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When Church and State Collide: Examining Belief and Determining Sincerity in Cases of Religious Exemption

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When Church and State Collide

Most people in the United States will be familiar with the phrase “separation of church and state.”¹ It is seen by many as something that sets the U.S. apart from other countries, as the embodiment of our identity as a secular society. But in reality, that phrase does not even come close to capturing the complexity of the relationship between government and religion in the modern United States. Rather than there being a wall separating these two entities, they in fact interact in a number of different ways, and one of these ways comes in the form of religious exemptions. There are many different kinds of religious exemptions, from those allowing inmates to receive special food in prison, to those that allow individuals to consume substances that are banned for the general population, but one that has grown increasingly controversial in recent years is religious exemption from vaccination.

This paper will discuss the history of and controversy surrounding vaccination exemptions in order to examine some of the issues involved in trying to craft a fair and practical exemption process. Though it is necessary to discuss the broader history of religious exemption law in order to understand certain aspects of this case study, this paper does not claim that the conclusions drawn about vaccination exemptions will

¹ Philip Hamburger, *Separation of Church and State* (Cambridge: Harvard University Press, 2009), 1. This phrase was said by Thomas Jefferson in reference to the First Amendment of the United States Constitution, in a letter he wrote to the Danbury Baptist Association in 1802. These words do not actually appear in the Constitution itself, but have come to be used by a vast number of Americans as a way to refer to their religious freedom.

necessarily apply to all forms of exemptions. In fact, the focus on vaccinations is meant to highlight the differences between different kinds of exemption, and to show that vaccinations involve their own unique set of considerations. Specifically, I will be focusing on the following questions as they relate to vaccination exemptions: How do courts go about determining what counts as “religion” in a legal context? How do courts determine whether an individual is sincere in their claims? And can they do either of things in a way that is both fair and consistent?

This essay will begin with a brief history of the controversy surrounding religious exemption law, after which I will lay out a framework for thinking about different kinds of exemption. I will also give a brief history of vaccination exemptions more specifically, and discuss how they fit into the framework presented. I will then go on to discuss some of the ways courts have attempted to define religion and the ways that they have attempted to determine sincerity, as well as the problems involved in each of these endeavors. Much time will be spent analyzing various court cases dealing with these issues, but scholars of religion will also be brought into the discussion in order to provide insight into how to think about religious beliefs and practices. The goal of this essay is, above all, to shed light on the complexity of religious exemption law, and to engage with questions that the courts have not sufficiently addressed.

Section I: A History of Religious Exemptions

Religious exemption law in the United States has had a somewhat turbulent history over the years.² Though the complicated dynamic between religion and law traces back to the founding of the country itself, a helpful place to start when trying to understand the debate over religious exemptions is the 1963 case of *Sherbert v Verner*. There had been cases dealing with religious exemption long before *Sherbert*, but it is here that the Court established the “no hindrance” principle that would come to be the center of much controversy at the end of the century and up to the present.³ The case involved a woman named Adell Sherbert from South Carolina, who was denied unemployment benefits when she quit her job because it forced her to work on Saturdays, which, as a Seventh-Day Adventist, was her Sabbath. The position of the state was that she lacked “good cause” for turning down available work, because if she had been willing to work on Saturdays she would have been able to keep her job.⁴ South Carolina law, however, forbid employers from terminating workers who refused to work on Sundays, and it was in part this blatant discrimination that resulted in the Court ruling in favor of Sherbert. Justice Brennan, who wrote the opinion of the Court, went even further in considering the constitutional question of the case, asking whether any “compelling state interest ... justifies the substantial infringement of [Sherbert’s] First Amendment right.”⁵

² John F. Wilson, “The Founding Era (1774-1797) and the Constitutional Provision for Religion,” *Church and State in the United States*. Wilson’s article goes into further detail about the creation of the religion clauses in the United States Constitution and provides further context for the relationship between religion and law in the U.S.

³ Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge: Harvard University Press, 2007), 39-40.

⁴ *Ibid.*, 40.

⁵ *Ibid.*, 40.

Though the exact meaning of Justice Brennan's opinion was somewhat ambiguous, later courts would go on to interpret it as meaning that whenever religious exercise was substantially burdened by the government, it would be subject to the compelling state interest test, regardless of whether this burden was specifically discriminatory in nature; in essence, it was an extreme version of the idea that government should not hinder religious practice, and if it did so it would have to prove that it had a compelling reason.⁶ Considering the vast religious diversity in the United States, it is conceivable that nearly any law could be considered a burden to someone's religious exercise, and what inevitably resulted from this decision was a principle that was extremely impractical, leading to confused and inconsistent application throughout the decades that followed.⁷

In 1990, the Supreme Court finally reevaluated the merits of the compelling state interest test in *Employment Division v Smith*, and in doing so they ignited a controversy the ramifications of which are still being felt today. Al Smith was an employee of the State of Oregon who lost his job after ingesting peyote (a banned substance in Oregon) as part of a ritual for the Native American Church, and was denied unemployment benefits because he was fired for criminal misconduct.⁸ Smith claimed that this was a violation of his free exercise of religion, but when the case finally reached the Supreme Court, the justices disagreed.⁹ They held that the compelling state interest test should not be applied to laws that are "neutral and generally applicable." When a generally applicable law incidentally burdens religious practice in some way, they asserted, it should not automatically be

⁶ Ibid., 41.

⁷ Ibid., 41-42.

⁸ Ibid., 78.

⁹ Ibid., 78.

considered unconstitutional.¹⁰ This was essentially the court attempting to reframe the discussion; rather than attempting to address every single law that could burden religious belief in some way, they instead wanted to shift the focus to laws or policies that singled out religious belief or practice in a discriminatory way.

The public outcry that followed this decision was extreme, with some individuals in the media claiming that the decision in *Smith* had marked the end of religious freedom in the United States. Christopher Eisgruber, current president of Princeton University, and Lawrence Sager, former dean of the University of Texas School of Law, argue that these claims were in fact ridiculous; the courts did not stop protecting the free exercise of religion, they simply shifted their evaluations to the question of whether laws were “neutral and generally applicable”; in other words, did these laws refrain from singling out specific religious groups or practices for discrimination? They point out that just three years after *Smith*, the Supreme Court ruled that it was unconstitutional for Hialeah, Florida to ban Santerians from sacrificing chickens while still allowing other nonreligious animal slaughter within the city limits, and the Court reached this decision on the basis of this new standard.¹¹ Despite the irrationality surrounding much of the public concern over *Smith*, Congress responded to it with the Religious Freedom Restoration Act (RFRA) in 1993, which stated that “no government policy – local, state, or federal – could ‘substantially burden’ religious exercise unless the imposition of the burden was ‘the least restrictive means’ to further a compelling state interest.”¹² The Supreme Court quite quickly held that it was unconstitutional to impose RFRA on state and local governments, but that did not

¹⁰ Ibid., 45.

¹¹ Ibid., 45.

