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VACCINATION EXEMPTIONS IN STATE SCHOOLS

When a person's religious beliefs forbid his complying with the public health laws of a state, serious legal questions always arise.[1] It has long been considered a proper exercise of state police power to require smallpox vaccinations of students as a condition precedent to their right to enroll in public schools.[2]

Although the vaccination renders the person vaccinated immune to smallpox,[3] he still may be a carrier of the disease.[4] Consequently,

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[1]If the law is enforced, does this violate the rights of free exercise and establishment of religion contained in the first amendment of the Federal Constitution and made applicable to the states through the fourteenth amendment? Does it violate the guarantee of equal protection of the laws? Does it violate the right of liberty?

Is a person's secular loyalty and subjection to state law more important than his loyalty to his religious principles and beliefs, and does a state have the right and power to so dictate? Prince v. Massachusetts, 321 U.S. 158 (1944), denied the right of children to distribute religious material after dark, in order to protect them from harm, and Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948), denied any right to handle poisonous snakes as a part of a religious ceremony.

[2]Jacobson v. Massachusetts, 197 U.S. 11 (1905); People ex rel. Barmore v. Robertson, 302 Ill. 422, 134 N.E. 815 (1922); Ex parte Lewis, 328 Mo. 843, 42 S.W.2d 21 (1931); Board of Education v. Maas, 56 N.J. Super. 245, 152 A.2d 394 (1959).

[3]Schmidt, Attorney's Dictionary of Medicine 858 (1962).

There is considerable dispute as to the effect of the smallpox vaccination and as to whether it actually results in absolute immunity. However, in Jacobson v. Massachusetts, 197 U.S. at 35, the court stated that whether or not the vaccination is medically sound, judicial notice would be taken of the proposition that it does achieve absolute immunity since the public is under this impression. This proposition is stated as fact in this comment since the courts treat it as such.

[4]There are no other valid reasons for the requirement. The unvaccinated student cannot spread smallpox to vaccinated students since they are immune.

Immunity by vaccination is obtained by introducing a germ into an individual so that his system can build up resistance to the germs so introduced. Schmidt, Attorney's Dictionary of Medicine 391 (1962). The theory that a vaccination prevents the spreading of disease to unvaccinated persons, therefore, is exposed as fallacious. Unless the entire world is vaccinated, the vaccinated person is the one most likely to spread the disease to unvaccinated persons.

Vaccination is not the only way a person may obtain immunity from a disease such as smallpox. People obtain a certain degree of immunity, known as herd immunity, by association and membership in a group. Burrows, Textbook of Microbiology 291 (17th ed. 1959). Natural immunity from a disease may be obtained by normal daily contact with germs so that resistance may be built up. Schmidt, supra at 391. A child may inherit immunity from his mother. Schmidt, supra at 391.

There is an objection on medical grounds to denying an unvaccinated student the right to enroll in public schools. An unvaccinated student has a better chance of obtaining herd or natural immunity by association in a school group which has a very high incidence of vaccination.

Smallpox occurs in two forms. Malignant smallpox, known as variola major, is considered the most serious and has been the cause of death in 25% to 40% of

the purpose of the vaccination requirement is limited to the public's interest in preserving a life that is an asset to society, and does not extend to the prevention or spread of the disease. This purpose exceeds in importance the right to free exercise of religion.[5] It has been held, therefore, that a student does not have a constitutional[6] right to an exemption.[7] The only exceptions to the vaccination requirement have been those provided by the legislatures or granted by authorities empowered with discretion to grant exemptions.[8]

The interesting question of whether there may be a constitutional right to an exemption from the vaccination requirement was considered in the recent case of *Kolbeck v. Kramer*.[9] Kolbeck applied to and was accepted by Rutgers University for the September 1962 term. While registering in the university, Kolbeck refused to submit to a smallpox vaccination, claiming that it was contrary to his religious principles and beliefs. The university then supplied Kolbeck with an exemption form which required certification that the applicant for exemption was a member of the Christian Science religion. Kolbeck

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the reported cases. Variola minor, the milder form of smallpox, has a fatality rate of 1% of the reported cases. In the United States variola major is now almost extinct, having been replaced by variola minor. Variola major, which is distinguished from variola minor in that it exists in epidemic form, is prevalent in Asia, Africa and the Middle East. Burrows, supra at 814.

