

## Private Choice Versus Public Health: Religion, Morality, and Childhood Vaccination Law

Ross D. Silverman

Thomas May

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/rrgc>



Part of the [Public Health Commons](#)

---

### Recommended Citation

Ross D. Silverman, & Thomas May, *Private Choice Versus Public Health: Religion, Morality, and Childhood Vaccination Law*, 1 U. Md. L.J. Race Relig. Gender & Class 505 (2001).

Available at: <http://digitalcommons.law.umaryland.edu/rrgc/vol1/iss2/7>

This Article is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in University of Maryland Law Journal of Race, Religion, Gender and Class by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

# PRIVATE CHOICE VERSUS PUBLIC HEALTH: RELIGION, MORALITY, AND CHILDHOOD VACCINATION LAW

ROSS D. SILVERMAN, J.D., M.P.H.,\*  
AND THOMAS MAY, PH.D.\*\*

State-enforced vaccination of children represents the exercise of civil authority over individual judgment. While public health is a valid social good and a legitimate basis for state action (as we will discuss below), it is not the only good that must be considered when establishing social policy on immunization. In particular, United States social policy *must* seriously consider the effects of state-enforced vaccination on individual autonomy and freedom. This is especially true when the freedom in question relates to the expression of religious and personal beliefs. Religious freedom is perhaps the most fundamental value underlying the U.S. governmental system, as illustrated by its prominent place in the First Amendment to the Bill of Rights.<sup>1</sup>

Although most states currently recognize exemption to mandatory childhood vaccination on religious grounds,<sup>2</sup> the courts have consistently held that public health concerns override religious beliefs in cases related to childhood vaccination.<sup>3</sup> In addition, the courts have found it legitimate, for example, for local authorities to

---

\* Assistant Professor, Southern Illinois University School of Medicine; Assistant Professor of Medical Jurisprudence, Southern Illinois University School of Law; B.A., Indiana University; J.D., Boston University School of Law; M.P.H., Boston University School of Public Health.

\*\* Associate Professor of Bioethics and Director of Graduate Studies in Bioethics, Medical College of Wisconsin; B.A., Otterbein College; Ph.D., Bowling Green State University.

1. U.S. Const. amend. I.

2. Forty eight states currently recognize exemptions to vaccination on religious grounds. See NATIONAL VACCINE PROGRAM OFFICE, CENTERS OF DISEASE CONTROL AND PREVENTION, NATIONAL VACCINE ADVISORY COMMITTEE WORKING GROUP ON PHILOSOPHICAL EXEMPTIONS, Atlanta, GA (January 1998) [hereinafter "NVAC Report"]. Only Mississippi and West Virginia do not offer an exemption from vaccination requirements based on a parent or child's religious beliefs. See *Brown v. Stone*, 378 So. 2d 218, cert. denied 449 U.S. 887, 66 L. Ed. 2d 112, 101 S. Ct. 242 (Miss. 1980) (holding a statute allowing only members of a "recognized denomination" the opportunity to be exempted from state vaccination laws to be a violation of the equal protection clause).

3. See discussion *infra* notes 10 and 14.

evaluate the sincerity,<sup>4</sup> strength and religious basis<sup>5</sup> of a person's beliefs in deciding whether to grant exemption from mandatory childhood vaccination. The importance of this approach is significant: where they exist, "rights" often trump considerations relating to social utility.<sup>6</sup> The rights associated with religious freedoms, then, should not be overridden by public health concerns without sound justification based on liberal, *constitutional* principles other than mere social utility. Furthermore, the exercise of liberal constitutional rights is not normally subject to an evaluation of the reasons one might exercise one's right. The right of a competent adult to refuse medical care, for example, holds independent of the content of that decision, or what it is based upon.<sup>7</sup>

---

4. In *Sherr v. Northport-East Northport Union Free School Dist.*, 672 F.Supp. 81 (E.D.N.Y., 1987), the court addressed both whether pantheistic beliefs qualified for exemption under the state school vaccination policy, and to what degree states may examine the sincerity of a family's religious beliefs. According to the court,

In order for plaintiffs to be afforded the exemption from immunization that they seek, it is not sufficient merely that the beliefs that they assert as grounds for exemption be religious in nature. It must also be demonstrated that the espoused beliefs are sincerely held and that the stated beliefs, even if accurately reflecting plaintiffs' ultimate conclusions about the advisability of inoculation of their children, do in fact stem from religious convictions and have not merely been framed in terms of religious belief so as to gain the legal remedy desired. *Id.* at 94.

As the Supreme Court emphasized in *U.S. v. Seeger*, however: "While the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case." *U. S. v. Seeger*, 85 S.Ct. 850, 863 (1965). For an example of the application of this passage to a childhood vaccination case, see *Brown v. City of Corning*, 429 N.Y.S.2d 355 (1980). For further discussion of this topic generally, see Ronald B. Flowers, *Government Accommodation Of Religious-Based Conscientious Objection*, 24 SETON HALL L. REV. 695 (1993).