¹² Ibid., 46.

stop individual states from implementing their own versions of RFRA, nor did it stop Congress from passing the Religious Land Use and Institutionalized Persons Act (RLUIPA), which brought back the compelling state interest test at the state and local level for anything having to do with prison inmates or land use.¹³

Unsurprisingly, this resurrection of the compelling state interest test was no more successful than it was after *Sherbert*, as Congress did nothing to address the issues of application that had existed before *Smith*; what resulted was simply more confusion that the courts would have to figure out themselves.¹⁴ In the wake of this legislative chaos, much is still up in the air; there is still debate among scholars and legal professionals about who should be eligible for religious exemptions, and even whether these exemptions should exist at all; it often comes down to the question of whether the benefits of religious exemptions outweigh the cost of their application. In trying to approach this subject that has become so confusing, and the debate around it which has become so heated and politically charged, Kent Greenawalt, a prominent scholar of both religion and law and author of several books on these topics, offers a helpful framework for understanding the different kinds of religious exemption, and the different ways that each should be dealt with. Greenawalt sets himself apart from those who would claim that resolving the issue of exemptions is simple by shedding light on the complexity of the issue. Rather than attempting to give a single answer to the question of whether religious exemptions to neutral and generally applicable laws should exist or not, he analyzes a number of different

¹³ Ibid., 47.

¹⁴ Ibid., 46.

kinds of exemption to show how each has a different history and requires a different approach.¹⁵

Greenawalt lays out what he sees as three distinct categories of exemption, organizing them in terms of what effect the exemption has on others. The first of the categories he introduces is exemptions that do not cause others direct harm. An example of this kind of exemption would be allowing members of the Native American Church to consume peyote in their religious rituals.¹⁶ The second category is exemptions that do have the potential to practically harm others, and Greenawalt gives the example of religious groups being allowed to violate zoning laws, which could negatively impact their neighbors.¹⁷ The third category involves those seeking an exemption so that they can treat certain people less favorably than others, such as businesses seeking to refuse service to gay couples or individuals.¹⁸ The effects that exemptions can have on others, Greenawalt asserts, “can be absolutely central to whether any exemption is warranted and, if it is, how far it should extend.”¹⁹ These three categories are simply his own way of organizing exemptions for the purpose of his book, and there are certainly other ways that one could go about categorizing them; for example, they could be grouped into categories based on subject matter, such as all medical exemptions in one category and all exemptions involving business regulations in another. However, these categories do highlight the necessity to evaluate different kinds of exemption individually. And for those exemptions that could

¹⁵ Kent Greenawalt, *Exemptions: Necessary, Justified, or Misguided?* (Cambridge and London: Harvard University Press, 2016), 2-5.

¹⁶ *Ibid.*, 5.

¹⁷ *Ibid.*, 5.

¹⁸ *Ibid.*, 6.

¹⁹ *Ibid.*, 5.

cause harm to others, determining whether they should be granted requires weighing the risks and benefits involved.

Section II: A History of Vaccination Exemptions

A particularly relevant example of an exemption that could cause harm is the exemption from mandatory vaccination. And, like religious exemption law more generally, vaccination exemptions and the controversy surrounding them have their own turbulent history. Many of the public concerns and legal precedent around vaccinations today have roots in the previous centuries, and so it is necessary to look to the past in order to make sense of the present.

Very often, the debate around vaccination exemptions focuses on the tension between individual rights to bodily autonomy and the right of the state to impose measures to safeguard public health. Though the vaccination of an individual person can protect that individual from contracting the specific disease in question, the larger goal of vaccinations is something called herd immunity. Herd immunity occurs “when a critical portion of a community is immunized against a contagious disease [and] the virus can no longer circulate in the population, so that the disease cannot gain a foothold in that society.”²⁰ Since the invention of vaccines, diseases like smallpox, polio, measles, mumps, rubella, and whooping cough have been dramatically reduced or entirely eliminated by large-scale vaccination programs that have created and maintained herd immunity.²¹ Herd immunity is especially important because it protects people in a population who are unable to be

²⁰ Roland Pierik, “On Religious and Secular Exemptions: A Case Study of Childhood Vaccination Waivers.” *Ethnicities* 17, no. 2 (2017), 221.

²¹ *Ibid.*, 221.

safely vaccinated. This includes children not yet old enough to be vaccinated, individuals who have compromised immune systems, and people who have a high probability of suffering from an allergic reaction to a vaccination. When a person chooses not to be vaccinated, or to not vaccinate their children, that choice puts at risk the people around them to whom they could pass the disease on if they were infected.²² Maintaining herd immunity does not mean that every single person in a community needs to be vaccinated, though the specific percent varies depending on the disease in question. Measles, for example, requires that between 92-94% of the population be immunized.²³ But this does mean that the vast majority of people do have to receive vaccinations in order for the population to be protected from outbreaks.

From the time vaccines were first introduced, however, there was (and still is) a particularly strong resistance to the compulsory nature of vaccinations, with many people believing that the government should not have the right to compel any individual health measure, regardless of its benefit to the overall public health of the community.²⁴ Often, they have claimed that that the people as a whole should be able to make decisions about scientific policy, rather than it being a government decision; they are very much against the “cult of the expert,” and have advocated instead for direct democracy.²⁵ Despite the public opposition to vaccines that has existed since the start of the 20th century, however, the laws permitting states to impose compulsory vaccination have remained relatively stable.

²² Ibid., 224.

²³ Ibid., 223-224.

²⁴ Robert D. Johnston, “Contemporary Anti-Vaccination Movements in Historical Perspective,” in *The Politics of Healing: Histories of Alternative Medicine in Twentieth-Century America*, ed. Robert D. Johnston, (New York: Routledge), 261.

²⁵ Ibid, 261.

The Supreme Court case of *Jacobson v Massachusetts* is perhaps the most important case when discussing compulsory vaccination, with the precedent it created still holding significant weight today. In 1902 in Cambridge, Massachusetts, the Cambridge Board of Health ordered that all the city's residents over twenty-one years of age receive the smallpox vaccination, due to a smallpox epidemic that had broken out more than six months prior in the Boston and Cambridge areas.²⁶ Three Cambridge citizens, including Reverend Henning Jacobson of the Swedish Lutheran Church, were arrested for refusing the vaccination; they were found guilty of violating the ordinance and were ordered to pay a fine of five dollars each.²⁷ When Jacobson appealed to the Supreme Judicial Court of Massachusetts, the court upheld his original conviction on the grounds that the Massachusetts statute permitting the state to impose compulsory vaccination was a reasonable use of the state's police powers.²⁸

In June of 1903, Jacobson filed an appeal to the U.S. Supreme Court, and the case was eventually argued in the October term of 1904. Jacobson's attorney claimed that Massachusetts's compulsory vaccination violated his Fourteenth Amendment rights, which prohibited states from depriving a person of life, liberty, or property without due process.²⁹ They argued that because Jacobson was a healthy citizen who was not at that time infected, the state should not be able to force him to receive a vaccination simply because he had the potential to contract a contagious disease; compulsory vaccination, they asserted, was a violation of his bodily integrity, and it was "unreasonable, arbitrary, and oppressive, and therefore, hostile to the inherent right of every freeman to care for his own body and health

²⁶ Lynne Curry, *The Human Body on Trial* (Santa Barbara: ABC-CLIO, 2002), 51-52.

²⁷ *Ibid.*, 52.

²⁸ *Ibid.*, 52.

