

## REFORMING NEW JERSEY'S VACCINATION POLICY: THE CASE FOR THE CONSCIENTIOUS EXEMPTION BILL

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### I. INTRODUCTION

When New Jersey became the first state to require a flu vaccine for children in 2008, parents protested outside the State House.<sup>1</sup> The new mandate requires children between six months and five years old to get an annual flu shot to attend a child care facility or day care center.<sup>2</sup> According to state epidemiologist Dr. Eddy Bresnitz, New Jersey based its decision to require flu vaccines for preschoolers on recommendations by the Centers for Disease Control and Prevention (CDC) and the Food and Drug Administration (FDA).<sup>3</sup>

Each year, flu-related complications hospitalize 108 of every 100,000 children five years or younger and cause about 100 deaths in people under the age of eighteen.<sup>4</sup> Because young children often

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<sup>1</sup> Ridgely Ochs, *NJ Flu Shot Mandate Sparks Protest*, NEWSDAY (New York), Oct. 17, 2008, at A02.

<sup>2</sup> N.J. ADMIN. CODE § 8:57-4.19 (2010). The same mandate also requires infants to get a pneumococcal conjugate vaccine, a vaccine that confers immunity against pneumonia-causing bacteria. *Id.* § 8:57-4.18. The mandate also requires sixth graders to get a Tdap (tetanus, diphtheria, acellular pertussis) booster, *id.* § 8:57-4.10(h)-(j), and a meningococcal vaccine, *id.* § 8:57-4.20.

<sup>3</sup> Jill P. Capuzzo, *A Proposal to Require Flu Vaccines for Preschool*, N.Y. TIMES, Dec. 9, 2007, at 46.

<sup>4</sup> *Id.* In addition, in a typical year, approximately 23,600 flu-related deaths occur in the United States. U.S. DEP'T OF HEALTH & HUMAN SERVS., *About the Flu*, FLU.GOV, <http://www.flu.gov/individualfamily/about/index.html> (last visited Nov. 21, 2010). But ninety percent of those deaths are people over the age of sixty-five. U.S. DEP'T OF HEALTH & HUMAN SERVS., *Seniors (Adults 65 Years and Older) and the Flu*, FLU.GOV, <http://www.flu.gov/individualfamily/seniors/index.html> (last visited Nov. 21, 2010). Because the CDC's estimate of flu-related deaths includes deaths from other respiratory conditions, the actual number of people dying from flu-related complications may be inflated. See ROBERT W. SEARS, *THE VACCINE BOOK: MAKING THE*

spread diseases to family members, the new vaccine policy will prevent illness and death in the entire community, not just in the population of vaccinated children.<sup>5</sup> Nevertheless, these statistics and community health benefits have not persuaded all parents that compulsory childhood flu vaccinations are an appropriate public health measure.

Some protesting parents feared that adding the flu vaccine to an ever-growing number of required vaccines might be unhealthy.<sup>6</sup> Many expressed suspicion that vaccines cause autism.<sup>7</sup> Louise Kuo-Habakus, a spokeswoman for New Jersey Coalition for Vaccination Choice, one of the rally organizers, voiced concerns about the infringement on personal liberty.<sup>8</sup> “This is not an anti-vaccine rally,” said Kuo-Habakus, “it is a freedom of choice rally.”<sup>9</sup>

Currently, the language of the New Jersey school vaccination law does not give parents much choice over vaccination.<sup>10</sup> The law permits only two types of exemptions from mandatory school vaccinations—one for children who have certain medical conditions and another for children (or to state it more accurately, parents) who have bona fide religious beliefs that conflict with vaccination.<sup>11</sup> Consequently, the rallying parents came out in support of a New Jersey bill that would provide for a “conscientious exemption,” meaning “an exemption from a mandatory immunization on the

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RIGHT DECISION FOR YOUR CHILD 122 (2007); *Estimating Deaths from Seasonal Influenza in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/flu/about/disease/us\\_flu-related\\_deaths.htm](http://www.cdc.gov/flu/about/disease/us_flu-related_deaths.htm) (last updated Oct. 5, 2010).

<sup>5</sup> See Capuzzo, *supra* note 3; see also Donald G. McNeil, *Flu Shots in Children Can Help Community*, N.Y. TIMES, Mar. 9, 2010, available at <http://www.nytimes.com/2010/03/10/health/10flu.html> (“An unusual study done in 49 remote Hutterite farming colonies in western Canada has provided the surest proof yet that giving flu shots to schoolchildren protects a whole community from the disease.”).

<sup>6</sup> *Preschoolers’ Parents Protest Required Flu Shots*, MSNBC.COM (Oct. 16, 2008), <http://www.msnbc.msn.com/id/27225500> (“[M]any of the parents mobilizing against the state policy believe various types of vaccine are being overused, resulting in more cases of autism, attention deficit hyperactivity disorder and other neurological problems in children.”) [hereinafter *Preschoolers’ Parents Protest*].

<sup>7</sup> Derrick Henry, *Law on Flu Vaccinations May Be Tested*, N.Y. TIMES, Jan. 2, 2009, at NJ2, available at <http://www.nytimes.com/2009/01/04/nyregion/new-jersey/04flun.html>.

<sup>8</sup> *Preschoolers’ Parents Protest*, *supra* note 6.

<sup>9</sup> *Id.*

<sup>10</sup> *But see* N.J. ADMIN. CODE § 8:57-4.3 (2010) (New Jersey’s medical exemption); *id.* § 8:57-4.4 (New Jersey’s religious exemption).