5. In *Mason v. General Brown Cent. School Dist.*, 851 F.2d 47 (2nd Cir., N.Y., 1988), the court found that parents have the burden of showing either that they are a member of a recognized religious organization whose religious tenets object to immunization, or that their personal and sincerely held religious beliefs lead them to object to immunization. The court rejected a church purporting to be the "religious" embodiment of the secular chiropractic ethic that immunization was unnecessary and contrary to one's "genetic blueprint," finding that the church's lacked all the indicators of a church (e.g., no membership rights, requirement of active participation, church dignitary status conferred with \$5 payments by mail). Furthermore, the court, while acknowledging that the family had done much to manifest the chiropractic ethic in their choice of lifestyle, determined that even though such lifestyle choices may be very important to the family, holding and adhering to such convictions do not render them beliefs religious. *Id.*

6. See generally, RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (Harvard University Press, 1977).

7. Assuming, again, that the patient is competent. There are times when the content of a patient's decision can be an *indicator* of incompetence; however, even in these cases it is the concept of capacity for autonomy, and not the content of the decision *per se*, that mitigates the right to refuse treatment. See Thomas May, *Assessing Competency Without Judging Merit*, 9 JOURNAL OF CLINICAL ETHICS 247, 254-57 (1998), and THOMAS MAY, *BIOETHICS IN A LIBERAL*

In short, although most states recognize religious exemptions to mandatory childhood vaccination, public health concerns ultimately may take precedence over religious beliefs. In this paper, we will examine the tension between public health and religious freedom that arises in U.S. childhood vaccination policy. We will argue that although individual autonomy and religious freedom are important social goods, the policy of mandatory childhood vaccination, in particular the recognition of public health concerns as overriding religious belief, is both legally and morally justified.

## I. LAW AND MANDATORY CHILDHOOD VACCINATION

The most common objection to mandatory childhood vaccination stems from the autonomy-based rights found in the U.S. Constitution. The earliest Supreme Court case addressing vaccination issues was *Jacobson v. Massachusetts*.<sup>8</sup> In *Jacobson*, the Court considered whether the state has the right to mandate that the public be vaccinated. The case arose following the adoption of a regulation by the Cambridge Board of Health mandating that all residents be vaccinated against smallpox or face trial and a potential fine. Henning Jacobson, after refusing to be vaccinated, was found guilty of violating the regulation and ordered to pay a five-dollar fine. Jacobson refused, and appealed the decision to the Massachusetts Supreme Court<sup>9</sup> and then the U.S. Supreme Court. Before the U.S. Supreme Court, Jacobson argued that compulsory vaccination laws violated his liberty, stating "compulsory vaccination law is unreasonable, arbitrary and oppressive, and hostile to the inherent right of every free man to care for his own body and health in such a way as to him seem best."<sup>10</sup> The Supreme Court rejected this argument, holding that state police powers give the State a right to impinge upon individual liberties. According to the Court, "[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an

---

SOCIETY: THE POLITICAL FRAMEWORK OF BIOETHICS DECISION MAKING (Johns Hopkins University Press, 2002).

8. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

9. *Commonwealth v. Jacobson*, 183 Mass. 242 (1904).

10. *Jacobson v. Massachusetts*, 197 U.S. at 11. For more in-depth discussion of the historical setting of the Jacobson case (but not the legal principles arising out of the decision), see Michael R. Albert, et. al., *The Last Smallpox Epidemic in Boston and the Vaccination Controversy, 1901-1903*, 344 N. ENGL. J. MED. 375 (2001). For further discussion of the legal significance of the Jacobson decision, see LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 66-69 (2000).

absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.”<sup>11</sup> Although the *Jacobson* case was concerned with the forced vaccination of *an adult* rather than a child, it is one of three Supreme Court cases—the others being *Zucht v. King*<sup>12</sup> and *Prince v. Massachusetts*<sup>13</sup>—that forms the backbone of the common law principle supporting the State’s power to require vaccination of the general public, and of children in particular.<sup>14</sup> These cases shed light on the debate underlying the implementation of public health goals, as well as the level of scrutiny with which a state may delve into the sincerity of an individual’s religious beliefs. Even though the Supreme Court has not directly addressed the issue of compulsory immunizations and the First Amendment,<sup>15</sup> through these and other cases the Court has extensively discussed whether state public health and safety policies may infringe upon an individual or family’s freedom to practice religion.

In the 1922 case, *Zucht v. King*,<sup>16</sup> the Supreme Court addressed the issues of mandatory vaccination, children, and the requirement that children be vaccinated prior to entering the public school system. The young woman denied access to school due to the lack of vaccination argued that the mandatory vaccination law violated her 14<sup>th</sup> Amendment Due Process and Equal Protection rights.<sup>17</sup> The Court, citing *Jacobson*, rejected these arguments.<sup>18</sup>

The 1944 case, *Prince v. Massachusetts*,<sup>19</sup> was a child labor law case in which a 9-year old child of a Jehovah’s Witness family was stopped from selling religious pamphlets on the street in the

---

11. *Jacobson v. Massachusetts*, 197 U.S. at 26.

12. *Zucht v. King*, 260 U.S. 174 (1922).

13. *Prince v. Massachusetts*, 321 U.S. 158 (1944); See discussion *infra*.

14. Prior to *Jacobson*, thirteen states—California, Georgia, Iowa, Maine, Massachusetts, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Dakota and Virginia—had already passed specific laws excluding unvaccinated children from the public school system, and a number of state courts had already ruled on the validity of these types of statutes. See, e.g. *Bissell v. Davison*, 65 Connecticut 183 (1894); *Abell v. Clark*, 84 California 226 (1890); *State v. Zimmerman*, 86 Minnesota 353 (1902); *Osborn v. Russell*, 64 Kansas 507 (1902); *Potts v. Breem*, 167 Illinois 67 (1897); *Duffield v. Williamsport School District*, 162 Pa. St. 476 (1894); *State v. Burdge*, 95 Wisconsin 390 (1897); *Re Rebenack*, 62 Mo. App. 8 (1897); *Blue v. Beach*, 155 Indiana 121 (1900).

15. But see, *Zucht v. King*, 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194 (1922).

16. 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194 (1922).

17. *Id.*

18. *Id.*

19. 321 U.S. 158 (1944).

evening. The Supreme Court, while acknowledging the family's right to freely practice religion fit, held that the police powers<sup>20</sup> afford the state broad authority to pass laws to protect the public. Additionally, under the auspices of the *parens patriae*<sup>21</sup> doctrine, the state could pass broad laws to protect children, even when such laws may conflict with an individual's religious beliefs.<sup>22</sup>

These cases provide the legal framework for the principle that the state may override an individual's religious beliefs concerning childhood vaccination in favor of public health concerns. The question remains, however, whether these legal grounds are morally justified in the context of the liberal, constitutional political system of the U.S.

