Vaccination*, 18(1) BAYLOR U. MED. CTR. PROC. 21, 24 (2005).

[31] JOHN FABIAN WITT, AMERICAN CONTAGIONS: EPIDEMICS AND THE LAW FROM SMALLPOX TO COVID-19 (2020).

Backlash was swift: the Anti-Vaccination League and the Anti-Compulsory Vaccination League advocated for autonomy over children's bodies and freedom of choice in the absence of government force, while an 1885 protest in Leicester drew 80,000-100,000 attendees, including several parents who pledged to be arrested rather than inoculate their children.[32] As the center of anti-vaccination activity, over 6,000 parents in Leicester were prosecuted during that period, with punishments of short jail stays or fines of ten to twenty shillings (approximately $1,700 - $3,600 USD in 2022).[33] By 1898, the British Vaccination Act allowed exemptions to the mandatory smallpox vaccine for "conscientious objectors" (the first use of the phrase) and their children, and removed penalties for parents eschewing vaccination. In the first year of the Act's passing, 200,000 people obtained exemptions. While the majority of these exemptors were concerned about safety (somewhat fairly, since production quality was not yet regulated), a minority of these exemptions were religious, with claimants arguing it was un-Christian to place vaccines that came from an animal inside the human body.[34]

In the United States, the Anti-Vaccination Society of America was founded in 1879. The New England Anti Compulsory Vaccination League and the Anti-Vaccination League of New York City similarly waged court battles to strike down vaccination laws in several states.[35] The last major smallpox epidemic in Boston seemed to be stemmed by Massachusetts' 1855 law requiring vaccination to attend school: nineteen percent of cases occurred in children under five, but only three percent occurred in children aged six to ten.[36] To control the epidemic, the Board of Health quarantined smallpox patients in special hospitals, and in December 1901 mandated, "all the inhabitants of this city who have not been successfully vaccinated since January 1, 1897, be vaccinated or revaccinated forthwith," or face a fine of $5 ($164 in 2022 dollars) or 15 days in jail.[37] The Anti Compulsory Vaccination League sprang into action, issuing a statement that compulsory vaccination violated civil liberties, especially given the danger of inoculation, and introduced legislation to repeal the mandate a mere month after it had been enacted.[38] This ultimately culminated in *Jacobson v. Massachusetts* (see discussion in Part Two), where the Supreme Court upheld the right of the state to use its police powers in the name of public

---

[32] *Id.*

[33] Stanley Williamson, *Anti Vaccination Leagues*, 59 ARCHIVES DISEASE CHILDHOOD 1195, 1195 (1984), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1628897/pdf/archdisch00727-0091.pdf.

[34] Witt, *supra* note 29.

[35] *Id.*

[36] *Id.*

[37] Michael R. Albert et al., *The Last Smallpox Epidemic in Boston and the Vaccination Controversy, 1901–1903,* 344 NEW ENG. J. OF MED. 375, 375 (2001), https://www.nejm.org/doi/full/10.1056/NEJM200102013440511#t=article.

[38] *Id.* at 376.

health.[39] This was further cemented when the Court held that San Antonio public schools could exclude children who failed to present proof of vaccination.[40] Yet this victory was Pyrrhic: anti-vaccine leagues succeeded in repealing compulsory laws in California, Illinois, Indiana, Minnesota, Utah, West Virginia, and Wisconsin.[41]

In the nineteenth century and the first half of the twentieth century, public health laws in the United States were largely immune from suit and from the allowance of religious and conscience exemptions, though mandatory laws were increasingly difficult to pass through election-minded state legislatures. Likewise, the state had established the right to intervene and mandate surgical or medical treatment for children whose lives were in danger (see, *infra*, discussion of *Elisha McCauley* in Part 2A (pg. 188)). What changed? In the 1960s, a series of high-profile child abuse cases led to the passage of a series of federal laws to protect children, including the 1974 Child Abuse Prevention and Treatment Act (CAPTA), which included provisions on medical neglect. Yet President Richard Nixon's advisors John Ehrlichman and J.R. Haldeman, both Christian Scientists, acted to prevent fellow adherents from prosecution and exempted those who believe in faith healing.[42] In order to access CAPTA funds, states were required to pass similar exemptions. While this requirement was relaxed in a later reauthorization of CAPTA, state exemptions had to be repealed individually and lingered into the 2000s. The current text of CAPTA still states,

> (a) In general, Nothing in this subchapter and subchapter III shall be construed—
>
> > (1) as establishing a Federal requirement that a parent or legal guardian provide a child any medical service or treatment against the religious beliefs of the parent or legal guardian; and
> >
> > (2) to require that a State find, or to prohibit a State from finding, child abuse or neglect in cases in which a parent or legal guardian relies solely or partially upon spiritual means rather than medical treatment, in accordance with the religious beliefs of the parent or legal guardian.

In the status quo, thirty-nine states shield parents from criminal prosecution should their children die as a direct result of not receiving medical care. The Committee on Bioethics of the American Academy of Pediatrics

---

[39] Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[40] Zucht v. King, 257 U.S. 650 (1921).

[41] Robert M. Wolfe & Lisa K. Sharpe, *Anti-vaccinationists Past and Present.* 325 BRIT. MED. J. (CLINICAL RSCH. ED.) 430, 431 (2002), https://doi.org/10.1136/bmj.325.7361.430.

[42] Wilson, *supra* note 21.

(AAP) has suggested revising CAPTA to require parents provide medical treatment even if it contradicts their religious beliefs.[43] Thus, while the state has the general right to find religious parents guilty of medical neglect if their own statutes do not bar them from doing so, there is no pre-existing compulsion to provide care (thus requiring that any action can only be corrective after an oft-irreparable physical harm has occurred) and there is little standing for a state to bring charges in court, in the face of the First Amendment.

It is important to note that suspicion towards medical compulsion is not a device of the uneducated and the Luddite: several disadvantaged communities have good reason to mistrust medical expertise. Historically, mandatory quarantines and vaccinations have been used as a tool of racial subjugation, such as the quarantines in the 1830s that targeted Irish Catholic neighborhoods and San Francisco's measures aimed at reducing the bubonic plague between 1900 and 1904.[44] In 1877, a New Orleans sanitation inspector recommended that, under the assumption smallpox was the "disease of the vulgar and ignorant," African Americans and poor whites be compulsorily vaccinated for community protection purposes.[45] New pharmaceuticals have also historically been tested upon people of color to disastrous effect, including gynecological experiments on female enslaved people, the testing of birth control on Puerto Rican women, and the infamous Tuskegee study, adding to hesitancy surrounding inoculation.[46] A concern initially voiced by the poor in the Victorian period was the state's disproportionate control over the bodies of the working class, especially considering the inability to enforce vaccine mandates in private schools

---

[43] Kenneth Hickey & Laurie Lyckholm, *Child Welfare Versus Parental Autonomy: Medical Ethics, the Law, and Faith-Based Healing*, 25 THEORETICAL MED. BIOETHICS 265, 268 (2004).

[44] Witt, *supra* note 29.

[45] WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 215 (1996).