<sup>11</sup> *Id.*

grounds of a sincerely held or moral objection to the immunization.”<sup>12</sup> Assemblywoman Charlotte Vandervalk, the bill’s sponsor, introduced the bill in 2004.<sup>13</sup> Vandervalk’s “Conscientious Exemption Bill” would give parents the right to refuse any specific vaccination after being informed of the risks of not vaccinating and filing paperwork with the local health department.<sup>14</sup> The New Jersey Department of Health and Senior Services (DHSS) has firmly opposed the Conscientious Exemption Bill. It has stated that “[b]road exemptions to mandatory vaccination weaken the entire compliance and enforcement structure,” and contends that “the highest number of children possible must receive vaccines to protect them and others.”<sup>15</sup>

The DHSS’s statement opposing the Conscientious Exemption Bill, while facially accurate, misleadingly glosses over three important issues. First, the DHSS’s statement implies that the Conscientious Exemption Bill would reduce compliance with vaccine mandates. Studies actually suggest that the New Jersey Conscientious Exemption Bill would pose little risk either to the compliance structure or to public health.<sup>16</sup> Second, DHSS implies that New Jersey has a very strict vaccination policy. In fact, no agency ever enforces New Jersey’s

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<sup>12</sup> Assemb. 260, 213th Leg., 2008–09 Sess. (N.J. 2008), available at [http://www.njleg.state.nj.us/2008/Bills/A0500/260\\_I1.PDF](http://www.njleg.state.nj.us/2008/Bills/A0500/260_I1.PDF).

<sup>13</sup> Assemb. 2616, 211th Leg., 2004–05 Sess. (N.J. 2004), available at [http://www.njleg.state.nj.us/2004/Bills/A3000/2616\\_I1.PDF](http://www.njleg.state.nj.us/2004/Bills/A3000/2616_I1.PDF). Assemblywoman Vandervalk introduced the bill into the Assembly Health and Senior Services Committee, but the committee has never posted the bill for a hearing. E-mail from Assemblywoman Charlotte Vandervalk, to author (Oct. 20, 2009, 10:32 AM EST) (on file with author). The Assemblywoman has reintroduced the same bill into the same committee. The bill for the 2010–11 session has been assigned the number A-243, which remains identical to the original 2003 version. E-mail from Beth Staples, Chief-of-Staff for Assemblywoman Charlotte Vandervalk, to author (Feb. 16, 2010, 10:55 AM EST) (on file with author); see Assemb. 243, 214th Leg., 2010–11 Sess. (N.J. 2010), available at [http://www.njleg.state.nj.us/2010/Bills/A0500/243\\_I1.PDF](http://www.njleg.state.nj.us/2010/Bills/A0500/243_I1.PDF) [hereinafter Assemb. 243].

<sup>14</sup> Assemb. 243. The “conscientious exemption” in Vandervalk’s bill is actually a type of exemption commonly referred to as a “philosophical exemption.” Such exemptions, available in a growing minority of states, permit parents to notify a school or public health authority of their decision to opt-out of mandatory vaccination programs. See *infra* Part III.A.2.

<sup>15</sup> N.J. Dep’t of Health & Senior Servs., Conscientious Exemption to Mandatory Immunizations (unpublished statement) (on file with author). The entire statement may be read in excerpts online. Paul G. King, *A Draft Response To: “The Position of the New Jersey Department of Health and Senior Services (NJ DHHS) on: The Pending New Jersey Conscientious Exemption Legislation”*, NATURAL SOLUTIONS FOUND. (Nov. 18, 2010, 12:51 AM), available at <http://www.healthfreedomusa.org/?p=1363> (listing each sentence of DHSS’s statement in bold-type font, followed by Dr. King’s commentary).

<sup>16</sup> See *infra* Part III.D.

religious exemptions, so any parent brazen enough to file an insincere religious exemption can completely and permanently opt out of all vaccinations.<sup>17</sup> Third, by ignoring distressed parents' complaints, DHSS is inflaming the backlash against vaccination which threatens to undermine the legitimacy of the entire immunization program.<sup>18</sup> Rather than engage in dialogue with parents who may have been influenced by misinformation about the risks of adverse reactions, or who distrust the government or pharmaceutical companies that produce vaccines, DHSS's approach coerces fretful or suspicious parents, or alternatively, encourages savvy parents to use the religious exemption to permanently opt out of the entire immunization program.

This Comment proposes that New Jersey adopt a modified version of the Conscientious Exemption Bill. Specifically, this Comment proposes that New Jersey (1) abolish the automatic religious exemption, (2) grant non-medical exemptions to those parents who go through an administratively burdensome procedure, similar to the one outlined in the Conscientious Exemption Bill, and (3) require annual renewal of non-medical exemptions. Abolishing the religious exemption will eliminate a policy that encourages corrupt and perverse behavior. In addition, an administratively burdensome exemption procedure will permit parents with strong beliefs against vaccination to have the ultimate autonomy over their children's health while maintaining high immunization levels. The annual renewal requirement will force fearful parents into an ongoing dialogue with the medical community about the safety and appropriateness of vaccinating their children. This dialogue, in turn, will help prevent the unchecked growth of fear, resentment, and suspicion that ran rampant at the 2008 New Jersey flu vaccine rally.<sup>19</sup>

Part II of this Comment surveys the development and goals of mandatory school immunization programs. Part III discusses exemptions from mandatory vaccination requirements, focusing on the criticism of religious and philosophical exemptions. Part IV discusses the contemporary backlash against vaccination. Part V discusses a legal framework for balancing the protection of public health with the preservation of parental autonomy.<sup>20</sup> Finally, Part VI criticizes New Jersey's flawed policy and recommends that New Jersey

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<sup>17</sup> See *infra* Part VI.A.1.

<sup>18</sup> See *infra* Part IV.

<sup>19</sup> See Ochs, *supra* note 1.

<sup>20</sup> This framework led to legislation that redesigned Arkansas's exemption policy in the early part of the last decade. See *infra* Part V.

adopt a new non-medical exemption policy similar to the one adopted in Arkansas several years ago.

## II. VACCINATION LAWS

Vaccination policy debates have been part of American society for most of its history.<sup>21</sup> In the 1960s and 1970s, states began enacting mandatory school vaccination laws that required multiple vaccinations because public health officials realized that these mandatory policies overcame some of the economic and social barriers that prevented purely voluntary immunization programs from achieving sufficiently high levels of vaccination coverage.<sup>22</sup> Since states initially enacted mandatory school vaccinations, the number of required vaccines has increased.<sup>23</sup> While few would dispute that these mandates have the potential to eliminate infectious disease,<sup>24</sup> an increasingly burdensome mandatory vaccination schedule endangers individual liberties.<sup>25</sup> Without some legal flexibility to mandatory vaccination laws, the benefits of vaccination come only at a high cost to personal liberty.<sup>26</sup>

### A. *Historical Development of Mandatory School Vaccination Laws*

In the mid-1700s, Edward Jenner invented a vaccine against smallpox, and while most Americans accepted the idea and practice of vaccination,<sup>27</sup> consistent outbreaks galvanized public health

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<sup>21</sup> James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 873 (2001).