---

20. Larry Gostin defines police power as, "The inherent authority of the state (and, through delegation, local government) to enact laws and promulgate regulations to protect, preserve, and promote the health, safety, morals, and general welfare of the people. To achieve these communal benefits, the state retains the power to restrict, within federal and state constitutional limits, private interests—personal interests in autonomy, privacy, association, and liberty as well as economic interests in freedom to contract and uses of property." GOSTIN, *supra* note 10, at 48. Also see *Jacobson v. Massachusetts*, 197 U.S. 11 (1904).

21. The doctrine of *parens patriae* describes the role of the state to protect those incapable of protecting themselves, primarily minors and incompetent persons. See GOSTIN, *supra* note 10 at 51-55. This principle originated in English law, where it described the office of the chancellor, or lord keeper, as "the general guardian of all infants, idiots, and lunatics" in the kingdom. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 47 (1897). Also see Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978); Susan D. Hawkins, *Protecting The Rights And Interests Of Competent Minors In Litigated Medical Treatment Disputes*, 64 FORDHAM L. REV. 2075 (1996).

22. *Prince*, 321 U.S. at 166-67. In its decision, the Court specifically cited to the right of the state to compel vaccination of children over a guardian's religiously-based objection. According to the Court,

[N]either rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.

*Id.*

## II. FREEDOM, MORALITY AND THE HARM PRINCIPLE

The single most prominent moral principle reflected in U.S. social policy and law is “The Harm Principle.”<sup>23</sup> The Harm Principle seeks to protect individual autonomy, while simultaneously recognizing that in some cases the exercise of one person’s autonomy can threaten another person’s freedom to structure their own life and values. Thus, the Harm Principle seeks to balance conflicting rights between individuals, thereby providing a basis for limiting rights on liberal grounds other than mere social utility.<sup>24</sup> John Stuart Mill, the principle’s most famous champion, described the principle in this way:

“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.”<sup>25</sup>

The prominence of this principle is demonstrated in the judicial system’s ongoing struggle to base review of legislation on it, both in the types of cases described in the preceding section, and even where statutes seem “paternalistic.”<sup>26</sup> In *Prince*, for example, the court uses the vaccination issue to stress when it is appropriate to override religious beliefs. According to the Court, a parent “cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.... [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare; and ... this includes, to some extent, matters of conscience and religious conviction.”<sup>27</sup> Even legislation that seems paternalistic, such as laws requiring motorcycle helmets or seat belt use, has been upheld by courts on grounds that

---

23. For an excellent analysis of “The Harm Principle,” see the following four books by Joel Feinberg on the moral limits of criminal law: JOEL FEINBERG, *HARM TO OTHERS* (Oxford University Press 1984); JOEL FEINBERG, *OFFENSE TO OTHERS* (Oxford University Press 1985); JOEL FEINBERG, *HARM TO SELF* (Oxford University Press 1986); and JOEL FEINBERG, *HARMLESS WRONGDOING* (Oxford University Press 1988).

24. See, generally, THOMAS MAY, *BIOETHICS IN A LIBERAL SOCIETY: THE POLITICAL FRAMEWORK OF BIOETHICS DECISION* (Johns Hopkins University Press, 2002).

25. JOHN STUART MILL, *ON LIBERTY*, 13 (The Liberal Arts Press, Inc., 1956) (1859).

26. See KENNETH R. WING, *THE LAW AND THE PUBLIC’S HEALTH*, 3RD EDITION 28 (Health Administration Press, 1990).

27. 321 U.S. at 166-67.

Professor Ken Wing, author of the book, *The Law and the Public's Health*,<sup>28</sup> describes as "tortured judicial logic."<sup>29</sup> Describing the numerous decisions concerning both mandatory helmet legislation and seat belt laws (which he describes as generally adopting the same principles and judicial postures), Wing states:

Note, in particular, that with the exception of the *Fries*<sup>30</sup> decision overturning early helmet legislation, all of these decisions have attempted to characterize this type of legislation as an attempt to protect the public's—not the affected individual's—health or welfare.<sup>31</sup>

Mill's basic formulation of the Harm Principle illustrates the tension between the public health good of vaccination and the exercise of individual religious freedom. If refusal of vaccination imposes risks only to the individual who refuses vaccination, state enforcement of vaccination would seem unjustified on moral grounds.<sup>32</sup> However, if harm is posed to others, state intervention overriding religious freedom may be justified.

*Prince* clearly refers to the harm principle in recognizing the state's broad powers to protect the public.<sup>33</sup> Interestingly, *Prince* goes further, however, by recognizing a strong *parens patriae* power to protect children even when this conflicts with the religious beliefs of that child's parents. While related, this represents a different type of protection from harm than normally seen as encompassed by the harm

---

28. WING, *supra* note 26.

29. WING, *supra* note 26 at 28. The majority of courts, according to Wing, have relied on the argument that serious injuries resulting from the failure to wear helmets result in economic burden to the public. In reviewing mandatory motorcycle helmet legislation, however, courts have used other "logic," including arguments that a failure to wear helmets affects third parties because: a serious motorcycle accident will cause a traffic hazard; society has an interest in maintaining a strong and productive citizenry; and the "well known fact" that cyclists ride near the center of the road and may therefore cross into oncoming traffic if injured. *Id.*

30. *People v. Fries*, 42 Ill. 2d 446, 250 N.E.2d 149 (1969).

31. WING, *supra* note 26 at 36 n.3. It should be noted that *Fries* itself was subsequently overruled by a decision employing the rationale Wing describes. *People v. Kohrig*, 113 Ill. 2d 384, 498 N.E.2d 1158 (1986).

