Mandatory School Vaccinations: The Role of Tort Law

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The United States is on the verge of a public health crisis. For decades, all 50 states have required that parents vaccinate their children against various diseases, including polio and measles, as a prerequisite to enrolling them in public schools [1]. While virtually all states have tailored their immunization statutes to exempt those with religious (and sometimes philosophical) objections to vaccines from these requirements [2], widespread use of these exemptions threatens to undermine many of the benefits of mandatory vaccinations, such as preserving “herd immunity” [3]. Since it is unlikely that state governments will eliminate such exemptions outright, society must consider other methods of providing incentives for vaccination and compensating those who have suffered due to a disease outbreak caused by a community’s loss of herd immunity.

This essay will propose using tort law as a mechanism for prevention and victim compensation while still preserving religious and philosophical exemptions to mandatory school vaccinations. Part I will provide a short overview of mandatory school vaccinations and the dangers posed by widespread use of religious and philosophical exemptions. Part II will explore the potential role of tort law, with a particular emphasis on private causes of action against specific individuals and the possibility of defendant class action lawsuits. Part III will examine whether tort law is an appropriate remedy.

AN OVERVIEW OF MANDATORY SCHOOL VACCINATIONS

Why Mandatory Vaccinations?

States institute mandatory immunization requirements as a prerequisite to public school enrollment because it is the most efficient method of perpetuating herd immunity. Herd immunity is present in a community when such a high percentage of its members have been immunized from a particular disease that the disease cannot gain a foothold in the community [3]. Thus, achieving and maintaining herd immunity protects not only those who have been vaccinated, but also those with compromised or weak immune systems, such as the elderly, babies, and those afflicted with HIV [3,4,5].

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But herd immunity does not just reduce levels of human suffering. Since achieving herd immunity is an inherently preventive measure, mandating school vaccinations as a method of perpetuating herd immunity is far less costly for governments, health care providers, and the economy than treating victims of a disease after it has appeared in a community. The preventable 1989-91 measles outbreak in the United States, for example, created $100 million in direct medical costs alone [6]. Herd immunity, then, is not only the most efficient method of preventing illness and human suffering, but also the most cost effective.

Religious & Philosophical Exemptions to Mandatory Vaccinations

Although many organized religions, including Catholicism and Judaism, do not prohibit vaccinations,1 several smaller religious sects, most notably Christian Scientists and the Amish, oppose vaccination on religious grounds [3]. Other individuals oppose vaccination for other reasons, ranging from non-religious philosophical or moral beliefs, such as a belief that vaccines interfere with “nature’s genetic blueprint” [8], to unspecified “personal reasons.”

Religious and other exemptions to mandatory vaccination laws are not required by the U.S. Constitution.2 However, since 100 percent immunization rates are not needed to achieve herd immunity,4 most state governments have chosen to exempt certain individuals from their mandatory vaccination requirements, believing that communities can obtain herd immunity even if such individuals do not become immunized. Most notably, 48 out of 50 states have exempted those whose religious beliefs forbid vaccination [2]. Eighteen states also have made the more controversial decision to exempt individuals who claim to possess non-religious cultural or philosophical objections to vaccines,5 which in some states are granted merely by checking one box on a simple form [9].

Such exemptions are not surprising, “[g]iven Americans’ deep respect for individual freedom” and the fact that “absolutely mandatory immunization laws meet stiff resistance” [13]. However, continuing recognition of such exemptions may not be sustainable in the long run.

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1However, even members of religions that do not prohibit vaccination have attempted to obtain religious exemptions to mandatory vaccinations, with mixed results. Compare Berg v. Glen Cove City Sch. Dist., 853 F.Supp. 651, 655 (E.D.N.Y. 1994) (granting a Jewish parent a religious exemption even though Judaism does not object to vaccination) with Farina v. Bd. of Educ., 116 F.Supp. 2d 503, 508 (S.D.N.Y. 2000) (finding that Catholic parents were not eligible for a religious exemption since their refusal to vaccinate their child was not for religious reasons) and McCarney v. Austin, 293 N.Y.S.2d 188, 200 (N.Y. 1968) (holding that New York’s religious exemption law does not exempt Catholics since the Catholic faith does not prohibit vaccination).

2Unspecified personal reasons make up 95 percent of all mandatory vaccine exemptions granted in the state of Washington [9].

