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Comparative Laws In Public Health Unmasked

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COMPARATIVE LAWS IN PUBLIC HEALTH UNMASKED

*Christine Chasse RN, JD MSN, NE-C**

ABSTRACT

The COVID-19 pandemic lay bare the vulnerabilities of some countries' public health responses and praise for others. Comparative law review in public health responses may glean lessons for the United States. For example, the United States had not had a pandemic of this magnitude in over a century and was reluctant to institute early masking policies. Meanwhile, the world raced for a COVID-19 vaccine. This begs the question of who will take the vaccine. Will—or can—governments force their citizens to be inoculated? Global comparisons in personal liberty, freedom, bodily autonomy, and how to parent intersect at the right to (or not to) mask and vaccinate debate. This Comment compares laws with various countries against a cultural and political backdrop, such as masking differences in the East and West, vaccines and the resurgence of eradicated diseases in the United States, how an authoritative, military dictatorship in Argentina implemented vaccine laws on its citizens, and how the past atrocities the people of the Democratic Republic of the Congo faced is influencing their vaccination rates and subsequent measles and Ebola virus outbreaks today. These global problems require global solutions.

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I. INTRODUCTION

In light of the 2019 Novel Coronavirus (COVID-19), which we are still in the midst of, it has become clear that a coordinated global response to infectious viruses is imperative. Despite scientific evidence and official advice regarding the safety of masking and vaccination, some governments and their citizens remain unconvinced about the safety and efficacy of those measures.¹ Why some nations and its citizens are open to preventative health measures and others are not goes well beyond science. Rather, this is a global phenomenon with many concepts in tandem, including the way global citizens interact with each other as parents and professionals, their laws, culture and history, the debate over evidence, and finally, personal liberties.²

But first, some insight into comparative law. “The essence of comparative law is the act of comparing the law of one country to . . . another.”³ The key act in comparing foreign laws is assessing how the laws are similar and how they are different.⁴ Additionally, law is nestled within the backdrop of the country’s culture. There are practical applications for comparative health laws. First, policies developed abroad may not have been tried yet and offer multiple choices for governments to consider. Second, another practical application is that health care leaders should consider the experience of other countries in an effort to improve current and future pandemic responses. And lastly, pandemics, by definition, are worldwide problems: viruses travel, and they have no borders. For example, the

¹ See Tessa Wong, *Coronavirus: Why some countries wear face masks and others don’t*, BBC NEWS (May 12, 2020), <https://www.bbc.com/news/world-52015486>.

² See Gabriela Irrazábal, *Derecho a la salud versus objeción de conciencia en la Argentina*, REVISTA BIOÉTICA (Jan. 10, 2020), https://www.scielo.br/scielo.php?script=sci_arttext&pid=S1983-80422019000400728&tlng=es; Wong, *supra* note 2.

³ See Edward J. Eberle, *The Method and Role of Comparative Law*, Wash U. Global Studies L. Rev. 8, 13, (Jan. 2009).

⁴ See *id.*

early COVID-19 cases, and many of the measles outbreaks in the last decade, were imported to the United States from Europe.⁵

As the different countries waffle on the issue of masking to stop the spread of COVID-19, this warrants additional questions on potential and existing vaccine policies following the development of the COVID-19 vaccine. This Comment is structured as follows. Section II discusses global measures for COVID-19 regarding containing the contagion of the disease, particularly masking. This section will discuss the differences in global mandates and cultural influences in their responses, including the argument that the varying global masking mandates (or lack thereof) was more influenced by the different nations' experience with pandemics since research on masks' efficacy is far from conclusive and often contradictory. Section III changes course and discusses the role of a scientifically reliable and valid way of containing infectious disease: vaccines, specifically for measles and the Ebola virus disease (EVD). This section discusses how different governments—the democratic government of the United States, a military regime in Argentina, and the war-torn government of the Democratic Republic of the Congo and their reliance on foreign aid—vaccinate their populations and mandate compliance (or not) for these highly infectious, vaccine-preventable illnesses. Section IV describes the lessons learned in comparative health law in terms of public health.

II. MASKING DURING THE COVID-19 PANDEMIC

From the onset of the 2019 Novel Coronavirus (COVID-19) outbreak, the World Health Organization (WHO) has officially advised that only three types of people should wear masks: (1) those who are infected and symptomatic, (2) those caring for people suspected of carrying COVID-19 outside of medical facilities, and (3) health workers.⁶ “WHO does not recommend their widespread use

⁵ Jared Kaltwasser, *Most early New York COVID-19 cases came from Europe*, CONTAGIANLIVE (June 4, 2020), <https://www.contagionlive.com/news/most-early-new-york-covid-19-cases-came-from-europe>.