32. For further discussion of this issue, see Lanie Friedman Ross & Timothy Aspinwall, *Religious Exemptions to the Immunization Statutes: Balancing Public Health and Religious Freedom*, 25 J. L. MED. & ETHICS 202, 204-06 (1997); Timothy J. Aspinwall, *Religious Exemptions to Childhood Immunization Statutes: Reaching for More Optimal Balance Between Religious Freedom and Public Health*, 29 LOYOLA UNIVERSITY CHICAGO L.J. 109 (1997).

33. *Prince v. Massachusetts*, 321 U.S. at 165-67.

principle.<sup>34</sup> Fundamentally, the *parens patriae* power justifies state intervention on the grounds of potential harm *to the person for whom exemption is requested*, rather than the public at large or an identifiable "other." We will argue that both of the types of harms alluded to in *Prince* are potentially threatened by failure to comply with mandatory childhood vaccination.

### III. TWO TYPES OF HARM

In the context of the Harm Principle, it is important to recognize that the dangers imposed by refusal of vaccination are not wholly individual. Vaccines are not 100% effective. There will be, therefore, a percentage of children who have been vaccinated that would be susceptible to vaccine-preventable diseases in the case of an outbreak. For example, during a measles outbreak in Utah, it was determined that the significant percentage of people exempted in a particular region led to an environment which made it possible for a six (viral) generation-long outbreak.<sup>35</sup> More than half of those who eventually contracted the disease had been vaccinated.<sup>36</sup>

As Feinberg<sup>37</sup> notes, however, we must be realistic in our understanding of the effects of our actions on others. Virtually *no behavior* is *entirely* isolated from effects on others: people will, at the very least, have reactions to the conditions they observe others to place themselves in. To address this, Feinberg argues that we must recognize that while all behaviors might have effects for persons other than the person acting, some behaviors will be *primarily* self-regarding (only *indirectly* affecting others).<sup>38</sup> To fail to recognize this principle would result in justified intervention in every area of life, trivializing the ideal of autonomy. The question, then, becomes one of how serious a threat is posed by the refusal of vaccination.

Those who are concerned about the dangers of exemptions on public health have the burden to demonstrate the significance of the potential harm.<sup>39</sup> In the absence of such a demonstrated threat of harm

---

34. *Id.* at 166-67.

35. Daniel A. Salmon, et al., *Health Consequences of Religious and Philosophical Exemptions from Immunization Laws, Individual and Societal Risk of Measles*, 282 JAMA 47 (1999).

36. *Id.*

37. FEINBERG, HARM TO SELF, *supra* note 23 at 56.

38. *Id.*

39. Extensive discussion of this subject is beyond the scope of this note.

to others, the harm principle would seem, at first blush, *not* to permit state intervention overriding religious beliefs (at least on the grounds of potential harm to others).<sup>40</sup> According to Mill's basic formulation of the Harm Principle, the *only* legitimate grounds for the exercise of power against an individual's will is to prevent harm to others.

An example derived from one measles outbreak suggests that exemptions might pose a threat when "clustered" in a given area (which is not unlikely, given the "clustering" of people with shared religious beliefs). In Utah, a "clustering" of exemptions to childhood vaccination six times the national average contributed to an outbreak of measles.<sup>41</sup> This large clustering of exempted individuals undermined the ability of vaccine programs to achieve "herd immunity," which prevents outbreaks from establishing a "foothold" because they cannot spread among those who are immune.<sup>42</sup>

Currently, forty-eight states offer parents the opportunity to have their children opt-out of vaccination requirements on religious grounds with Mississippi and West Virginia being the only states not providing this option. State legislatures, however, are rapidly expanding exemptions to mandatory childhood vaccination, creating conditions in which "herd immunity" might be threatened. Fifteen states have expanded school vaccinations exemptions to include people who object to vaccination on moral or philosophical grounds.<sup>43</sup>

---

40. We will argue below that the harm principle remains consistent with state enforcement *even if* the threat of harm to the general public is low.

41. Salmon, *supra* note 35.

42. "Herd immunity" may be described as "the resistance of a group to attack by a disease to which a large proportion of the members are immune, thus lessening the likelihood of a patient with a disease coming into contact with a susceptible individual." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (24th Ed., 1965) *as quoted in* Paul E. M. Fine, *Herd Immunity: History, Theory, Practice*, 15 EPIDEMIOLOGIC REVIEWS 265 (1993). *Also see* J.P. Fox, et. al. *Herd Immunity: Basic Concept and Relevance to Public Health Immunization Practices*, 94 AM. J. EPIDEMIOL. 179 (1971).

43. In varied statutory language and through the use of widely divergent administrative procedures, the following states recognize philosophical exemptions to vaccinations: California, CAL. EDUC. CODE § 8263(d) (Deering Supp. 1995) ("No standard, rule, or regulation shall require medical examination or immunization for admission to a child care and development program of a child whose parent or guardian files a letter with the governing board of the child care and development program stating that the medical examination or immunization is contrary to his or her religious beliefs, or provide for the exclusion of a child from the program because of a parent or guardian having filed the letter."); Colorado, COLO. REV. STAT. §§ 25-4-1704(2) and 25-4-1704(4)(b) (Supp. 1995) ("An infant shall be exempted from receiving the required immunizations ... Upon submitting a statement signed by one parent or guardian that such parent or guardian adheres to a religious belief whose teachings are opposed to immunizations, or that such parent or guardian has a personal belief that is opposed to immunization."); Idaho, IDAHO CODE §§ 39-4801, 39-4802(2) (1993) ("Any minor child whose parent or guardian has submitted a signed statement to school officials stating their objections on religious or other grounds shall be exempt from the provisions of this