3The U.S. Supreme Court has held that a state’s interest in promoting public health overrode an individual’s right to opt his or her child out of a vaccine for religious reasons, for “[t]he 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” [10].

4The percentage needed varies by disease — achieving herd immunity from measles, for instance, would require that 90 percent of a community be immunized [11].

5Some of the states that have codified such exemptions are Arizona (Ariz. Rev. Stat. Ann. § 15-873), California (Cal. Health & Safety Code § 120365), Idaho (Idaho Code § 39-4802), Louisiana (La. Rev. Stat. Ann. § 17:170(E)), Maine (Me. Rev. Stat. Ann. Tit. 20-A, § 6355), Michigan (Mich. Comp. Laws Ann § 333.9215), Minnesota (Minn. Stat. § 121A.15), Nebraska (Neb. Rev. Stat. § 79-221), North Dakota (N.D. Cent. Code § 23-07-17.1), Ohio (Ohio Rev. Code. Ann § 3313.67.1), Oklahoma (Okla. Stat. Tit. 70 § 1210.192), Vermont (Vt. Stat. Ann. Tit. 18, § 1122), Washington (Wash. Rev. Code. § 28A.210.090) and Wisconsin (Wis. Stat. Ann. § 252.04).
The Dangers of Religious and Philosophical Exemptions

In recent years, the core premise behind allowing religious and philosophical exemptions — that communities can still achieve herd immunity even if such exemptions are granted — has come under significant doubt.

Religious Communities as Disease “Hot Spots.”

Governments traditionally have considered “communities” in relatively broad terms, viewing entire states — or sometimes even the whole nation — as a “community” for herd immunity purposes [14]. However, recent experiences have demonstrated that actual communities are far smaller. For instance, although nationwide measles vaccination rates appeared high enough to ensure national herd immunity, disproportionately low vaccination rates among blacks and Hispanics resulted in measles outbreaks in several large urban areas, most notably Los Angeles [15].

Religious communities — particularly Christian Science, Amish, and Mennonite communities — have been the source of many preventable disease outbreaks in recent years. Diseases from polio [16] to measles [17] to rubella [18] have resurfaced with increasing frequency in the United States due to herd immunity being lost in such religious ghettos. This comes at a tremendous cost to society, for “vaccine-preventable diseases impose $10 billion worth of healthcare costs and over 30,000 otherwise avoidable deaths in America each year” [19].

Religious and Philosophical Exemptions as Exemptions of Convenience.

However, those with genuine religious objections to vaccination do not represent the entirety of the threat to society. Many individuals increasingly have taken such exemptions not because of genuine beliefs, but because they are simply too lazy to vaccinate their children. Since such parents “do not bear [the] negative externality costs or harms” of losing herd immunity directly, they “may not take them into account in making their decision not to be immunized” [20]. In fact, thousands of parents have joined mail-order or sham religions, such as the “Congregation of Universal Wisdom,” so they can qualify for religious exemptions and not have to go to the trouble of vaccinating their children.6

The situation is even worse in states where one can obtain an exemption for non-religious “philosophical” reasons, with such states frequently having the highest vaccination opt-out rates in the nation [22]. Admittedly, individuals may take advantage of philosophical exemptions for a wide range of reasons, ranging from “devotion to ‘natural’ or alternative healing” to “libertarian opposition to state power” to “mistrust of pharmaceutical companies” to a “belief that vaccines are not as safe as experts claim” [23]. However, there is little doubt that many parents use such exemptions out of mere convenience rather than sincere belief — for instance, one recent empirical study has shown a significant relationship between religious and philosophical exemption rates and the level of “red tape” or governmental scrutiny used to get the exemption, with states with very simple exemption processes having the highest exemption rates and states with very complex procedures having the lowest [22]. The widespread and growing use of religious and philosophical exemptions for convenience may, in the long run, jeopardize herd immunity, not just in religious communities, but secular ones as well.

THE ROLE OF TORT LAW

Although most scholars have recommended that state governments close the “legal loophole” of religious and philosophical exemptions [23,24,25], this nation’s political landscape makes outright eliminating...
these exemptions highly unrealistic. Tort law, however, may allow state governments to retain religious, philosophical, and other exemptions to mandatory vaccinations, while still providing both a deterrent against religious exemptions of convenience and a mechanism for compensating victims.

