

Episode: Ethics Talk Videocast Transcript – COVID-19 Vaccine Mandates and Solutions to Avoid Relying on Them

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[bright theme music]

TIM HOFF: Welcome to another special edition of *Ethics Talk*, the *American Medical Association Journal of Ethics* podcast on ethics in health and healthcare. I'm your host, Tim Hoff. This episode is an audio version of a video interview conducted by the Journal's editor in chief, Dr Audiey Kao, with Professor Debbie Kaminer. Professor Kaminer is a professor in the Department of Law at the Zicklin School of Business, Baruch College. She joined us to talk about vaccine mandates and other policy solutions to promote herd immunity against COVID-19. To watch the full video interview, head to our site, JournalofEthics.org, or visit our [YouTube channel](#).

DR AUDIEY KAO: Professor Kaminer, thank you for being a guest on *Ethics Talk* today.
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DR DEBBIE KAMINER: Thank you so much for having me. It's a pleasure to be here.

KAO: So, a safe and effective vaccine against COVID-19 can help stop this pandemic only if enough people take the vaccine. Yet some public polling finds that only 50 percent of people are willing to get vaccinated. While states have long had the power to mandate vaccinations, such as for elementary school children, I think it would help our audience to better understand states' authority to mandate vaccinations.

KAMINER: Yeah. So, I think that a lot of people would be surprised to learn the extent of the states' power to actually mandate vaccinations. And what this comes from is what are known as state police powers. And these state police powers give states the power to pass legislation to protect public health and safety. Now, the leading case on this is actually a case from 1905. And while this case is 115 years old, it is regularly cited in lower court cases. And the case is called *Jacobson versus Massachusetts*. And what it involved was a Massachusetts state law that required every adult, everyone over the age of 18, who lived in Cambridge, Massachusetts to get vaccinated against smallpox during a outbreak of smallpox. Mr. Jacobson did not want to get vaccinated. He claimed the law was unconstitutional and that it violated his 14th Amendment liberty rights. And unfortunately for Mr. Jacobson, the United States Supreme Court disagreed, saying that these liberty rights are not absolute, and that in fact, under the state's police powers, the state had the right to mandate vaccination. This was, as I just mentioned, a very, very broad vaccination mandate because it was everyone over 18 who lived in Cambridge.

Now, a lot of times when I tell people about this case, they'll say, "But nothing like this would happen today." That's actually inaccurate. There was something very similar that happened in New York last year. In April of 2019, the New York City Health Commissioner, in the midst of the measles outbreak, passed a regulation that said anyone over six months who lived, worked, or went to school in one of four zip codes in New York City had to be vaccinated against measles.

KAO: Hmm.

KAMINER: Now, this was a relatively controversial decision. There were some people who were upset that it was heavy handed. There were other people who actually what they were upset by was the penalty was a \$1,000 fine. So, it felt a little bit like people who were wealthier could buy their way out of the vaccine mandate. So, while it was politically controversial, there was no question, and this was just last year, that it was constitutionally permissible to do so. Now, obviously, the problem with these types of very broad policies is that they are heavy handed, they can be divisive, they can backfire, and then the end result is it's going to increase tensions. So, what you can have instead are more targeted policies.

And the targeted policies will be something like you mentioned, which currently all 50 states have some type of mandatory vaccination for schoolchildren. Some places also have mandatory, some states have mandatory vaccination for healthcare workers or in nursing homes or in colleges. So, clearly, all states currently have some type of targeted mandatory vaccination. Now, the big issue here is actually religious or philosophical exemptions. Forty five states, for their mandatory vaccination for schoolchildren, have some type of religious or philosophical exemption. Only five states do not. The two most recent states who removed the religious or philosophical exemptions were New York State and California. And while there were complaints about this and it was quite divisive to do, it was clearly constitutional to do so.

And what's interesting is what religious opponents say is that if I don't want to be vaccinated for religious reasons, and you, the state, are forcing me to be vaccinated, you are interfering with my rights to the free exercise of religion under the First Amendment to the United States Constitution. That is wrong. And the reason why it's wrong, it is legally incorrect, is that under the free exercise clause of the First Amendment, what are known as neutral laws of general applicability are constitutional, even if they burden a religious practice. So, sort of in English, what this means is that if the legislature's motivation in passing the law is not religious interference and the law does not single out religious behavior, it doesn't violate the free exercise clause.

Now, not to get too much into the weeds here, but in addition to the federal constitution, each state has its own constitution. And some states also have what are known as Religious Freedom Restoration Acts, which provide additional protection of religious practices. But even in the states with that additional protection, it would not be required to have religious exemptions.

KAO: Yeah. So, I think our audience, given the legal and constitutional background we just gave, I think has a much firmer understanding of where the states' authorities reside. If I can just reflect on some of the points you made a moment ago about trying not to be heavy handed. So, given that, how can states implement and enforce vaccine mandates without fueling public distrust in government and amplifying vaccination resistance?