<sup>22</sup> Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?*, 37 U. MICH. J.L. REFORM 353, 382–83 (2004).

<sup>23</sup> See, e.g., KEITH COLGROVE, *STATE OF IMMUNITY: THE POLITICS OF VACCINATION IN TWENTIETH-CENTURY AMERICA* 227 (2006) (detailing the growing number of vaccines since 1990).

<sup>24</sup> See, e.g., JACOB HELLER, *THE VACCINE NARRATIVE* 17 (2008).

<sup>25</sup> See generally Chris Feudtner & Edgar K. Marcuse, *Ethics and Immunization Policy: Promoting Dialogue to Sustain Consensus*, 107 PEDIATRICS 1158 (2001) (considering how increasingly demanding vaccine requirements burden individual liberties); Daniel A. Salmon et al., *Compulsory Vaccination and Conscientious or Philosophical Exemptions: Past, Present, and Future*, 367 LANCET 436 (2006) (advocating that policymakers consider public sentiment towards compulsory vaccination when designing an immunization program).

<sup>26</sup> See Calandrillo, *supra* note 22, at 383 (“[I]n recent years, legislatures have expanded allowable exemptions to immunization laws in an effort to balance public safety with individual rights and liberties.”).

<sup>27</sup> Hodge & Gostin, *supra* note 21, at 844.

officials to recommend mandatory vaccination laws.<sup>28</sup> In 1809, Massachusetts became the first state to enact a mandatory vaccination law.<sup>29</sup> In 1827, Boston became the first jurisdiction to mandate the smallpox vaccination as a prerequisite for school attendance.<sup>30</sup> Over the course of the mid-nineteenth century, many state legislatures followed suit.<sup>31</sup> Although smallpox was both highly communicable and deadly, some state courts and legislatures, recognizing the heavy burden of coercion inherent in mandatory vaccination, issued rulings or enacted statutes that permitted compulsory vaccination only during outbreaks.<sup>32</sup>

During the mid-twentieth century, “a voluntaristic ethos prevailed with respect to vaccination.”<sup>33</sup> Public health officials preferred public education and persuasion programs to more coercive measures.<sup>34</sup> Vaccination campaigns that relied on persuasion and health education, rather than mandates, resulted in greater immunization coverage and a significant reduction of diseases such as smallpox, diphtheria, and polio.<sup>35</sup> The success derived from popular trust in science, government funding for the vaccination campaigns, and popular dread of the diseases that vaccines prevented.<sup>36</sup>

The measles vaccine catalyzed the creation of modern mandatory school vaccination laws.<sup>37</sup> After the licensing of the measles vaccine in 1963, the federal government mounted a major effort to make measles the second vaccine-eradicated disease,<sup>38</sup>

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<sup>28</sup> See generally *id.* at 831–49 (discussing public health officials calling for mandatory vaccination laws as a means of preventing outbreaks during the nineteenth century).

<sup>29</sup> Alan R. Hinman et al., *Childhood Immunization: Laws That Work*, 30 J.L. MED. & ETHICS 122, 122 (2002).

<sup>30</sup> Hodge & Gostin, *supra* note 21, at 850.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 853; see also COLGROVE, *supra* note 23, at 10 (Laws requiring smallpox vaccination as a condition for school attendance “provoked numerous legal challenges and legislative battles, especially in the second half of the nineteenth century, when many states repealed or modified their laws in response to activist pressure.”).

<sup>33</sup> COLGROVE, *supra* note 23, at 174.

<sup>34</sup> *Id.* at 93–97.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 93–100.

<sup>37</sup> Calandrillo, *supra* note 22, at 382.

<sup>38</sup> Smallpox was the first and only disease that vaccination has eradicated. Walter A. Orenstein et al., *Immunizations in the United States*, in VACCINES 1357, 1357 (Stanley A. Plotkin & Walter A. Orenstein, eds., 4th ed. 2004).

smallpox having been eliminated from the United States in 1949.<sup>39</sup> But measles did not disappear.<sup>40</sup> Studies revealed that states requiring measles vaccination as a condition for school attendance had rates of infection forty to fifty-one percent lower than states without such requirements.<sup>41</sup> This discovery drove all states to make proof of vaccination against measles, as well as polio, diphtheria, and other diseases, required for school attendance.<sup>42</sup> By 1981, every state had enacted a mandatory school vaccination requirement, and ninety-five percent of children entering school had been immunized against diphtheria, tetanus, pertussis, poliomyelitis, measles, mumps, and rubella.<sup>43</sup>

*B. Contemporary Vaccine Recommendations and Requirements*

All states currently enforce laws requiring proof of vaccination for school admission.<sup>44</sup> No matter how states make their ultimate determinations about specific required vaccinations, the recommended guidelines of the Advisory Committee on Immunization Practices (“ACIP”) are very influential.<sup>45</sup> The CDC, the parent organization of the ACIP, adopts and publishes the ACIP’s recommendations each year.<sup>46</sup> In 2010, the ACIP recommended that children receive the following vaccines by eighteen months: three doses of hepatitis B vaccine; two doses of rotavirus vaccine; four doses of diphtheria, tetanus, and acellular pertussis vaccine (DTaP); four doses of *Haemophilus influenzae* type b conjugate vaccine (Hib); four doses of pneumococcal vaccine; three doses of inactivated polio vaccine; an annual dose of influenza vaccine, beginning at age six months; one dose of measles, mumps, and rubella vaccine (MMR); one dose of varicella vaccine; and one dose of hepatitis A vaccine.<sup>47</sup>

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<sup>39</sup> *Smallpox: 30th Anniversary of Global Eradication*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/Features/SmallpoxEradication> (last updated Oct. 1, 2007).

