

Commentary: Cautionary Notes on Exemption Elimination

Commentaire : Mise en garde au sujet de l'élimination des exemptions

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Abstract

A flourishing democracy should have a great deal of space for a wide range of beliefs and practices. The issue of vaccine hesitancy requires that we have as much data and information as possible in order to determine the precise point at which those beliefs and practices may endanger others or the population as a whole. Imposing restrictions before determining that point is about power rather than protection, and ultimately alienates portions of the population.

Résumé

Une démocratie saine doit prévoir suffisamment d'espace pour une vaste gamme de croyances et de pratiques. La question de la réticence à la vaccination demande que nous ayons en main toutes les données possibles afin de déterminer le point précis où ces croyances et pratiques peuvent mettre en danger des individus ou l'ensemble de la population. Imposer des restrictions avant de connaître ce point est plus une question de pouvoir que de protection et, en bout de ligne, peut aliéner des segments de la population.

Introduction

Dozens of vaccines for COVID-19 are reportedly at some stage of development. Hopes for success are high as the global community longs for a return to “normalcy.” It is in this context that vaccine hesitancy attracted renewed attention and has taken on a new urgency. In their article *Eliminating Religious and Philosophical Exemptions: The Next Step in Ontario's*

Campaign against Vaccine Hesitancy, Thomas and Flood (2020) take up the issue of vaccination exemption. Taking Ontario as their point of entry, they discuss issues that have applicability beyond the province of Ontario. There are many reasons why people avoid or refuse vaccinations, including a mistrust of medical science and the pharmaceutical industry. As Thomas and Flood (2020) note, the majority of non-medical exemptions do not seem to be religiously motivated.

Discussion

Only 2.5% of Ontario children receive non-medical exemptions, but as Thomas and Flood (2020) point out, they are clustered geographically in what they refer to as “alternative schools.” This, of course, increases the risk of disease outbreaks, and leads us to ask the following questions: What precisely are these alternative schools? Are they primarily religion-based, or is there some other commonality that inspires vaccine hesitancy? Moreover, are there cohorts of people within those alternative schools who are vaccine hesitant, and what is their demographic? If we wish to maximize the “persuasion” route rather than the “force” approach, it is vital that these details be understood. Thomas and Flood (2020) note that mandatory education for vaccine-hesitant people does not seem to be producing an effect. It is important to consider to what extent that education has been developed with the resisting cohorts in mind and whether it has been prepared in collaboration with those within the alternative community who are vaccine positive. It is possible that there are elements of the education that alienate the hesitators rather than engage them. There may be minor tweaks to the education that would open the door to greater information and ultimately persuade vaccine-hesitant people of the value in choosing to be vaccinated.

Although Thomas and Flood (2020) point out that the majority of vaccine exemptions do not seem to be religiously motivated, it is important to understand the constellation of beliefs and practices associated with vaccine hesitancy. “Philosophical objection” does not tell us much. By better understanding the rationale behind their position, we are better able to meet their objections. It is true that in this era of “fake news” all data can be claimed as tainted, but this should not prevent the dissemination of data-based information that might move some people to a deeper understanding and a subsequent shift in their position.

Thomas and Flood (2020) note that the number of exemption requests continues to rise despite the education. But what is the magnitude of that increase and is it meaningful (i.e., an increase of 10 people or 100)? What is the tipping point for overall herd immunity, and how close do we come to that point considering the number of exemption requests currently being granted? This takes us back to the issue raised above – low immunization within a particular population creates an outsized risk outbreak but, nonetheless, it is important to know the numbers in order to understand the precise level of increased risk. This brings us to an important recommendation made by Thomas and Flood (2020): there is an urgent need for better vaccination record-keeping that will tell us who has accessed vaccinations and who has not. It is also possible that some people seek exemption unevenly – in other words, they may have an objection to a specific vaccine, but not to all. This, too, offers an opening to overcome

resistance. Better record-keeping will also give an accurate picture of where herd immunity stands in any given disease. This information is crucial for the development of sound (and legally supportable) vaccination policies and practices. It will allow for a precise calculation of how much flexibility we actually have, and when the risk of harm is too great. This, in turn, allows for the development of a strategy that avoids legal challenges, and, equally as important, is inclusive enough to not unnecessarily alienate people who are vaccine hesitant.