²⁹ *Ibid.*, 52.

in such a way as to him seems best.”³⁰ The court, however, disagreed with Jacobson, and in a seven-to-two decision upheld the compulsory vaccination order as a reasonable exercise of police powers. Especially in light of the recent epidemic of a life-threatening disease, they believed that it was justifiable to demand vaccinations in order to protect the overall health of the community.³¹

Though the court upheld the right of states to impose compulsory vaccination, Lawrence Gostin, in his article about the *Jacobson* case, points out that this case was also “the Court’s first systematic statement of the constitutional limitations imposed on government.”³² While it defended police powers, it also emphasized a necessity to safeguard liberty. Justice Harlan asserted that that police powers can only be exercised in instances where there is a demonstrable health threat, and cannot be used arbitrarily. Furthermore, the methods used to combat a given threat must have a “real or substantial relation” to the goal of protecting public health, and the burden imposed cannot be disproportional to the public health benefit that the state is attempting to achieve. Finally, Justice Harlan also made it clear that public health measures cannot pose a health risk to the subject involved; a person should not be required to receive a vaccination if that person has a severe allergy to one of the vaccine components, for example.³³ And, by and large, the precedent from *Jacobson* continues to be influential in the discussion surrounding compulsory vaccination and the boundaries of police powers.³⁴

³⁰ Ibid., 52-53.

³¹ Ibid., 53-54.

³² Lawrence Gostin, “Jacobson v Massachusetts at 100 Years: Police Power and Civil Liberties in Tension,” *American Journal of Public Health* 95, no. 4 (2005), 579.

³³ Ibid., 579.

³⁴ Ibid., 580.

Today, courts continue to consistently recognize the rights of states to compel vaccination, and they also recognize that states are not required to provide either religious or philosophical exemptions, though it is worth noting that nearly all states do provide at least religious exemptions of some sort, and many provide philosophical exemptions as well.³⁵ New York Public Health Law, for example, requires that all students enrolled in New York public schools submit proof of immunization, unless a licensed physician certifies that the vaccination would be detrimental to the health and wellbeing of the child, or if vaccination is against the “genuine and sincere religious beliefs” of the parent or guardian.³⁶ However, a state regulation also allows public schools to exclude from attendance those students who have received exemptions from vaccination in the event of an outbreak of a vaccine-preventable disease.³⁷

In January of 2015, several parents of children enrolled in a New York public school challenged the constitutionality of the vaccine requirements in the New York Public Health Law.³⁸ The plaintiffs, who were Catholic, received religious exemptions for their children, who were then excluded from school when one of their fellow classmates was diagnosed with chickenpox.³⁹ In their lawsuit, the plaintiffs argued that the exclusion of their children from school violated their free exercise of religion as guaranteed by the First Amendment, but, citing the earlier case *Prince v Massachusetts*, the court held that “the right to practice religion freely does not include liberty to expose the community or the child to

³⁵ Marie Killmond, “Why is Vaccination Different? A Comparative Analysis of Religious Exemptions,” *Columbia Law Review* 117, no 4 (2017), 5.

³⁶ N.Y. Pub. Health Law § 2164(8), § 2164(9)

³⁷ 10 N.Y.C.R.R. § 66-1.10

³⁸ *Phillips v. City of New York*, 775 F.3d 538, 544 (2d Cir. 2015)

³⁹ *Ibid.*

communicable disease or the latter to ill health or death.”⁴⁰ The plaintiffs also challenged the constitutionality of the mandatory vaccination law itself, arguing that it violated substantive due process. Referencing *Jacobson*, the court concluded that the vaccination requirement was well within the police powers of the state, asserting that the case of the plaintiffs was no more convincing than the one that Reverend Jacobson had made more than a hundred years prior.⁴¹

Just over a year later, in August of 2016, the courts yet again upheld the right of states to impose compulsory vaccination. In the wake of a serious measles outbreak at Disneyland in 2015, California passed Senate Bill 277 and became one of only three states in the U.S. to get rid of religious and philosophical exemptions for vaccination requirements (the other two states being Mississippi and West Virginia).⁴² After SB 277, the only exemptions available were for medical reasons, children who were homeschooled, or students who qualified for an individualized education program (IEP).⁴³ In July of 2016, a group of plaintiffs filed a motion to prevent the state of California from enforcing SB 277, arguing that the removal of the personal belief exemption was a violation of their rights to free exercise, equal protection, due process, and education. In response, the court referred to *Jacobson*, stating, “for more than 100 years, the United States Supreme Court has upheld the right of the States to enact and enforce laws requiring citizens to be vaccinated.”⁴⁴ In response, the plaintiffs claimed that they argued not against the right of the state to impose compulsory vaccination, but specifically against the removal of the personal belief

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Killmond, 21.

⁴³ *Whitlow v. Cal. Dep't of Educ.*, 203 F. Supp. 3d 1079 (S.D. Cal. Aug. 26, 2016)

⁴⁴ Ibid.

exemption. This reframing was unconvincing to the court, however, and they ultimately rejected the motion of the plaintiffs, stating that nowhere in the Constitution does it require states to provide either religious exemptions or personal belief exemptions to vaccination requirements.⁴⁵

The precedent established in *Jacobson* and enforced up to the present day falls in line with classic social contract theory – first developed by political philosopher Jean Jacques Rousseau – which asserts that by choosing to live in a society, one also agrees to give up certain freedoms for the good of the group; when living among other people, it is important to recognize that the choices one makes about one’s own body can at times harm others, and deciding not to vaccinate is one of these potentially harmful choices.⁴⁶ In light of this, it becomes increasingly difficult to justify the religious and philosophical vaccination exemptions that most states currently offer, especially within the context of a growing anti-vaccination movement.

Though the anti-vaccination movement is often looked at as a fairly recent phenomenon, in reality the opposition to vaccination has existed nearly as long as vaccinations themselves.⁴⁷ In addition to those opposed to the compulsory nature of vaccination, many people are also opposed to vaccinations themselves for a variety of different reasons. One group that people are often most familiar with are those who oppose vaccination on religious grounds (typically Protestant Christian groups), arguing that vaccinations interfere with divine providence.⁴⁸ There are many other reasons that people

⁴⁵ Ibid.

⁴⁶ Jean-Jacques Rousseau, *The Social Contract*, trans. Maurice Cranston (London: Penguin Books, 1968), 59-65.

⁴⁷ Johnston, 260. Johnston’s article goes into greater detail about the history of vaccination resistance, tracing it all the way back to a conflict in Boston in 1721 about smallpox inoculation.

⁴⁸ Pierik, 221.

have given over the years for opposition to vaccinations, however, one of the most prominent being a concern over their safety or efficacy.⁴⁹

Yet another fear was associated with the use of mercury in vaccines, which was used as a preservative in order to combat the bacterial contamination that had so many people justifiably concerned over vaccine safety.⁵⁰ More specifically, the preservative was called thimerosal, an organomercurial that was 50% ethylmercury, and for the first roughly 50 years of its history its efficacy was sometimes questioned, but rarely its safety.⁵¹ Mercury, however, began to be associated with a series of environmental disasters involving the compound methylmercury. Though these two forms of mercury have similar sounding names and have only a slight difference in their physical structure, the chemical distinction between the two is fairly significant; it is comparable to the difference between ethanol and methanol, the former being the alcohol in drinks like beer and wine, and the latter being a highly lethal chemical.⁵² While ethylmercury was being use as a vaccine preservative with few safety concerns, methylmercury was gaining a reputation as a highly toxic substance, which was shown to cause extreme neurological impairments in both those people exposed directly, as well as the children of mothers who were exposed.⁵³

As this stigma surrounding methylmercury began to envelop all forms of mercury, the use of thimerosal in vaccines became the focus of intense public scrutiny that was

⁴⁹ Johnston, 261 and Jeffrey P. Baker, "Mercury, Vaccines, and Autism: One Controversy, Three Histories," *American Journal of Public Health* 98, no. 2 (2008), 245. Despite the relative safety of modern vaccines, there was in the early 1900s a not insignificant risk associated with the smallpox vaccine, for example, which could cause fatal encephalitis or, if contaminated, spread syphilis or other infections. Besides smallpox, there were other vaccines at the time that could be dangerous for a variety of reasons. In 1916, a batch of typhoid vaccines was tainted after being stored improperly, causing 68 severe reactions, 26 abscesses, and 4 deaths in South Carolina. In Australia in 1928, a contaminated diphtheria vaccine caused the death of 12 children. This worry over vaccine safety at the time, then, was not completely unfounded.