<sup>40</sup> COLGROVE, *supra* note 23, at 166.

<sup>41</sup> Calandrillo, *supra* note 22, at 382.

<sup>42</sup> *Id.*

<sup>43</sup> Hinman et al., *supra* note 29, at 123–24.

<sup>44</sup> Calandrillo, *supra* note 22, at 358.

<sup>45</sup> See Kathryn M. Edwards, *State Mandates and Childhood Immunization*, 284 J. AM. MED. ASS’N 3171, 3172 (2000).

<sup>46</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, RECOMMENDED IMMUNIZATION SCHEDULES FOR PERSONS AGED 0 THROUGH 6 YEARS (2010), *available at* [http://www.cdc.gov/vaccines/recs/schedules/downloads/child/2010/10\\_0-6yrs-schedule-pr.pdf](http://www.cdc.gov/vaccines/recs/schedules/downloads/child/2010/10_0-6yrs-schedule-pr.pdf).

<sup>47</sup> *Id.*

The 2010 guidelines also recommend the following additional dosages by age six: one additional dose each of DTaP, inactivated poliovirus, MMR, and varicella, and for certain high-risk groups, an additional pneumococcal and hepatitis A vaccine and a meningococcal vaccine.<sup>48</sup>

New Jersey follows the ACIP recommendations in most respects.<sup>49</sup> New Jersey does not require rotavirus vaccine, though no other states do either.<sup>50</sup> In addition, New Jersey does not require hepatitis A vaccine, but neither do most states.<sup>51</sup> While New Jersey requires all three recommended doses of hepatitis B by the time the child enters kindergarten, New Jersey does not require hepatitis B for children entering a state-approved day care facility or preschool, and in that sense, at least, New Jersey is less demanding than many states.<sup>52</sup> New Jersey is also one of a large minority of states to require pneumococcal vaccine for day care or preschool.<sup>53</sup> In addition, New Jersey was the first state to make the CDC's recommendation of an annual influenza vaccine beginning at six months of age a requirement for child care.<sup>54</sup>

The number of required vaccines has grown significantly over the years.<sup>55</sup> Many parents today may have been required to receive only a single dose of a combined diphtheria-tetanus-pertussis vaccine, a single dose of MMR, and a single dose of polio.<sup>56</sup> Today, the government's "Healthy People" campaign has the goal of assuring that children receive fifteen shots against twelve diseases before age three.<sup>57</sup> For parents who put their children into day care in New

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<sup>48</sup> *Id.*

<sup>49</sup> See CTRS. FOR DISEASE CONTROL & PREVENTION, CHILDCARE AND SCHOOL VACCINATION REQUIREMENTS 2007-2008 3 (2008), available at <http://www2a.cdc.gov/nip/schoolsurv/combinedlaws2007.pdf>.

<sup>50</sup> Compare *id.* with N.J. ADMIN. CODE § 8:57 (2010).

<sup>51</sup> See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 49, at 3.

<sup>52</sup> N.J. ADMIN. CODE § 8:57-4.16 (2010). Compare *id.*, with CDC, *supra* note 49, at 3.

<sup>53</sup> N.J. ADMIN. CODE § 8:57-4.18 (2010); IMMUNIZATION ACTION COAL., PNEUMOCOCCAL CONJUGATE VACCINE MANDATES FOR CHILDREN IN DAY CARE, OCTOBER 2010, available at <http://www.immunize.org/pdfs/pcv7.pdf>.

<sup>54</sup> Henry, *supra* note 7.

<sup>55</sup> COLGROVE, *supra* note 23 (detailing the addition of more recommended vaccines since 1990).

<sup>56</sup> See Evelyn Pringle, *Vaccination Profiteers Gang Up on Hannah Bruesewitz In Supreme Court*, COUNTERCURRENTS.ORG (Nov. 4, 2010), <http://www.countercurrents.org/pringle041110.htm> ("Before 1986, children's vaccines included diphtheria, tetanus, pertussis, measles, mumps, rubella and inactivated poliovirus.")

<sup>57</sup> A project of the U.S. Department of Health and Human Services, "Healthy People 2010" is "a set of health objectives for the Nation to achieve over the first



Jersey, the 2008 vaccination mandate ordered the administration of another seven injections (four influenza vaccines and three pneumococcal conjugate vaccines) before kindergarten.<sup>58</sup>

Tied to the growing number of required vaccines is mounting concern about the appropriateness of requiring these vaccines for all children. Many parents have expressed genuine, though scientifically unfounded, concerns that injecting their children with so many vaccines might have negative health consequences.<sup>59</sup> Furthermore, not all the vaccines in the increasingly crowded vaccine schedule are as important as others. Certain vaccines, like Hib and pertussis, are very important for all children who can medically tolerate them,

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decade of the new century.” U.S. Dep’t of Health & Human Servs., *What is Healthy People?*, HEALTHYPEOPLE.GOV, <http://www.healthypeople.gov/About/whatis.htm> (last visited Oct. 23, 2010). “*Healthy People 2010* established vaccination coverage targets [for children aged 19–35 months] of 90% for individual vaccinations in the 4:3:1:3:3:1 vaccine series and 80% for the series.” N.A. Molinari et al., *National, State, and Local Area Vaccination Coverage Among Children Aged 19–35 Months—United States, 2008*, 303 J. AM. MED. ASS’N 128, 129 (2010). The “4:3:1:3:3:1 series” means at least four doses of DTaP, three doses of Hib, one dose of MMR, three doses of hepatitis B, three doses of polio, and one dose of varicella. *Objective 14-22, Achieve and Maintain Effective Vaccination Coverage Levels for Universally Recommended Vaccines Among Young Children*, HEALTHYPEOPLE.GOV, <http://www.healthypeople.gov/document/html/objectives/14-22.htm> (last visited Oct. 23, 2010). On December 2, 2010, the U.S. Department of Health and Human Services announced “Healthy People 2020,” an updated set of public health objectives. Press Release, U.S. Dep’t of Health & Human Servs., HHS Announces the Nation’s New Health Promotion and Disease Prevention Agenda (Dec. 2, 2010) available at <http://www.healthypeople.gov/2020/about/DefaultPressRelease.pdf>. The Healthy People 2020 immunization objectives are available online at <http://www.healthypeople.gov/2020/topics/objectives2020/objectiveslist.aspx?topicid=23>.

