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# Religious & Philosophical Exemptions to Mandatory School Vaccinations: Who Should Bear the Costs to Society?

*Anthony Ciolti\**

As of 1999, all fifty states mandate that parents vaccinate their children against at least some diseases, such as measles, rubella, and polio, as a condition of public school enrollment.<sup>1</sup> However, every state has also tailored its legislation to exempt certain individuals from these mandatory vaccinations. Not surprisingly, all states allow medical exemptions to their immunization requirement, under the belief that it makes no sense to force vaccines on children who are allergic to vaccines, have compromised immune systems, or would otherwise suffer more harm than good from receiving a vaccine.<sup>2</sup>

But other types of exemptions from mandatory school vaccination requirements have not been universally embraced. For instance, forty-eight states have instituted religious exemptions to their mandatory vaccination requirements, with West Virginia<sup>3</sup> and Mississippi<sup>4</sup> not believing religious beliefs are sufficient to exclude a child from the requirement. Far fewer states have instituted the more controversial philosophical exemption: only fourteen states recognize non-religious moral or philosophical opposition to vaccination as a legitimate reason to opt out of their school vaccination requirements.<sup>5</sup>

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1. Edmund W. Kitch et al., *U.S. Law, in* VACCINES 1165, 1168 (Stanley A. Plotkin & Walter A. Orenstein eds., 3d ed. 1999).

2. Alan R. Hinman et al., *Childhood Immunization: Laws that Work*, 30 J.L. MED. & ETHICS 122, 124 (2002).

3. W. VA. CODE § 16-3-4 (West, Westlaw through S. 403 of 2009 Reg. Sess.).

4. MISS. CODE ANN. § 41-23-37 (West, Westlaw through 2008 Sess.).

5. The fourteen states that have codified a philosophical exemption are Arizona (ARIZ. REV. STAT. ANN. § 15-873 (Westlaw through 48th Leg., 2d Reg. Sess.)), California (CAL. HEALTH & SAFETY CODE § 120365 (West 2006)), Idaho (IDAHO CODE ANN. § 39-4802 (LEXIS through 2008 Reg. Sess.)), Louisiana (LA. REV. STAT. ANN. § 17:170(E) (2001)), Maine (ME. REV. STAT. ANN. tit. 20-A, § 6355 (2008)), Michigan (MICH. COMP. LAWS ANN. § 333.9215 (West 2001)), Minnesota (MINN. STAT. ANN. § 121A.15 (Supp. 2009)), Nebraska (NEB. REV. STAT. § 79-221 (Supp. 2006)), North Dakota (N.D. CENT. CODE § 23-07-17.1 (2008)), Ohio (OHIO REV. CODE ANN. § 3313.671 (LexisNexis Supp. 2008)), Oklahoma (OKLA. STAT. tit. 70 § 1210.192 (Westlaw through 2008 legislation)), Vermont (VT. STAT. ANN. tit. 18, §

This Essay will discuss the impact that recognizing religious and philosophical exemptions to mandatory school vaccinations may have on society, with a particular focus on who should bear the costs of the negative externalities created by widespread use of such exemptions. Part I will discuss the rationale behind mandatory vaccinations and identify the costs associated with religious and philosophical exemptions. Part II will discuss the current state of school vaccination law and explain why society cannot expect legislatures to completely eliminate religious and philosophical exemptions or rely on the judiciary to provide a proper check on the abuse of such exemptions. Part III will then address the issue of who should bear the costs of such exemptions, arguing that state and local governments, and potentially the federal government, should institute measures to ensure that those who elect religious and philosophical exemptions reimburse the rest of society for the negative externalities they have created.

## I. THE COSTS OF RELIGIOUS & PHILOSOPHICAL EXEMPTIONS

Many scholars fear that “serious consequences will follow the proliferation of legally sanctioned exemptions to compulsory vaccinations.”<sup>6</sup> Although many who support religious and philosophical exemptions view the decision to vaccinate one’s child as an individual rights issue, such a focus ignores that the benefits of mandatory vaccination are communal as well as individual. Thus, it should come as no surprise that the cost of widespread non-compliance with mandatory school vaccinations will not only result in the loss of such communal benefits, but will also impose significant costs on the entire community.