KAMINER: Right. And that is such a crucial problem because it doesn't matter what laws you have if people absolutely are refusing to obey those laws. So, I do think before I directly answer your question, sort of for background, one of the most important issues is that public health agencies maintain credibility. If people don't trust the government, and the government announces that a vaccine is safe and effective, people are not going to be vaccinated.

KAO: Yeah.

KAMINER: Now, traditionally, there were a small group of individuals who were either vaccine-resistant or vaccine-hesitant and weren't willing to be vaccinated. What is so troubling in terms of a potential COVID-19 vaccine is now, the very people who used to be first in line to be vaccinated are very skeptical that a vaccine may be fast tracked by the Trump administration for political reasons. And this can be very, very problematic. So, for example, just yesterday it came out that the CDC had notified public health officials around the country to prepare for a possible vaccine around Election Day. There was an issue with the FDA overstating the benefits of convalescent plasma and having to backtrack. There were the issues with the CDC's changing its testing policies. And while science is always changing, particularly with new and emerging diseases, there's this disturbing trend that federal health officials' recommendations are being influenced by politics.

Now, so, assuming that people do trust the government and assuming that's not a problem, I think the most important thing to do is to have targeted policies, not to have the kind of broad policy you have in the Jacobson case in Cambridge or what happened in New York City, but to have very targeted policies focusing on those who either are most likely to get ill or most likely to spread the disease. And since all states already have frameworks in place like with schoolchildren, you could add COVID-19 into that type of a framework. It simply is not as heavy handed.

KAO: Right.

KAMINER: You also could do things such as, if COVID-19 spreads very easily and widely in crowded indoor venues where people are for a long amount of time, maybe pass a law that you need to be vaccinated to go to a bar or to a sporting event or to a concert. Just as people you go to a bar and you want to buy a drink, you need to show ID that you're 21, if you go to a bar, you need to show proof that you've been vaccinated against COVID-19. It simply doesn't come across as heavy handed.

KAO: Yeah.

KAMINER: Yeah. I also think another thing which is very effective is that if state officials are passing vaccination laws, they should be getting publicly vaccinated themselves. And while this didn't involve the law, it was, I found it to be very, very effective. I live in New York, and during one of Governor Cuomo's live press conferences, he was tested for COVID-19 on live TV. It wasn't just him saying, "Do as I do," it was also-- It wasn't just him saying, "Do as I say," it was also what he did. Now, in terms of backlash, backlash is a potential problem. I think it can be managed. When California removed its religious exemption for mandatory vaccination, it was quite controversial. People worried about the backlash, but the end result was significantly increased vaccination coverage.

KAO: Yeah. Well, I appreciate those points. I think they're important insights if it comes to the point where mandates are necessary. So, if we can switch gears a little bit: as opposed to states, private employers have generally not concerned themselves about public health interventions, such as vaccinations. But for health and liability reasons, employers in industries such as retail, shipping, and food processing may now be concerned, given the economic fallout from this pandemic. So, first, can private employers mandate that their employees get vaccinated?

KAMINER: Yeah, actually, what's interesting is that private employers have even more flexibility than the government does. And the reason for this is, unlike government, private employers are simply not subject at all to constitutional restrictions. Additionally, you would think that policies by private employers should be less controversial because it is not the government telling people what to do; it is a private employer trying to protect its own private property. Now, you're right: very few businesses outside of healthcare facilities or nursing homes have mandated mandatory vaccination. But prior to the COVID-19 pandemic, there may have also been less of a need to do so. So, employers certainly can.

Now, the issue with employers, when employers are asked about this, based on some of the research that has been done, is employers are very, very concerned about being liable for religious discrimination and wondering whether or not they need to have some form of religious accommodation. The answer, under federal law, under Title VII of the 1964 Civil Rights Act, particularly Section 701-J, is they absolutely do not, okay? And the reason why you don't is that what federal law says is you only need to accommodate an employee's religious needs if doing so does not cause an employer to incur even a de minimis cost or a minimal cost. So, basically, employers are not required to incur any type of cost in accommodation.

Now, one of the interesting things that has been going on is that the EEOC, which is the Equal Employment Opportunity Commission, has actually opposed vaccination policies that don't include religious exemptions, and it's actually attempted to litigate cases. The EEOC has lost all of these cases. But the problem is that the EEOC has been successful in some cases in pressuring employers into settlement agreements because it is simply easier to settle than to litigate. This all, of course, was prior to COVID-19. So, I would hope the EEOC would take a different position at this point.