In the 1999-2000 legislative session, at least three additional states considered expansion of their vaccination statute to include a philosophically-based exemption.<sup>44</sup>

---

chapter.”); Louisiana, LA. REV. STAT. § 17:170(A)(1), 170(E) (West Supp. 1997) (“No person seeking to enter any school or facility ... shall be required to comply with the provisions of this Section if ... a written dissent from the student or his parent or guardian is presented.”); Maryland, 20-A M.R.S. § 6355 (1999) (Child may not be enrolled without an immunization certificate except when “The parent states in writing a sincere religious belief which is contrary to the immunization requirement of this subchapter or an opposition to the immunization for moral, philosophical or other personal reasons.”); Michigan, MCL § 333.9215 (1999) and MSA § 14.15(9215) (“A child is exempt from this part if a parent, guardian, or person in loco parentis of the child presents a written statement to the administrator of the child’s school or operator of the group program to the effect that the requirements of this part cannot be met because of religious convictions or other objection to immunization.”); Minnesota, MINN. STAT. § 121A.15(3)(d) (“If a notarized statement [is submitted] stating that the person has not been immunized ... because of the conscientiously held beliefs of the parent or guardian of the minor child or of the emancipated person, the immunizations specified in the statement shall not be required.”); New Mexico, N.M. STAT. ANN. § 24-5-3 (2000) (A child may submit “affidavits or written affirmation from his parent or legal guardian that his religious beliefs, held either individually or jointly with others, do not permit the administration of vaccine or other immunizing agent.”); Ohio, OHIO REV. CODE § 3313.671(A)(3) (“A pupil who presents a written statement of the pupil’s parent or guardian in which the parent or guardian objects to the immunization for good cause, including religious convictions, is not required to be immunized.”); Oklahoma, 70 OKL. ST. § 1210.192 (1999) (“Any minor child, through the parent, guardian, or legal custodian of the child, may submit ... [a] written statement by the parent, guardian or legal custodian of the child objecting to immunization of the child.”); Utah, UTAH CODE ANN. § 53A-11-302(3)(b)(ii) (1999) (Requires the submission of a form obtained at and the signing of which is witnessed by an agent of the local health department that offers “a statement that the person has a personal belief opposed to immunizations.”); Vermont 18 VT. STAT. § 1122(a)(3) (2000) (“A person may remain in school without a required immunization: ... If the person, or in the case of a minor the person’s parent or guardian states in writing that the person, parent or guardian has religious beliefs or moral convictions opposed to immunization.”); Washington, REV. CODE WASH. (ARCW) § 28A.210.090 (2000) (“Any child shall be exempt in whole or in part from the immunization measures ... upon the presentation of ... a [signed and] written certification that the signator has either a philosophical or personal objection to the immunization of the child.”); and Wisconsin, WIS. STAT. § 252.04 (1999) (“The immunization requirement is waived if the student, if an adult, or the student’s parent, guardian or legal custodian submits a written statement objecting to the immunization for reasons of health, religion or personal conviction.”). *See also* NVAC Report, *supra* note 2 (stating at least 15 states offer philosophical exemptions); CENTERS FOR DISEASE CONTROL AND PREVENTION, STATE IMMUNIZATION REQUIREMENTS, 1994-95 at 22 (Washington, DC: U.S. Department of Health and Human Services, 1995) (stating that 19 states offer philosophical exemptions). A thorough discussion of the varied means through which states enforce their religious and moral and philosophical is beyond the scope of this article; however, several recent decisions offer excellent insight into steps school boards and health authorities might take to enforce school vaccination requirements. *See, e.g.,* *Turner v. Liverpool Central School District* (U.S. Dist. Ct., S.D.N.Y., 2001) *as reported in* NEW YORK LAW JOURNAL, March 20, 2001, at 29; *In re Exemption from Immunization Requested by Susan LePage v. Wyoming*, 2001 Wy. 26, 18 P.3d 1177 (2001); 44 Op. Att’y Gen. Mont. 7 (1991).

44. *See, e.g.* SB 823, 91st General Assembly (Illinois 1999); House Bill 1489 (Missouri 2000); Assembly Bill 155 (New Jersey 2000); Assembly Bill 1390 (New Jersey 2000); Assembly Bill 1831 (New Jersey 2000). Additional childhood vaccine-related legislation has

The Utah experience aside, the threat posed by refusals of childhood vaccination does not *appear*, at this time, great. The most recent numbers suggest that few parents<sup>45</sup> request exemption from state vaccination requirements on any grounds.<sup>46</sup> A National Vaccine Advisory Committee working group on philosophical exemptions from childhood immunizations concluded that: "Given the small number of children who are currently exempted from immunization for any reason, philosophical exemptions do not appear to have a major detrimental impact on child health and well-being in the United States at this time."<sup>47</sup>

The NVAC committee goes on, however, to mitigate their conclusion with the following cautionary note: "[T]he extent of the use of philosophical exemptions may change in the future, with a coincident impact on disease outbreaks among exempted as well as other not fully protected populations."<sup>48</sup> Although *current* levels of exemption do not appear to pose a threat to "herd immunity,"<sup>49</sup> the type of change in use of exemptions about which the NVAC is concerned would clearly meet the harm principle's standard for prioritizing mandatory vaccination over religious freedom. This type of dramatic rise in exemptions *could be* but one "media event" away.<sup>50</sup>

Other trends suggest that a rise in exemptors is already underway. In Michigan, the Department of Public Health recently

---

been proposed—and passed—during recent legislative sessions, including bills proposing to strike provisions in child welfare statutes that previously provided abuse and neglect grounds based on a parent's failure to vaccinate their child. S.B. 1305, 92nd Gen. Assem., (Ill. 2001)(amending 705 ILL. COMP. STAT. § 405/2-10.1).