[46] For more information on the Tuskegee Syphilis Study, *see The U.S. Public Health Service Syphilis Study at Tuskegee*, CTRS. FOR DISEASE CONTROL, https://www.cdc.gov/tuskegee/index.html (Apr. 22, 2021). For more information on the history of birth control testing, *see* Theresa Vargas, *Guinea Pigs or Pioneers? How Puerto Rican Women Were Used to Test the Birth Control Pill*, WASH. POST: RETROPOLIS (May 9, 2017, 8:00 AM), https://www.washingtonpost.com/news/retropolis/wp/2017/05/09/guinea-pigs-or-pioneers-how-puerto-rican-women-were-used-to-test-the-birth-control-pill/; *see also American Experience: The Puerto Rico Pill Trials*, PBS, https://www.pbs.org/wgbh/americanexperience/features/pill-puerto-rico-pill-trials/ (last visited Jul. 28, 2022). For general insight into the reluctance of communities of color towards vaccines, *see* Sandra Quinn & Michelle Andrasik, *Addressing Vaccine Hesitancy in BIPOC Communities — Toward Trustworthiness, Partnership, and Reciprocity*, 385 NEW ENG. J. MED.: PERSPECTIVES 97 (2021). For insight into experiments on enslaved women, *see* L.L. Wall, *The medical ethics of Dr. J Marion Sims: a fresh look at the historical record*, 36(2) J. MED. ETHICS 346 (2006).

and the disproportionate impact of fines on the poor; in England, anti-vaccination sentiment was coupled with opposition to the Contagious Diseases and Notification of Infectious Diseases Acts as a violation of bodily sovereignty.[47] Today, some communities hold concerns that religious exemptions will be used unequally given how often bodies are assigned status as victim or threat based on race. It seems the best way to mitigate the unequal effect of vaccine mandates is universal enforcement, which will be discussed in Part Three as a means of avoiding Equal Protections Clause violations. This further serves as a tool of racial equity given that Black, Indigenous, and People of Color are disproportionately likely to fall victim to communicable illness.

1B. Contemporary Theories of Parental Rights in the American Legal System

What are the duties of parents in comparison with the duties of the state in the American legal system? The mutual obligation of parents and the state with regards to children in liberal democracies can be conceptualized in four prongs:

> (1) guaranteeing parents' liberty to form and raise a family; (2) denying anyone absolute authority over the immature, while transferring to the immature themselves authority in realms where they have reliably attained decision-making maturity; (3) ensuring that young citizens will attain maturity with their entitlement to life-deciding liberty intact; and (4) ensuring that young citizens will attain maturity having acquired the capacities to fulfill the basic obligations of citizenship.[48]

The question of whether there ought to be religious accommodation for exemptions from medical treatments involves the first three prongs of this obligation. Compelling medical treatment may be justifiable under the second prong, given that no one individual ought to have absolute sovereignty over the immature and preserving their ability to reach adulthood, at which they may make decisions, is the foremost priority. Religious groups typically object to this line of thinking and favor the supremacy of parental rights. For example, the Christian Science lobby has argued that nominally allowing adults to be Christian Scientists but refusing to allow parents to raise their children in accordance with religious principles functionally denies Christian Scientists the right to practice their religion.[49] However, Dwyer argues the interests of children ought to take priority in

---

[47] Nadja Durbach, *'They Might as Well Brand Us': Working-Class Resistance to Compulsory Vaccination in Victorian England,* 13(1) SOC. HIST. MED. 45 (2000).

[48] Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L. REV. 1055, 1057 (2010).

[49] Hickey & Lyckholm, *supra* note 41, at 268.

adjudicating the debate between children's and parental rights, and that the state ought determine a child's interest from its own perspective rather than the perspective of a religious parent.[50] Given that children are commonly accepted to lack the maturity to express a serious preference and make fully rational choices, as evidenced by the abrogation of their voting rights and separate sentencing for juvenile offenders, both utilitarian and rights-based frameworks would necessitate compelling parents to seek medical treatment except in minor cases, in order to increase the child's chance of surviving into adulthood.[51]

Dwyer goes so far as to challenge all parental rights as inconsistent with other individual rights based on self-determination: parents may be pragmatically permitted to act in the interest of a child when that child is unable to act in their own interest, but do not have unique rights in child-rearing. Therefore, children's rights form the basis of jurisprudence on children's issues.[52] If children's rights and individual rights are the key issue at stake, Dwyer argues religious exemptions clearly violate the Equal Protection Clause of the Fourteenth Amendment.[53] Equal Protections Clause claims must first show intentionally discriminatory state action; states that mandate vaccinations and have laws against medical neglect while allowing for religious accommodation deny the guarantee of freedom from medical harm to a subgroup of children who are identifiable by their parents' beliefs, and are intentional insofar as religious groups' demands for such laws can be clearly noted.[54] Because medical care has

---

[50] James G. Dwyer, *Spiritual Treatment Exemptions to Child Medical Neglect Laws: What We Outsiders Should Think*, 76 NOTRE DAME L. REV. 147, 152 (2000).

[51] *Id.*

[52] James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL L. REV. 1371, 1374 (1994).

[53] James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321 *passim* (1996).

[54] Successful Equal Protection claims often show a low likelihood of the defining characteristic's relevance to legislative purpose, a history of discrimination for the class in question, political powerlessness, and lack of control over the inalienable trait in order for a class to be considered suspect. The children of religious exemptors meet each of these categories and it is unclear why religious children would specifically lack the need for disease prevention or pose a smaller risk to those unable to be vaccinated: religious minorities have historically been discriminated against, children have few legal rights, and children cannot control their parents' conduct or what happens to them. For more insight into proving discriminatory intent, *see* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (holding discriminatory policies must be adopted "'because of,' not merely 'in spite of,' their adverse effects upon an identifiable group"); McCleskey v. Kemp, 481 U.S. 279 (1987) (stating claimants must show that the state pursued its course of action *because* of the discriminatory impact that would result); Palmer v. Thompson, 403 U.S. 217(1971) (suggesting, but not holding, that if other valid motivators can be inferred, the judiciary should not pry into

been deemed a basic necessity, albeit one individuals do not have a constitutional right to,[55] denying medical treatment to children would likely be subject to intermediate scrutiny, requiring states that allow exemption to show said exemptions were "substantially related to a legitimate and important state interest or purpose";[56] there is no clear state interest in children going untreated for illness even if there is a parental interest. This is diametrical to how many laws regarding religious accommodation function, where the lack of accommodation is held to strict scrutiny, because the legal system would be operating from the interest of the child rather than that of the adult. This argument stands despite the United States' limited embrace of children's rights because children have access to most constitutional rights that do not explicitly require an age of majority.

Scholarship on state duty also answers this paradox. Williams argues that under *parens patriae*, the government has a vested interest in allowing children to reach adulthood, which enables the state to limit religious practice regarding children and punish those whose children are hurt due to faith-based exemptions to medical treatment.[57] While police powers allow the state to compel adults to undertake life-sustaining treatment if it has a direct impact on the welfare of others, adults are also explicitly recognized as having the right to control their own bodies.[58] The Court has a far greater right and duty to intervene in children's lives given the compelling state interest in raising future generations of responsible citizens, as well as the vulnerability of children, which facilitates justifying mandatory vaccine laws on grounds of *parens patriae* as well as police powers.[59] Levin et al. propose a test for determining the circumstances under which religious accommodation of practices that endanger children and third parties ought be allowed: religious practices relating to health may be regulated if it (1) produces directly negative effects on children and other vulnerable group members or if it creates unreasonable burdens for society, (2) if this deleterious effect is likely, and (3) if the magnitude of the effect

---

discriminatory inference, and in order to establish a constitutional violation under the Equal Protection Clause, there must be proof of discriminatory intent and discriminatory impact); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) (holding that there must be some showing that legislators are aware of the potential for discriminatory impact and passed the law because of, not in spite of, that potential).

[55] *See* Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 259 (1974).

[56] Dwyer, *supra* note 51, at 1423.