<sup>58</sup> N.J. ADMIN. CODE §§ 8:57-4.18 to -4.19 (2010). This calculation assumes the child gets the first annual flu shot at age six months, and then another before age two, another before age three, another before age four, and a final one before age five.

<sup>59</sup> Paul A. Offit & Charles J. Hackett, *Multiple Vaccines and the Immune System*, in VACCINES 1583, 1583, 1587 (Stanley A. Plotkin & Walter A. Orenstein eds., 4th ed. 2004) (stating “[s]pecific concerns include whether vaccines weaken, overwhelm, or in some way alter the normal balance of the immune system, paving the way for chronic diseases” and concluding that “[t]he lack of plausible biologic mechanisms is matched by an absence of clear clinical data linking vaccines to autoimmune disease such as type 1 diabetes or multiple sclerosis or to allergic diseases such as asthma”); see also Paul A. Offit et al., *Addressing Parents’ Concerns: Do Multiple Vaccines Overwhelm or Weaken the Infant’s Immune System?*, 109 PEDIATRICS 124, 127 (2002) (“Current studies do not support the hypothesis that multiple vaccines overwhelm, weaken, or ‘use up’ the immune system.”);

*Frequently Asked Questions About Multiple Vaccinations and the Immune System*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/vaccinesafety/Vaccines/multiplevaccines.html> (last updated March 24, 2010) (“No evidence suggests that the recommended childhood vaccines can ‘overload’ the immune system.”).

while other vaccines, like varicella and hepatitis B, are less important for most children.<sup>60</sup>

C. *Goals of Mandatory School Vaccination Laws: What Are They and How Are They Achieved?*

Mandatory school vaccination laws have the primary health goal of reducing the prevalence of disease.<sup>61</sup> Success depends on the maintenance of very high levels of vaccination coverage.<sup>62</sup> Mandatory school vaccination laws achieve high rates of immunization by overcoming certain barriers to immunization, primarily apathy and poverty.<sup>63</sup> Enforcement of the laws has also played a key role in achieving high levels of immunization.<sup>64</sup> Extending vaccine mandates to child-care facilities and preschools and government monitoring of vaccination rates have also helped reduce outbreaks of disease.<sup>65</sup> Finally, and most importantly, the mandates work because the population generally accepts vaccination.<sup>66</sup> But health outcomes are not the only goals that need to be considered in the formulation of a vaccine policy.<sup>67</sup> Immunization policies also have ethical goals, such as preserving parental autonomy and ensuring that the benefits and burdens of vaccination are equitably distributed.<sup>68</sup>

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<sup>60</sup> Lawrence D. Rosen, *Vaccine Schedule: This Doctor Supports a Flexible Schedule*, U.S. NEWS & WORLD REP., Jan. 30, 2009, available at <http://health.usnews.com/health-news/family-health/articles/2009/01/30/vaccine-schedule-this-doctor-supports-a-flexible-schedule.html> (“[W]e’re starting to see that all vaccines are not created equally. Preventing predominantly deadly diseases like HiB, pneumococcal meningitis, and pertussis must take priority over requiring chicken pox and hepatitis B vaccines for all children at young ages.”).

<sup>61</sup> Salmon et al., *supra* note 25, at 439.

<sup>62</sup> See *infra* Part I.C.1.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See Hinman et al., *supra* note 29, at 122 (“School laws are particularly effective for several reasons: (1) school laws are generally accepted among communities, (2) immunization of children becomes a priority, (3) physicians support school laws, and (4) school laws harness extra resources for immunization.”).

<sup>67</sup> Feudtner & Marcuse, *supra* note 25, at 1158 (criticizing contemporary public health decisions that ignore “ethical concerns, such as protecting individual rights or providing an equitable distribution of health care benefits”).

<sup>68</sup> *Id.* at 1159.

1. Health Goals: Preserving Herd Immunity by  
Overcoming Barriers to Vaccination

States implemented mandatory school vaccination because it keeps a higher percentage of the population immune from infectious diseases.<sup>69</sup> Higher vaccination rates reduce the overall number of infections, which saves thousands of lives and millions of dollars every year.<sup>70</sup>

The prevention of outbreaks requires the maintenance of herd immunity.<sup>71</sup> Herd immunity is the phenomenon of community protection against a disease that occurs when a high enough proportion of the population receives a vaccination.<sup>72</sup> The number of people that must be vaccinated in order to achieve herd immunity depends upon the infectiousness of the disease and the density of the community's population.<sup>73</sup> Typically, herd immunity requires vaccination rates of eighty to ninety-five percent.<sup>74</sup> Herd immunity makes it possible to eliminate and even eradicate disease even when not everyone receives an immunization.<sup>75</sup> Nevertheless, public health officials sensibly strive for vaccination rates as close to one hundred percent as possible.<sup>76</sup>

Mandatory vaccination laws, when enforced,<sup>77</sup> preserve herd immunity because they help society overcome some of the barriers that prevent very high numbers of children from receiving

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<sup>69</sup> See generally, Paul Fine, *Community Immunity*, in VACCINES 1443 (Stanley Plotkin & Walter A. Orenstein eds., 4th ed. 2004).

<sup>70</sup> Calandrillo, *supra* note 22, at 380–81 (enumerating some of the cost savings in terms of dollars, lives, and suffering that has resulted from vaccination).

<sup>71</sup> *Id.*

<sup>72</sup> Fine, *supra* note 69, at 1443.

<sup>73</sup> Abi Berger, *How Does Herd Immunity Work?*, 319 BRIT. MED. J. 1466, 1466 (1999), available at [http://findarticles.com/p/articles/mi\\_m0999/is\\_7223\\_319/ai\\_58410590](http://findarticles.com/p/articles/mi_m0999/is_7223_319/ai_58410590).

<sup>74</sup> Paul E. M. Fine, *Herd Immunity: History, Theory, Practice*, 15 EPIDEMIOLOGIC REVS. 265, 268 tbl.I.