### A. Non-Medical Exemptions Jeopardize Herd Immunity

When a critical mass of a community’s members are vaccinated from a given disease, “herd immunity” prevents that disease from gaining a foothold in the community. The very high percentage of immunized individuals serves as a “protective barrier” that keeps the disease from spreading to those who are too young to be immunized or have compromised immune systems due to old age or diseases such as AIDS.<sup>7</sup> Creating such a protective barrier through herd immunity has always been one of the major goals of mandatory school

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1122 (2002)), Washington (WASH. REV. CODE ANN. § 28A.210.090 (West 2006)), and Wisconsin (WIS. STAT. ANN. § 252.04 (West 2004)).

6. Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting out of Vaccinating Their Children?*, 37 U. MICH. J.L. REFORM 353, 419 (2004).

7. See *id.* at 420; see also Paul E.M. Fine, *Herd Immunity: History, Theory, Practice*, 15 EPIDEMIOLOGIC REVS. 265 (1993); John P. Fox et al., *Herd Immunity: Basic Concept and Relevance to Public Health Immunization Practices*, 94 AM. J. EPIDEMIOLOGY 179 (1971).

immunization laws – by immunizing virtually all school children in a given community, state governments can ensure that the “herd immunity” effect will continue in perpetuity, as community immunization levels continue to remain at the high percentage required to prevent the spread of disease.<sup>8</sup>

Religious and philosophical exemptions may jeopardize herd immunity in certain communities. Although the percentage of the population that must be immunized to ensure herd immunity varies depending on the disease, it will remain a relatively large percentage – for instance, more than 90 percent of the population must be immunized in order to provide herd immunity protection from measles.<sup>9</sup> Given that a certain percentage of the population cannot receive a vaccine for legitimate medical reasons, even a relatively small number of individuals using religious and philosophical exemptions to exclude their children from mandatory school vaccinations can eliminate a community’s herd immunity against certain diseases.<sup>10</sup>

Not surprisingly, the loss of a community’s herd immunity may result in an outbreak of that disease in the community. In fact, many such disease “hot spots” have arisen in communities with a relatively high number of religious exemptions. For example, America’s last two polio outbreaks began in Amish, Mennonite, and Christian Science communities.<sup>11</sup> Outbreaks of other preventable diseases, such as measles and rubella, have also originated in communities where many parents have not vaccinated their children for religious reasons.<sup>12</sup>

### *B. The Monetary Costs*

But such outbreaks have an impact beyond the suffering caused in those particular communities. The creation of disease hotspots due to widespread use of religious and philosophical exemptions “deals a serious monetary blow to our cash-strapped medical system.”<sup>13</sup> For instance, the U.S. measles outbreak that took place between 1989 and 1991 created costs of more than \$100 million in medical expenses alone.<sup>14</sup> Hepatitis B outbreaks attributed to low hepatitis B vaccination rates are expected to create “\$700 million in

8. James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 877 (2001).

9. Hinman et al., *supra* note 2, at 125.

10. Calandrillo, *supra* note 6, at 420-21.

11. Donald G. McNeil Jr., *Worship Optional: Joining a Church to Avoid Vaccines*, N.Y. TIMES, Jan. 14, 2003, at F1, available at <http://www.nytimes.com/2003/01/14/science/worship-optional-joining-a-church-to-avoid-vaccines.html> (last visited Mar. 30, 2009).

12. *Id.*

13. Calandrillo, *supra* note 6, at 427.

14. Nat’l Vaccine Advisory Comm., *The Measles Epidemic: The Problems, Barriers, and Recommendations*, 266 JAMA 1547 (1991).

medical and work loss costs.”<sup>15</sup> In fact, “vaccine-preventable diseases impose \$10 billion worth of healthcare costs and over 30,000 otherwise avoidable deaths in America each year.”<sup>16</sup>