[57] Rebecca Williams, *Faith Healing Exception versus Parens Patriae: Something's Gotta Give*, 10 FIRST AMEND. L. REV. 692, 730 (2012).

[58] *See* Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914) (holding that "Every human being of adult years and sound mind has a right to determine what shall be done with his own body"), *abrogated on other grounds by* Bing v. Thunig, 143 N.E.2d 3 (N.Y. 1957).

[59] Dorit Rubinstein 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, 912 (2015).

is large. This fits current Supreme Court jurisprudence suggesting that religious accommodation need not be necessary in cases where there are no comparable mainstream practices permitted and adheres to the compelling interest test by requiring likelihood of effect.[60] In this view, the state would be able to forbid religious accommodation for life-saving medical procedures, effectively compelling parents to seek medically advisable treatment for their children.

Scholastic support for ending religious exemptions to medical mandates is not universal. Novak argues exemptions may violate the Establishment Clause because they do not meet the second and third criteria of the Lemon Test, in addition to previously mentioned violations of the Equal Protection Clause.[61] Critics may also argue that the relationship between medical treatment and health of the child is often far less direct than the case of organ transplant or blood transfusion. For example, Ross and Aspinwall argue failure to properly vaccinate is medical neglect because it technically places children at risk of death, but dispute that this form of neglect merits legal intervention because the risk of harm in a largely immunized society is small in both probability and imminence.[62] However, they fail to note that religious communities are often insular and concentrated populations which allows disease to rapidly proliferate between unvaccinated children of adherents, as was the case for Orthodox Jews in Brooklyn and the Amish in Michigan. Religious accommodations are not only potentially unnecessary, they are also actively harmful: Bucchieri argues that state-by-state compulsory vaccination laws are insufficient to further the state interest in public health because exempt populations form concentrated pockets of vulnerability. They have clearly been ineffective in preventing an outbreak of disease, as philosophical objection to vaccines has grown.

PART TWO: LEGAL PRECEDENTS FOR COMPELLING TREATMENT

The right of the state to intervene in matters of public health can be traced to Cicero's *Salus populi suprema lex* proclamation (translated, the health of the people is the supreme law). In this vein, many argue that the state has the power of "overruling necessity" to suspend civil liberties as

---

[60] Hillel Y. Levin et al., *To Accommodate or Not to Accommodate: (When) Should the State Regulate Religion to Protect the Rights of Children and Third Parties*, 73 WASH. & LEE L. REV. 915, 966-67 (2016).

[61] Alicia Novak, *The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges*, 7 U. PA. J. CONST. L. 1101, 1112-1116 (2005). The Lemon Test, first established in *Lemon v. Kurtzman,* has three prongs: the law must have a secular purpose, the primary purpose of the law can neither advance nor inhibit religion, and the law cannot cause an "excessive entanglement" of government and religion. 403 U.S. 602 (1971).

[62] Lainie Friedman Ross & Timothy J. Aspinwall, *Religious Exemptions to the Immunization Statutes: Balancing Public Health and Religious Freedom*, 25 J. L., MED. & ETHICS 202, 202-209 (1997).

normal and compel actions in periods of crisis.[63] The power to compel originates with the authority of police power, or the "inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice."[64] The federal government in the United States, however, lacks a police power (and the Tenth Amendment seems to suggest it would be unconstitutional to expand the scope of federalism to encompass police powers) – it instead relies on enumerated powers, such as those over interstate commerce, which can be used to regulate public health. In practice, most contagion-preventing measures have therefore been reserved to the states. It would therefore be likely that any no-exceptions vaccine mandates for minors would need to be passed at the state level; in this paper, I merely prove such laws would not be unconstitutional. This is a uniquely high bar in the United States, given that public health crises cannot "suspend the operation of the constitution."[65]

2A. Legal Precedents on Religious Accommodation

In the first landmark case on religious accommodations, *Reynolds v. United States*, the Court held that the Free Exercise Clause does not require special accommodations, and that allowing religious exemptions "would be to make the professed doctrines of religious beliefs superior to the law of the land, and in effect permit every citizen to become a law unto himself."[66] The Court later reversed its position by applying the Free Exercise and Free Establishment clauses to the states through the Fourteenth Amendment: *Cantwell v Connecticut* established that a family of Jehovah's Witnesses had the right to preach using anger-inducing materials despite statutes prohibiting a breach of peace and incorporated free exercise to the states via the Due Process Clause, while *Everson v. Board of Education of the Township of Ewing* incorporated the Establishment Clause to the states.[67] Limitations to accommodation remained, however: in *Cantwell*, the Court opined that, "the [first] Amendment embraces two concepts - freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[68] Though *Cantwell* was decided a mere two years after *Carolene Products*, the balancing test implicit in the decision bears greater resemblance to a rational basis test than to strict scrutiny, which perhaps contributed to the ruling's short-lived preeminence. The right to religious exemption was fully realized in *Sherbert v.*

---

[63] John Fabian Witt, *The Law of Salus Populi: Epidemics and the law*, THE YALE REV. (Mar. 30, 2020), https://yalereview.org/article/law-salus-populi.

[64] *Police Power*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[65] *See* People v. Roff, 3 Park. Crim. Rep. 216 (N.Y. 1856).

[66] 98 U.S. 145, 167 (1879).

[67] Cantwell v. Conn., 310 U.S. 296 (1940); Everson v. Bd. of Ed. of the Ewing Twp., 330 U.S. 1 (1947).

[68] *Cantwell, supra* note 65, at 303-304.

Verner, in which the Court overturned South Carolina's ruling that Seventh-Day Adventist Adeil Sherbert was ineligible for unemployment benefits after she was fired for refusing to work on the Sabbath, a failure "without good cause . . . to accept suitable work.[69] In *Sherbert,* the Court found that religious exercise was a preferred freedom and that "only the gravest abuses, endangering paramount interest" give occasion for permissible limitation, thereby establishing that the state would need to demonstrate compelling interest and demonstrate the law was narrowly tailored in order to infringe on religious belief.[70] The general favorability of the Court towards religious accommodation was again reversed in *Employment Division v. Smith*, in which the Court ruled Alfred Smith and Galen Black could be fired from their jobs and denied unemployment benefits after consuming peyote for religious purposes because peyote's criminalization was neutral and did not *intend* to burden any subset of the population.[71] In *Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, however, the Court ruled an ordinance prohibiting animal sacrifice was unconstitutional because it unfairly burdened Santeria adherents.[72] The difference in outcome between *Employment Division* and *Lukumi Babalu* can ultimately be attributed to intent: in Oregon, laws against peyote were written neutrally and with neutral intent, while in Hialeah, the law prohibiting animal sacrifice was nominally neutral but was written with the intent of targeting the Santeria church. Given that compulsory vaccination and medical neglect laws were written with neutral intent, it is likely that religious requests for exemptions would fall under similar structures as *Employment Division* and would not be protected. However, the Supreme Court has again reversed its stance on accommodations in the Roberts era, with rulings such as *Burwell v. Hobby Lobby*[73] and *Masterpiece Cakeshop v. CCRC.*[74] Thus, the current state of the law regarding religious accommodation is one in which the Court is extremely unwilling to give state action precedence over religious belief in the absence of extremely high and direct cost.

---

[69] 374 U.S. 398, 401 (1963).