<sup>75</sup> *Id.*

<sup>76</sup> Note, *Towards a Twenty-First Century* Jacobson v. Massachusetts, 121 HARV. L. REV. 1820, 1822 (2008).

<sup>77</sup> In the 1970s and early 1980s, many schools continued to experience outbreaks, in spite of the new school immunization laws, because schools did not enforce the laws. Alan R. Hinman, *What Will It Take to Fully Protect All American Children with Vaccines?*, 145 AM. J. DISEASES CHILD. 559, 560 (1991). Once schools started to exclude students who did not show proof of immunization, compliance rates quickly approached one hundred percent. *Id.*

vaccinations.<sup>78</sup> Two of the principle barriers to very high immunization levels are apathy and poverty. Experts often state that vaccination is “a victim of its own success” because as vaccines eliminate a disease, parents tend to forget the importance of vaccination.<sup>79</sup> When the threat of a disease is great, parents are more inclined to vaccinate their children willingly, but once the disease is under control, parents tend to become apathetic about their children’s vaccinations.<sup>80</sup> Similarly, parents sometimes have an apathetic attitude toward diseases that they do not view as a significant threat. For example, the measles vaccine aroused much less public enthusiasm in the 1960s than the polio vaccine had in the 1950s because many people viewed measles as a rite of passage rather than a serious health risk.<sup>81</sup> Mandatory laws counteract apathy by making immunization a priority.<sup>82</sup> They prevent parents from forgetting to vaccinate their children when the threat of disease is not apparent.<sup>83</sup> Additionally, the laws put pressure on governments to provide the resources to ensure that all children receive vaccines.<sup>84</sup>

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<sup>78</sup> Even as states passed mandatory vaccination laws in the 1960s and 1970s, a substantial numbers of measles cases still occurred in those states that passed the mandatory laws. Walter A. Orenstein & Alan R. Hinman, *The Immunization System in the United States—The Role of School Immunization Laws*, 17 VACCINE S19, S20 (1999). Once schools began excluding students who did not have proof of vaccination, compliance soon became almost universal, and the incidence of measles dropped precipitously. *See id.* at S21–22.

<sup>79</sup> *See, e.g.*, Arthur Allen, *Injection Rejection*, NEW REPUBLIC, Mar. 23, 1998, at 24.

<sup>80</sup> *See* COLGROVE, *supra* note 23, at 129 (citing Melvin A. Glasser, *A Study of the Public’s Acceptance of the Salk Vaccine Program*, 48 AM J. PUB. HEALTH 141, 141–46 (1958)) (noting two factors that discouraged people from seeking out the polio vaccine: (1) a belief that the disease had been conquered and (2) a lack of definite positive influences leading people to seek out the vaccines).

<sup>81</sup> Parents were so terrified of polio during the 1950s, that thousands volunteered their children as test subjects for the Salk polio vaccine trials. ARTHUR ALLEN, VACCINE 161 (2001). By contrast, “[m]easles was a virtually universal experience for children” and had an “unthreatening image.” COLGROVE, *supra* note 23, at 150, 151. Arthur Langmuir, an architect of the national campaign against measles in the 1960s stated, “There was an amazing apathy on the part of both citizens and health authorities [regarding the measles vaccine].” *Id.* at 170.

<sup>82</sup> Orenstein & Hinman, *supra* note 78, at S23.

<sup>83</sup> COLGROVE, *supra* note 23, at 177 (“[S]ome additional stimulus is often needed to provoke action on the part of a basically interested person who has many other concerns competing for attention.” (quoting Alan Hinman, a vocal advocate for the creation of mandatory school vaccination laws)).

<sup>84</sup> *See* Orenstein & Hinman, *supra* note 78, at S23 (noting that school vaccination laws induce local government to provide resources to ensure compliance); Orenstein et al., *supra* note 38, at 1364 (explaining how state review of the shortcomings of immunization programs induced the federal government to provide more grant money to ensure success).

Poverty's tendency to limit children's access to vaccines became notable shortly after the introduction of the polio and measles vaccines.<sup>85</sup> When polio infection rates started to increase in 1958 and 1959, after the exhaustion of a federally funded national polio campaign, an epidemiological pattern emerged: polio tended to strike impoverished communities.<sup>86</sup> After the CDC's measles vaccine campaign of the mid-1960s brought the number of cases down to an all-time low of 22,000 in 1968, the number more than tripled to about 75,000 by 1971.<sup>87</sup> The new measles epidemic was particularly severe in poor urban and rural areas.<sup>88</sup>

Today, school vaccination laws, in combination with government funding, provide a "safety net" against poverty's tendency to limit access to vaccines.<sup>89</sup> Parents who cannot afford vaccinations can get them for free.<sup>90</sup> Federal funding largely supports the cost of public immunization.<sup>91</sup> Even with the "safety net," however, poverty continues to be a barrier to immunization, though not a serious threat to herd immunity.<sup>92</sup> While the vast majority of poor children receive all the vaccinations necessary to meet the "Healthy People" objectives, poor children are much more likely to be under-vaccinated.<sup>93</sup> Experts have attributed this disparity to systematic failures in the public health delivery system, such as inconvenient

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<sup>85</sup> COLGROVE, *supra* note 23, at 131–39, 149–62.

<sup>86</sup> *Id.* at 131–34.

<sup>87</sup> *Id.* at 166–67.

<sup>88</sup> *Id.* at 167.

<sup>89</sup> Orenstein & Hinman, *supra* note 78, at S23; *see also* Orenstein et al., *supra* note 38, at 1360–65 (describing the symbiosis between state vaccination laws and federal funding towards improved childhood vaccine coverage from the 1970s through the present).

<sup>90</sup> *See* Gary L. Freed et al., *Childhood Immunization Programs: An Analysis of Policy Issues*, 71 MILBANK Q. 65, 86 (1993); Orenstein et al., *supra* note 38, at 1365 (“[C]hildren . . . can receive free vaccines through . . . [a federally funded] program.”).

<sup>91</sup> Orenstein et al., *supra* note 38, at 1365 (“[A]pproximately 56% of vaccines routinely recommended for children are purchased with public funds through federal contracts negotiated by the CDC with vaccine manufacturers.”).