[5]Vonnegut v. Baun, 206 Ind. 172, 188 N.E. 677 (1934); Mosier v. Barren County Bd. of Health, 308 Ky. 829, 215 S.W.2d 967 (1948); Sadlock v. Board of Educ., 137 N.J.L. 85, 58 A.2d 218 (1948); Streich v. Board of Educ., 34 S.D. 169, 147 N.W. 779 (1914); McSween v. Board of School Trustees, 60 Tex. Civ. App. 270, 129 S.W. 206 (1910); City of New Braunfels v. Waldschmidt, 109 Tex. 302, 207 S.W. 303 (1918); Cude v. State, 377 S.W.2d 816 (Ark. 1964).

[6]Any general reference to the Constitution in this comment covers both the Federal Constitution and applicable state constitutions.

[7]E.g., Zucht v. King, 260 U.S. 174 (1922).

[8]Alaska Comp. Laws Ann. § 14-30-110 (Supp. 1964), where an exemption is granted to religious objectors; Conn. Gen. Stat. Ann. § 10-204 (1906), where an exemption is granted to students whose physical condition makes vaccination unwise, hereinafter referred to as unfit subjects; Ga. Code Ann. § 32-911 (Supp. 1963), where exemptions are granted to religious objectors and to unfit subjects; Mass. Ann. Laws, ch. 111, § 183 (1964), where an exemption is granted to unfit subjects; Miss. Code Ann. § 6328-24(9) (Supp. 1962), where exemptions are granted to religious objectors and to unfit subjects; N.J. Stat. Ann. § 18:14-52 (Supp. 1963), where exemptions are granted to unfit subjects and local boards are given the power to exempt religious objectors; N.M. Stat. Ann. § 12-3-4.3 (Supp. 1963), where a student is exempted upon his showing that he is an unfit subject, "or upon affidavits from an officer of a *recognized religious denomination* that such child's parents or guardians are bona fide members of a *denomination* whose religious teaching requires reliance upon prayer or spiritual means alone for healing." (Emphasis added.) The constitutionality of the New Mexico statute has not been tested, and it is possible that no one has standing to attack it.

[9]84 N.J. Super. 569, 202 A.2d 889 (1964).

was not a Christian Scientist and did not belong to a recognized religious sect. Rutgers denied Kolbeck the exemption, contending that his claim was not based on a bona fide religious belief. At this time, there were enrolled in the university eight Christian Science students who were exempted from the vaccination requirement due to their religious beliefs.

The Superior Court of New Jersey, in ordering the defendant university to admit Kolbeck,[10] said, "The State or any instrumentality thereof cannot, under any circumstances, show a preference of one religion over another. Such favoritism cannot be tolerated and must be disapproved as a clear violation of the Bills of Rights of our Constitutions."[11]

The court reasoned that since Rutgers is a governmental agency of New Jersey,[12] it is subject to the rulings of the State Board of Ed-

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[10]This was an action brought in lieu of a prerogative writ by Kolbeck through his father as guardian *ad litem*.

The court did not explicitly discuss Kolbeck's standing to attack constitutionality, but recognized it implicitly.

Kolbeck has standing since the action arises out of a case or controversy and he has shown that the challenged action is unconstitutional as applied to him. See the concurring opinion of Justice Frankfurter in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 149 (1951). Kolbeck has directly suffered a detriment due to the challenged act and stands to benefit by it being declared unconstitutional.

If Kolbeck were attacking the New Mexico statute, supra note 8, granting exemptions to members of specific sects, he would not have standing; if the act were declared unconstitutional, he would not gain a benefit since the statute would be rendered invalid and would thus serve only to destroy the existing exemption and not create a new one for his benefit.

In this case, however, Kolbeck is attacking the constitutionality of Rutgers University's act denying him admission. If this act is found to be unconstitutional, it is invalidated and Rutgers must admit Kolbeck. Thus, Kolbeck stands to benefit from a finding of unconstitutionality.

Under the New Jersey statute, supra note 8, Rutgers had the power to grant exemptions to religious objectors or could, if it so desired, deny them admission. Rutgers chose to grant the exemption to Christian Scientists. It then denied Kolbeck admission because he was not a Christian Scientist. Kolbeck is not attacking the university's act in granting the exemption to Christian Scientists, but its act denying him admission. Once the university exerted its discretion to grant an exemption to religious objectors, it could not constitutionally withhold the exemption from non-Christian Scientists.