When considering mandatory vaccinations, it is important to avoid throwing the baby out with the bathwater. We, as a society, must ask what are the beliefs and practices that we want to protect, even if it means protecting something with which we strenuously disagree. Take for example the case of *A.C. v. Manitoba* (2009) involving a Jehovah's Witness girl who was assessed as a mature minor and wished to refuse a blood transfusion. In his dissenting judgment, Justice Binnie stated, "The *Charter* is not just about the freedom to make what most members of society would regard as the wise and correct choice" (para. 163). Disagreement is not a lawful reason to override a decision, Justice Binnie later noted (para. 175). Courts often assess harm to others or a society in cases involving religious practices and beliefs, which seem to go against what most members of society would choose. Of course, harm itself is a slippery concept; however, in the case of vaccine hesitancy, we might argue that harm can be assessed at that point where herd immunity is scientifically shown to be at risk because a sufficient number of people have not been immunized.

Thomas and Flood (2020) focus their remarks on two important questions: first, if exemptions are eliminated, will this result in an effective meeting of target rates for vaccination? After reviewing evidence from the US, they conclude that elimination of non-medical exemptions shows promise. Politics aside, there are many differences between Canada and the US that make it challenging to compare data about social behaviour and impacts. For example, the rhetoric of freedom has much greater purchase south of the border, and although we see it in recent Canadian demonstrations about mask wearing, there is a stronger tradition of social balancing in Canada – indeed, it is built in to the Section 1 provision of the *Charter* discussed in detail by Thomas and Flood (2020).

The second question posed by the authors is whether or not the elimination of non-medical exemptions is defensible under the *Charter*. To answer this question, they divide religious and non-religious non-medical exemptions and conclude that the former are more likely to receive *Charter* protection than the latter. They then outline the likely *Charter* analysis, with an infringement of Section 2(a) (freedom of religion and conscience) being found with a state policy of forced immunization, but supported on a Section 1 proportionality analysis, which essentially balances individual and societal/state interests. In other words, the Section 1 analysis offsets the infringement argument based on Section 2.

Thomas and Flood (2020) note that a religious objection or justification for vaccine exemption may have a greater likelihood of being supported by the courts than those based on conscience. They may be correct about this, but not necessarily so. The Supreme Court decisions on religion also include some cases, such as *Alberta v. Hutterian Brethren of Wilson Colony* (2009), that suggest that the Court is willing to override religion in some

circumstances. The Hutterian Brethren requested an exemption from having their photographs on their drivers' licenses for religious reasons. The basis of the request was clear. But the majority of the Court was unwilling to support the request, with the justification being that public security was at risk. It is entirely conceivable that in the current pandemic situation, the Court would decide that vaccine exemptions cannot be justified even if forcing vaccinations is in fact a *Charter* violation. In other words, public harm would outweigh the right protected under Section 2(a). This discussion also raises a broader issue that is controversial in religious and law circles: to what extent is religion "special"? Why should someone who has a strenuous opposition to vaccines for reasons of conscience be less protected by the *Charter* than someone who invokes a religious reason? In other words, if the courts would not support an exemption on the basis of conscience, are there compelling reasons to support an exemption on the basis of religious beliefs?

Interestingly, although the vaccination exemption issue is primarily related to children, there has been little consideration of the rights of children themselves. Legal approaches to children's rights are evolving, and the question of what children themselves want is important and increasingly being taken into consideration. We see parallel discussions around contraceptives, for example, and the right of people who are legally classified as children to access reproductive information and resources. Parental practices that demonstrably put children at risk or are harmful may not be upheld, and children themselves may access their *Charter* rights to be vaccinated. The question of children's legal agency and personhood and parents' right to harm is one that will inevitably come up in this issue.

Conclusion

Ultimately, a flourishing democracy should have a great deal of space for a wide range of beliefs and practices. The issue of vaccine hesitancy requires that we have as much data and information as possible to determine the precise point at which those beliefs and practices may endanger others or the population as a whole. Imposing restrictions before that point can be determined is about power rather than protection, and ultimately alienates those who hold unpopular beliefs.

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