<sup>92</sup> N.A. Molinari et al., *supra* note 57, at 129 (“A significant gap in coverage persists between children who live in poverty and those who do not.”).

<sup>93</sup> *Id.* at 128–29 (noting that while over ninety percent of infants get most of the recommended vaccines, poor children are still more likely to be under-vaccinated); *see also* Philip J. Smith et al., *Children Who Have Received No Vaccinations*, 114 PEDIATRICS 187, 189 (2003) (reporting that children from poor families were more likely to be not up to date (“NUTD”) on at least one vaccine).

clinic hours and requiring families to schedule more clinic visits than necessary.<sup>94</sup>

Reaching infants and toddlers has historically been one of the most vexing problems in accomplishing universal vaccine coverage.<sup>95</sup> While states can ensure all children are vaccinated before entering kindergarten by enforcing mandatory school laws, ensuring preschool-aged children receive the recommended vaccinations is more difficult.<sup>96</sup> Delivering vaccination to very young children became a priority because outbreaks of measles since the 1960s have tended to affect very young children more than older school-aged children.<sup>97</sup> Many states require vaccination as a prerequisite for entering a state-approved day care center or preschool.<sup>98</sup> Mandatory vaccination requirements for Head Start programs have been particularly helpful in ensuring that poor children get vaccinated.<sup>99</sup> The CDC monitors the vaccination rate of young children through the National Immunization Survey, which most recently reports that more than ninety percent of children under thirty-five months of age were up-to-date on each vaccine listed in the “Healthy People” objectives, except for the fourth dose of DTaP.<sup>100</sup> Experts attribute

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<sup>94</sup> See Orenstein et al., *supra* note 38, at 1370–73, for a comprehensive report on barriers to vaccination associated with failures in the public health delivery system.

<sup>95</sup> See generally Felicity T. Cutts et al., *Causes of Low Preschool Immunization Coverage in the United States*, 13 ANN. REV. PUB. HEALTH 385 (1992). In 1978, the government set the goal of “completing the basic immunization series of at least 90% of children by age two.” *Id.* at 385. The measles outbreak of 1989–91 brought attention to the continuing problem of low immunization rates in young children. *Id.* Bill Clinton’s Childhood Immunization Initiative of 1993 finally helped bring coverage of preschool children to ninety percent. Orenstein et al., *supra* note 38, at 1364.

<sup>96</sup> Cutts et al., *supra* note 95, at 385 (“There is no mechanism similar to school immunization laws to achieve universal immunization of preschoolers. State day care immunization laws only affect licensed centers, which care for an estimated 20% of children under age 6 who have working parents.”); Orenstein & Hinman, *supra* note 78, at S24 (“The only setting in which enforcement can occur for preschool children in the United States is for those enrolled in licensed day care. Thus while school laws are a safety net, they cannot assure that children are vaccinated in the first 2 years of life.”).

<sup>97</sup> Nat’l Vaccine Advisory Comm., *The Measles Epidemic: The Problems, Barriers, and Recommendations*, 266 J. AM. MED. ASS’N. 1547, 1547 (1991), available at <http://www.hhs.gov/nvpo/nvac/The%20Measles%20Epidemic%20-%20JAMA%20-%20091891.pdf>.

<sup>98</sup> Orenstein & Hinman, *supra* note 78, at S19–20.

<sup>99</sup> Freed et al., *supra* note 90, at 86 (“Upon enrollment in school or licensed day care centers, most obstacles to vaccination are neutralized; as a result . . . 94 to 97 percent of children enrolled in Head Start or state-licensed day care centers become fully immunized.”).

<sup>100</sup> Ctrs. for Disease Control & Prevention, *National, State, and Local Area Vaccination Coverage Among Children Aged 19–35 Months—United States, 2008*, 58

the achievement of higher rates of vaccination among young children to systematic changes in the health care system—particularly in the delivery of vaccines in the public sector.<sup>101</sup>

Perhaps the most important component of mandatory vaccination laws' success has been public confidence in vaccination.<sup>102</sup> Anti-vaccination attitudes have never been a significant barrier to immunization.<sup>103</sup> The mandatory laws serve primarily to enhance the priority of immunization.<sup>104</sup> Few people in the United States are actually vaccinated against their will.<sup>105</sup> Most parents trust the advice of their family doctors, and most doctors support vaccination.<sup>106</sup> When legislators passed mandatory school vaccination laws in the 1960s and 1970s, popular dissent was minimal because, by this time, vaccination had achieved the status of an uncontroversial medical orthodoxy.<sup>107</sup> Advocates of modern vaccination mandates did not view them as coercive but rather as tools to remind parents to take precautions that they already agreed were worthwhile.<sup>108</sup>

## 2. Ethical Goals: Balancing Public Health with Personal Liberty

While reducing disease rates is the most important goal of a mandatory school vaccination policy, this goal can come at a

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MORBIDITY & MORTALITY WKLY. REP. 921, 921 (2009), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5833a3.htm#tab1>.

<sup>101</sup> See Orenstein et al., *supra* note 38, at 1366–67.

<sup>102</sup> Orenstein & Hinman, *supra* note 78, at S24 (stating that one of the keys to high immunization coverage is “parent and physician acceptance”); see also Feudtner & Marcuse, *supra* note 25, at 1158 (“[B]road cultural consensus . . . enabled the United States’ universal childhood immunization programs of the past 50 years . . .”); Salmon et al., *supra* note 25, at 440 (“For compulsory vaccination to work as planned, the great majority of the population must be willing to be vaccinated.”); Daniel Salmon et al., *Public Health and the Politics of School Immunization Requirements*, 95 AM. J. PUB. HEALTH 778, 781 tbl.2 (2005) (noting that immunization programs require “broad community consensus” in order to work).

<sup>103</sup> COLGROVE, *supra* note 23, at 217; see also Orenstein et al., *supra* note 38, at 1370 (citing four studies that found no correlation between parental beliefs about vaccination and the immunization status of a child).