## II. ELIMINATING RELIGIOUS AND PHILOSOPHICAL EXEMPTIONS IS NOT REALISTIC

### A. Current Legal Environment

The U.S. Supreme Court has consistently affirmed a state’s right to institute compulsory immunization requirements, for a state’s interest in exercising its police power to promote communal health safety overrides an individual’s liberty right to opt out from a vaccine.<sup>17</sup> The Court, in *Prince v. Massachusetts*, clearly stated that religious exemptions to compulsory school vaccination laws are not required under the Constitution:

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. . . . 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.<sup>18</sup>

Though religious exemptions to vaccination laws are not constitutionally required, they are not prohibited either. Thus, each of this nation’s fifty states may, at each legislature’s discretion, adopt religious or philosophical exemptions to their mandatory immunization laws that are as broad or as narrow as they wish, or – as is the case in Mississippi and West Virginia – even non-existent, with state constitutional law as the only significant legal limitation.

It is in this legal context that many scholars have proposed “simple” and intuitive solutions to the religious and philosophical exemption problem. In particular, scholars have proposed that state legislative bodies or state courts should intervene by outright eliminating these harmful exemptions. However, as the following sub-sections will explain, such intervention is highly unlikely to take place in practice.

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15. Calandrillo, *supra* note 6, at 427.

16. *Id.* at 428-29.

17. See *Jacobson v. Massachusetts*, 197 U.S. 11, 25-27 (1905); see also *Prince v. Massachusetts*, 321 U.S. 158, 167-70 (1944).

18. *Prince*, 321 U.S. at 166-67, 170.

*B. Legislative Intervention Is Unlikely*

Several scholars, recognizing the negative externalities created by religious and philosophical exemptions, have proposed that state governments simply abolish these exemptions altogether and, like Mississippi and West Virginia, mandate vaccinations for all children except those who have a documented medical reason.<sup>19</sup> Such scholars have correctly pointed out that religious and philosophical exemptions are not required under the Free Exercise clause of the First Amendment.<sup>20</sup> Thus, these scholars conclude that “states should eliminate the religious exemption from school immunization laws” in order to eliminate these negative externalities.<sup>21</sup>

Eliminating religious and philosophical exemptions would certainly eliminate the negative externalities such exemptions cause. But this solution, while effective, is highly unlikely to ever occur in practice. One must remember that “[s]tate governments are made up of politicians,” and “as much as we might wish for elected officials not to consider politics when setting legislative priorities, in reality, politicians simply cannot afford not to take political considerations into account when deciding what bills they should support.”<sup>22</sup> The United States has historically been, and remains, a religious nation: “90 percent of Americans claim to believe in God . . . 80 percent say that religion is an important part of their lives . . . and 40 percent attend religious services and read the Bible each week.”<sup>23</sup> Many recent public opinion polls have shown that Americans believe government has already gone too far in reducing the role of religion in America – in fact, 49 percent of Americans believe that religion is under attack, while only 17 percent believe that religion has too much influence.<sup>24</sup> Given that 83 percent of Americans would prefer to either maintain the status quo in regards to religion or increase religion’s influence in government, it is not likely that

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19. See Calandrillo, *supra* note 6, at 429-34; see also Linda E. LeFever, Comment, *Religious Exemptions from School Immunization: A Sincere Belief or a Legal Loophole?*, 110 PENN ST. L. REV. 1047 (2006); Ross D. Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*, 12 ANNALS HEALTH L. 277 (2003).

20. See LeFever, *supra* note 19, at 1060-61 (concluding that religious and philosophical exemptions to mandatory school immunization laws are not required under the U.S. Constitution).

21. *Id.* at 1066-67.

22. Anthony Ciolli, Note, *The Medical Resident Working Hours Debate: A Proposal for Private Decentralized Regulation of Graduate Medical Education*, 7 YALE J. HEALTH POL’Y L. & ETHICS 175, 198 (2007).

23. WARREN A. NORD & CHARLES C. HAYNES, *TAKING RELIGION SERIOUSLY ACROSS THE CURRICULUM I* (1998).

24. Polling Report, Religion, <http://www.pollingreport.com/religion.htm> (last visited Mar. 30, 2009).

more than a handful – if any – of state governments could successfully eliminate such exemptions through the legislative process.