⁵⁰ Baker, 245.

⁵¹ *Ibid.*, 245.

⁵² *Ibid.*, 246.

⁵³ *Ibid.*, 246-247.

ignited by a group of parents of autistic children.⁵⁴ The “autism epidemic” of the 1990s came about because of the efforts of autism researchers to expand the definition of the disorder, but the rise in diagnoses and lack of medical professionals with experience treating autism left parents of autistic children quite frustrated. This frustration with the medical establishment led many of these parents to search for alternative explanations, often with the hope that they would be able to find a way to cure, rather than simply manage, the disorder.⁵⁵ It is in this context that a group of these parents seized upon the mercury-containing preservative thimerosal as an explanation for autism.⁵⁶ Though the studies that claimed to link vaccinations with autism have at this point been thoroughly discredited by the larger scientific community, the fear of autism continues to contribute to the growing anti-vaccination movement, and is one of the more recent among many reasons parents have for refusing to vaccinate their children.⁵⁷

With so many people opposed to vaccination for a number of reasons, offering religious or philosophical exemptions can be problematic. When maintaining herd immunity requires that the majority of people be immunized, allowing exemptions has the potential to make the community vulnerable to outbreaks of sometimes deadly diseases. With effective vaccinations having been widespread in the United States for decades, it is often easy to think that the threat of vaccine-preventable diseases is long gone. The 2015 measles outbreak in Disneyland, however, proves that substandard vaccine compliance can have devastating effects.⁵⁸ Besides the Disneyland outbreak, over the last decade there

⁵⁴ Ibid., 250.

⁵⁵ Ibid., 249.

⁵⁶ Ibid., 251.

⁵⁷ Killmond, 4.

⁵⁸ Pierik, 226.

have been numerous outbreaks of measles and other contagious diseases in the United States: In 2014 alone the CDC reported 23 separate measles outbreaks, with the majority being among unvaccinated Amish communities in Ohio.⁵⁹ This compliance issue is in part due to extremely lax requirements for vaccination exemptions, with many states allowing parents to exempt their children from vaccination requirements by simply checking a box on a form.⁶⁰ Ideally, nonmedical vaccine exemptions should be extremely limited and resistant to fraudulent claims, so that there are enough people immunized to maintain herd immunity. However, in order to limit exemptions, specifically religious exemptions, it becomes necessary to engage with some questions that are anything but easy to answer: How do courts determine whether a claimant's beliefs are grounded in religion? How do they determine if those beliefs are sincere? And is it even possible to determine either of these things in a way that is fair and constitutional?

Section III: Defining Religion

There are various possibilities when it comes to placing limits on vaccination exemptions, and all of them come with their own set of problems. In trying to define the eligibility requirements for vaccination exemptions, some of the most important questions are as follows: Should courts be allowed to limit exemptions to only certain religions? Should only religious exemptions be allowed, or should the system be expanded to allow for philosophical exemptions as well? And in discussing these options, how does one go about defining religion so as to distinguish it from philosophy?

⁵⁹ "Measles Cases and Outbreaks," Centers for Disease Control and Prevention, <https://www.cdc.gov/measles/cases-outbreaks.html>.

⁶⁰ Pierik, 227.

For the first of these questions, one can look to judicial precedent for an answer. In the Massachusetts law code of 1967, children were required to be fully immunized in order to attend public schools. Besides a physician certifying that vaccination would pose a significant health risk to the child in question, the law gave only one other possibility for exemption:

In the absence of an emergency or epidemic of disease declared by the department of public health, no child whose parent or guardian objects in writing to vaccination or immunization upon the ground that it conflicts with the tenets and practice of a recognized church or religious denomination of which he is an adherent or member shall be required to present said physician's certificate in order to be admitted to school, but may present, in lieu thereof, an affidavit signed by an official of such church or religious denomination that the parent or guardian of such child is an adherent or member in good standing of such church or religious denomination, and that such parent or guardian objects on religious grounds to vaccination and immunization.⁶¹

In 1970, this attempt to restrict religious exemptions to members of recognized religious groups came under scrutiny in a case heard by the Supreme Judicial Court of Massachusetts, *Dalli v. Board of Education*.

Beulah G. Dalli was unable to qualify for a religious exemption that would allow her five year old daughter to attend public school without being vaccinated because she was not a member of a recognized religious denomination. She did not belong to any particular church or denomination, and her beliefs about vaccination were grounded in her own personal belief in the Bible and its teachings, specifically that an injection of “animal serum” would violate the biblical instruction to “keep the body clean and acceptable to God.”⁶² She asserted in her case that limiting exemptions to members of recognized denominations was a violation of equal protection and free exercise of religion. The court agreed, and in their

⁶¹ Mass. Gen. Laws ch. 76, § 15 (1967)

⁶² *Dalli v. Board of Educ.*, 358 Mass. 753, 267 N.E.2d 219 (1971)

opinion asserted that the preferred treatment of certain religious beliefs over others was discriminatory and thus a violation of the First and Fourth Amendments of the United States Constitution.⁶³ In trying to limit exemptions to vaccinations, then, it is not possible to do so in a way that favors certain religious denominations, and so it is necessary to expand the exemption to incorporate all forms of religious belief.

Religious exemptions for vaccination more broadly, however, come with their own set of concerns, enough so that three states at this point have refused to allow them, with the most recent state to get rid of its religious exemptions being California.⁶⁴ In 1979, the Mississippi Supreme Court ruled that the state's religious exemption statute was unconstitutional, due in large part to what it saw as a violation of the equal protection rights of the children who could be exposed to the disease through those who had received the exemption. In their view, the potential harm that can come from allowing nonmedical exemptions from vaccination was great enough that they felt it was justified to eliminate the state's religious exemption, even when doing so conflicted with the religious beliefs of some parents seeking exemption for their children.⁶⁵ This sentiment is not confined to the Mississippi Supreme Court, either; various scholars have pointed out the Fourteenth Amendment concerns associated with religious vaccination exemptions. Because vaccines are not one hundred percent effective, even those children who have been immunized can be at risk in the case of an outbreak, not to mention those who have not been vaccinated because of medical reasons.⁶⁶ In one Utah community that had a high percentage of

⁶³ Ibid.

⁶⁴ Killmond, 21.

⁶⁵ Alicia Novak, "The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges," *Journal of Constitutional Law* 7, no. 4 (2005), 1108.

⁶⁶ Ibid., 1116.

religious exemptions, for example, there was an extended measles outbreak due to the absence of herd immunity, and a significant number of those children who were eventually infected had in fact received vaccinations for measles.⁶⁷ In a very direct way, religious exemptions can potentially violate the basic rights of life and health of others.