Three acts are involved: (1) the act of the New Jersey legislature granting Rutgers the power to exempt religious objectors; (2) the act of Rutgers granting this exemption to Christian Scientists; (3) the act of Rutgers denying this exemption to Kolbeck since he was not a Christian Scientist. To complain of the first and second acts, Kolbeck does not have standing. To complain of the third act, he does.

[11]202 A.2d at 893.

[12]N.J. Stat. Ann. § 18:22-15.1 (Supp. 1963).

ucation[13] whose powers are provided by statute.[14] Thus, the university's power is indirectly controlled by the New Jersey statute. While the statute concerning vaccination provides for the exclusion from schools of unvaccinated students, it gives the Board of Education a discretionary power to exempt students who have religious objections.[15]

The court stated that Rutgers University could properly exert its discretion to grant *or* deny exemptions to all religious objectors;[16] but Rutgers could not grant exemptions to persons professing one religious belief, as the Christian Scientists, *and* simultaneously deny an exemption to the plaintiff, who had a different, but equally bona fide religious belief.[17]

The court expressly stated that the right of liberty as found in the first and fourteenth amendments was violated,[18] since the university, by denying admission to Kolbeck, was restricting his right to matriculate by discriminating against his religious beliefs.[19] The university could not classify Kolbeck's individual belief as non-religious merely because he was not a member of a recognized religious sect.

Equal protection of the laws was denied Kolbeck when the university arbitrarily classified him as not being exempt under the New Jersey statute, which classification was contrary to the classification of another religious faith as being so exempt.[20]

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[13]N.J. Stat. Ann. § 18:22-15.57 (Supp. 1963).

[14]N.J. Stat. Ann. § 18:2-4(b) (Supp. 1963).

[15]"A board of education may exclude from school any teacher or pupil who has not been successfully vaccinated or revaccinated, unless the teacher or pupil shall present a certificate signed by the medical inspector appointed by the board of education that the teacher or pupil is an unfit subject for vaccination, but the board of education may exempt a teacher or pupil from the provisions of this section, if said teacher or the parent or guardian of said pupil objects thereto in a written statement signed by him upon the ground that the proposed vaccination interferes with the free exercise of his religious principles." N.J. Stat. Ann. § 18:14-52 (Supp. 1963).

It should be noted that the exemption of an unfit subject appears to be mandatory under this statute.

[16]202 A.2d at 890.

[17]Id. at 893.

[18]"There is no right in a state or an instrumentality thereof to determine that a cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth Amendment." 202 A.2d at 892.

[19]This limits the free exercise of religion provided for by the first amendment. It is made applicable to the states and individuals in the guarantee of liberty in the fourteenth amendment. Cantwell v. Connecticut, 310 U.S. 296 (1940).

[20]"The suggestion that plaintiff does not have a bona fide religion to qualify

Somewhat surprisingly, the vaccination cases have not shown any historical development.[21] The principles developed in the very first cases are the same principles employed in recent cases.

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for this exemption ... indicates an arbitrary and capricious policy for a State University." 202 A.2d at 893.

An equal protection of the laws violation is usually indicated by the court's finding that a state or instrumentality thereof indulges in an arbitrary classification detrimental to one group of persons. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

[21]The conscientious objector cases concern the same legal principles as does the principal case. The historical development of these cases helps illuminate the constitutional questions raised. It must be kept in mind, however, that the conscientious objector cases are not based upon public health policy.

There are no constitutional grounds by which the conscientious objector can refuse to submit to military service under religious objections. Checinski v. United States, 129 F.2d 461 (6th Cir. 1942). The first exemptions came through legislative grants by the states. E.g., State v. Roberts, 1 Me. 369 (1820), where a state constitution granting an exemption was construed as being a delegation to the legislature to control the matter of exemptions. These early grants usually enumerated specific religious sects, members of which were to be exempted upon a religious claim supported by required affidavits. E.g., Me. Stat. (1821) c. 164, § 1 [Rev. Stat. (1940) c. 16, § 3]. Cases arising under these early statutes held that constitutional rights were not violated by enforcing these statutes. E.g., State v. Roberts, supra. In 1930, Macintosh v. United States, 42 F.2d 845 (2d Cir. 1930), suggested that in order for one to qualify for the exemption it was not essential to be a member of a specific religious sect.