Of course, some states are more beholden to religious interests than others. Vermont, for instance, passed a law allowing civil unions for same-sex couples in 2000 despite a national climate that was overwhelmingly anti-gay.<sup>25</sup> It is not outside the realm of possibility that a liberal state such as Massachusetts, Vermont, or Rhode Island may pass legislation eliminating religious exemptions despite a national mood that strongly supports religion. However, one must remember that forty-eight states currently allow religious exemptions. Though some of those states may contain legislatures that have the courage to pass potentially unpopular legislation that is in society's best interests, it is very doubtful that *every single one* of those states would completely eliminate such exemptions. Thus, alternate solutions to the exemptions problem are needed for states that are unwilling to completely do away with religious and philosophical exemptions to mandatory school vaccinations.

### *C. Judicial Intervention May Do More Harm than Good*

Similarly, the judicial branch is unlikely to curtail the use of religious and philosophical exemptions. Just as states are not required to institute religious and philosophical exemptions, U.S. Supreme Court precedent would indicate that states are not forbidden from creating religious and philosophical exemptions, for such exemptions would almost certainly withstand challenges under the First Amendment's Establishment Clause and the Fourteenth Amendment.<sup>26</sup>

In fact, courts are more likely to exacerbate the problem of religious and philosophical exemptions than curtail it. Several states, such as New York, seeking to prevent abuse and the resulting negative externalities, had passed statutes that did not contain philosophical exemptions and only allowed for very narrow religious exemptions. The original New York statute, for instance, limited the religious exemption to an applicant who could demonstrate she was a "bona fide member of a recognized religious organization."<sup>27</sup> Although a federal district court struck down this portion of the statute,<sup>28</sup> New York continued to limit the use of its religious exemption by "closely examin[ing] the genuineness and sincerity of the applicant's

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25. For more information on the Vermont civil union law, see Vermont Secretary of State, The Vermont Guide to Civil Unions, <http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html> (last visited Mar. 30, 2009).

26. See LeFever, *supra* note 19, at 1061-64 (discussing why First and Fourteenth Amendment challenges to religious and philosophical exemptions would fail).

27. Sherr v. Northport-E. Northport Union Free Sch. Dist., 672 F. Supp. 81, 84 (E.D.N.Y. 1987).

28. *Id.* at 99.

religious beliefs, and discern[ing] whether such beliefs were religious, or merely philosophical or scientific in nature.”<sup>29</sup>

But even this method of limiting New York’s religious exemption did not withstand judicial scrutiny. In *Turner v. Liverpool Central School*,<sup>30</sup> a mother sued a New York school district seeking to obtain a religious exemption for her child. The mother and her daughter were members of the “Congregation of Universal Wisdom,”<sup>31</sup> a mail-order religion run by a chiropractor that does not require its adherents to follow any religious tenets or to abandon their previous religions – in fact, the only membership requirement at the time was a “customary donation” between \$1.00 and \$75.00.<sup>32</sup>

Yet the judge still granted her the religious exemption – despite overwhelming evidence that this was not a legitimate religion, as well as his own findings that the mother “had a history of inconsistent action regarding her beliefs and medical care proscribed by church beliefs” and that “her testimony with regard to vaccination had been ‘inconsistent and ever evolving.’”<sup>33</sup> In other words, the judge, for all practical purposes, made the religious exemption so broad that even philosophical objections would fall under its aegis!<sup>34</sup>

Courts in other states have reached similar decisions. Wyoming, for instance, had a mandatory school vaccine exemption statute which stated: “Waivers shall be authorized by the state or county health officer upon submission of written evidence of religious objection or medical contraindication to the administration of any vaccine.”<sup>35</sup> In *In re LePage*, the Wyoming Department of Health denied a family’s request for a religious exemption, believing that the family’s opposition to vaccination was not based on religious beliefs, but was a mere philosophical objection.<sup>36</sup> The Wyoming Supreme Court, however, overturned the Department of Health’s decision, finding that the Wyoming statute required that the Department of Health *automatically* issue a waiver upon receiving a written request, and that the Department did not have the authority to investigate whether an applicant’s written statement was actually sincere.<sup>37</sup> As a result of this decision, any individual can automatically receive a religious exemption in Wyoming by simply requesting one, without having to undergo any scrutiny whatsoever.