45. As of 1997, it was estimated that less than 1% of all children entering school nationwide, and no more than 2.5% of children in any one state, consciously opted out of the childhood vaccination program on religious or moral grounds. NVAC Report, *supra* note 2. But see discussion *infra*, notes 41 – 45 concerning increasing numbers of children opting out and the potential risks to society of such trends.

46. NVAC Report, *supra* note 2.

47. *Id.*

48. *Id.*

49. Although even this fact is not clear, as we will discuss in the conclusion of this paper.

50. See E.J. Gangarosa, et. al., *Impact of Anti-vaccine Movements on Pertussis Control: The Untold Story*, 351 LANCET 356 (1998). In Japan in the 1970s, for example, media events surrounding neurological injuries suffered by two infants alleged to have been caused by the DPT vaccine led to a public outcry and the elimination of the vaccine coverage requirement by the government. Subsequently, from 1974 to 1976, the percentage of children vaccinated for pertussis plummeted from 80% to 10%, and in 1979, a pertussis epidemic occurred, resulting in more than 13,000 cases and 41 deaths. *Id.* Similar outbreaks following loosening of childhood vaccination requirements have also occurred in Sweden, the Russian Federation, Ireland and Australia. *Id.* For a broad discussion of the impact of media events on society and culture, see MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000).

reported that in 2000, more than 3% of incoming kindergartners in the state received waivers. For the first time in several years, the state reported a decline in the percentage of immunized children in the incoming class.<sup>51</sup> In Colorado, the number of children receiving waivers based on philosophical grounds increased by 83% from 1987 to 1998.<sup>52</sup> This study also found that the relative risk for measles was twenty-two times greater for child exemptors, the relative risk for pertussis (whooping cough) was 62 times greater for children in day care, and that *at least 11% of vaccinated children are known to have contracted their case of measles from someone who opted out of the vaccination program.*<sup>53</sup> The potential harms posed to the public at large when vaccination levels fall below the threshold necessary to achieve “herd immunity,” then, provide a solid *potential* ground for state intervention that overrides individual autonomy, if this critical threshold is threatened.

The line drawn between the “religious” and the “philosophical” or “moral,” first blurred by the Supreme Court during the Vietnam War era,<sup>54</sup> has all but vanished in the eyes of the law, further undermining the ability of the public health system to

---

51. Margarita Bauza, *Fewer Kids Get Immunizations: Parents Opt Out, Weigh Health Risk Versus Benefit*, DETROIT NEWS, May 11, 2001, at A1. As the Michigan immunization outreach program has cost the state over \$84 million to run, questions are now being raised about the advisability of continuing to provide the same budgetary support for the program, given the slipping numbers. To reduce the funding would only serve, however, to complicate efforts to maximize the level of disease protection for school-aged children, and potentially increase the angle of the slippery slope.

52. Daniel R. Feikin, et. al., *Individual and community risks of measles and pertussis associated with personal exemptions to immunization*, 284 JAMA 3145 (2000).

53. *Id.* Sixty-seven percent of the sources of disease could not be pinpointed; consequently, the actual number of vaccinated children who contracted measles from a non-vaccinated individual could be significantly higher. *Id.* Also see Centers for Disease Control and Prevention, *Interstate Measles Transmission from a Ski Resort—Colorado*, 43 MMWR 627 (1994), available at <http://www.cdc.gov/epo/mmwr/preview/mmwrhtml/00032422.htm> (visited June 10, 2000).

54. See *Welsh v. U. S.*, 398 U.S. 333 (1970). In this case, the court determined that to qualify for a “religious” exemption from participation in the war, an individual’s opposition must stem from one’s “moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with strength of traditional religious convictions.” *Id.* Citing *U. S. v. Seeger*, 380 U.S. 163, 178 (1965), the Court asserts, “The test [for whether an individual qualifies for exemption] might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.” [citations and footnotes omitted] *Id.* at 339. For a discussion of the *Seeger* and *Welsh* decisions and the difficulties of defining the boundaries of religion, see Harlan, in his concurrence, more directly states that the law must encompass “the class of individuals it purports to exclude, those whose beliefs emanate from a purely moral, ethical, or philosophical source. The common denominator must be the intensity of moral conviction with which a belief is held.” *Id.* at 358-59.

effectively carry out its goals of protecting children from communicable diseases. This is compounded by the efforts of some states, which, while lacking a moral or philosophical provision in their law, take steps to assist parents with their religious exemption requests. Some states go so far as to explicitly direct potential exemptors to web sites with model opt-out forms, or inform those who inquire that all that is needed to gain an exemption is the appearance of certain "magic words" in the request. Even those states that in the past, subjected exemption requests to rigorous scrutiny<sup>55</sup> are now showing signs of lowering the threshold applicants must cross to qualify for exemption.<sup>56</sup>

The trends described above should cause concern about loosening criteria for granting exemptions to childhood vaccination. One might not believe that the level of exemption from vaccination poses enough of a significant public health risk to *permit* state intervention based on the Harm Principle. However, all agree that the harm principle does not *prohibit* state intervention to enforce childhood vaccination. The reason for this, as we will see below, is that because exemptions are requested by *parents* on behalf of their *children*, the *strong* autonomy-rights inherent in the harm principle simply do not apply.

#### IV. LIMITS OF THE HARM PRINCIPLE

The strength of the harm principle as a principle of social policy is that its emphasis on individual autonomy is consistent with a number of competing moral approaches. The deontological moral system of Immanuel Kant, for example, places the concept of individual autonomy at the center of morality.<sup>57</sup> Interestingly, Kant's theory does this by denying the relevance of contingent, consequence-oriented considerations to moral reasoning.<sup>58</sup> The unique feature of man, argued Kant, is his ability to be directed by reason (rather than simply reacting to his circumstances). Moral value, then, is gained

---

55. See, e.g., *Farina v. The Board of Education of the City of New York*, 116 F. Supp. 2d 503 (E.D.N.Y., 2000) (holding that the plaintiffs failed to demonstrate genuine and sincere religious beliefs which would qualify their children for exemption); *Sherr v. Northport-East Northport Union Free School Dist.*, 672 F.Supp. 81, (E.D.N.Y., 1987).