⁶ World Health Organization, *Q&A: Masks and COVID-19* (June 7, 2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-on-covid-19-and-masks>; see Sean T. O'Leary & Yvonne

among the public for control of COVID-19,” citing spotty research on the masks’ effectiveness at preventing COVID-19 transmission.⁷ Somewhat paradoxically, however, in the same paragraph, “WHO advises governments to encourage the general public to use non-medical fabric masks.”⁸

WHO’s stance seems to stem from the belief that infected but asymptomatic people are not contagious. There is emerging evidence, however, that there are more “silent carriers,” or healthy people diagnosed with the virus who show little or no symptoms, than initially indicated. Recent studies from China suggest that silent carriers are, in fact, highly contagious and could have been responsible for nearly 80 percent of positive virus cases.⁹ Another study estimates that up to 44 percent of COVID-19 virus transmissions can happen before the person exhibits any symptoms.¹⁰ This does not necessarily mean that masking is the solution; various studies suggest masking to stop the virus. Some nations and advisories, such as New Zealand, have held back on masking mandates due to the conflicting evidence and lack of clinical trials.¹¹

At the height of the pandemic, more than half of the world’s countries mandated wearing face masks in public.¹² Others, such as the United States and Brazil, have decided against federal mandates—though there are some state and city mask orders—despite having some of the globe’s highest confirmed COVID-19 infections and deaths.¹³ This section analyzes the different approaches taken globally to halt or slow the transmission of COVID-19, measures taken in the

A. Maldonado, *Vaccine Policies and Disease Incidence Across the Pond: Implications for the United States*, OFFICIAL J. OF THE AM. ACAD. OF PEDIATRICS (Feb. 2020), <https://pediatrics.aappublications.org/content/145/2/e20192436>.

⁷ *Coronavirus disease (COVID-19) for the public: When and how to use masks*, WHO (June 23, 2020), <https://www.afro.who.int/news/coronavirus-disease-covid-19-advice-public-when-and-how-use-masks>.

⁸ *Id.*

⁹ Wong, *supra* note 2.

¹⁰ See Xi He et al., *Temporal dynamics in viral shedding and transmissibility of COVID-19*, 26 NATURE MED. 672, 672 (2020).

¹¹ See Wong, *supra* note 2.

¹² Claire Felter & Nathalie Bussemaker, *Which Countries Are Requiring Face Masks?*, COUNCIL ON FOREIGN RELATIONS (Aug. 4, 2020, 11:42 AM), <https://www.cfr.org/in-brief/which-countries-are-requiring-face-masks>.

¹³ *Id.*

United States, cultural considerations of the East and West, and finally, the lack of a coordinated, global approach to stopping the spread of COVID-19.

A. Global Mandates

Among the first countries to institute mask mandates back in March 2020 were Venezuela, Vietnam, and the Czech Republic.¹⁴ Slovakia was the second European country to mandate wearing face masks. In an effort to destigmatize them, Slovakian President Zuzana Caputova wore a red one that matched her dress as she was sworn in.¹⁵ In April 2020, Austrian chancellor Sebastian Kurz acknowledged that wearing masks would be a “big adjustment” because they “are alien to our country.”¹⁶ Other countries varied in their approaches: Jamaica imposed curfews, for example.¹⁷ The United Arab Emirates and Lebanon are imposing fines. Qatar and Cuba are threatening years of jail time, and Madagascar made rulebreakers to sweep streets.¹⁸

Vietnam, one of the first countries to institute a masking policy, was able to report a 99-day streak without any community-acquired COVID-19 infections.¹⁹ Despite this success coupled along with their early masking policy, other nations with low infection rates actively discouraged masks. Norway, for example, stated that their transmission rates are so low that two hundred thousand people would have to wear masks in order to prevent a single COVID-19 case.²⁰ As their COVID-19 infections rates have started to rise and mask prices surged 700% in the wake of the increased demand, the

¹⁴ Al Jazeera News, *Which countries have made wearing face masks compulsory?* (Aug 17, 2020), <https://www.aljazeera.com/news/2020/04/countries-wearing-face-masks-compulsory-200423094510867.html>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *See id.*

¹⁸ *See id.*

¹⁹ Sen Nguyen, *Vietnam's first coronavirus outbreak in 99 days spreads fear, anxiety*, SCMP (July 31, 2020, 7:00 AM), <https://www.scmp.com/week-asia/health-environment/article/3095403/coronavirus-vietnams-first-outbreak-99-days-spreads>.