29. Silverman, *supra* note 19, at 286.

30. 186 F. Supp. 2d 187 (N.D.N.Y. 2002).

31. *Id.* at 189.

32. McNeil, *supra* note 11, at F1.

33. Silverman, *supra* note 19, at 287.

34. *Id.* at 288.

35. WYO. STAT. ANN. § 21-4-309(a) (2007).

36. 18 P.3d 1177, 1179 (Wyo. 2001).

37. *Id.* at 1181.



### III. WHO SHOULD BEAR THE COSTS OF NON-MEDICAL EXEMPTIONS?

Given that judicial decisions in New York, Wyoming, and elsewhere have worsened the problem by greatly expanding the scope of religious and philosophical exemption statutes, and given the current political climate in America that would make legislative repeals of such exemptions unlikely, it seems that – for better or worse – religious and philosophical exemptions are here to stay. Thus, scholars and policymakers must consider how to make the best of a bad situation by minimizing the impact of the resulting negative externalities on society.

Because those who take religious or philosophical exemptions “do not bear these negative externality costs or harms directly,” they “may not take them into account in making their decision not to be immunized.”<sup>38</sup> As a result, these individuals “place those with weakened immune systems due to age or infirmity in harm’s way,” as well as “allow[] disease hot spots to emerge” and impose a significant financial burden on state and federal governments and the health care system.<sup>39</sup> Governments may reduce the impact of such negative externalities, then, by instituting policies that cause those who take such exemptions to bear a significantly greater portion of those externalities than they do under the current system.

#### *A. The New York City System: Taxing Communities & Intermediaries*

New York City’s response to recent judicial rulings greatly expanding the scope of New York State’s religious exemption demonstrates that penalizing communities that take advantage of unnecessary or insincere religious exemptions may greatly reduce the number of such exemptions that are actually filed. Although the judiciary has eroded the state government’s ability to prevent even blatantly insincere individuals from taking advantage of the religious exemption, the New York City Board of Education has instituted policies to punish public schools that enroll unvaccinated children. Most notably, the Board of Education fines principals \$2,000 for every day that an unvaccinated child is in school – even if the child is not vaccinated due to a religious exemption.<sup>40</sup>

This New York City Board of Education policy has successfully reduced the number of unvaccinated children in its schools despite the presence of a very broad religious exemption imposed by the judiciary.<sup>41</sup> The Board of Education’s \$2,000-a-day fine serves to align the interests of those who may take insincere or unnecessary religious exemptions with the interests of the rest of society. Individuals who opt for a religious exemption simply because

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38. Calandrillo, *supra* note 6, at 421.

39. *Id.*

40. McNeil, *supra* note 11, at F4.

41. *Id.*

it is cheaper and easier than actually immunizing their children may now choose vaccination, for not vaccinating their children will result in a known, tangible harm to their children's public school and, by extension, their children's education. Similarly, community members who might otherwise remain silent – particularly in religious communities where certain congregation members may distrust or fear vaccinations even though vaccinations are not forbidden by church doctrine – may encourage parents to vaccinate their children in order to avoid such penalties.

Some may object to the tactics employed by the New York City Board of Education, arguing that punishing public schools is equivalent to punishing the community, for all children, including the overwhelming majority of the student body that have received their mandatory immunizations, will suffer. However, the Board of Education's policy is necessary to motivate other stakeholders in the public education system to take proactive measures to increase child immunization rates.

In many states, public schools actually have a strong financial incentive to encourage parents to opt their children out of mandatory immunization requirements even when they have no legitimate religious or philosophical objections to vaccinations. Certain financial subsidies from the federal government are tied to a child's immunization status, with children who have obtained religious or philosophical objections not counting against the school.<sup>42</sup> Thus, public school administrators, rather than challenging the sincerity of a child's vaccination or educating parents on the benefits of vaccines, may find it more fruitful to encourage exemptions so that the school can obtain more funding at an earlier date.<sup>43</sup>