Now, some states, just as I was talking about the fact that you have the federal constitution, you also have state constitution and state laws, some states may have their own religious accommodation laws that say that employers need to accommodate employees unless doing so would lead to significant difficulty or expense. For example, that's a standard in New York. But in the midst of one of the worst public health and economic crises in the last century, it certainly seems that you could justify an employer having a mandatory policy without religious exemptions.

KAO: Yeah. So, like with our state mandate discussion, are there things that private employers can do with regards to vaccine mandates that would minimize employee backlash?

KAMINER: Sure. Yeah, absolutely. I mean, I would say probably the most important thing from a management perspective is transparency and clearly articulating the need for the policy. Let your employees know the purpose of this policy is to protect their health and to protect their jobs. That is why you are enacting the policy. You could also, just like you do with the government, you could have top officials. Or I'm sorry. You could have like the top managers in a business actually get vaccinated themselves and show everyone that they're being vaccinated. I also think that if it is an employer where COVID-19 is significantly likely to spread, such as a bar, a gym, a meat packing plant, a restaurant, a factory, a school, it would be pretty easy to articulate to employees, even if employees don't agree with you, but to justify and articulate why this type of policy is necessary.

KAO: Right, yeah. So, as we near the end of our conversation, up to this point, we've been talking about public and private sector vaccine mandates, but we'd rather not have to rely on such mandates.

KAMINER: Yeah.

KAO: Resistance to mandates such as wearing a facemask point to some who do not see masking as an action that is meant to protect other people. Given that, what can be done to better instill a greater public health or community ethic among those who are hesitant to get vaccinated against COVID-19?

KAMINER: Yeah, it's a huge problem, and absolutely it is better not to mandate, but instead to encourage and nudge people to do so. I think you certainly need a massive campaign to educate the public on the safety and effectiveness of COVID-19, of a potential COVID-19 vaccine. I think that when people trust government, government messaging matters very, very much. And to give another example from New York State, and this one involving Cuomo on masks, from April, he consistently and regularly gave the message that wearing a mask is about respect: I wear a mask to protect you. You wear a mask to protect me. We all wear masks to protect essential workers, healthcare, providers and high-risk individuals. People don't want to view themselves as being uncaring and disrespectful. I think he's been very, very successful in doing that. Obviously, a vaccine is much more intrusive than a mask, but I still think that type of an approach could work.

I also think that government really needs to be creative in recruiting various experts that a community member trusts, the community members trust, to give the message. And this could be religious leaders. It could be social media influencers. It could be politicians, celebrities, professional athletes, whoever it is a community listens to.

So, for example, last year in New York City, during the measles outbreak, the measles outbreak, was primarily impacting the Orthodox Jewish community. It was the Orthodox Jewish community in those four zip codes. So, the Orthodox Jewish Nurses Association was actually at the forefront of educating the community about the safety and efficacy of vaccines, because those were the people, these nurses, who the community would listen to. In 1956, Elvis Presley got his vaccine for polio on The Ed Sullivan Show, and vaccination rates increased from .6 to more than 80 percent in six months with teenagers. So, those kinds of things work.

I also think vaccines need to be free. It needs to be widely advertised that they are free. People have what's known as an admission bias. They're much more concerned with the risk of doing something, in this case being vaccinated, than in doing nothing, in this case not being vaccinated and getting ill. And as a result, you have to do whatever you can to make it quick, easy. Have free vaccines at indoor testing sites, outdoor testing sites, clinics, workplaces, schools, CVSs, I think that could be very effective.

And I know you asked me specifically about government, but there are actually some interesting things that employers could do that are non-coercive as well. So, at Rutgers University, there was a study done a few years ago, and the study involved the influenza vaccine. And what happened was some of the employees who work there were sent an email that told them that they had been signed up to get a flu vaccine on this date and this time. And they had the option of opting out of the flu vaccine. And then other employees were just told, "We're having these clinics. You can sign up." They had to actually opt in. Just by forcing an employee to opt out instead of making them opt in, it increased

vaccination rates by 36 percent. There was another study that was done in a Midwestern utility firm. And in this study, some employees were just sent a mailer that let them know when flu clinics were taking place. Other employees were sent the information when they were taking place, but also, they had a reminder: "Please mark down the time and day you're going to be vaccinated." That increased vaccination rates by 12 percent. So, there really are not only with government, but with employers, some very easy, inexpensive, non-coercive ways to encourage vaccination. So, I think realistically, it's going to end up being some combination of government mandates, employer mandates, and also some of this messaging and nudging.

KAO: Yeah. Well, I want to thank Professor Debbie Kaminer for sharing her expertise and insights with our audience today. Professor Kaminer, thank you for being a guest on *Ethics Talk*.

KAMINER: Thank you so much for having me.

KAO: And finally, to our viewing audience, I encourage everyone to get vaccinated against seasonal influenza. Getting the flu shot will protect you and others. Be well and be safe. We'll see you next time on *Ethics Talk*. [bright theme music plays]