[70] The subsequent application of the strict scrutiny test has been somewhat inconsistent. *Goldman v. Weinberger* established that strict scrutiny did not hold in the military context where religious headgear could be prohibited. 475 U.S. 503 (1986). In *O'Lone v. Estate of Shabazz*, the Court found that Muslim prisoners had no right to attend Juma'ah services. 482 U.S. 342 (1987). Additionally, the Court ruled that American Indian parents had to procure a Social Security card for their daughter even though it violated their religious beliefs. Bowen v. Roy, 476 U.S. 693, 695–98 (1986). However, if compelling life-saving medical treatment for minors meets the strict scrutiny test, it does not matter whether a lesser standard would be applied in a constitutional challenge, because the argument would also meet that standard.

[71] 494 U.S. 872 (1990).

[72] 508 U.S. 520 (1993).

[73] 573 U.S. 682 (2014).

[74] 138 S. Ct. 1719 (2018).

A distinct body of law has emerged specifically regarding medical compulsion towards minors with religious parents. The most important case regarding public health mandates is that of *Jacobson v. Massachusetts,*[75] in which the Court held that mandatory vaccination laws were protected under the state's police power.[76] In *Jacobson v. Massachusetts,* Pastor Henning Jacobson refused a smallpox vaccination, defying an order from the Cambridge Board of Health, which would have resulted in a $5 fine (approximately $2,900 in 2021 dollars). Jacobson appealed his conviction, but the Supreme Court upheld the vaccine mandate 7-2, citing both the state's police powers and the right of the state to "embrace … reasonable regulations established directly by legislative enactments as will protect the public health."[77] Though Jacobson was an adult, the case established that restricting liberty in order to pursue the state interest in public health and safety was legitimate[78] because the state's power included "reasonable regulations,"[79] a precursor to the rational basis test which requires that courts sustain laws rationally related to a legitimate state purpose.[80] Critics may note that the Jacobson ruling was not broad: Justice Harlan explicitly wrote that the "arbitrary and oppressive" use of vaccination may be unconstitutional. This is a limited view, however: Harlan was writing in specific reference to medical conditions that would not allow a subject to be vaccinated, rather than religious objections, which would likely fall under his broader prescription that liberty does not secure an absolute right to be freed from restraint, if the common good is at stake. The state's right to vaccinate was further cemented in *Prince v. Massachusetts,*[81] in which the Court ruled that children of Jehovah's Witnesses could not sell magazines without violating child labor laws, because the interest of the state in protecting children from harm outweighs a parent's religious interest: "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."[82] In *Prince,* the Court opined on the circumstances under which religious rights and parental rights may be limited: in instances that "guard the general interest

---

[75] 197 U.S. 11 (1905).

[76] *Id.* at 25.

[77] Unfortunately, *Jacobson* is also notable for being key precedent used in the *Buck v. Bell* decision, when compulsory sterilization was justified under similar grounds that "compulsory vaccination is broad enough to cover cutting the Fallopian tubes." 274 U.S. 200, 207 (1927).

[78] James G. Jr. Hodge & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 890 (2001).

[79] 197 U.S. at 25.

[80] *See* Rubinstein Reiss et al., *supra* note 57, at 895-96.

[81] 321 U.S. 158 (1944).

[82] *Id.* at 170.

in youth's well-being," *parens patriae* power gives the state authority above the parent's.[83] Though *Prince* concerned child labor laws, the Court specifically referenced compulsory vaccination as one of the state's powers.

There is also a significant body of legal opinions on religious accommodations for life-sustaining or life-saving medical procedures. The most infamous case regarding medical treatment is *Commonwealth v. Twitchell* (1993),[84] in which the conviction of Christian Scientist parents of a child who died from an easily treatable ailment due to his parents' reliance on healing through prayer was upheld by the Massachusetts State Supreme Court, with the Court holding that "intentional failure of each to seek medical attention for their son involved such "a high degree of likelihood that substantial harm will result to" him as to be wanton or reckless conduct."[85] *Twitchell* was the last in a string of cases involving the parental rights of Jehovah's Witnesses, which began with *In re. Elisha McCauley*, wherein the Massachusetts State Supreme Judicial Court ruled that the parents of Elisha McCauley, an 8-year-old with leukemia, could be mandated to treat her: "We conclude that Elisha's best interests, and the interests of the state, outweigh the McCauleys' parental and religious rights."[86] In a series of cases decided between *McCauley* and *Twitchell*, the Massachusetts courts ruled that parents could be forced to seek treatment for their children and be held criminally liable if they failed to do so, but adults had the right to refuse medical care, in line with the argument presented in this paper that the state and child's interest are most important to uphold. A significant amount of attention has been devoted to the children of Jehovah's Witnesses and blood transfusions, reflecting the large proportion of First Amendment jurisprudence relating to freedom for Witnesses. Though legal decisions vary between states, the Courts have generally ordered that the children of Witnesses receive life-saving transfusions. The extent to which the state can compel parents beyond life-saving varies widely. In *New York Family Court in re Sampson*, the child of Jehovah's Witnesses who suffered from Von Recklinghausen's disease and therefore had a large but not life-threatening facial tumor was mandated to receive surgery to alleviate the deformity under *parens patriae*.[87]

2B. Constitutional Torts

While the Supreme Court's jurisprudential approach to religious accommodation laws has oscillated, since 1963 doctrine on the permissibility of laws burdening members of a religious group has been held to the

---

[83] *Id.* at 166–67.

[84] 617 N.E.2d 609 (1993).

[85] *Id.* at 613

[86] 565 N.E.2d 411, 413 (Mass. 1991).

[87] M. J. Zaremski, *Blood Transfusions and Elective Surgery: A Custodial Function of an Ohio Juvenile Court*, 23 CLEV. ST. L. REV. 231, 244 (1974).

standard of strict scrutiny. In *Sherbert v. Verner*, the case that held religious mandates to the *Carolene Products* standard, the Court established that any substantial burden on religiously motivated conduct must be justified by a compelling interest and that "only the gravest abuses, endangering paramount interest" could be curtailed.[88] This balancing test was updated in *Employment Division*, which eliminated laws with neutral, general applications from being considered under the *Sherbert* test.[89] Congress quickly attempted to override this decision by passing the Religious Freedom Restoration Act (RFRA), which itself was then quickly overridden in *City of Boerne v. Flores*, holding that because the RFRA enhanced the *Sherbert* test, it changed constitutional rights and unenforceable because it interfered with the judiciary's unique power of interpretation. Thus, the *Sherbert* test can currently be considered in three prongs: (1) whether the government has pressured a person to forego a benefit or undertake a cost in order to engage in a religious practice, thereby burdening free exercise, (2) whether the state possesses a compelling interest, and (3) whether the law is narrowly tailored. In other words, the law is only justifiable if no alternative, non-burdensome law could achieve the same aims and there is a compelling reason for the law.[90]

When is state interest compelling enough to justify burdening religious participants? The endangerment of paramount interest suggested in *Sherbert* is decidedly vague, as it remains uncertain what represents a paramount interest of the state; to overcome a constitutional challenge on the grounds it violates the Establishment Clause, a law "must either…represent no infringement by the State of [the appellant's] constitutional rights of free exercise, or because any incidental burden on the free exercise of the appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate."[91]

It is unclear the *Jacobson* ruling, nearly 115 years old, would pass strict scrutiny or meet modern interpretations of the liberty interest in the Fourteenth Amendment, but no Supreme Court case regarding healthcare has been subject to strict scrutiny. In 2015, the Second Circuit Court of Appeals affirmed New York's requirement that children be vaccinated in order to attend public schools, which allowed for religious exemptions but allowed schools to temporarily bar exempted students during vaccine-preventable disease outbreaks.[92] The Court found that substantive due process was not violated due to the precedent established in *Jacobson* and

---

[88] Sherbert v. Verner, 374 U.S. 406, 408 (1963).