More closely related to the religious aspect of religious exemption, there are those who assert that allowing religious exemptions poses an establishment clause problem. The establishment clause states that Congress “shall make no law respecting the establishment of religion,” and for many, allowing religious exemptions improperly advances religion in a way that violates this clause because it gives religious individuals privileges that nonreligious individuals cannot receive.⁶⁸ The clause does not go on to describe in detail all of the actions that would count as an establishment of religion, but rather leaves room for interpretation; those who are against religious exemptions argue that unfairly privileging religion over secular beliefs is unconstitutional, while those who are in favor of religious exemptions argue that requiring parents to vaccinate their children even when it goes against their religious beliefs violates their right to free exercise of religion.⁶⁹ In the case of vaccinations specifically, however, the continued use of *Jacobson* as precedent seems to show that the sentiment in the courts is that the right to free exercise does not necessarily give individuals the right to do something that could cause harm to others, and so this claim loses some of its weight. The ruling in *Everson v. Board of Education* also offers some guidance, with the justices asserting that the establishment clause forbids the government from passing laws “which aid one religion, aid all religions, or prefer one religion over

⁶⁷ Ibid., 1116.

⁶⁸ Ibid., 1111.

⁶⁹ Ibid., 1111.

another.”⁷⁰ Thus a very strong case can be made for religious exemptions being unconstitutional.

Opening up vaccination exemptions to allow for philosophical exemptions, however, is possibly even more problematic, though not for all of the same reasons. On one hand, it would mean an exemption system for vaccinations that could be free from discrimination or establishment clause issues, but it would also mean opening up exemptions to so many people that it could compromise herd immunity. The levels of scrutiny for religious exemptions vary from state to state, with some requiring an evaluation of the level of sincerity of the person claiming the exemption, and others simply requiring parents to sign a form that states that they have an opposition to vaccinations grounded in religious belief.⁷¹ When it comes to philosophical exemptions, the burden of proof is even lower. Though each state has its own specific details and requirements, philosophical exemptions generally allow anyone to claim an exemption if they have any personal, philosophical, or moral reason for objecting to vaccinations.⁷² This relaxed system means that there can hardly be room for discrimination, considering essentially anyone who wants an exemption can qualify, and there would be no establishment clause issue because it is open to everyone regardless of religious belief or lack thereof.

From this perspective, it is a perfectly sound solution to the exemption issue. But keeping in mind the risk that unvaccinated individuals can pose to the people around them, the problems caused by philosophical exemptions may be greater than those that they would eliminate. The idea that philosophical exemptions would cause a significant rise in

⁷⁰ *Everson v. Bd. Of Educ.*, 330 U.S. 1, 15 (1947).

⁷¹ Novak, 1108.

⁷² *Ibid.*, 1109.

the number of unvaccinated individuals is not purely theoretical; states that have introduced philosophical exemptions have seen a rise in the number of parents claiming these exemptions for their children. Furthermore, these states also show that philosophical exemptions make up a larger percentage of all exemptions claimed than either religious or medical exemptions.⁷³ Therefore, many of the problems that are present with religious exemptions are magnified when philosophical exemptions are introduced. Allowing these exemptions, then, clearly poses a risk to the overall health of the community, one that may not threaten the right to free exercise in the way religious exemptions do, but that does in fact threaten the health and safety of others to a greater extent.

Between these three options – restricting exemptions to members of established religions, restricting exemptions to religious reasoning more generally, or allowing philosophical exemptions in addition to religious exemptions – religious exemptions on their own seem to be the least problematic when it comes to balancing rights; it would not blatantly privilege certain religious beliefs over others, but it would still be limiting enough that it would not compromise herd immunity to the extent that philosophical exemptions would (though the problem of exposing the community to the risk of outbreaks is not entirely absent). However, while the establishment clause issue in this case is relatively minor in comparison to restricting exemptions to only certain religious groups, there is a significant implementation problem when it comes to allowing religious exemptions; it requires courts to determine what exactly counts as “religion.”

At first glance, defining religion may seem like a simple task; every dictionary seems to do it without much trouble, after all. But among religious scholars, there is no single,

⁷³ Ibid., 1110.

universally agreed upon definition for religion. There are dozens of different approaches that have been argued for and against for years, but something as complex and nuanced as religious belief cannot be easily pinned down with a dictionary-style definition. In order to get a sense of the complexity of religious beliefs, it will be helpful to examine a few of the definitions and approaches that have been presented over the years.

Émile Durkheim was a prominent French sociologist in the late 19th century, and one of his most important works, *The Elementary Forms of Religious Life*, remains influential in the field of religious studies.⁷⁴ In it, he defines religion as “a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden - beliefs and practices which unite into one single moral community called a Church, all those who adhere to them.”⁷⁵ In this approach, the focus is on the social aspect of religion; the beliefs and practices of religion are important in the way they bring together a community, not because of the specific individual impact that they might have. William James, an American psychologist and philosopher writing around the same time as Durkheim, approached religion from an entirely different angle.⁷⁶ James considered individual belief, rather than religious communities, to be the fundamental aspect of religion, defining religion as “the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine.”⁷⁷ In an academic context, it is less pressing that there be a single, fundamental definition of religion; scholars can give definitions for the purpose of specific

⁷⁴ Henri M. Peyre, *Encyclopaedia Britannica*, “Émile Durkheim,” *Encyclopædia Britannica*, inc., 2018.

⁷⁵ Robert Alun Jones, *Emile Durkheim: An Introduction to Four Major Works* (Beverly Hills, CA: Sage Publications, Inc., 1986), 62

⁷⁶ Horace M. Kallen, *Encyclopaedia Britannica*, “William James,” *Encyclopædia Britannica*, inc., 2018.

⁷⁷ William James, *The Varieties of Religious Experience: A Study in Human Nature* (Nee Hyde Park, New York: University Books, 1902), 31.

discussions, and they can choose to focus on targeted aspects of religion – such as Durkheim’s emphasis on religious groups and James’s emphasis on the individual – without discounting other aspects of what could be considered religious. The law, however, is by necessity much more black and white than academics, and defining terms such as religion in a definitive way is a much more pressing concern because it has a direct effect on the treatment of individuals seeking religious exemptions.

In *Dalli*, the Massachusetts court ruled that the state could not restrict religious exemptions to those who were members of a recognized religious group, due to justified concerns about discrimination.⁷⁸ In the case of a single person seeking exemption, though, one whose beliefs are not connected to a religious group, how is the court to determine if their beliefs are indeed religious and not simply “philosophical?” In the case of Beulah Dalli, her beliefs were determined to be religious because they were based on her own reading and interpretation of the Bible, but what about someone whose beliefs are not drawn from a recognized holy book written centuries prior?⁷⁹ Where does the line between religion and philosophy lie, when there is not an established religious group to look to?

This is not a question that courts have ignored; they do not simply accept that any beliefs are religious just because an individual claims that they are. In fact, on multiple occasions, people have been denied exemptions because the court has questioned them about the nature of their beliefs and determined that they are not religious in nature. In *McCartney v. Austin* in 1969, the plaintiffs sought a vaccination exemption for their child, stating that it was against their religious beliefs to vaccinate. The plaintiffs claimed to be Roman Catholic, however, and the court determined that because the Catholic faith of

⁷⁸ *Dalli v. Board of Educ.*, 358 Mass. 753, 267 N.E.2d 219 (1971)

⁷⁹ *Ibid.*

which the plaintiffs were members did not have any stated opposition to vaccinations, their reasoning for seeking an exemption could not be religious in nature.⁸⁰ However, simply because an individual disagrees with or differs from the official doctrine of the religious organization they belong to, does that mean that those differing opinions are not religious? If an individual belonged to a church that believed sex before marriage was not sinful, but that individual felt based on their own reasoning that it was a sin, is this belief not religious simply because it does not conform? In a similar case from a family court, the plaintiffs, who were members of the Methodist Church, also argued that they should be granted a vaccination exemption for their children. The court pointed out that the Methodist Church did not have any tenets prohibiting vaccination, and argued that the beliefs of the plaintiffs were based on their personal convictions as chiropractors rather than on their religious convictions.⁸¹ It is evident that the courts are willing to engage with the question of whether beliefs are religious in nature; the more pressing question is, are they doing so consistently and fairly?