²⁰ *See Felter & Bussemaker, supra note 13.*

Norwegian government still has not mandated wearing masks.²¹ Ten countries in Oceania, one of the few areas of the world without a mask mandate, has yet to report a single case.²²

“Without national mandates, large percentages of people choose to forgo masks.”²³ In the United Kingdom, for example, prior to their national mandate in July 2020, only 16 percent of residents surveyed said they always wore a mask outside of their home.²⁴ There is also the fear that people may end up re-using their disposable masks, or procure shoddy ones from the black market. Japan, Indonesia, and Thailand, for example, have experienced mask shortages. In response, Japan and Singapore gave free reusable masks to help prevent their citizens from unhygienically reusing disposable masks, while South Korea has rationed the use and distribution of surgical masks.²⁵

B. The United States and COVID-19

The Centers for Disease Control and Prevention (CDC) advised Americans in April 2020 to wear face coverings in public to slow the virus’ transmission.²⁶ However, the fragmentation of the United States public health infrastructure has resulted inconsistent policies nationwide, a reflection of the varying levels of federal state, and local government in concert. Historically, and from a constitutional perspective, public health is primarily a function of state and local government.²⁷ Thus, the United States has not issued any

²¹ David Nikel, *Norway Clamps Down as Coronavirus Cases Rise, Face Masks a Possibility*, FORBES (Aug. 7, 2020, 8:45 AM), <https://www.forbes.com/sites/davidnikel/2020/08/07/norway-clamps-down-as-coronavirus-cases-rise-face-masks-a-possibility/#47ae5d0d14a5>.

²² See Felter & Bussemaker, *supra* note 13.

²³ *Id.*

²⁴ The Royal Soc’y, *Face masks and covering for the general public: Behavioral knowledge, effectiveness of cloth coverings and public messaging*, ROYAL SOC’Y (June 26, 2020), <https://royalsociety.org/-/media/policy/projects/set-c/set-c-facemasks.pdf?la=en-GB&hash=A22A87CB28F7D6AD9BD93BBCBFC2BB24> at 19.

²⁵ See Wong, *supra* note 2.

²⁶ See Felter & Bussemaker, *supra* note 13.

²⁷ Institute of Medicine (IOM), *The Future of the Public’s Health in the 21st Century*, NAT’L ACAD. PRESS (2002), <https://www.ncbi.nlm.nih.gov/books/NBK221231/#:~:text=Role%20of%20the%20Federal%20Government%20in%20Assuring%20Popula>

federal masking mandates. However, the individual states have the power to mandate mask use, leading to a patchwork of protections. 31 of the 50 states have imposed masking mandates, as well as most of the nation's airlines, and the ten largest North American retailers, including Walmart and Target.²⁸ Most states grant exemptions for the masking requirement for those with medical conditions or disabilities.²⁹ Many objectors commonly argue that the masking requirement is unconstitutional and thus cannot be forced to wear one,³⁰ even though there is no statute or court ruling supporting this viewpoint. Recently, a federal district court in Maryland rejected this argument, holding that "wearing a face covering simply conveys the idea that masks protect the public, nothing more."³¹ With travel between and amongst the states, the lack of uniformity has proven to be an obstacle in containing the virus.³² This state-by-state approach is not ideal for pandemics as COVID-19 cases surged.³³

While a federal mandate in the United States sounds like an ideal solution, it may not even be legal. Not only is it unclear if the CDC can enforce mask mandates, but further, it would be difficult to enforce and would further politicize the issue.³⁴ Allowing the states to police and monitor their locales may be more efficient than delegating it to the federal government. This method is consistent with state sovereignty and respects their role as public health decision makers.³⁵

tion%20Health&text=For%20most%20of%20its%20history,the%20public's%20health%20and%20safety.

²⁸ The White House has mandated that staff wear masks, although then-President Donald J. Trump refused to wear one. *See Wong, supra* note 2.

²⁹ Lawrence O. Gostin et al., *Universal Masking in the United States: The Role of Mandates, Health Education, and the CDC*, JAMA NETWORK (Aug. 10, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2769440>.

³⁰ *Id.*; *Cf. Leah Asmelash & Hollie Silverman, City's proclamation requiring face masks in stores and restaurants is amended after threats of violence*, CNN (May 3, 2020, 8:25 AM), <https://www.cnn.com/2020/05/02/us/face-masks-stillwater-oklahoma-trnd/index.html>.

