

When Religious Freedom Harms Children (Part 1)
A Talk with Professor Marci Hamilton

I. Religious rights and special interest in child welfare

- A. Right to religious freedom
 - 1. The Establishment and Free Exercise Clauses of the First Amendment states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” U.S. Const. amend. I.
 - 2. The Free Exercise Clause protects religious beliefs and the actions made on behalf of those beliefs. The right to religious freedom is not absolute.
- B. Special Interest in Children
 - 1. Generally, parents and the government have a special interest in protecting children’s interest.
 - 2. The federal government and all states have statutory provisions regarding child welfare, including laws against child abuse and neglect, and reporting laws.

II. Immunization Laws and Exemptions

- A. Each state has different requirements for vaccinating children.
- B. All states allow medical exemptions from vaccinations.
 - 1. In West Virginia, for example, a parent or guardian must present a written request from a treating physician to the school for exemption, stating an explanation of the medical reason.¹
- C. Most states allow religious exemptions from vaccinations. States vary in their requirements for religious exemption claims.
 - 1. In New York, a child may be exempt from immunization requirements if the parent holds “genuine and sincere religious beliefs” which are contrary to immunization. N.Y. Public Health Law § 2164.
 - a. A parent or guardian must sign a written statement stating an objection to immunization because of sincere and genuine religious beliefs. The signed and written statement need not be notarized. 10 NYCRR § 66-1.3(d).
 - b. The child’s school decides whether to accept or reject the request for a religious exemption.
 - 2. In Florida, a parent must request religious exemption from immunization requirements from the school. The school will issue Form DH 681 on which the parent will affirm that a religious conflict exists. The form must be issued upon request, and no other information should be solicited from the parent. The form requires only the following information: child’s name, date of birth, and parent’s name. Florida Administrative Code Rule 64D-3.046.
- D. Some states allow philosophical exemptions from vaccinations.

¹ WV Code § 64-95-9.1 Medical Exemptions:
<http://www.dhhr.wv.gov/oeps/immunization/requirements/Documents/64->



- E. West Virginia and Mississippi do not allow religious or philosophical exemptions.
- F. Recent state legislative changes
 - 1. In June of 2015, California’s Governor Edmund “Jerry” Brown signed SB 277 removing personal belief and religious exemptions, effective July 1, 2016.²
 - a. SB 277 removes the philosophical exemption, which includes religious beliefs, for government-mandated vaccinations for K-12 children. Those who file personal belief affidavits prior to January 1, 2016 may be grandfathered in.
 - b. § 120325 of the Health and Safety Code is amended to remove exemptions from immunizations for “personal beliefs.” § 120365 was repealed entirely.
 - 2. In May 2015, Vermont also passed H. 98 repealing its personal belief exemptions.³
- G. Public health effects – undermining herd immunity
 - 1. Many diseases can be prevented by widespread immunization, which if it reaches the level of herd immunity may effectively eradicate the disease.
 - 2. When religious and personal belief exemptions are exploited and expanded, herd immunity is undermined. Undermining herd immunity affects not only the children who are not immunized, but the elderly and others with compromised immune systems.
 - 3. This results in recurrence of serious highly contagious diseases.
 - a. For example, in 2014 and 2015, the U.S. experienced a surge in reported measles cases in as many as 28 states, emanating from clusters of unvaccinated populations.

III. Medical Neglect

- A. The Child Abuse Prevention and Treatment Act (CAPTA) as amended in 1996
 - 1. A provision under CAPTA provides, in part, that there is no federal requirement that a parent provide a child any medical service against their religious belief and to require that a state find the withholding of medical care to be neglect or abuse. 42 U.S.C. 5106i.
- B. State religious exemptions for medical care/treatment
 - 1. As a result of a federal policy in the 1970s and early 80s, states enacted religious exemptions on medical care of children
 - a. Some states allow religious exemptions from required testing of newborns for certain metabolic disorders or other treatments to prevent blindness in infants with certain STDs.
 - b. Some states allow religious exemptions for testing children’s blood for lead levels.

² SB 277, Sess. 2015-2016 (Cal. 2015)

http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB277

³ H. 98, Sess. 2015-2016 (Vt. 2015) <http://legislature.vermont.gov/bill/status/2016/H.98>



2. Many states have religious defenses to felony crimes and misdemeanor crimes against children, including neglect and abuse, negligent homicide, and involuntary manslaughter.
 - a. For example, Idaho Code 18-1501(4) provides a religious defense to the crime of “injury to children.” It states, “The practice of a parent or guardian who chooses for his child treatment by prayer or spiritual means alone shall not for that reason alone be construed to have violated the duty of care to such child.”
 - b. Idaho provides religious defenses for manslaughter and negligent homicide of children.
- C. Faith healing groups
 1. Faith healing is widely practiced in groups like the Faith Assembly, Christian Scientists, and Church of the First Born. Faith healing groups reject medical treatment in favor of prayer.
 2. Religious exemptions have shielded these groups from prosecution even when scores of children in those communities have died from otherwise treatable or preventable medical conditions. Children in many of those communities have died from easily treatable ailments like food poisoning, pneumonia, and diabetes.
 3. *Lundman v. McKown*, 530 N.W.2d 807 (1995)
 - a. 11 year old, Ian, died from diabetes after 3 days of prayer care under Christian Science practitioners. Instead of administering insulin after he slipped into a coma, they prayed over his body for 3 days. His mother, a Christian Scientist, and his father are divorced. His father commenced a wrongful death action against Ian’s mother, stepfather, and other Christian Scientists involved in Ian’s care.
 - b. The jury awarded him \$1.5 million in damages.
 - c. The Minnesota Court of Appeals upheld the jury’s award of damages. The court noted that religious freedom ends when the person’s conduct offends the law, for example, endangering a child’s life, which then may subject the conduct to regulation.

IV. Religious Practices Dangerous to Children

- A. Some religious practices may violate local health laws.
- B. Metzitzah b’peh
 1. Practice among some ultra-Orthodox Jewish groups, which involves the circumciser using his mouth to suck blood away from the incision during the circumcision ceremony.
 2. While the practice itself is not dangerous, it exposes an infant to the risk of transmission of herpes virus, which may result in brain damage or death.
 3. In New York City, the number of herpes infections among infants has jumped in the past several years.
- C. New York City Health Code
 1. Article 181 of the New York City Health Code requires that, prior to circumcision involving direct oral suction of infants less than 60 years of age,



the person performing the circumcision obtain the written consent of the a parent. The purpose of the consent forms was to educate parents about the dangers of the practice.

2. In June 2015, the Board initiated steps to repeal the consent form requirement. The vote on repeal is expected to follow in September.