The issue of defining religion grows even more complicated when one considers lived religion, or “popular religion” as Robert Orsi calls it in his book *The Madonna of 115th Street*. He explains that lived religion consists of religious beliefs and practices as they are experienced in everyday life, in contrast to the specific doctrines of organized religion; it is what lies outside of religious institutions and the oversight of officials.⁸² Orsi also discusses the way that popular religion has sometimes been viewed over the years, as somehow backwards, being dismissed with terms like “magic” or “superstition,” seen by some as “the

⁸⁰ *McCartney v. Austin*, 57 Misc. 2d (N. Y.) 525, affd. 31 App. Div. 2d (N. Y.)

⁸¹ *Matter of Elwell*, 55 Misc. 2d (N. Y.) 252, 259

⁸² Robert A. Orsi, *The Madonna of 115th Street: Faith and Community in Italian Harlem, 1880 1950* (New Haven, CT: Yale University Press, 2002), xxxi-xxxiii.

experience of dark, poor, alien folk, of children and women, of the colonized, enslaved, and ‘primitive,’ of the ignorant or uneducated.” To some of these critics, lived religion isn’t even real religion at all.⁸³

In her book *The Impossibility of Religious Freedom*, Winnifred Sullivan shows what can happen when the legal system comes into contact with the world of lived religion. Her book is a case study focusing on the case *Warner v. Boca Raton*, in which a group of Florida residents attempted to prevent a local cemetery from removing various grave decorations including crosses, statues, planters, and Stars of David that they had placed over the course of a decade on the graves of their loved ones, which were decorations that violated cemetery regulations.⁸⁴ Their claim was made on the basis of the Florida RFRA, which prevented substantial burden of religious practice. The Florida RFRA also defined “exercise of religion” as “an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.”⁸⁵ Despite this broad definition of religion, the inquiries of both the judge and the city’s lawyer into the religious lives of the plaintiffs reflected a view of religion that seems fairly similar to the critics of lived religion that Orsi described.

When questioning one of the plaintiffs, the lawyer, Bruce Rogow, implied that her motivation for setting up a perimeter around her brother’s grave to prevent it from being stepped on was not religious, because her Catholic teachings never explicitly required her to do so; this is despite the fact that the reasoning she gave was based on a personal

⁸³ Ibid., xxxiv.

⁸⁴ Winnifred Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005), 2.

⁸⁵ Ibid., 22-23.

understanding of events in the Bible, just like the plaintiff in the *Dalli* case.⁸⁶ For many of the plaintiffs, they felt that their decisions regarding the placement of items on their loved one's graves were motivated by their own understanding of their respective religions, yet the lawyers in the trial continually seemed to dismiss their practices as idiosyncratic, as simply personal choices that had nothing to do with religion.⁸⁷ They also seemed to be trying to show that the plaintiffs were not faithful practitioners of their religions, that they did not attend church regularly enough or did not consult with the proper religious officials; their practices did not conform to standard doctrine, and therefore they were personal rather than religious.⁸⁸ Furthermore, the judge very often projected his own sensibilities and understandings of religion onto the plaintiffs, dismissing the explanations of both the plaintiffs and the religious experts at the trial and allowing his personal beliefs to influence his assessment. That which did not fit his understanding of religion was dismissed as merely personal preference.⁸⁹ In her commentary on the case, Sullivan summed up the nature of discourse fairly well, saying, "the City seemed to be saying: How can anyone seriously believe that this is religion – that this is religion powerful enough and important enough to challenge state sovereignty?"⁹⁰

Not all lawyers and judges would have the same attitude towards lived religion as those in the *Warner* case did; *Dalli* is, in fact, a good example of a court being willing to accept the religious nature of a belief that is not grounded in the official doctrine of a religious denomination. But *Warner* does show the issues that arise when courts are asked

⁸⁶ Ibid., 39.

⁸⁷ Ibid., 39-41.

⁸⁸ Ibid., 103.

⁸⁹ Ibid., 92-94.

⁹⁰ Ibid., 109.

to decide what practices count as religious. Sometimes, the distinction can seem rather simple. Returning to the issue of vaccination, a person who claims to be against vaccines because they believe based on scientific reasoning that they are harmful is clearly not basing their opinion on religious convictions. Similarly, a person who belongs to a religion the doctrines of which explicitly condemn vaccination seems very clearly to be basing their opinion on their religion. But some cases, possibly the majority of cases, are not so clear. Outside of the world of religious institutions, with their officials and their holy books and their established doctrine, religion is messy, and the boundaries between religion and philosophy, or between religion and culture, are not always easy to distinguish. The purpose of this paper is not to offer a method for determining what beliefs are religious, but rather to show how difficult it is to do so consistently and fairly within the context of the legal system, a system which is quite fond of black and white definitions.

Section IV: Determining Sincerity

Perhaps even more difficult than determining what counts as religious is determining whether an individual is sincere in their claim; in other words, does the person claiming a religious exemption actually hold the beliefs they claim to, or are they simply trying to obtain an exemption due to some other reason that would normally not qualify? Not all kinds of exemption are equally at risk for fraudulent claims; as Greenawalt points out, determining whether a claimant is sincere in their stated reasoning for seeking exemption can actually be fairly easy if one can find no secular advantage to obtaining said

exemption.⁹¹ The Amish, for example, have traditionally been granted an exemption that allows them to take their children out of school at the age of fourteen, and it is unlikely that an individual would join the Amish simply to get an exemption to take their child out of school at a younger age than is typically allowed. When looking at exemptions allowing individuals to consume otherwise prohibited substances, however, there is much less certainty; it is very much conceivable that someone would attempt to join the Native American Church, for example, in order to qualify for an exemption that would allow them to consume the peyote.⁹²

As discussed earlier in this essay, there are many people who oppose vaccination for a number of reasons, many of which are not religious in nature. Though concerns about vaccine safety have been around for decades, such as the fear that they will cause autism, the Internet has made it even easier for fears and doubts about vaccination to spread to a wide audience. There are many websites and blogs that are entirely dedicated to discussing vaccines, and to spreading information about what they consider to be the dangers of vaccinating. Though there are a variety of different reasons that the individuals who run these websites give for their opposition to vaccines, there are some common themes among them; more specifically, some of the things that are seen most often are distrust of the government and scientists, issues with the compulsory nature of vaccines, and testimonials from parents and medical professionals warning about the dangers of vaccination.

⁹¹ Kent Greenawalt, *Religion and the Constitution Volume 1: Free Exercise and Fairness*. (Princeton, NJ: Princeton University Press, 2006), 122.