³¹ *See Gostin, supra* note 30.

³² *Id.*

³³ *Id.*

³⁴ *See id.*

³⁵ *Id.*

A federal mandate, on the other hand, may provoke the ire of the individual states.³⁶

C. Cultural Differences

As alluded to *supra*, a discussion on comparative law would be incomplete without some assessment of the backdrop of the country's response to public health issues. Mask usage was already common in East Asia before the start of the COVID-19 pandemic.³⁷ Not only has heavy pollution in crowded Asian cities normalized wearing masks outside, but the region has also been exposed to relatively recent outbreaks before, such as SARS and H1N1.³⁸ "One key difference between these societies and Western ones is that they have experienced contagion before—and the memories are still fresh and painful."³⁹ Additionally, not only is it seen as safer to wear masks publicly, but it is also more considerate.⁴⁰ When people in these regions have allergies or are sick, they wear masks because it is considered rude to be openly coughing and sneezing.⁴¹ Masking was even considered a fashion statement. For example, Hello Kitty masks were trendy in street markets.⁴² People who do not wear masks in East Asia are shunned and blocked from entering shops and buildings. Hong Kong tabloids published photos of unmasked Westerners congregating in public in an effort to shame them.⁴³

Meanwhile, the United States has not faced a pandemic of this magnitude in over a century.⁴⁴ The issue of not wearing a mask has become more of a political or symbolic statement regarding personal liberty than for the protection of others. For example, the city of Stillwater in Oklahoma was forced to soften a masking mandate in

³⁶ *Id.*

³⁷ See Felter & Bussemaker, *supra* note 13.

³⁸ See Wong, *supra* note 2; see also Al Jazeera News, *supra* note 15.

³⁹ Wong, *supra* note 2.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ See *id.*

⁴⁴ See generally Richard Hughes IV, *Vaccine Exemptions and the Federal Government's Role*, HEALTH AFFAIRS BLOG (Mar. 21, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190318.382995/full/>.

response to threats of violence just three hours after the rule went into effect.⁴⁵ The city manager, Norman McNickle, said that while “it is unfortunate and distressing that those who refuse [to mask] and threaten violence are so self-absorbed as to not follow what is a simple show of respect and kindness to others... [he] cannot, in clear conscience, put our local business community in harm’s way, nor can the police be everywhere.”⁴⁶ In other places in the United States, violence escalated. For example, in Michigan, a store security guard and father of eight was shot and killed for telling a shopper to wear a mask.⁴⁷

III. VACCINES

Scientists around the globe raced for a COVID-19 vaccine and developed an FDA-approved formulary. Availability and access issues aside, vaccines are only effective when enough people receive them within a population.⁴⁸ Now that formularies have been created, nearly one-fourth (27%) of the American public remains vaccine hesitant.⁴⁹ The Kaiser Family Foundation estimated that vaccine hesitancy is highest among Republicans (42%) and rural residents (25%). Interestingly, 35% of Black adults – a group that was disproportionately affected by the pandemic – said they “definitely or probably would not get vaccinated.”⁵⁰ Almost a third (29%) of healthcare workers say the same.⁵¹

⁴⁵ See Asmelash & Silverman, *supra* note 31.

⁴⁶ *Id.*

⁴⁷ Ben Kessler & Corky Siemaszko, *Michigan security guard killed in mask dispute; suspect said he ‘disrespected’ them*, NBC NEWS (May 5, 2020, 2:03 AM), <https://www.nbcnews.com/news/us-news/michigan-security-guard-killed-police-investigating-if-it-was-over-n1199241>.

⁴⁸ Carmel Shachar & Dorit Rubinstein Reiss, *When are Vaccine Mandates Appropriate?*, AMA Journal of Ethics (Jan. 2020), <https://journalofethics.ama-assn.org/article/when-are-vaccine-mandates-appropriate/2020-01>.

⁴⁹ Liz Hamel, Ashley Kirzinger, Cailey Munana, & Mollyann Brodie, *KFF COVID-19 Vaccine Monitor: December 2020*, Kaiser Family Foundation (Dec. 15, 2020), <https://www.kff.org/coronavirus-covid-19/report/kff-covid-19-vaccine-monitor-december-2020/>.

