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Health Law:*Protecting Children When Parents Choose Not to Vaccinate*Dorit Rubinstein Reiss¹

In addition to the risk non-vaccinating poses to society generally, a parent's decision not to vaccinate creates an immediate and personal risk to the child left unvaccinated. Indeed, unvaccinated children are among the more common victims of vaccine-preventable diseases.

In spite of this, much of the literature on legal issues related to vaccines focuses on the tension between parental autonomy and the public health. I aim to do two things. First, I argue for changing that framework, a move to a triadic framework that gives the rights of children to be protected against disease a weight equal to parental autonomy and public health considerations. Second, I examine which protections, if any, the law provides to children whose parents decide not to vaccinate. The article does not offer revolutionary suggestions for changing the law, though it does suggest incremental reforms in several places.

These arguments are based on two premises. First, parental rights are very important in our system—but not absolute: The state can and sometimes should take a role when parental decisions endanger the child's welfare or harm the child. Second, while nothing is risk free, the risks of modern vaccines are very small and far outweighed by the risks they prevent. Vaccines are one of the greatest advances of modern medicine. The current vaccine schedule protects children from fifteen dangerous diseases before the age of 18. It is extremely safe: Serious harms from vaccines are fleetingly rare. Children with medical contraindications (medical factors that make vaccinating riskier) are a special case. But for most children, vaccinating on the schedule recommended by expert body is the safer choice.

Since the early 1920s, our jurisprudence has acknowledged that the Fourteenth Amendment's guarantee of liberty protects parental rights. They are still—rightly—considered very important in our system. Among other reasons, the family circle is where concerns about privacy and personal liberty are at their highest. In addition, the substantial responsibilities parents shoulder require the autonomy needed to act. In many circumstances, parents are a child's best advocate, and parental rights fit comfortably with protecting children. But not always.

1. Summarized and excerpted from Dorit Rubinstein Reiss, *Rights of the Unvaccinated Child*, 73 *STUD. L. POL. & SOC'Y* 73 (2017).

Sometimes, parents make decisions that harm rather than protect children, and in these cases, the legal system can step in to protect the child. However, it is often a delicate balance, because intervening in the family can also have unintended, undesirable consequences for the child—by, for example, undermining the relationship with her parents—or have other harmful social consequences.

Because the risks of vaccinating are an order of magnitude smaller than the risks of not vaccinating, a parent who does not vaccinate is acting against the interests of the child, something that arguably justifies legal intervention. However, as explained, there are good reasons to be cautious when stepping into the family realm. I therefore address below different conceptions of children's rights and their relationship to the question in four fields of law: tort law, criminal law, direct intervention with an emphasis on family law, and school-immunization mandates litigated under constitutional law.

Tort Law

A negligence suit by an unvaccinated child harmed by a preventable disease would often be straightforward in terms of the elements of negligence. Parents have a duty to care for the child, including a duty of medical care. Not vaccinating is, arguably, a breach of a duty of care: the risks of not vaccinating are lower than the risks of vaccinating, and the cost of vaccinating is usually covered either by insurance or by the Vaccines for Children program. In addition, community norms and expert consensus support vaccinating most children. Most modern vaccines are highly effective (with, perhaps, the exception of influenza vaccines), so showing that non-vaccination increases the risk of contracting a disease is relatively straightforward. Even though most preventable diseases are rare in our communities (thanks largely to vaccines), contracting a vaccine-preventable disease is the natural and foreseeable result of not vaccinating the child, fulfilling the element of proximate cause.

In most states, however, the claim would run against the barrier of parental immunity, which offers a defense to negligence claims regarding, among other things, medical decisions for the child. A minority of states—including California—has rejected parental immunity in favor of a reasonable-parent standard for tort liability. I argue that parental immunity should not shield parents from tort claims brought by their unvaccinated children. While such tort suits can be expected to be rare—because in a working relationship the parents would cover the

child's costs anyway, and the child will be emotionally disinclined to sue—retaining the possibility of suit can help children find coverage for their needs when there is a breakdown in the parental relationship.

Criminal Law

Criminal law was used in the 1950s and 1960s against parents who did not vaccinate their children. In those cases, parents whose children were denied entry to school because they were unvaccinated were penalized for truancy—for not sending their children to school. This legal strategy is unlikely to be viable today, both because most states offer exemptions from school-immunization requirements and because all states have a homeschooling option, and most parents would likely take advantage of either an exemption or homeschooling. However, if a child is harmed or killed by a preventable disease, a state can use statutes addressing child neglect, manslaughter, or even homicide to penalize the parent, if the elements apply.