[89] Employment Division v. Smith, 494 U.S. 872 (1990); *see supra* note 68.

[90] Though there are some denominations which wholly eschew medical treatment in favor of faith healing, the Lemon test is unlikely to apply to these denominations because the child's medical status still falls under the idiosyncratic religious beliefs of the parents, not of the formal religious institution.

[91] *Sherbert*, 374 U.S. at 403.

[92] Phillips v. City of New York, 775 F.3d 538 (2d Cir. 2015).

free exercise was not violated due to precedent established in *Prince*, so the constitutional challenge had no grounds.[93] This indicates the precedent established by *Jacobson* still holds today, despite the evolution of jurisprudence, and that exemption-free laws mandating vaccination are still constitutional. In 2018, the California Courts of Appeal dismissed a challenge to California's law eliminating personal beliefs exemptions to school immunization requirements in *Brown v. Smith* on similar grounds.[94] In practice, this test is more complex. Religious accommodation was upheld even in cases where the state had a clear interest at stake, as in *Wisconsin v. Yoder*, indicating that the state's interest in public health may not be sufficient to prohibit accommodation.[95] However, although the *Yoder* ruling established that religious exemptions to education were constitutional, a key component of the majority opinion involved the self-sufficiency of the Amish: even with only an eighth grade education, Amish children would be able to provide for themselves in adulthood, while without life-sustaining medical treatment children would not be able to become adults and the argument would no longer stand.[96]

2C. Enforcing the Law

What sort of enforcement may be possible for failing to vaccinate children? Hartsell finds parents defending themselves often cite the Free Exercise Clause (although this defense may fail given precedent in *Reynolds v. United States* and *Prince v. Massachusetts*), as well as the Due Process Clause of the Fourteenth Amendment, under which they can claim "liberty" includes the freedom to raise children in accordance with spiritual belief.[97] The Fourteenth Amendment is a double-edged sword: as used in defense of children's rights, it often guarantees rights in a criminal context. If children of religious exemptors do have a right not to be harmed, what sort of compensation may they be entitled to, and what punishment for failure to treat illness may be levied against parents? In the few states where parents can be criminally charged, they are rarely found guilty: in *Walker v. Superior Court*,[98] the indictment for manslaughter of the mother of a child who died of untreated meningitis was upheld and the mother was later convicted[99]; however, in *State of Minnesota v. McKown,*[100]

---

[93] *Id.* at 542-43

[94] Brown v. Smith, 235 Cal. Rptr. 3d 218 (Ct. App. 2018).

[95] 406 U.S. 205 (1972).

[96] *Id.* at 221–25.

[97] Jennifer L. Hartsell, *Mother May I ... Live? Parental Refusal of Life-Sustaining Medical Treatment for Children Based on Religious Objections*, 66 TENN. L. REV. 499, 512–16 (1999).

[98] Walker v. Superior Court , 763 P.2d 852 (Cal. 1988).

[99] Lawrence J. Goodrich, *Christian Scientist's Case Settled in California*, C.S. MONITOR (June 25, 1990).

[100] State of Minnesota v. McKown, 475 N.W.2d 63 (1990).

Commonwealth of Massachusetts v. Twitchell,[101] and *Hermanson v. State of Florida* [102] state courts overturned criminal convictions or dismissed indictments of the parents of children who had died due to lack of medical treatment, citing Fourteenth Amendment violations.

Ferraiolo argues parents who refuse to vaccinate eligible children could be prosecuted under reckless endangerment, criminally negligent homicide, or second-degree manslaughter, should they fail to vaccinate or fail to prove their religion prohibits vaccination;[103] however, this would likely fail in Court because it requires the Court to interpret religion rather than take a sincerely held belief in good faith, and therefore causes an excessive entanglement with religion. Ciolli suggests using tort law as an alternative to prohibiting religious accommodation for vaccination, instead allowing individuals infected by children of exemptors to file class action lawsuits against representative exemptors for the damages they incur from illness, under Federal Rule of Civil Procedure 23 in hopes of deterring religious exemption.[104] In this view, parents would be civilly rather than criminally wrong, and failing to vaccinate would not be an act of child abuse—a criminal offense that explicitly violates a statute—but instead a violation against a person not expressly prohibited by law. Rubinstein Reiss also suggests the use of tort law to provide financial compensation to the victim's family because there ought be a duty to act in prevention of easily-preventable diseases, although she proposes individual rather than class-action lawsuits.[105] Thus, religious exemptions present a challenge of enforcement as well as that of doctrine: if a parent does engage in medical neglect but claims religious exemption, they are unlikely to be prosecuted even in areas where the state could have mandated the child undergo treatment if they were still alive.

PART THREE: THE CASE FOR MANDATING MEDICINE

It is near-universally recognized that the state has the right to compel blood transfusions for a hemorrhaging child, surgery or an organ transplant for the child in liver failure, chemotherapy for the child with cancer. But where does the line for a medical state of emergency lie? How direct must the benefit of the treatment offered be, and what kind of benefits justify state intervention? Must that benefit be curative, or does improving a child's chances of survival when they are still below 50%, or extending a child's life in the case of terminal illness, or improving a terminally ill

---

[101] Com. v. Twitchell, 617 N.E.2d 609 (1993).

[102] Hermanson v. State 604 So.2d 775 (Fla. Dist. Ct. App. 1990).

[103] Stephanie A. Ferraiolo, *Justice for Injured Children: A Look into Possible Criminal Liability of Parents Whose Unvaccinated Children Infect Others*, 19 QUINNIPIAC HEALTH L.J. 29, 45–49 (2016).

[104] Anthony Ciolli, *Mandatory School Vaccinations: The Role of Tort Law*, 81 YALE J. BIOLOGY & MED. 129, 131–33 (2008).

[105] Dorit Rubinstein Reiss, *Compensating the Victims of Failure to Vaccinate: What Are the Options*, 23 CORNELL J. L. & PUB. POL'Y 595, 633 (2014).

child's quality of life, constitute a great enough benefit to justify intervention? In the case of medical treatments like vaccines, which reduce the likelihood of future deadly illness at a time when a child is not presently in danger of death, does the action bring a direct enough benefit to warrant state intervention? How should the state consider the collective good and public health when a medical action brings benefit to one's peers as well as oneself? As described previously, the Supreme Court has declined to provide lower courts with a general rule statement for the circumstances under which freedom of medical action with regards to one's children may be constrained. In this section, I provide a philosophical justification for heavy state intervention, then propose a balancing test, in line with other tests the Court has used to regulate the free exercise of religion, that may be used to evaluate when the Court may compel a parent to treat their child. This is not a rehashing of the *Sherbert* test, but instead a proposed mode of analysis for how courts could evaluate whether any given medical treatment unduly burdened free exercise.

3A. Scope Conditions

The first issue at hand is what legal precepts are invoked in evaluating the relevant constitutional questions, and which fall outside the scope conditions for this paper – in other words, what this argument is *not* about. The question of sincerity of belief deserves special attention. The Court has historically mandated that religious belief be sincere in order to merit accommodation[106] and given that most major religions have formally encouraged procedures like vaccination from central religious institutions (although the Jehovah's Witnesses doctrinally condemn blood transfusions) it may seem as though "anti-vax" attitudes are not doctrinally sanctioned and are therefore insincere and can be set aside. However, the threshold for sincerely held belief is typically decided by lower courts and sincerity of belief is often taken on good faith at higher levels; in *Thomas v. Review Board*[107] the Court ruled that even when adherents struggle to articulate their beliefs, hold differences in belief with other followers of the religion, or are scripturally or logically inconsistent, it is not the place of the Court to dissect religious belief. Therefore, despite proclamations in support of vaccination from centralized religious institutions that adherents claim membership in when citing the need for religious exemption, the arguments for the constitutionality of laws mandating vaccination will proceed as though all claimants are sincere in belief, and sincerity is not a relevant question.