⁵⁰ *Id.*

⁵¹ *Id.*

Vaccine refusal is already a serious public health problem,⁵² especially in the context of disease and global pandemics. For example, although the CDC declared measles “eliminated” in 2000, outbreaks have continued to spike in the United States. Multiple studies have attributed this trend to American nonmedical vaccine exemptions.⁵³ In 2019, the CDC reported 1,282 individual cases of measles in 31 states. The vast majority of cases were among the unvaccinated.⁵⁴ However, in that same year in the DRC, a single, local measles outbreak killed nearly 2,000 children.⁵⁵ Measles is extremely infectious as 90 percent of unvaccinated individuals will contract the virus once exposed. The CDC puts it succinctly: “As long as measles is a threat anywhere, it is a threat everywhere.”⁵⁶

In fact, in the context of Europe, the United States, Argentina, and the DRC, almost all cases of the resurgence of a previously eradicated disease like measles are attributed to parental refusal of the vaccine.⁵⁷ Researchers have categorized vaccine opponents several ways, including religious objectors, political libertarians, and even self-interest maximizers.⁵⁸ Harsh penalties could make a religious objector reluctantly comply, whereas a political libertarian’s noncompliance would be fueled.⁵⁹ Research in the Western Hemisphere suggests that vaccine refusal is highest in religious minority groups where negative media coverage is prevalent as well as in higher income groups with access to the internet.⁶⁰ Parental

⁵² *Id.*

⁵³ Hughes IV, *supra* note 45.

⁵⁴ U.S. Department of Health & Human Services, *Measles* (accessed Sept. 12, 2020), <https://www.cdc.gov/measles/cases-outbreaks.html>.

⁵⁵ Zita Amwanga, *Measles Vaccines are Free in DRC. So Why Don’t Parents Want to Vaccinate their Children?* GLOBAL PRESS JOURNAL (July 16, 2019), <https://globalpressjournal.com/africa/democratic-republic-of-congo/measles-vaccines-free-drc-dont-parents-want-vaccinate-children/>.

⁵⁶ Centers for Disease Control and Prevention, *Global Measles Outbreaks* (Sept. 9, 2020), <https://www.cdc.gov/globalhealth/measles/globalmeaslesoutbreaks.htm>.

⁵⁷ Sean T. O’Leary & Yvonne A. Maldonado, *Vaccine Policies and Disease Incidence Across the Pond: Implications for the United States*, OFFICIAL JOURNAL OF THE AM. ACAD. OF PEDIATRICS (Feb. 2020), <https://pediatrics.aappublications.org/content/145/2/e20192436>; see Irrazábal, *supra* note 3.

⁵⁸ Shachar & Reiss, *supra* note 49.

⁵⁹ *Id.*

⁶⁰ See generally Irrazábal, *supra* note 3.

refusal in the DRC, however, has been linked to customs, beliefs, and fear of government discussed in further depth *infra*.⁶¹

Once COVID-19 vaccines have been developed, it begs the question of who can take the vaccine, if people can refuse, or if governments could, or should, mandate their administration in a concerted effort to suppress the pandemic. This section examines comparative legal approaches to vaccination refusal, as well as political and cultural influences in the United States, Argentina, and the DRC.

A. The United States

Like the *mélange* of masking policies explained *supra*, the United States does not have a federal law mandating vaccination. Thus, there are variable rates of vaccine coverage in different regions.⁶² Medical exemptions have generally, and appropriately, been allowed in all 50 states for those with contraindications, such as being immunocompromised or allergic to vaccine components.⁶³ Currently, 45 states and Washington D.C. grant religious exemptions and 15 states allow philosophical exemptions.⁶⁴ Only five states—California, West Virginia, Mississippi, New York, and Maine—do not allow nonmedical exemptions.⁶⁵ Research supports that stricter state policies correlate with lower rates of nonmedical vaccine exemptions.⁶⁶ Nonmedical exemptions started increasing in the United States in the late 1990s. The increase in nonmedical exemptions in the United States was partially fueled by Dr. Andrew Wakefield's 1998 work that falsely

⁶¹ Amwanga, *supra* note 56.

⁶² The United States is not the only developed country without a national vaccination mandate. England and Ireland, for example, do not mandate vaccinations. See Parents PACK, *Around the World: Vaccine Requirements Vary from Country to Country* (Mar. 17, 2015), <https://www.chop.edu/news/vaccine-requirements-vary-country-country>.