In 1940, Congress passed a Selective Service Act which allowed exemptions to conscientious objectors who objected to military service on religious grounds. Selective Training and Service Act of 1940, § 5.

The Universal Military Training and Service Act contains the same provision, but in § 456(j) states: "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or merely personal moral code." 62 Stat. 604 (1948). 50 App. U.S.C.A. § 456 at 102 (Supp. 1963).

Limiting the exemption to those who believe in a Supreme Being was declared unconstitutional and a violation of due process in 1964. United States v. Seeger, 326 F.2d 846 (2d Cir. 1964), cert. granted, 377 U.S. 922 (1964).

In determining the right to an exemption, the courts have looked, not to the religion under which the claimant professes membership, but to the sincerity of his objection. Witmer v. United States, 348 U.S. 375 (1955); Peter v. United States, 324 F.2d 173 (9th Cir. 1963); Annot., 99 L. Ed. 443, 447. Thus, a member of a religious sect, recognized to have military objections, may be denied an exemption if the court feels that he, as an individual, is not sincere in his objections on religious grounds. Bradley v. United States, 218 F.2d 657 (9th Cir. 1954); United States v. Simmons, 213 F.2d 901 (7th Cir. 1954); Gonzales v. United States, 212 F.2d 71 (6th Cir. 1954). A person who is not a member of a specific religious sect may be allowed the exemption. Williams v. United States, 216 F.2d 350 (5th Cir. 1954); United States v. Hein, 112 F. Supp. 71 (N.D. Ill. 1953) (dictum).

Such administration of the military requirement does not run the risk of denying the constitutional rights of due process and equal protection of the laws since it avoids group association and treats each individual as a separate entity. Likewise, it does not run the risk of denying the claimant liberty since it is not deciding

All states have the power to enforce the vaccination requirement.[22] They differ, however, as to how the power is exercised. Three different methods are utilized: (1) a statute making the vaccination a mandatory requirement,[23] (2) a statute giving administrative bodies the power to require the vaccination,[24] or (3) administrative enforcement in the absence of a specific statute, but implied under a general grant to make rules regarding public health.[25]

The first method precludes any discretionary action on the part of

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whether a cause is religious, but rather, whether the claimant sincerely entertains such a belief.

Up until now, the vaccination cases were in the same stage of development as the conscientious objector cases were prior to 1930. The Kolbeck case appears to be a step towards the same type of development as the Macintosh case indicated. This lag is probably due to the fact that it is far more popular to seek exemption from military service than to seek exemption from a vaccination requirement. Whether the development in the military cases will be followed in the vaccination cases is yet to be seen.

[22]E.g., Ala. Code tit. 37, § 493 (Recomp. 1958); Alaska Comp. Laws Ann. § 14-30-090 (1962); Ariz. Rev. Stat. Ann. § 36-629 (1956); Cal. Educ. Code § 11851; Conn. Gen. Stat. Ann. § 10-204 (1960); D.C. Code Ann. § 31-1102 (1961); Ga. Code Ann. § 32-911 (Supp. 1963); Md. Ann. Code art. 77, § 133 (1957); Mass. Ann. Laws ch. 76, § 15 (1964); Miss. Code Ann. § 6328-24(9) (Supp. 1962);

Mo. Rev. Stat. § 163.017 (Supp. 1963); N.H. Rev. Stat. Ann. § 200:1 (1955); N.J. Stat. Ann. § 18:14-52 (Supp. 1963); N.M. Stat. Ann. § 12-3-4.1 (Supp. 1963); N.Y. Pub. Health Law § 2130; N.C. Gen. Stat. § 130-87 (repl. vol. 1964); Ohio Rev. Code Ann. § 3313.67 (Baldwin 1964); Pa. Stat. Ann. tit. 24, § 13-1303 (1962); S.C. Code § 32-694 (1962); Va. Code Ann. § 22-249 (repl. vol. 1964); W. Va. Code Ann. § 1285 (1961); Wis. Stat. § 143.13 (1963).

In the absence of a statute, by a general grant to states or their instrumentalities, they have this power whether or not they exert it. Infra note 25.