What is Tort Law?

A “tort” is defined as a “civil ‘wrong’ — other than a breach of contract — that causes injury, for which a victim can get a judicial remedy” [27]. This judicial remedy typically entails “requiring the wrongdoer to pay compensatory monetary damages to the victim sufficient to restore the victim to status quo ante — i.e., to the position the victim would have occupied had the injury not been caused by the defendant’s wrong” [28]. Such damages typically will cover economic losses suffered by the victim — such as medical bills and lost income — as well as non-economic losses, such as mental or emotional distress [28]. Furthermore, in exceptionally egregious cases, courts also may award punitive damages as a means of deterring such conduct [29].

Class Action Lawsuits

Perhaps one of the biggest obstacles to applying tort law to the mandatory vaccination context is the inherent difficulty in assessing blame to any particular individual for the community’s loss of herd immunity. Since herd immunity may perpetuate even if 10 percent of a given community has not been vaccinated, it may be difficult — if not impossible — to determine which specific individuals are to blame for causing herd immunity to dissipate. Similarly, while the loss of herd immunity may cause significant damage to society, those damages may be allocated over a large number of actors. While certain institutions, such as hospitals, may have experienced damages high enough to justify a lawsuit, many individuals may have suffered injuries that, while significant to them, do not justify the cost of a lawsuit.

Class action lawsuits, however, may provide an effective mechanism for pursuing such tort claims. Federal Rule of Civil Procedure 23 (“Rule 23”) allows members of a class to “sue or be sued as representative parties on behalf of all” members of that class [30]. Though each state sets forth its own rules of civil procedure and has its own distinct requirements for class action lawsuits, many have chosen to adopt rules similar to Rule 23 [31].

The Prerequisites to a Class Action Lawsuit.

Rule 23 sets forth four requirements that must be met for a class action lawsuit to proceed: numerosity, commonality, typicality, and adequacy of representation [30]. All of these prerequisites are likely to be met in a hypothetical class action lawsuit involving the loss of herd immunity.

Numerosity

While courts have not adopted any bright line rules to tell whether the numerosity requirement has been met [32], courts generally have found the requirement satisfied if a class contains at least 40 members [33]. Given the sheer number of individuals who suffer as a result of the loss of herd immunity, plus the large number of people who would need to use a religious or philosophical exemption in a given community to cause herd immunity to fade away, numerosity probably would be a relatively easy requirement to meet both for a defendant class and a plaintiff class.

Commonality

Commonality in a class action tort suit for failure to vaccinate one’s children through use of a religious or philosophical exemption also would be strong. As the name

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7The United States, in addition to possessing a strong respect for freedom and individual rights, is also a highly religious nation [7]. Public opinion polls show that only 17 percent of Americans believe religion has too much influence, with 49 percent believing religion is actively under attack [12]. Since “politicians simply cannot afford to not take political considerations into account when deciding what bills they should support,” it is unlikely that all 48 states with religion exemptions would completely repeal them anytime in the near future [26].
implies, the commonality element is fulfilled when there is a single issue common to all members of a class [34]. Since all members of a plaintiff class would have suffered in some way from a completely preventable disease emerging, and since all members of a defendant class would have contributed to the loss of herd immunity that contributed to that disease’s emergence in the community by using non-medical exemptions to avoid vaccinating their children, many common issues of law and fact would be present.

Typicality and Adequacy of Representation

The typicality and adequacy of representation requirements are often related. For a court to allow a class action to proceed, it must find that the arguments made by the representative parties are typical — in other words, the arguments made by the attorney representing a plaintiff class, as well as arguments made by an attorney representing a defendant class, must be typical to those made by other members of the class and not unique to the “named” party [35]. Similarly, the adequacy of representation requirement is meant to ensure that there are no intra-class conflicts of interests and the resulting trial would truly be fair — an example of the adequacy of representation requirement not being met would be if a plaintiff deliberately sued a representative defendant who has limited financial resources or a representative defendant who, for whatever reason, has little or no stake in the outcome and, thus, has no incentive to put on a vigorous defense on behalf of the entire class [36]. Both of these requirements, however, should not be difficult to meet.

Rule 23(b) Categories.