⁶³ *Id.*

⁶⁴ National Conference of State Legislatures, *States with Religious and Philosophical Exemptions from School Immunization Requirements* (June 26, 2020), <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

⁶⁵ *See id.*

⁶⁶ *Id.*

linked the MMR vaccine that prevents measles with autism.⁶⁷ He was subsequently found to have “acted unethically” and the work was retracted 12 years later.⁶⁸

“History indicates that federal intervention in vaccination requirements can have a powerful effect on state practices.”⁶⁹ Local state governments started imposing immunization requirements as a condition for school entry as far back as the 1850s.⁷⁰ However, the legality and constitutionality of these mandates have been repeatedly challenged. For example, in 1905, the US Supreme Court in *Jacobson v. Massachusetts* ruled that vaccination requirements are found to be a reasonable exercise of state police power.⁷¹ Today, *Jacobson* remains settled law. However, since the *Jacobson* ruling, the value that both courts and society at large place on bodily autonomy and freewill has increased.⁷² The United States protects an especially wide sphere of parental sovereignty. For example, it is the only country *not* to ratify the UN’s Convention on the Rights of the Child.⁷³

B. Argentina

In the interest of understanding immunization as a social good and for national interest, Argentina offers free vaccinations for all of its citizens.⁷⁴ The mandate was created in 1983 during the Argentine

⁶⁷ See Laura Eggerston, *Lancet retracts 12-year-old article linking autism to MMR vaccines*, Canadian Med. Ass’n J. (Feb. 4, 2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2831678/>.

⁶⁸ *Id.*

⁶⁹ Hughes IV, *supra* note 45.

⁷⁰ *Id.*

⁷¹ See generally *Jacobson v. Massachusetts*, 197 U.S.11, 31, 25 S.Ct. 358, 49 L.Ed. 643 (1905).

⁷² Schachar & Reiss, *supra* note 49.

⁷³ Sarah Mehta, *There’s only one country that hasn’t ratified the Convention on Children’s Rights: US*, ACLU (Nov. 20, 2015), <https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens#:~:text=The%20treaty%20has%20been%20ratified,failed%20to%20ratify%20the%20CRC.>

⁷⁴ Erica Sanchez, *Argentina Senate Approves New Law Making Vaccines Free and Mandatory*, GLOBAL HEALTH (Dec. 17, 2018), <https://www.globalcitizen.org/en/content/esto-es-lo-que-necesitas-saber-sobre-la-nueva-ley/>.

military dictatorship and offered no method for refusal.⁷⁵ The vaccine schedule is coupled with both criminal and civil penalties for those that refuse.⁷⁶ The obligatory nature of vaccination was recently buttressed by a new law, § 22.909, authored by Dr. Pablo Yedlin, a pediatrician who was concerned about the resurgence of measles, a disease that was previously eradicated, discussed in more depth *infra*.⁷⁷ Section 22.909 incorporated vaccination requirements into the conditional receipt of social and government benefits such as being able to enter or graduate from school, process identifications, passports, prenuptial certificates, and even driver's licenses.⁷⁸ "Public solidarity" supports this type of sanction.⁷⁹ For instance, public funding of community goods is "something we do together."⁸⁰ Refusing to vaccinate, and thereby refusing governmental benefits, is a way to recognize that the unvaccinated choose to place themselves outside of the community.⁸¹ The Argentine government has taken the position that is the government's obligation and responsibility to prevent the spread of serious diseases.⁸²

A case study can illustrate how the Argentine government implements its rules in light of vaccination refusal. An Ayurveda family had an in-home delivery.⁸³ Afterwards, they traveled to their local hospital where they refused vaccinations for their newborn, citing that it is against their religious practice of Ayurvedic medicine.⁸⁴ The parents were prosecuted for denying the child "his right to health."⁸⁵ Initially, the family won in Family Court and was instructed to present "an alternative health plan signed by a specialist in Ayurvedic medicine" after being full understanding of the risks and

⁷⁵ See Irrazábal, *supra* note 3.

⁷⁶ *Id.*

⁷⁷ Sanchez, *supra* note 75.

⁷⁸ *See id.*

⁷⁹ Katie Attwell & Mark C. Navin, *Childhood Vaccinations Mandates: Scope, Sanctions, Severity, Selectivity, and Salience*, THE MILBANK QUARTERLY, 988 (2019).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Sanchez, *supra* note 75.

⁸³ See Irrazábal, *supra* note 3.