⁹² *Ibid.*, 121-122

The sentiment that parents are being lied to about vaccines can be seen in a variety of forms. A blog called Living Whole, for example, has an entire article about the various lies that scientists and the government have supposedly been telling about vaccines, beginning with “Dear Parents, you are being lied to.”⁹³ The author – a naturopath named Megan Redshaw, who runs the blog – asserts that it is untrue that measles is a deadly disease, that diseases like chickenpox and the flu are not “a big deal,” that vaccines do not actually prevent whooping cough, that vaccines did nothing to aid in the eradication of diseases and in some cases actually made certain diseases more prevalent, and the list goes on.⁹⁴ In the mission statement of another website, Vaccination News, the owner of the site, Sandy Gottstein, also claims a concern for the amount of false information about the benefits of vaccination, saying that she is against “bad science” being used to force parents to vaccinate their children.⁹⁵

This mission statement brings up another of the common themes found on similar websites, which is the opposition to the compulsory nature of vaccines, a sentiment that has been present since the very beginning of the anti vaccination movement; there is among many anti-vaccination advocates a resentment that vaccination is required. The Vaccination News website, for example, asserts that parents should feel free to vaccinate their children if they want to, but that they should be allowed to make their own decision about whether or not it is right for their child. They claim that their goal is to provide

⁹³ Megan Redshaw, “Dear parents, are you being lied to?” Living Whole, April 2014, <https://www.livingwhole.org/dear-parents-are-you-being-lied-to/>.

⁹⁴ Ibid.

⁹⁵ Sandy Gottstein, “Vaccination News,” Vaccination News, <https://www.vaccinationnews.org>.

information from all sides of the vaccination debate in order to help parents make an informed decision.⁹⁶

In addition, perhaps one of the most common tactics on these websites is the list of “testimonials” that many include; while there are various kinds of testimonials included on different websites, the most common two seem to be testimonials from individuals claiming to be medical professionals who agree with the sentiments of the website in question, and testimonials from or about individuals – typically children – who have supposedly been harmed because of vaccinations they received. Vaccination News has a list of around a dozen testimonials supposedly from doctors, professors, and parents expressing gratitude to the website for providing information, or agreeing with many of the anti-vaccination sentiments that are found in the articles posted by the website. Many of these testimonials also include the promise of a monetary contribution to the website in order to allow it to continue its work, and urge others to donate as well.⁹⁷ The website Vax Truth gives its testimonial page the title “Meet the Children,” and it includes a few dozen stories about children who were supposedly harmed by vaccines, written by their parents. One mother writes that vaccination caused her son to be restless, to cry all the time and never sleep, claiming that her doctor ignored all of her concerns.⁹⁸ Another parent writes about how her daughter was a perfectly normal child until her first round of vaccinations, after which point she was constantly sick.⁹⁹ One testimonial even has a mother claiming that her adult son died after receiving the flu vaccine, asserting that the vaccine must have

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ “Meet The Children,” VaxTruth, Vaxtruth.org/meet-the-children/.

⁹⁹ Ibid.

been the cause because nothing else in his life had been different in the months before his death.¹⁰⁰

Many of the tactics on these websites instill fear that one's child will be harmed, or that the government and the pharmaceutical industry are lying to them about the risks of vaccination. These websites are easy to find and are there for everyone to see, cloaking themselves with the air of authority, often by presenting quotes from people they claim are medical professionals supporting their stances. And if parents are made to fear that their child could be at risk if they allow them to be vaccinated because of the information that they come across online, it is not unreasonable to worry that at least some of them would attempt to lie about their religious beliefs in order to obtain an exemption. In Robert Johnston's history of the anti-vaccination movement, in fact, he says that one vaccine safety advocate has helped parents "formulate religious exemptions" if they had concerns about vaccine safety, implying that the parents did not in fact have religious reasons for their concerns.¹⁰¹ Yet despite the obvious need to be able to attempt to determine sincerity in cases of vaccination exemption, it is unclear how to do so, and there are also concerns about whether it is something courts should even have the right to examine.

The most important Supreme Court case dealing with the issue of sincerity is *United States v. Ballard*, which directly addressed the question of whether courts should be allowed to examine the sincerity of religious beliefs. In 1944, Guy W. Ballard, Edna W. Ballard, and Donald Ballard were convicted for mail fraud through their promotion of the I Am movement through the mail. They solicited funds and memberships and sold literature promoting their movement, which claimed, among other things, that Guy W. Ballard was a

¹⁰⁰ Ibid.

¹⁰¹ Johnston, 275.

divine messenger, and that the founders of the movement were able to cure any disease, even those that were typically classified by medical professionals as incurable, and that they had in fact cured hundreds of individuals in the past.¹⁰² There were two major questions brought before the justices: whether the court could inquire into the truth or falsity of the claims themselves, and whether the court could attempt to determine whether the beliefs in question were sincerely held by the members of the movement.

Justice Douglas delivered the opinion of the Court, and he spent the majority of the opinion addressing the issue of determining the truth or falsity of religious beliefs; in other words, the question of whether the courts should be allowed to try and determine whether the religious beliefs of an individual were literally and factually true. It was this, rather than sincerity, that struck him as problematic. The Circuit Court of Appeals had previously held that the questions of truth should be submitted to the jury for consideration, likely because they felt that a case of mail fraud could not be properly considered without determining whether the claims themselves were untrue, but Justice Douglas asserted that doing so would be a violation of the freedom of religion guaranteed by the Constitution. “Heresy trials are foreign to our Constitution,” he wrote, going on to explain, “Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others.”¹⁰³ In contrast to this strong condemnation, Douglas says almost nothing of the sincerity question, simply agreeing with the statements of the trial judge that it is

¹⁰² *United States v. Ballard*, 322 U.S. 78 (1944)

¹⁰³ *Ibid.*

permissible to question whether an individual “honestly and in good faith” believes the things they claim to.¹⁰⁴

While this opinion was the majority and thus ultimately the ruling of the court, it was by no means unanimous; Chief Justice Stone was joined in his dissenting opinion by Justice Roberts and Justice Frankfurter, agreeing with the majority that courts should be able to determine sincerity, but going even further by asserting that the question of truth should be applied to certain religious claims.¹⁰⁵ Though this debate over how much the courts should be able to question religious beliefs is extremely important, for the purpose of this essay, which is attempting to address the question of sincerity, it is Justice Jackson’s dissenting opinion that is the most relevant, as he is the only Justice who discussed the question of sincerity in any real detail; though his opinion was not the majority, the points that he raises are very often endorsed by scholars who deal with the question of adjudicating sincerity.¹⁰⁶

Jackson disagreed with the opinions of both Douglas and Stone, making a compelling argument for why the courts should refrain from questioning whether an individual’s religious beliefs are sincerely held. One of the important concerns he raised is the way juries would view an individual with a faith that they do not understand, or one that is drastically different from their own; if certain beliefs seem ridiculous to a jury, they may be less likely to believe that the individual in question could sincerely believe in them, and this paves the way for potential discrimination.¹⁰⁷ Jackson’s other major point involves the issue of how one goes about defining and determining sincerity; namely, does sincerity

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Nathan S. Chapman, “Adjudicating Religious Sincerity,” *Washington Law Review* 92, (2017), 1.