A class action lawsuit must not only meet the Rule 23(a) prerequisites, but also fall into one of three categories described in Rule 23(b) [37]. Fulfilling one of the Rule 23(b) categories likely would pose the greatest obstacle to a religious exemption lawsuit. Two of these categories — those defined in Rule 23(b)(2) and (b)(3) — are clearly inapplicable in this context, for 23(b)(2) does not apply to defendant class actions and 23(b)(3) “must allow class members to ‘opt-out’ of the litigation,” which, when applied to a defendant class, would almost certainly result in virtually all defendants opting out [38].

Rule 23(b)(1)(B) allows the maintenance of a class action when “the prosecution of separate actions by or against individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests” [39]. Courts, however, often have interpreted this rule very narrowly, finding that certification under this rule requires that a “precedent plus” standard be met, a standard “which requires precedential effect plus some other factor in order to justify certification” [40]. Though meeting this standard would be very difficult, it is not impossible. One court, for instance, found that multi-forum patent infringement lawsuits may meet this standard because the “inherent difficulty of the subject matter … and the expense involved” may cause subsequent courts to “accord great weight” to the first court’s decision, which would “impede the ability of the nonparty class members to protect their interests” [41]. One may argue that many of the complex scientific issues regarding the loss of herd immunity may justify certification.8

The HPV Vaccine and Lawsuits against Specific Individuals

Since an extremely large number of individuals suffer damages resulting from and contribute to the loss of herd immunity, most potential lawsuits seeking to recover monetary damages from individuals who used religious and philosophical exemptions as an

8Furthermore, the immense benefits of litigating such disputes as class action lawsuits may justify alterations to federal and state rules of civil procedure in order to allow such suits to proceed.
excuse to not vaccinate their children would have to be class actions. However, the unique nature of the HPV vaccine may allow for specific individuals to file suit against other specific individuals for damages resulting from a refusal to vaccinate children.

The recently developed and licensed HPV vaccine, though primarily developed to prevent cervical cancer, has ignited a significant amount of controversy since it also has the ability to prevent genital warts that are also caused by HPV [42]. While many medical professionals and social activists believe that this vaccine is an important public health tool and mandating it as a prerequisite for starting high school would greatly reduce the number of cervical cancer victims, several prominent social conservative advocacy groups, such as Focus on the Family and the Family Research Council, believe that mandating a “genital warts vaccine” would both undermine abstinence messages and force children to “undergo an intervention that may be irreconcilable with [their] family’s religious values and beliefs” [43]. Despite such protests, the Michigan state senate has already passed a bill that would mandate the HPV vaccine for girls [43], though families would still have the opportunity to use Michigan’s vaccine exemption statute to opt-out of the vaccine — a statute that allows for both religious and philosophical exemptions [43].

Religious, cultural, and philosophical opposition to the HPV vaccine is thus distinct from opposition to other vaccines. Though genuine opposition to mandatory vaccination for diseases such as polio is primarily rooted in religious objections to the act of vaccination, most opposition to the HPV vaccine stems not from the actual act, but from a fear of the message the vaccination sends to children who are on the verge of becoming physically capable of sexual activity. Given that such opposition comes from groups traditionally not opposed to vaccination, it is possible that in many areas, the HPV vaccine, even if mandated, will never result in herd immunity being achieved at all in a large number of communities.

The HPV vaccine situation, however, is also unique in that affliction with the diseases the vaccine is intended to prevent potentially can be traced back to specific individuals. HPV — including the strains of HPV that cause genital warts and cervical cancer — is primarily spread through sexual contact. Boys, though sometimes not showing symptoms themselves, may become infected with an HPV strain and transmit it during sexual activity to a girl, who may then develop genital warts or even cervical cancer [23]. Although the Food and Drug Administration has not yet approved the HPV vaccine for boys, such approval is expected eventually, and once granted, it is likely that activists would lobby states to require the vaccine for both girls and boys [23]. Given that boys may act as carriers of HPV, one can easily envision parents of girls (or girls themselves) — particularly those from districts or states that do not mandate the HPV vaccine — filing lawsuits against specific boys (and their parents) who should have been immunized from HPV due to a state mandate but used a religious or philosophical exemption to avoid vaccination.

One serious obstacle to such lawsuits involves the consent defense to the tort of battery. Courts, when faced with lawsuits involving a plaintiff suing a defendant for infecting her with a sexually transmitted dis-

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9 For instance, Juan Carlos Felix, the head of the National Cervical Cancer Coalition’s medical advisory panel, has stated that he “would like to see it that if you don’t have your HPV vaccine, you can’t start high school” [42].