⁸⁴ *Id.*

⁸⁵ *Id.*

benefits of vaccination.⁸⁶ Undeterred, the Argentine government appealed. On appeal, the Provincial Supreme Court rejected the Family Court's decision.⁸⁷ Instead, it ruled that the family should be intimidated to comply with the mandate, or they would forcibly vaccinate the child. One judge dissented after consulting with a bioethicist.⁸⁸ The case went up to the Supreme Court of the Nation in 2012 who affirmed the Provincial Supreme Court's decision.⁸⁹ Forcible vaccination without parental consent has been described as "the most extreme type of sanction" because it is a "direct assault on the bodily integrity of the child and through an explicit violation of parental liberty."⁹⁰

C. The Democratic Republic of the Congo

As of this writing, nowhere is EVD, a highly infectious and deadly disease, a more serious public health concern than in the DRC.⁹¹ EVD has already sparked a global pandemic. The world's second largest Ebola outbreak infected 3,200 people in the DRC in under two months, between August 1, 2018, to September 24, 2019.⁹² More than two thirds of those affected (2,100) died.⁹³ The EVD vaccine's development has been expedited.

Fortunately, the WHO has reported that one of the experimental vaccines has already been shown to be 97.5% effective.⁹⁴ Of the 90,000 people in the DRC who received the vaccine, only 15 people contracted disease more than 10 days post-vaccination, when

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See generally Attwell & Navin, *supra* note 80, at 984.

⁹¹ Concern Worldwide US, *Ebola Outbreak in DRC: Second-Largest Outbreak in History Rages in Congo* (2020), <https://www.concernusa.org/story/ebola-outbreak-in-drc/>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ World Health Organization, *Preliminary results on the efficacy of rVSV-ZEBOV-GP Ebola vaccine using the ring vaccination strategy in the control of an Ebola outbreak in the Democratic Republic of the Congo: an example of integration of research into epidemic response* (2019), <https://www.who.int/csr/resources/publications/ebola/ebola-ring-vaccination-results-12-april-2019.pdf?ua=1>.

the vaccine has reached the point of efficacy. However, due to horrific past human rights violations and repression, the Congolese people are wary of measures taken by their government, “no matter how well intentioned.”⁹⁵ Human rights issues included unlawful killings by government and armed groups, forced disappearances and abductions by government and armed groups, torture . . . arbitrary detention by the government, harsh and life-threatening prison conditions . . . internet blackouts, site blocking . . . delayed elections and restrictions on citizens right to change their government through democratic means; corruption and a lack of transparency at all levels of government . . . and unlawful recruitment of child soldiers[.]⁹⁶

Additionally, the experimental nature of the vaccine has made the Congolese distrustful, some even equating it to submitting to experimentation.⁹⁷ Compounding the general mistrust of their government, the region has political and economic instability that makes certain populations unable to receive WHO personnel to administer the vaccines.⁹⁸ The Congolese are also deeply angry with “Ebola response teams who don’t allow them to practice their traditional funeral customs.”⁹⁹ Subsequent attacks in the region and distrust with international health interventions and vaccination campaigns illustrate the mistrust Congolese locals have for vaccinations, even for lethal viruses like EVD.¹⁰⁰

Like in the US, DRC citizens have the right to refuse vaccines. However, the DRC “can act to protect persons other than the affected person, even at the cost of limiting individual liberties.”¹⁰¹ This includes denying access to public spaces, like quarantining and isolating unvaccinated individuals by force, a legal method in the

⁹⁵ Schachar & Reiss, *supra* note 49, at 36.

⁹⁶ U.S. Dep’t of State, *Country Reports on Human Rights Practices for 2018: Democratic Republic of the Congo*, www.state.gov/wp-content/uploads/2019/03/Democratic-Republic-of-the-Congo-2018.pdf (last visited Sept. 14, 2020).

⁹⁷ *Id.*

⁹⁸ Morgan Winsor, *Ebola outbreak spreads to 3rd province in eastern Democratic Republic of Congo*, ABC News (2019), <https://abcnews.go.com/International/ebola-outbreak-spreads-3rd-province-eastern-democratic-republic/story?id=65051770>.

⁹⁹ Amwanga, *supra* note 56.

¹⁰⁰ Winsor, *supra* note 99.

¹⁰¹ Shachar & Reiss, *supra* note 49, at 37.

DRC.¹⁰² The DRC also imposes criminal sanctions for vaccine refusal and limits the violator's access to schools and jobs. The DRC has taken the position that an objector's refusal to vaccinate not only places their lives at risk but also everyone else's in their community, especially given the highly infectious and lethal nature of EVD.¹⁰³ Community protection is a valuable resource to all who need it, including newborn infants and adults who are immunocompromised.