[23]D.C. Code Ann. § 31-1102 (1961); Md. Ann. Code art. 77, § 133 (1957); Mass. Ann. Laws ch. 76, § 15 (1964); N.H. Rev. Stat. Ann. 200:1 (1955); N.Y. Pub. Health Law § 2130; N.C. Gen. Stat. §130-87 (repl. vol. 1964); Pa. Stat. Ann. tit. 24, § 13-1303 (1962); S.C. Code § 32-694 (1962); Va. Code Ann. § 22-249 (repl. vol. 1964); W. Va. Code Ann. § 1285 (1961).

A state statute may give local authorities the power to make the vaccination compulsory by passing appropriate ordinances; then, by exercising this power the regulation becomes mandatory. Ala. Code tit. 37, § 493 (recomp. 1958).

[24]Alaska Comp. Laws Ann. § 14-30-090 (1962); Conn. Gen. Stat. Ann. § 10-204 (1960); Ga. Code Ann. § 32-911 (Supp. 1963); N.J. Stat. Ann. § 18:14-52 (Supp. 1963); Ohio Rev. Code Ann. § 3313.67 (Baldwin 1964).

[25]The following states lack specific vaccination statutes, but have the power to enforce the requirement under a general grant to provide for public health regulations: Arizona; Arkansas; California; Delaware; Florida; Hawaii; Illinois Indiana; Iowa; Kentucky; Louisiana; Maine; Michigan; Minnesota; Nebraska; Nevada; Rhode Island; Tennessee; Texas; Vermont; Washington.

See the Texas case of Chrestman v. Tompkins, 5 S.W.2d 257 (Tex. Civ. App. 1928), for an application of this power.

There is an Arizona statute that explicitly prohibits compulsory vaccination. Ariz. Rev. Stat. Ann. § 36-629 (1956).

local boards of education. Any provision for exemption in one of these statutes also serves as a mandate upon local boards. A student, therefore, cannot make a plea for an exemption not explicitly included within the statute.[26]

By the nature of the second method, a vaccination requirement can be enforced as compulsory or can be entirely disregarded. If enforced, the granting of exemptions may be discretionary.[27] If discretionary, the local boards can deny admittance to a student who could have been exempted by an express statutory grant.[28] They can also allow admittance to a student who might not have been exempted under a mandatory interpretation of the statute.[29] This type of statute, therefore, contains the possibility of both more lenient and stricter enforcement of exemptions than the first method.[30]

The third method is usually enforced during a period of smallpox epidemic,[31] and local boards of education enforce the vaccination requirement as a protective health measure. Such power is upheld and is not subject to exemption.[32]

In upholding the power to exclude unvaccinated students from public schools, the courts have found that such an exclusion does not violate the constitutional rights of due process,[33] civil liberty,[34] or religious freedom.[35] It has been generally held that the exclusion does not conflict with the right to attend school[36] or with compulsory education requirements.[37]

Once it becomes established that religious beliefs are sufficient grounds for exemptions from the vaccination requirements, it remains

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[26]See supra note 7.

[27]Supra note 15, where the exemptions for religious objectors is discretionary and the exemption for unfit subjects is mandatory.

[28]Board of Educ. v. Maas, supra note 2.

[29]Ibid.

[30]It can be more lenient since the entire provision can be disregarded by a local board. It can be stricter since the provision for exemption can be disregarded.

[31]Auten v. Board of Directors, 83 Ark. 431, 104 S.W. 130 (1907); Vonnegut v. Baun, supra note 5; Duffield v. School Dist., 162 Pa. 476, 29 Atl. 742 (1894); State ex rel. Cox v. Board of Educ., 21 Utah 401, 60 Pac. 1013 (1900).

[32]Ibid.

[33]Zucht v. King, supra note 7; City of New Braunfels v. Waldschmidt, supra note 5.

[34]Supra note 5.

[35]Ibid.

[36]Hagler v. Larner, 248 Ill. 547, 120 N.E. 575 (1918); Blue v. Beach, 155 Ind. 121, 56 N.E. 89 (1900).

Contra, Osborn v. Russell, 64 Kan. 507, 68 Pac. 60 (1902).

[37]Hartman v. May, 168 Miss. 477, 151 So. 737 (1934).