But the New York City plan eliminates these perverse financial incentives, for the \$2,000 a day fine will offset – and likely even exceed – any financial benefit gained from allowing or encouraging dishonest exemption requests. In fact, the Board of Education's policy has caused New York City schools to play a very active role in promoting the benefits of vaccination and scrutinizing exemption requests.<sup>44</sup> Although it is unlikely, given recent judicial rulings, that a New York City school could actually deny a religious exemption if challenged in court, empirical evidence demonstrates that even the slightest amount of administrative scrutiny during the exemption request process results in a significant reduction in the number of individuals who actually obtain an exemption.<sup>45</sup>

One recent study found that the amount of administrative "red-tape" involved in the exemption process has a direct impact on the percentage of parents that obtain an exemption – none of nineteen states with the most complex exemption processes had more than one percent of their students

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42. Calandrillo, *supra* note 6, at 436.

43. *Id.*

44. McNeil, *supra* note 11, at F4.

45. Jennifer S. Rota et al., *Processes for Obtaining Nonmedical Exemptions to State Immunization Laws*, 91 AM. J. PUB. HEALTH 645 (2001).

exempt from mandatory school immunizations.<sup>46</sup> Similarly, the fifteen states with the simplest processes all had exemption rates greater than one percent.<sup>47</sup> Such results are not surprising, for states with simple exemption procedures are evidently not concerned with limiting the actual number of exemptions granted to those with “soft” or non-existent beliefs. For instance, more than 95 percent of exemptions in Washington – a state where one simply needs to check a box to receive an exemption – were granted for “personal” reasons not rooted in religious beliefs.<sup>48</sup>

The New York City plan, while “punishing” the community as a whole by fining the local public school, actually benefits the entire community both by giving schools a financial incentive to make high mandatory immunization rates an institutional priority, and by causing many “soft” objectors to immunization to drop their exemption requests after encountering even just the first level of red tape from their local school. While fining schools \$2,000 a day even for those with valid medical exemptions may appear harsh, one must consider such fines in the context of the high costs of containing and treating an outbreak of a preventable disease in that school district, which would far exceed the dollar amount of fines collected.<sup>49</sup> Furthermore, applying such a fine to valid medical exemptions provides an incentive to more greatly scrutinize medical exemptions – for instance, the New York City Board of Education has discovered that many medical exemption requests are “based on quackery” and do not actually withstand medical scrutiny.<sup>50</sup>

However, the New York City plan is not without its flaws. Though the plan has worked in New York City, other jurisdictions may not have the ability to implement it in its current incarnation. Some states, such as Wyoming in the wake of the *LePage* decision,<sup>51</sup> are unable to reap the full benefits of the New York City plan, for they are unable to have governmental agencies scrutinize exemption requests in the same way as New York. Thus, while Wyoming could fine schools for every child that has not been immunized, Wyoming schools would not have the ability to impose nearly as much red tape, for the Wyoming Supreme Court has required that the state grant exemption requests immediately.<sup>52</sup>

That said, many of the benefits of such a plan would continue to accrue to Wyoming. Schools, even if unable to impose administrative hurdles to weed out insincere requests and requests of convenience, would, like New York City schools, have an incentive to promote immunization over

46. *Id.* at 647-48.

47. *Id.*

48. Bruce Jancin, *Exemptions to Mandatory School Immunization Laws are Climbing*, FAM. PRAC. NEWS, Aug. 15, 2002, at 38.

49. Calandrillo, *supra* note 6, at 427.

50. McNeil, *supra* note 11, at F4.

51. *In re LePage*, 18 P.3d 1177, 1181 (Wyo. 2001).

52. *Id.*

exemptions, for fines would offset the financial benefits of exemptions.<sup>53</sup> Similarly, parents who considered exemptions as a matter of convenience may now rethink such decisions, as choosing to exempt their children from mandatory immunizations would result in tangible harm to their educations.