---

[106] *See* Wisconsin v. Yoder, 406 U.S. 205, 235 (1972); United States v. Seeger, 380 U.S. 163, 165–66 (1965); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 717 n.28 (2014); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018).

[107] Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 715–16 (1981).

While some may argue centrality of belief is an important factor for consideration, this is also outside the scope conditions of this paper because the Court has rejected the relevance of centrality to the compelling-interest test.[108] It should additionally be noted that religious and conscientious objection are not the same, but that does not matter here, because if we find religious exemptions to medically necessary procedures to be constitutionally unprotected, this would also apply to conscientious objection, given that overriding religious exemption is the higher bar to clear.

I will only argue that the state should have the ability to compel religious adherents to make certain medical decisions for their children; the potential impacts this could have on the legality of publishing anti-vaccination media and similar materials are beyond the scope of this argument. Others may ask whether the right to forbid religious objection to certain medical procedures extend to regulating speech around such medicine, because that speech affects the rate at which parents elect to treat their children? Epidemiologists generally concur that the incidence of diseases is affected by cultural factors in addition to characteristics of the pathogen (for example, the infection rate for HIV/AIDS is affected by condom usage as well as the generally high virulence of species of lentivirus), so speech can endanger public health by encouraging nonparticipation in medically advisable practices.[109] However, the Supreme Court has historically interpreted the First Amendment as providing a robust protection for speech.[110] This has the notable advantage of allowing for debate and public dialogue around health practices.[111] The majority of Court decisions at the nexus of public health and free expression have ruled the state cannot limit the publication of medical information, but what of medical misinformation?[112] The *Central Hudson* test for commercial speech is

---

[108] Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989).

[109] *See* Caroline Buckey et al., *Thinking clearly about social aspects of infectious disease transmission*, 595 NATURE 205 (2021); William W. Dressler, *Culture and the risk of disease*, 69 BRIT. MED. BULL. 21 (2004).

[110] *See* Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969); Reno v. ACLU, 521 U.S. 844, 896–97 (1997); Texas v. Johnson, 491 U.S. 397, 420 (1989); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 773 (1976).

[111] LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 146 (2000); *see also* Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 459-60 (1971) (noting that the Court upheld dissemination of health claims that were widely, but not universally, held to be false, while maintaining the need to balance concerns for public health).

[112] The Court found Virginia's law banning media from publishing advertising supporting abortion was unconstitutional. Bigelow v. Virginia, 421 U.S. 809, 829 (1975). Furthermore, the First Circuit ruled that the Massachusetts Bay Transportation Authority's refusal to publish ads providing information on HIV violated the First Amendment. AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth., 42 F.3d 1, 3 (1st Cir. 1994).

one possible metric to also apply to regulating speech that persuades individuals against pursuing medical treatments deemed advisable by the scientific community for their children: the test asks (1) if the regulated speech promotes legal activity, is truthful, and is not misleading (if yes, the speech deserves protection), then asks (2) if government regulation serves a "substantial interest," (3) if regulation directly advances that interest, and (4) if regulation is narrowly tailored (if yes, the speech can be regulated).[113] Parmet and Smith examine the conflict between First Amendment speech rights and the necessity of regulating speech that harms public health: because speech is a determinant of population health, the government must intervene to regulate speech to be both truthful and informative and limit speech that alters culture in health-threatening ways, a perspective that is in line with the *Central Hudson* test.[114] While this article is written specifically within the context of obesity, though this would also apply to the religious organizations that publish materials advising against vaccination or blood transfusions. Naprawa deepens this analysis by arguing that anti-vax speech should be regarded as commercial rather than opinion speech because statements on vaccine safety are fact-based and related to the sale (or lack thereof) of a product (especially when a naturopathic alternative is presented).[115] The right to restrict this form of speech is strengthened given that the *Central Hudson* test does not apply to false speech, which is not protected by the Constitution.[116] It is explicitly unlawful for any "person, partnership or corporation to disseminate, or cause to be disseminated, any false advertisement .. .having an effect upon commerce of food, drugs, devices, services or cosmetics."[117] Under the Roberts court, the *Central Hudson* test has been reduced to another form of strict scrutiny because the majority of cases at the intersection of health and the First Amendment have been deemed to involve content-based speech.[118] For example, in *Sorrell v. IMS Health Inc.*,[119] the Court struck down Vermont's Prescription Confidentiality Law because it placed a speaker- and content-based burden on speech and therefore was subject to heightened scrutiny, which it did not meet.[120] Though anti-vaccination

---

[113] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562–66 (1980).

[114] Wendy E. Parmet & Jason A. Smith, *Free Speech and Public Health: A Population-Based Approach to the First Amendment*, 39 LOY. L.A. L. REV. 363, 430–32 (2006).

[115] *Naprawa*, *supra* note 2, at 505-506.

[116] Cent. Hudson Gas and Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 557 (1980).

[117] 15 U.S.C. § 52(a)(1) (2012).

[118] Samantha Rauer, *When the First Amendment and Public Health Collide: The Court's Increasingly Strict Constitutional Scrutiny of Health Regulations That Restrict Commercial Speech*, 38 AM. J.L. & MED 690, 694 (2012).

[119] Sorrell v. IMS Health Inc, 564 U.S. 552 (2011).

[120] IMS Health Inc. v. Sorrell, 630 F.3d 263, 267 (2d Cir. 2010).

speech may be perceived as false in the scientific community, the Supreme Court has never invoked the first prong of the *Central Hudson* test in relation to such speech, nor denied a compelling government interest as in the second prong of the test; the author argues that this renders the *Central Hudson* test a least restrictive means test in practice, thereby subjecting public health-related speech to a more rigorous standard. Altogether, given that the publication of anti-vaccination and materials encourages individuals not to vaccinate, it seems reasonable that the Court could restrict the act of opining on the harms of vaccinations and other medically advisable procedures, in addition to restricting the ability to act on this belief.

3B. Ethical Justifications for Compelling Medicine

Having established the legal precedent by which abolishing a parent's claim on religious exemptions for their children's medical treatment may not unduly burden free exercise, I now turn to the question of whether failing to provide accommodation is philosophically justifiable, if not desirable. At its broadest level, the issue of compelling medically advisable action is a question of societal accommodation, and to what extent the state ought inculcate a system of norms and standard of behavior in its citizens uniformly. The liberal democratic principles of majority rule and neutrality suggest non-accommodation, while the principle of liberty instead suggests accommodation, placing religion at an uncomfortable crossroads in the American model of government. In the liberal monist view, group practices that are inconsistent with the liberal majority do not have to be accommodated,[121] but the United States has largely adopted a philosophy of liberal pluralism. In this view, the right to pursue salvation is the most inalienable of rights because God has placed restrictions on human action that take priority over complying with earthly law due to the great suffering caused by moral conflict and fear of eternal punishment for believers.[122] This is countered by the Hobbesian view in which citizens ought follow the sovereign when civil law contravenes religion, because the Kingdom of Heaven and a political kingdom hold different jurisdictions; in this view, there is a lexical order to divine commands and the first duty of the citizen is to seek peace.[123] Hobbes' view is an expansion on Luther, who argued that true believers ought respect state authority because even if they did not require state law to act morally, those outside the faith would require external guidance: in this conception, following the state is a method of loving thy neighbor because one is behaving in a

---

[121] Richard A. Shweder, *Shouting at the Hebrews: Imperial Liberalism v. Liberal Pluralism and the Practice of Male Circumcision*, 5 L., CULTURE & HUMANITIES 247, 247 (2009).