Should the DRC enact harsh mandates that include compulsory vaccination a lá Argentina, the backlash would likely be violent and should be carefully approached if implemented. Given the known violence already occurring at DRC EVD clinics, a mandate on experimental vaccines would not likely be well-received and instead perhaps fuel violence, backlash, resistance, and resentment.¹⁰⁴ Because enforcement is limited – and in the case of inaccessible, war-torn areas, non-existent – it is unlikely to promote public health and/or safety.¹⁰⁵

IV. CONCLUSION

In light of COVID-19, there are multiple options to consider after a comparative law analysis. While criminal sanctions have been utilized differently across the 50 states for not masking, these penalties for vaccine refusal are rare in the United States. Some researchers suggest that imposing financial penalties on noncompliant parents would eradicate measles.¹⁰⁶ In a study of 29 European countries with varying vaccine rates, researchers determined that for every €500 increase in the maximum possible penalty, there was an associated increase of 0.8 percentage points for measles vaccination coverage.¹⁰⁷ In Hungary, for example, parents face a financial penalty of up to €1600 (\$1800 USD) if they choose not to vaccinate their child. The

¹⁰² *Id.*

¹⁰³ *See id.*

¹⁰⁴ *Id.* at 39.

¹⁰⁵ *Id.*

¹⁰⁶ *See* Sean T. O'Leary, MD, MPH & Yvonne A. Maldonado, MD, *Vaccine Policies and Disease Incidence Across the Pond: Implications for the United States*, 145 PEDIATRICS: OFF. J. AM. ACAD. PEDIATRICS 1, 2 (2020), <https://pediatrics.aappublications.org/content/145/2/e20192436>.

¹⁰⁷ *Id.*

result? There are virtually no measles cases in Hungary.¹⁰⁸ The authors go on to add, “importantly, these types of financial penalties may also be fair because it is clear that persons unvaccinated by parental choice place an unneeded financial burden on our health care system.”¹⁰⁹

State governments may need to consider financial penalties because only about two-thirds of adults in the United States say they would take the COVID-19 vaccine.¹¹⁰ Even if COVID-19 proves to be a seasonal illness with resurgences of variants like influenza, Americans historically have not complied with revaccination. For example, only slightly more than a third (37 percent) of Americans elected to take the influenza vaccine in the 2017-2018 flu season.¹¹¹ Similar noncompliance at this level would not be enough to stop the spread of COVID-19. States may be reluctant to mandate experimental vaccines, but there exists precedent that suggests that sometimes the public health threat is significant enough. For example, in 1954, 623,972 American children were injected with another experimental vaccine – the polio vaccine.¹¹² In just 25 years, this devastating and disabling disease was eradicated from the United States due to vaccination efforts.¹¹³

The Institute of Medicine criticized American public health laws, suggesting that what “underlies many of its defects, is its overall antiquity.”¹¹⁴ Modern effectiveness of public health is reduced when the mandates do not or cannot account for the variety of perceptions, values, and beliefs that drive individuals’ vaccination choices. In the United States, for example, ignoring a legacy of maltreatment of Black

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Bridget Balch, *The Cost of Being Unvaccinated is Rising – Will People Be Willing to Pay the Price?*, ASS’N OF AM. MED. COLL. (Oct. 26, 2021), <https://www.aamec.org/news-insights/cost-being-unvaccinated-rising-will-people-be-willing-pay-price>.

¹¹¹ Centers for Disease Control and Prevention, *Estimates of Flu Vaccination Coverage among Adults* (accessed Sept. 12, 2020), <https://www.cdc.gov/flu/fluview/coverage-1718estimates.htm>.

¹¹² Marcia Meldrum, *A Calculated Risk: The Salk Polio Vaccine Field Trials of 1954*, BRITISH MED. J. OF CLINICAL RESEARCH, at 1233 (Nov. 1998), https://www.researchgate.net/publication/13491307_’A_calculated_risk’_The_Salk_polio_vaccine_field_trials_of_1954.

¹¹³ Centers for Disease Control and Prevention, *Polio Elimination in the United States* (last accessed Oct. 2, 2020), <https://www.cdc.gov/polio/what-is-polio/polio-us.html>.

¹¹⁴ Institute of Medicine (IOM), *supra* note 28.

Americans by the medical establishment, one notable example is the Tuskegee Syphilis Study, can undermine understanding of why some Black American parents might not be motivated to comply with a government mandate to vaccinate their children.¹¹⁵ Culture, history, and legacy all intersect with the right to promote and maintain public health.¹¹⁶

¹¹⁵ See generally Debbie Elliot, *In Tuskegee, Painful History Shadows Efforts To Vaccinate African Americans*, NPR (Feb. 16, 2021, 5:00 AM) <https://www.npr.org/2021/02/16/967011614/in-tuskegee-painful-history-shadows-efforts-to-vaccinate-african-americans>.

¹¹⁶ *Id.*