56. *Turner v. Liverpool Central School District* (U.S. Dist. Ct., S.D.N.Y., 2001) as reported in *NEW YORK LAW JOURNAL*, March 20, 2001, at 29.

57. See generally IMMANUEL KANT, *THE GROUNDING FOR THE METAPHYSICS OF MORALS* (James W. Ellington, trans., Indianapolis: Hackett Publishing, 1981).

58. *Id.*

through the purity of moral reasoning, which should be the product of an autonomous will devoid of the influence of contingent, external facts and considerations.<sup>59</sup> Mill, on the other hand, was a utilitarian. The value he placed on autonomy results from several beliefs: first, that the enjoyment of goods is partly constituted by man's autonomous pursuit of them; second, that once man has known those goods he will not lightly give up the forms of happiness for which autonomy is a necessary ingredient; third, that each man possesses a unique set of attributes, the development of which are indispensable for his happiness, and of which the individual is in the best position to know; and fourth, autonomy is vital for allowing "experiments in living."<sup>60</sup> All of these reasons for valuing autonomy are consequential considerations.

Central to either approach to the value of autonomy, however, is a crucial presumption: man as a rational, developed agent possessing the capacity for autonomy.<sup>61</sup> While the particular capacities necessary for autonomy are contentious,<sup>62</sup> it is almost universally accepted that children do not possess sufficient capacities to be considered fully autonomous.<sup>63</sup>

Because children are not viewed as fully autonomous agents, the harm principle does not prohibit interference with decision-making on their behalf in the same way it might when applied to adults. As a society, we generally believe that allowing parents to make decisions on behalf of their children is the best way to determine what is in the child's interests.<sup>64</sup> But this is not always the case, because the right of

59. See THOMAS MAY, *AUTONOMY, AUTHORITY AND MORAL RESPONSIBILITY* (1998).

60. See JOHN GRY, *MILL ON LIBERTY: A DEFENCE* ch. 2 (1983).

61. Joel Feinberg, *Autonomy*, in *THE INNER CITADEL* at 27-53 (John Christman, ed., New York: Oxford University Press, 1989); SUSAN WOLF, *FREEDOM WITHIN REASON* 7-8 (1990); THOMAS MAY, *AUTONOMY, AUTHORITY AND MORAL RESPONSIBILITY, LAW AND PHILOSOPHY LIBRARY* (1998).

62. See, generally, *THE INNER CITADEL* (John Christman, ed. 1989).

63. An exception to this general principle is the "mature minor" doctrine, under which an individual approaching the age of eighteen may be treated as an adult in the eyes of the law. See 750 Ill. Comp. Stat. 30 (2000); *In re E.G.*, 133 Ill. 2d 98 (1989); Committee on Bioethics, American Academy of Pediatrics, *Informed Consent, Parental Permission, and Assent in Pediatric Practice*, 95 PEDIATRICS 314 (1995). Frequently, this doctrine is used by states to justify laws that give minors an opportunity to confidentially consult with a health care provider for treatment related to reproductive health, mental health, or substance abuse. See, e.g., *Consent by Minors to Medical Treatment Act*, 410 Ill. Comp. Stat. 210 (2000). But see *Bellotti v. Baird*, 443 U.S. 622 (1979); see also *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (reaffirming *Bellotti*). Vaccination programs, however, generally concern pre-school-aged children—children not eligible for "mature minor" status.

64. See Jack Douglas, *Cooperative Paternalism versus Conflictful Paternalism*, in *PATERNALISM* 171-200 (Minneapolis: University of Minnesota Press, 1983), (especially pp. 171-174).

parents to raise their children is not without bounds. For example, parents can have their children taken away due to neglect or abuse;<sup>65</sup> limits are placed upon Jehovah's Witness parents who refuse treatment that might be necessary to sustain the life of their child;<sup>66</sup> parents must submit to Mandatory elementary education of their children.<sup>67</sup> All of these phenomena demonstrate a concern with the limits of parental decision-making when the welfare of their child is threatened.<sup>68</sup>

The opinion offered in *Prince*<sup>69</sup> illustrates this grounding. According to the Court, "Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience."<sup>70</sup> The court concludes with what has become an oft-quoted passage in the debate between parent's rights and public health doctrine: "Parents may be free to become martyrs themselves. But it does not follow [that] they are free ... to make martyrs of their children."<sup>71</sup> It becomes relevant, then, to consider the harms posed *to the individual for whom exemption is requested* when that individual is a child.

The dangers of infection from vaccine-preventable disease have been discussed widely for well over a century.<sup>72</sup> Diseases such as measles, pertussis, and Haemophilis influenza type b (Hib) can lead to severe injuries to children, including encephalitis, meningitis, and death. The implementation of successful<sup>73</sup> vaccination programs in the

---

65. See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982); *Cude v. State*, 237 Ark. 927, 377 S.W.2d 816 (1964). But see S.B. 1305, 92nd Gen. Assem., (Ill. 2001)(amending 705 ILL. COMP. STAT. 405/2-10.1) (eliminating lack of immunization of a child as a sole ground for abuse and neglect charges under the state Juvenile Court Act and Adoption Act).

66. *State v. Perricone*, 37 N.J. 463, 181 A.2d 751, cert. denied, 371 U.S. 890 (1962). Also see Elizabeth J. Sher, *Choosing For Children: Adjudicating Medical Care Disputes Between Parents and the State*, 58 N.Y.U.L. Rev. 157 (1983).

67. *Wisconsin v. Yoder*, 406 U.S. 208 (1972).