[122] It should be noted that this viewpoint, while common among early political theorists, is explicitly Christian; in Jewish thought when the law and religion conflict believers are encouraged to follow state law rather than religious doctrine.

[123] THOMAS HOBBES, LEVIATHAN (Noel Malcolm ed., 1st ed., 2012).

manner pursuant to the public interest.[124] The concept of two kingdoms, civil and religious, was also proposed by Madison in his *Memorial and Remonstrance* and Jefferson in his *Letter to the Danbury Baptists.* It also aligns with the Jewish tradition, where the halakhic law provision *dina d'malkhuta dina,* or "the law of the land is the law" dictates that civil law is binding the Jewish inhabitants of a country above religious law, though this doctrine is typically applied to taxation and other economic matters.[125] It is therefore possible to conceive of an ethical framework under which a religious adherent ought *not* claim accommodation while still acting in line with their ethical dictates, and a motivation for interpreting the law in such a way, although this paradigm comes with the ethical harm of placing a normative judgement upon which moral frameworks the state should privilege.

Adjudicating the debate between spiritual health and medical health is the most crucial problem in arguing against religious accommodation for medical harms. It is commonly recognized that only parents should be responsible for spiritual health: from the time of Luther and Locke, ethicists have argued that the state cannot be responsible for care of the soul because faith cannot be commanded.[126] If parents are responsible for a child's spiritual health, allowing the state to manage a child's physical health may infringe on parental responsibility and preclude spiritual health. The strongest criticism of allowing the state to compel medical treatment for minors is that in saving the body, the soul is lost. However, if there is truly an irreconcilable tension between soul and body, it would still be preferable to forfeit the soul for two reasons: first, it is uncertain whether children adhere to their parents' beliefs or would hold those beliefs in adulthood, so neither the actor in question nor the state cannot prioritize soul over body, and second, no major religions fault adherents for what they were forced to do against their will and compelling parents would allow many groups to skirt the ethical dilemmas they currently face.

This is further complicated by the idea that even if saving the soul were more important than saving the body, it would require a doctor not to engage in customary practice and potentially violate the physician's own ethical framework. When a patient of legal age refuses medical treatment, the physician's ethical obligation towards autonomy (the individual's right to reject treatment) and beneficence (the duty to promote well-being) are put into conflict.[127] The physician who honors autonomy is

---

[124] MARTIN LUTHER, *Temporal Authority: To What Extent it Should Be Obeyed*, *in* MARTIN LUTHER'S BASIC THEOLOGICAL WRITINGS (Timothy F. Lull ed., 1989).

[125] Samuel Atlas, *Dina D'Malchuta Delimited*, 46 HEBREW UNION COLL. ANNUAL 269, 269 (1975).

[126] *See* Luther *supra* note 121; *see also* Hobbes *supra* note 120.

[127] David A. Sacks & Richard H. Koppes, *Caring for the Female Jehovah's Witness: Balancing Medicine, Ethics, and the First Amendment*, 170 AM. J. OBSTETRICS & GYNECOLOGY 452, 452 (1994).

rarely legally liable, but is it moral to place another individual into a state of moral conflict in order to assuage one's own morals?

It is entirely possible to continue supporting the liberal pluralist viewpoint while suggesting lifesaving health matters for minors not be included within the larger ethical argument for accommodation. The answer to the question of regulation is also a function of the extent to which individual interaction is within the private sphere: because individuals have the capacity to infect others if unvaccinated, failing to be vaccinated is something that endangers public health and therefore resides in the public sphere. Beyond individual health, vaccinations contribute to public health, which strengthens the ethical imperative of the state to compel vaccination. Salmon et al.'s finding[128] that vaccine exemptions affect herd immunity and lead to an increase in the incidence of measles among the non-exemptor population imposes an ethical burden on those able to receive vaccines. Mill, in *On Liberty*, explicitly suggests that public safety is an instance in which the rights of the individual may be overridden: "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[129] Compelling parents to pursue life-saving medical treatment for their children, and compelling vaccinations in support of herd immunity, clearly prevents harm to others and is therefore a just action of the liberal state. Receiving vaccination is also a matter of distributive justice: given that individuals with cancer, autoimmune diseases, severe allergies, and clotting disorders often cannot receive vaccines, compelling the able-bodied to vaccinate in order to preserve the health of the medically fragile is consistent with the minimaxer philosophy.

The right of the state to compel parents to seek medical treatment via scientific means, allow blood transfusions, and engage in other life-saving procedures is less clear, because the relationship between parent and child is at least somewhat private. However, the state sees fit to regulate the conduct of a parent towards the child because even if a child's spiritual health is the duty of a parent, other forms of children's health—physical, emotional, and mental—are recognized as a collective good the state has a vested interest in, because those children will become the next generation of citizens. The state regulates conduct between parent and child in ways that guarantee minimum standards of physical safety and education because it is within the public interest for a child to become an autonomous and self-sufficient adult and given that becoming an adult (especially a self-sufficient one) is contingent upon safety from medical harms, this conduct also ought to be regulated. If the state is to protect a large swath of individual rights, ought those rights be protected against other individuals infringing upon them —including the family unit— as well as

---

[128] Salmon et al., *supra* note 24.

[129] JOHN STUART MILL, ON LIBERTY, 70. (Dover Thrift Ed. 2002).

against state infringement?[130] If a child cannot have freedom of action because the state recognizes that they cannot yet rationally understand consequences, and there is a preference for preserving the largest possible amount of choice for the child once they reach maturity–e.g., requiring schooling so that children may become tradesmen or attend college, forbidding children from participating in binding legal agreements without parental consent–any choice which places a child in significant danger of not reaching adulthood infringes on their future freedom of choice and ought be avoided.

The claim to parental rights in this area is weakened by the ethical grounds on which parental rights are traditionally based. The deontological justification for parental rights suggests that because autonomy is a good in the liberal state, and parental rights further parental autonomy because shaping a family is central to self-determination, parental rights must therefore be a good.[131] Parenting is meaning-giving, and a key expression of conscience in this view.[132] However, deontological proponents largely fail to contend with the inevitable conflict between rights of the parent and rights of the minor, and by their own framework in which autonomy is the highest good, autonomy over the self surely takes precedence over autonomy over other individuals, therefore rendering children's rights more important than parents' rights. Thus, a child's right to life would outweigh a parent's right to raising children in accordance with their own conscience. The instrumental/utilitarian approach to parental rights instead suggests deference to parental rights promotes the highest possible level of children's welfare.[133] While it is true that parents often take the spiritual welfare of their children very seriously, religious exemptions to medical treatment are a clear instance in which parents are not seeking the highest possible standard of physical welfare. If physical welfare were to be prioritized over spiritual welfare, then, parental rights would not apply in this case.

3C. A Potential Balancing Test

Ideally, the Court should return to its reading of the Establishment Clause in *Cantwell*, in which freedom of belief is absolute but conduct may be regulated "for the protection of society," rather than the higher bar allowing only action in circumstances of "the gravest abuses" in *Sherbert.* It is, however, entirely possible to develop a test for which compelling medical procedures may be evaluated as justifiable or unduly burdensome that is harmonious with Sherbert. The first question for consideration is

---

[130] James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1371 (1994).