### *B. Cost Allocation in Religious Communities*

Perhaps the most serious flaw with the New York City plan is that it would do little to ensure that children who attend private or parochial schools or who are home-schooled receive the proper immunizations. Since disease hotspots often occur in religious communities, and such communities often have a significant number of children who do not attend the traditional public school system, society would greatly benefit from increasing child immunization rates in these communities.<sup>54</sup> However, given that religious sects such as the Amish or Christian Scientists are less likely to view religious exemptions merely as exemptions of convenience, it is doubtful that any plan, outside of the unrealistic goal of completely eliminating all non-medical exemptions, would result in greater immunization rates. Given those circumstances, governments may wish to implement some sort of system of allocating the costs of handling an outbreak in a more equitable fashion.

How could a state government allocate costs in such a situation? This is a very difficult question, since the decision of a relatively small percentage of a religious community's population not to immunize their children could cause a loss of herd immunity and result in an epidemic. Furthermore, the total costs of treating such an epidemic are likely well beyond the means of this small percentage of the community. But while such realities may make it very difficult, if not impossible, for governments to completely shift the costs of such negative externalities onto those that cause them, governments may still take certain steps to ensure that such groups bear a greater share of the total cost.

For instance, the federal or state governments may mandate that individuals who have not vaccinated their children because of a religious or philosophical exemption pay an annual fee, consisting of a percentage of their income, to a fund set aside to deal with the costs of such outbreaks, with "innocent" victims of these outbreaks – such as those with compromised immune systems – having their medical and other costs reimbursed. Such a fund would not only more equitably distribute costs, but the existence of a fee would also separate those with sincere convictions from those who do not wish to spend the time and money necessary to vaccinate their children.

Some may object to a state or federal tax that appears to discriminate based on religious beliefs. However, one must remember that the right to "religious freedom" is not absolute, and the right to practice one's religion

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53. Calandrillo, *supra* note 6, at 436.

54. *Id.* at 422.

does not give an individual free reign to trample on the fundamental rights of others. Federal and state governments have commonly passed legislation that “discriminates” against customs, such as female circumcision,<sup>55</sup> that are disproportionately practiced by members of certain religions, for banning or regulating such customs benefits society as a whole. One must also consider that the federal government has frequently used the tax system to promote certain religious-based values or practices over others – for instance, federal and state governments have tied many financial and other benefits to marriage.<sup>56</sup>

As discussed earlier,<sup>57</sup> use of religious exemptions by even a small percentage of a community can jeopardize herd immunity and cause significant monetary damages and immeasurable human suffering, much of which will be borne by innocent third parties. Given this fact, taxing individuals who proactively choose to opt out of society’s primary method of preserving herd immunity in order to both compensate victims and provide an incentive to immunize one’s children would not serve as an unnecessary intrusion on one’s religious freedom.

In fact, such a system may serve as an effective middle ground between the current system and outright elimination of religious exemptions. Religious and philosophical exemptions to mandatory vaccinations would be regulated similarly to the tobacco industry. Currently, those who use tobacco products incur heavy taxes meant to deter individuals from smoking and simultaneously compensate governments, victims of second-hand smoke, and others who suffer from the negative externalities caused by tobacco products. Likewise, religious and philosophical exemptions would remain available, but those who voluntarily decide to use them would be required to pay a tax to compensate society for the resulting negative externalities.

#### IV. CONCLUDING REMARKS

Religious and philosophical exemptions to mandatory school vaccines, while perhaps rooted in good intentions, now have the potential to jeopardize the herd immunities of many American communities, causing significant human and financial loss. Unfortunately, given this nation’s current political climate and several recent judicial decisions, it is not likely that state legislatures or the judiciary will eliminate or limit these harmful exemptions. Since outright elimination is not likely, scholars and policymakers should focus on creating ways to more closely align the interests of those seeking exemptions with those of society, just as New York City’s Board of

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55. See, e.g., 18 U.S.C. § 116 (2006).

56. For more information, see Liz Pulliam Weston, *The Myth of the Marriage Penalty*, MSN MONEY, <http://moneycentral.msn.com/content/Taxes/P48908.asp> (last visited Mar. 30, 2009).

57. See discussion *supra* Part I.

Education has done with its public school fines program. When such interest alignment is unlikely to succeed, policymakers should devise ways to allocate the costs of such negative externalities in a more equitable way, such as directly fining individuals who do not vaccinate their children and redistributing such funds to compensate victims of resulting epidemics.