68. For an interesting treatment of the conflict between the religious beliefs of parents and state police power, see James G. Dwyer, *Parents' Religion And Children's Welfare: Debunking The Doctrine Of Parents' Rights*, 82 CALIF. L. REV. 1371 (1994). Also see LaDonna DiCamillo, *Caught Between the Clauses and the Branches: When Parents Deny Their Child Nonemergency Medical Treatment for Religious Reasons*, 19 JOURNAL OF JUVENILE LAW 123 (1998); Committee on Bioethics American Academy of Pediatrics, *Religious Objection to Medical Care*, 99 PEDIATRICS 279 (1997).

69. 321 U.S. 158 (1944).

70. *Id.* at 166.

71. *Id.* at 170.

72. GOSTIN, *supra* note 10 at 175-87.

73. Centers for Disease Control and Prevention, *Ten Great Public Health Achievements—United States, 1900-1999*, 48 MORBIDITY AND MORTALITY WEEKLY REPORT

U.S.<sup>74</sup> has led a significant number of parents to lose sight of the very real harms that could return with a change in direction of state plans.<sup>75</sup>

In sum, significant harms are posed to children who contract vaccine-preventable disease. This risk would seem to justify state intervention overriding the *parents'* religious beliefs or conscience on the basis of the state's *parens patriae* powers. Because the harm principle does not grant to children the *strong* autonomy rights it grants to adults, this exercise of *parens patriae* powers is not prohibited.

## V. EVALUATING THE MORAL LEGITIMACY OF PUBLIC HEALTH LAW

Let us return, now, to our evaluation of the moral validity of current legal views of public health, and its priority over religious belief. Armed with our understanding of the harm principle, we can see the justification for state enforcement of childhood vaccination.

As we have seen, the Harm Principle presumes competent, *adult* individuals who are able to rationally evaluate the benefits and burdens of their actions in exercising their autonomy. Children do not qualify for the autonomy-based rights protected by the harm principle, and so, are the proper subject of state-enforced protections. Studies have estimated that children exempted from vaccinations are significantly more likely to contract dangerous, sometimes deadly, vaccine-preventable diseases than their vaccinated classmates.<sup>76</sup> It should be clear, then, that state intervention that overrides the religious beliefs of parents is justified under the *parens patriae* powers. In addition, as we have seen borne out in the examples of outbreaks in Utah and Colorado,<sup>77</sup> when levels of vaccination fall below a threshold required to maintain "herd immunity," the threat of an epidemic is posed not only to those who have been exempted from vaccination, but

---

241 (1999) (in which vaccination is considered one of the great public health achievements of the twentieth century); Centers for Disease Control and Prevention, *Achievements in Public Health, 1900-1999: Control of Infectious Diseases*, 48 MORBIDITY AND MORTALITY WEEKLY REPORT 621 (1999).

74. W. A. Orenstein & A.R. Hinman, *The Immunization System in the United States—the Role of School Immunization Laws*, 17 SUPPL 3 VACCINES 19 (1999).

75. Bruce G. Gellin, et. al., *Do Parents Understand Immunizations? A National Telephone Survey*, 106 PEDIATRICS 1097 (2000); Bruce G. Gellin, et. al. *The Risk of Vaccination—The Importance of "Negative" Studies*, 344 N. ENG. J. MED. 372 (2001).

76. Salmon, *supra* note 35 (estimating that unvaccinated children are 35 times more susceptible to contracting measles than vaccinated children). *Also see* Feikin, *supra* note 51.

77. *See supra* note 39 and accompanying text.

also to those who *have* been vaccinated but who have not achieved immunity.

While a new president has ushered in a national debate on the role of religion in society,<sup>78</sup> politicians and public health administrators are being challenged to reopen a century-old<sup>79</sup> discussion about the balance between individual beliefs, parental rights and the health and well-being of children and the community at large.<sup>80</sup> In this paper, we have limited our discussion of the moral validity of state intervention to grounds related to the harm principle. The Harm Principle is a minimal, but for this reason non-contentious, ground for the exercise of civil authority over individual autonomy. State intervention that overrides individual autonomy should not be taken lightly, particularly where the exercise of autonomy that is restricted relates to religious beliefs and practices. However, public health (and in particular childhood vaccination) represents an area where state intervention that restricts the exercise of individual autonomy seems justified, even on grounds as minimal as the harm principle.

---

78. Including what, exactly, qualifies as "religion." See Exec. Order No. 13, 1993 CFR Executive Order 13199 (2001 Compilation) (Executive Order to establish the White House Office of Faith-Based and Community Initiatives); Peter Edelman, *Lecture: Poverty and Welfare: Does Compassionate Conservatism Have A Heart?* 2001 Edward C. Sobota Memorial Lecture, 64 ALB. L. REV. 1073 (2001); Kate O'Beirne, *Church (Groups) and State: The Problem With the Faith-Based Bit*, NATIONAL REVIEW, February 19, 2001, at 21; Franklin Foer & Ryan Lizza, *Holy War*, THE NEW REPUBLIC, April 2, 2001, at 14.

79. Michael R. Albert, et. al., *The Last Smallpox Epidemic in Boston and the Vaccination Controversy, 1901 – 1903*, 344 N. ENG. J. MED. 375 (2001).

80. Three authors have offered suggestions as to how to frame such a debate. See Lawrence O. Gostin, *Public Health Law in a New Century*, 283 JAMA 3118 (2000) (suggesting that, when developing public health policy, policymakers should ask themselves the following questions: (1) What risks are involved?; (2) How effective is the intervention?; (3) What are the economic costs (to the regulator, the regulated, and the opportunity costs)?; (4) What are the burdens on individual human rights?; (5) Does the policy offer a fair distribution of services?) *Id.* Also see Ross & Aspinwall, *supra* note 32 at 205-6.