[131] Hamilton, *supra* note 46, at 1055.

[132] EAMONN CALLAN, CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY 145–47 (1997).

[133] *Id.*

whether a medical benefit must be curative in order to fall under the umbrella of compulsion. In *New York Family Court in re Sampson*, the child of Jehovah's Witnesses who suffered from Von Recklinghausen's disease and therefore had a large but not life-threatening facial tumor was mandated to receive surgery to alleviate the deformity under *parens patriae*.[134] Thus, it seems the test can encompass treatments that improve quality of life even if the disorder would be non-fatal if untreated. Life-extending treatments for the terminally ill have less guidance in the courts, but seem to fall under the ethical primacy of autonomy: given that children do not have recognizable preferences and the epistemic uncertainty that children will hold the same religious views as their parents, if the life-extending treatment would allow a child to survive into adulthood and recognize their own preferences, it should be undertaken. Similarly, if a treatment would significantly extend a child's lifespan when undertaken immediately rather than after the age of 18 (for example, extending one's life expectancy from 30 to 60), it extends the period for which the now-child will be able to engage in choice and autonomy as an independent actor, and therefore falls under the compelling interest of the state in preserving individual liberty and allowing children to reach (prolonged) adulthood. By preserving the most pronounced viability for the child, the state preserves the largest number of options for the child to act upon in adulthood and thus, the freedom of the body's host rather than the body's temporary guardians (the parents). Parental supremacy would only be valid if children were chattel. The rule by which courts could broadly conceive of medical benefit in a scope worthy of intervention could therefore read, "In instances where medical treatment is (a) necessary to save a child's life or (b) likely to significantly extend into adulthood, extend the total span, or improve the quality of that child's life, the state may compel parents to undertake actions that violate even the most sincerely held religious beliefs." This still requires judicial intervention to quantify terms like "significant" extension or "significant" improvement but is likely to produce a more uniform set of decisions than the present approach.

The second set of concerns broadly falls into the bucket of directness of benefit. A vaccination indirectly improves a child's chance at life by preventing them from getting the measles, but it does not treat a present malady. It might very well be that the child is never exposed to measles and never sickens; it is impossible to know if the child will actually benefit. Further, vaccinations do not just benefit one child; they are critical instruments of public health where third parties may be just as large a target. Some diseases we vaccinate against (such as Covid-19) are highly contagious, but rarely fatal for children; the risk lies in who they may pass the illness to and the public shutdown necessitated by epidemic. In line with *Sherbert* view, the state could compel vaccinations and life-saving

---

[134] M. J. Zaremski, *Blood Transfusions and Elective Surgery: A Custodial Function of an Ohio Juvenile Court*, 23 CLEV. ST. L. REV. 231, 233-234 (1974).

medical procedures without exemption because such practices further a compelling interest (public health and a healthy next generation) and are as narrowly tailored as possible (without high rates of buy-in herd immunity diminishes, as can be seen with the discussion of R_0, *infra* the Introduction). This alone would be sufficient. Yet further justification for compulsory vaccination may be found outside the First Amendment, where there are no collective rights. A federal compulsory vaccination law without religious exemption would be both desirable and constitutional because the Commerce Clause allows Congress to pass laws regarding public health, such as the 1944 Public Health Services Act.[135] Clarifying what may be seen as a "compelling state interest" would best establish the rule for intervention: in cases where a medical treatment prevents future illness that may threaten the viability of *the child or of the well-functioning of society*, the state may compel parents to undertake actions that violate even the most sincerely-held religious beliefs. This both protects the child's future autonomy and future participation in the polity for highly dangerous diseases like measles and protects social well-being—the ability of schools to stay open, businesses and markets to function, and seniors to avoid mass death, largely synchronous with the already-established compelling interest test.

The final question regarding medical compulsion is whether this argument may be extended to others with the diminished capacity to express and act on their preferences. During the Covid-19 pandemic, the question arose whether the mentally disabled in nursing homes, especially seniors with dementia and Alzheimer's, could be vaccinated even if those with medical power of attorney over them objected.[136] This argument likely does not extend to such populations. In instances where someone has lost their previous decision-making capacity, their prior revealed preferences can shed light on how they would likely act; a lifelong anti-vaxxer stricken by senility should not receive something they have a revealed preference against. In this instance, family members of the patient are likely more able to ascertain the preferences of their loved one than the state is—a key justification for medical power of attorney going to private actors in the first place. In the case where someone has been, and will be, mentally incapacitated for life, their family is no longer their temporary guardian

---

[135] Rebecca Bucchieri, *Religious Freedom versus Public Health: The Necessity of Compulsory Vaccination for Schoolchildren*, 25 B.U. PUB. INT. L.J. 265, 288 (2016).

[136] *See* Xavier Symons, *COVID-19 vaccine consent for aged-care residents — it's ethically tricky, but there are ways to get it right*, ABC RELIGION & ETHICS (Feb. 24, 2021), https://www.abc.net.au/religion/the-ethics-of-vaccine-consent-for-older-persons/13189892; *see also* Fenit Nirappil and Yasmeen Abutaleb, *Nursing homes face daunting task of getting consent before they give coronavirus vaccines*, WASH. POST (Dec. 20, 2020), https://www.washingtonpost.com/health/nursing-homes-covid-vaccine-consent-delays/2020/12/19/730ecd4a-3fd5-11eb-8bc0-ae155bee4aff_story.html.

but their lifelong guardian. It is impossible to preserve their ability to make future choices, because they will never have the capacity to legally engage in autonomous choice. The purpose of compulsion having been defeated, there seems to be little justification for compelling treatment. However, there is a clear public health justification—a compelling state interest—to exclude the unvaccinated from nursing homes and rehabilitation centers, it just likely does not meet the bar of compelling treatment.

CONCLUSION

While parental rights and religious rights are two of the most protected rights in the American state, it ultimately holds that the state may override parental beliefs in cases where religious conviction would otherwise cause the parent to fail to make medically advisable decisions because of the state's compelling interest in public health, the safety and wellbeing of children, and the individual rights of the child. The weakness of religious exemptions is particularly pronounced in instances in which children are involved, where the state has the strongest right towards the children. The state is the ultimate protector of the public and has a unique duty to children:

> Children, when born into the world are utterly helpless, having neither the power to care for, protect or maintain themselves … the law of nature, as well as the common law, devolves upon the parents the duty of caring for their young in sickness and in health, and of doing whatever may be necessary for their care, maintenance and preservation, including medical attendance, if necessary; and an omission to do this is a public wrong which the state, under its police powers, may prevent.[137]

In this paper, I prove there is extensive legal precedent for compelling parents to act against their religious beliefs but in the physical interest of their child, and that challenges to states that abolish exemptions to vaccine laws are likely to fail in court. Beyond this, I argue that it is not only legal for states to mandate all children be protected from medical harm regardless of parental belief, it is advisable given various moral frameworks that both the Framers relied on and contemporary jurisprudence supports, and develop a test the Court may use to evaluate whether a medical intervention is necessary and compellable. Ultimately, the increasing politicization surrounding vaccines and bodily autonomy is unlikely to subside; the Court must adapt its previous jurisprudence on conscience and religion to meet the contemporary needs of a society under viral siege. This is entirely possible through the libertarian American lens that prioritizes choice, autonomy, and individual liberty, rather than a more interventionist and collectivist mode of rights.

---

[137] People v. Pierson, 68 N.E. 243, 246-247 (N.Y. 1903).

***