¹⁰⁷ *United States v. Ballard*, 322 U.S. 78 (1944)

mean that a person does not have any doubts? He points out that many religious believers do not always have unwavering and consistent faith in what they believe, quoting William James as saying that “faith means belief in something concerning which doubt is still theoretically possible.”¹⁰⁸ He does not believe that religious leaders should be immune from fraud convictions in every case; if a leader solicited funds to build a new church but instead used that money to go on a lavish vacation, for example, that would be unquestionably illegal. But when it comes to false representations of faith, things are much more difficult. As Jackson himself put it, “When does less than full belief in a professes credo become actionable fraud if one is soliciting gifts or legacies?”¹⁰⁹

Just two decades after *Ballard*, determinations of sincerity would be put to a significant test in the context of conscientious objectors; in the 1960s and 1970s, the courts were very much involved in the sincerity testing of conscientious objectors to the draft, and in many ways they were fairly careful and consistent.¹¹⁰ Rather than looking at only at consistency of faith, as Jackson feared, draft boards were to take into consideration any combination of the following factors: Consistency of belief, delay in asserting conscientious objector status, objector’s testimony before the review board, religious leader testimony, or the strength of the registrant’s statement of religious belief.¹¹¹ In the 1965 case *United States v. Seeger*, for example, the Supreme Court dealt with a group of individuals seeking conscientious objector status, and in it the Court is shown to take into consideration a number of factors, saying at one point that Seeger was shown to have sincere religious

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Noha Moustafa, “Note: The Right to Free Exercise of Religion in Prisons: How Courts Should Determine Sincerity of Religious Belief Under RLUIPA,” *Michigan Journal of Race & Law* 20, no 1 (2014), 9.

¹¹¹ Ibid., 9.

beliefs due to the following reasons: “He was a product of a devout Roman Catholic home; he was a close student of Quaker beliefs from which he said ‘much of [his] thought is derived’; he approved of their opposition to war in any form; he devoted his spare hours to the American Friends Service Committee and was assigned to hospital duty.”¹¹² Rather than questioning whether he ever lapsed in his faith (as Justice Jackson feared would be the case when dealing with sincerity), they instead chose to look at a more complete picture of his religious life. Though the draft boards in general seemed to avoid some of the potential pitfalls and managed to set up a system that seemed at least fair in theory (whether every draft board actually reliably implemented this system is another question entirely), Jackson was right to worry that determining religious sincerity would often prove to be problematic, and one of the most prominent examples of how determining sincerity can go very wrong comes from a somewhat different context: prisons.

When the Religious Land Use and Institutionalized Persons Act passed through Congress, it essentially revived RFRA at the state level, but it had a limited application; specifically, it would apply to land use and prisons. In relation to prison policy, RLUIPA states that “no government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution... even if the burden results from a rule of general applicability, unless the government demonstrated that imposition of the burden on that person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling interest.”¹¹³ In RLUIPA, Congress also defined “religious exercise” as “any exercise of religion whether or not compelled by, or

¹¹² *United States v. Seeger*, 380 U.S. 163 (1965)

¹¹³ Moustafa, 3.

central to, a system of religious belief.”¹¹⁴ The question of centrality had, before RLUIPA, been one of the key factors in determining the degree of burden placed on a prisoner, and thus the major factor in determining whether a prisoner would qualify for exemption. After RLUIPA made it significantly easier for prisoners to get religious accommodation, virtually the only factor that prisons could examine was sincerity, and thus many prisons resorted to sincerity tests, with varying degrees of success.¹¹⁵

In prisons, religious accommodations are often very desirable, meaning there is a significant incentive for inmates to lie about their religious beliefs; they can allow access to better food, more time outside of cells or congregating with fellow inmates, and other privileges not typically offered to prisoners.¹¹⁶ While sincerity testing would ideally ensure that only those with genuine religious beliefs received the appropriate accommodations, in practice there have been many difficulties in developing an efficient way to determine sincerity. Because neither Congress nor the courts have set standards for determining sincerity, prison officials have been left to figure out a solution without any guidance, and the systems established have been inconsistent and often problematic.¹¹⁷

One of the most crucial issues echoes Jackson’s concerns, which is that prisons often require perfect adherence to religious beliefs in order to qualify for an exemption. For example, a Jewish prisoner may request kosher meals, but if he lapses and purchases non-kosher food from the commissary, his accommodation could be revoked.¹¹⁸ When using lapsing behavior as a guide, it is not always possible to tell whether that lapse is a result of

¹¹⁴ Ibid., 4.

¹¹⁵ Ibid., 4.

¹¹⁶ Ibid., 5.

¹¹⁷ Ibid., 6.

¹¹⁸ Ibid., 6.

dishonesty or whether the individual is a sincere believer who simply did not maintain perfect adherence. In addition, in many prisons, sincerity is determined by having chaplains monitor the inmate's behavior to see whether they are consistently adhering to their professed religion. Prisons often do not have chaplains for every religion, however, resulting in sincerity tests often being conducted by individuals who belong to different sects or faiths, adding even more difficulty to an already trying task.¹¹⁹

Prisons have also used a number of other methods for determining sincerity, such as the possession of physical articles of faith. When Red Onion State Prison in Virginia, for example, originally introduced their Ramadan meals program (which allowed Muslim inmates to receive special meals before and after sunset), they simply allowed any inmate to sign up. When that resulted in nearly half the prison population signing up, however, they decided to devise a sincerity test to reduce the number of inmates in the program after realizing that many of those who had signed up were not in fact practicing Muslims. In order to qualify to participate in the Ramadan meals program, an inmate would be required to possess a prayer rug, Quran, or some other physical indication of faith, as if it is possession of these objects that makes an individual a true Muslim. Though this policy was eventually struck down in court, it is an example of how difficult it can be to find a way to fairly determine sincerity.¹²⁰

It is conceivable that prisons could adapt an approach more similar to that of the draft boards and take a more holistic approach to sincerity testing, and that this would allow them to create a system that was much more fair. But whether a system like this could ever be applied on a scale large enough to address vaccination exemptions is

¹¹⁹ Ibid., 6-7.

¹²⁰ Ibid., 7.

somewhat doubtful; how could officials realistically examine in a meaningful way the life of every person in the country who wanted a religious exemption? Would officials be required to comb through the religious history of every individual to try and find inconsistency of faith? What level of inconsistency amounts to insincerity? And would the officials involved in determining sincerity have any amount of expertise in the faiths that they would be examining? Even if one were to only require sincerity testing for exemptions where fraud was highly likely, such as vaccination exemptions, it is still difficult to imagine a system that could be thorough enough to amount to an accurate assessment, but also be practical in terms of time and cost. And with something as pressing as the issue of vaccination, in which many individuals are seeking exemptions from something that is otherwise compulsory, a practical solution is essential.

Conclusion

Taking all these factors into consideration, it becomes difficult to justify the continued existence of vaccination exemptions, even when considering the benefit they give to individuals whose religious beliefs forbid vaccination. In trying to determine whether an individual seeking exemption is sincere in their beliefs, and whether those beliefs are indeed grounded in religion, there is considerable room for both error and discrimination. When a relaxed exemption system means putting public health at risk, and a restrictive system means addressing issues that the courts are unprepared to answer effectively, the only reasonable conclusion is to eliminate nonmedical exemptions for vaccinations, just as three states have already done.

However, it is important to note that the conclusions drawn about vaccination exemptions do not apply to every form of exemption, and they do not even necessarily apply to all exemptions that have the potential to harm others. As discussed throughout this essay, all kinds of exemption have different considerations to be taken into account, and it is entirely possible that other exemptions could have perfectly reasonable systems of determining eligibility. For example, not all exemptions require the courts to engage with the question of sincerity, because not all exemptions are appealing to the general population. Beyond discussing the issues with vaccination exemptions specifically, this case study shows how different exemptions really do need to be addressed in different ways; vaccination exemptions should not be treated in the same way as exemptions for peyote use, and peyote exemptions should not be treated in the same way that zoning law exemptions should be treated. In order to go about bringing some order to the chaos of exemption law in the United States, it is essential to begin by addressing problems on a case-by-case basis, rather than assuming that it is possible to come to one universally applicable answer.

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