There is an argument for using criminal law against parents who do not vaccinate, especially focusing on deterrence and retribution for the harm to the child. But using criminal law against parents who do not vaccinate does raise serious concerns. In many criminal cases involving the death or harm to a child, parents failed to provide treatment to an obviously seriously ill child or failed to feed a child for a lengthy period. By contrast, parents who opt not to vaccinate an apparently healthy child against a disease that, thanks to vaccines, is rare or eradicated seem less culpable.

Criminal law is a heavy-handed tool, and I would hesitate to recommend it in non-vaccination contexts except in unusual circumstances. Unusual circumstances can include, for example, a child bitten by an unknown dog and a parent refusing the rabies and tetanus vaccines recommended in such situation. If the child then contracts one of these very dangerous diseases, criminal law may be appropriate.

Vaccinating Against Parental Will

While uncommon, there are cases where courts have ordered medical treatment for children over parental opposition. These include ordering that children be given chemotherapy in spite of parental opposition, undergo surgery in spite of parental opposition (not always for life-risking conditions), be given blood transfusion over opposition. These precedents suggest that vaccines' generally high effectiveness (with the

exception of influenza vaccines), low risks, and low invasiveness support ordering vaccines over parental will. Yet most (though not all) of cases where courts ordered medical treatment over parental opposition included a clear risk of imminent harm, which is not generally present because vaccination rates are high and, correspondingly, diseases rates are low. As a result, forced vaccination is not warranted in routine situations (also taking into account the high level of coerciveness and intrusion involved, and practical difficulties in forcing vaccines on a large scale). However, in specific high-risk situations, such intervention may be warranted. An example in the United States in which courts ordered vaccination over parental will—religiously-motivated parental will—was the measles outbreak in Philadelphia in 1991, during which unvaccinated children belonging to religious groups who believed in faith healing died from measles at high rates. After several earlier attempts to protect the children failed to prevent additional deaths, the city's public-health officer requested and received a court order to vaccinate over parental opposition, and several children were vaccinated pursuant to the order. This example suggests that vaccinating over parental opposition is possible but should be limited to situations of high risk and used only as a last resort.

Other unusual situations can justify overriding parental will. Most courts in the United States allow states to vaccinate children who were removed from their home due to parental neglect or abuse in spite of parental opposition (none of these cases involved children who were removed because of non-vaccinating, and I do not mean to suggest that non-vaccination alone is grounds for removing children from the home of otherwise fit parents). In addition, in custody disputes, when one parent wants to vaccinate and the other does not is to vaccinate, most courts have ordered vaccination as in the best interests of the child, and I explain why that is the correct result. Finally, there are some circumstances under which older children—teenagers—should be allowed to consent to vaccination over parental opposition.

School Immunization Requirements

All states in the United States require that children be vaccinated before attending school, though there is variation in the vaccines required, the procedures involved, and which exemptions from the requirement are available. The focus of most discussions of school mandates—including my own work on the topic—is mostly on the effects on the public health; simply put, stricter mandates lead to less

outbreaks of preventable diseases. But do strict school mandates also protect the unvaccinated children? The simple answer is yes, because strict school mandates lead to more children being vaccinated. However, the strictest mandates—mandates without non-medical exemptions (like the laws in Mississippi, West Virginia, and California)—do present risks and potential harms for the unvaccinated children. The reason is grounded in the existence of a tiny minority in the population who believes vaccines are poison. Strict school mandates could lead this minority to respond in one of three ways that may be detrimental to the children involved. The minority may decide to fake medical records rather than vaccinate, which can lead to school officials not knowing which children are unprotected, and being unable to exclude those at-risk children during an outbreak. Parents can also choose to detox their children, subject them to one or more of the false methods for treating children after vaccination sold on the internet. Some of these methods—like cilantro or clay baths—are relatively harmless, but some involve dosing children with potentially harmful products. Finally, parents may choose to homeschool rather than vaccinate, and homeschooling out of opposition to vaccines can lead to situations where parents who are not set up to homeschool, or are not capable to do it well, homeschool, to the detriment of the child's education.

These tactics do not mean that strict school mandates are unjustified. There are still reasons drawing on public health to use strict school mandates, including the need to protect the majority of children from the risk of outbreaks (outbreaks which will also put the unvaccinated children at risk). And they still raise vaccination rates, leading to more children protected. But they may have costs for a small number of children of parents who strongly oppose vaccines, and those costs deserve consideration.