10 The Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention has recommended the vaccine for girls between 11 and 12 years of age [44].

11 One can analogize the HPV vaccine to the hepatitis B vaccine, which has not been terribly effective at reducing incidence of the disease because social conservative opposition has prevented universal vaccination [44].
ease, generally have held that the plaintiff, by consenting to sexual intercourse, also has consented to the possibility of receiving a sexually transmitted disease, unless the plaintiff can prove the defendant misrepresented himself, such as by claiming he is disease free [45]. Such cases, however, were decided prior to the HPV vaccine’s development, and certainly before any jurisdictions contemplated mandating such a vaccine as a prerequisite to high school enrollment. Courts, when faced with a lawsuit involving this new set of facts, may find that a plaintiff, knowing that the state has mandated the HPV vaccine, had reason to believe the defendant male also was vaccinated, and, thus, the defendant male and/or the defendant parents should be found liable for not obtaining a vaccination and not informing the plaintiff about the lack of immunity, regardless of whether the defendant actually knew he was an HPV carrier.

IS TORT LAW A DESIRABLE REMEDY?

Although some may question whether tort law is the appropriate remedy for this problem, one must acknowledge that allowing such causes of action would be consistent with the primary purposes of tort law. The specter of tort liability provides a strong deterrent to engaging in risky behavior that may have a negative impact on other members of society [46]. Just as the defamation torts deter newspapers and other media from recklessly publishing lies about individuals and products liability doctrine deters manufacturers from developing and selling unsafe products, finding individuals liable for using religious and philosophical exemptions to vaccinating their children would deter many parents, particularly those who use such exemptions merely for convenience and not due to a sincere religious objection, from the risky practice of not immunizing their children — a very desirable outcome, given the benefits of herd immunity and the high costs of treating otherwise preventable diseases.

Perhaps more importantly, assessing such liability is consistent with tort law’s overarching goal of “assign[ing] responsibility for injuries that arise in social interaction” and “provid[ing] recompense for victims with meritorious claims” [46]. While states can easily justify respecting genuine religious objections to vaccination, it is far more difficult to justify not allowing those who have suffered tangible harm from those religious objectors to receive compensation for their very real injuries. Though some may feel uncomfortable with the practice of allowing individuals to be successfully sued for practicing their genuine religious beliefs, one must remember that this is not a new concept, for courts already have found that practicing one’s religious beliefs in certain situations may work against an individual in a tort suit, for individuals make a conscious choice to assume the “specific risk” inherent in following their religion’s tenets [47].

CONCLUDING REMARKS

Over the past three years, state governments have taken substantial steps toward promoting herd immunity by placing new mandates upon parents, ranging from requiring additional vaccines to making vaccines prerequisites for an even larger number of activities and benefits. Most recently, New Jersey became the first state in the nation to require flu shots as a prerequisite to pre-school or day care attendance [49]. Yet, during this same period, state governments increasingly have bowed to pressure from social conservatives to create broad-based exceptions that undermine the purpose behind mandatory vaccination. For instance,

Furthermore, one must also consider that the U.S. Supreme Court has held that an individual’s right to practice his religion freely is subordinate to preventing the spread of communicable disease in a community [48].

For example, the state of Texas, which had been set to become the first state in the nation to mandate the HPV vaccine, rescinded its mandate several months after it was announced, due to pressure from social conservative groups [50].
despite the known problems with statutes authorizing philosophical exemptions, the number of states with these exemptions is more likely to increase than decrease, with the New York legislature currently considering a bill that would make New York the 19th state to allow exemptions for philosophical reasons [51].

Tort law, though perhaps not as effective a remedy as outright state government intervention, has the potential to be the best method of preventing religious and philosophical exemption abuse and compensating victims of vaccine-preventable disease outbreaks that has a realistic chance of being implemented. Class action lawsuits, and perhaps lawsuits against specific individuals, would more closely align the interests of those considering religious and philosophical exemptions with those of the rest of the society, thus reducing the number of exemptions of convenience. Such lawsuits also would provide a mechanism for those who do take such exemptions to the detriment of others to compensate such individuals for the harm they have suffered, resulting in a more equitable distribution of costs than today.

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