<sup>104</sup> Orenstein et al., *supra* note 38, at 1376; see also COLGROVE, *supra* note 23, at 177.

<sup>105</sup> Orenstein & Hinman, *supra* note 78, at S23.

<sup>106</sup> *Id.*

<sup>107</sup> COLGROVE, *supra* note 23, at 178.

<sup>108</sup> James Colgrove & Ronald Bayer, *Manifold Restraints: Liberty, Public Health, and the Legacy of Jacobson v. Massachusetts*, 95 AM. J. PUB. HEALTH 571, 573 (2005).

substantial cost to personal autonomy.<sup>109</sup> As with any public health measure, achieving the right balance between public health and personal autonomy should be an important goal in the creation of a school vaccination policy.<sup>110</sup> Many vaccination mandates are based upon cost-benefit analyses that too often do not take into account issues of liberty.<sup>111</sup> Some experts have written recently of a need to look at vaccination policies not just in terms of health outcomes, principally the control of disease and its associated costs, but also in terms of ethical outcomes, such as the parental right to choose, arguing that respect for parental autonomy confers a benefit upon society just as the control of disease does.<sup>112</sup> Furthermore, a vaccination policy that ignores the sentiments of dissenters in the population can undermine the broad public consensus which has sustained high vaccination rates.<sup>113</sup>

Non-medical vaccine exemptions are an important part of the balance of public health and personal liberty. Exemptions prevent coercion of parents who sincerely disagree with one or more aspects

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<sup>109</sup> Thomas May & Ross D. Silverman, *Free-Riding, Fairness and the Rights of Minority Groups in Exemption from Mandatory Childhood Vaccination*, 1 HUMAN VACCINES 12, 13 (2005).

<sup>110</sup> See Hinman et al., *supra* note 29, at 126 (“School immunization laws reflect the delicate balance between the rights of the individual to determine his/her own fate and the rights of society to ensure that all members of society participate in community protection.”); see also Feudtner & Marcuse, *supra* note 25, at 1163 (“Public health programs involve more than just issues of health. . . . [P]ublic health is also a morally-laden medical venture. Concerns for individual liberty and social equity permeate public health policy, and should be incorporated into mainstream analyses of health care programs.”).

<sup>111</sup> Feudtner & Marcuse, *supra* note 25, at 1158 (“Cost-effectiveness studies . . . have not formally considered ethical concerns, such as protecting individual rights.”).

<sup>112</sup> May & Silverman, *supra* note 109, at 12 (“[L]egislation [that] adversely impacts the religious rights of even a very small minority of citizens can result in the denial of a good to everyone.”). “Contemporary public health generally ‘eschews physical compulsion, . . . except as a last-ditch step.’” *Id.* at 14 (quoting Lawrence O. Gostin & M. Gregg Bloche, *The Politics of Public Health: A Response to Epstein*, 46 PERSP. BIOLOGY & MED. S162 (2003)). For a discussion of the need to balance health outcomes with ethical outcomes, see generally Feudtner & Marcuse, *supra* note 25.

<sup>113</sup> See Ross D. Silverman, *No More Kidding Around: Restricting Non-Medical Childhood Immunization Exemptions to Ensure Public Health Promotion*, 12 ANNALS HEALTH L. 277, 279 (2003) (“[T]he public health community continues to face growing skepticism toward its policies and programs. This is especially true when such policies threaten to encroach upon individual rights.”); cf. Feudtner & Marcuse, *supra* note 25, at 1163–64 (“[C]learly-stated moral considerations and how they are to be measured . . . may help to sustain the consensus required for effective public health programs.”).



of a state's immunization program.<sup>114</sup> While removing non-medical exemptions may reduce the number of exemptions in the short term, forcing vaccination on families who sincerely oppose it may create a backlash that can ultimately jeopardize school immunization laws.<sup>115</sup>

### III. EXEMPTIONS

All states provide exemptions from mandatory vaccinations. Two distinct categories of exemptions exist: medical exemptions, which are issued to children for whom vaccination is medically contraindicated, and non-medical or belief-based exemptions, which are justified on social policy.<sup>116</sup> All states furnish medical exemptions for children with rare health conditions that render vaccination unreasonably risky.<sup>117</sup> Children who are immuno-compromised, have certain forms of cancer, or who are allergic to vaccine components generally receive medical exemptions.<sup>118</sup> Forty-eight states have non-medical or belief-based exemptions.<sup>119</sup> Two types of non-medical exemptions exist: religious exemptions and philosophical exemptions. Twenty-eight states only recognize religious beliefs as the basis for a non-medical exemption. Twenty recognize other personal beliefs as a valid basis for vaccine exemptions.<sup>120</sup> Only West Virginia and Mississippi offer no belief-based exemptions.<sup>121</sup>

#### A. *Development of Non-Medical Exemptions*

##### 1. Religious Exemptions

Religious exemptions were the first belief-based exemptions. The passage of mandatory school vaccination laws during the 1960s and 1970s posed serious problems for the small minority of the population that opposed medical interventions for religious

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<sup>114</sup> See Alexis Osburn, Note, *Immunizing Against Addiction: The Argument for Incorporating Emerging Anti-Addiction Vaccines Into Existing Compulsory Immunization Statutes*, 56 CLEV. ST. L. REV. 159, 186 (2008) (describing vaccine exemptions as "safety-valves").

<sup>115</sup> Salmon et al., *supra* note 25, at 439–40.

<sup>116</sup> Salmon et al., *supra* note 102, at 778.

<sup>117</sup> Hodge & Gostin, *supra* note 21, at 833.

<sup>118</sup> Calandrillo, *supra* note 22, at 413.

<sup>119</sup> See Calandrillo, *supra* note 22, at 411–12, for a list of state religious and philosophical exemptions.

<sup>120</sup> Paul Offit, *Fatal Exemption: Relationship Between Vaccine Exemptions and Rates of Diseases*, WALL ST. J., Jan. 20, 2007, at A10 (reporting that there were 20 states with philosophical exemptions in 2007).

<sup>121</sup> Calandrillo, *supra* note 22, at 413.

reasons.<sup>122</sup> The lobbying efforts of Christian Scientists played a key part in the passage of the first religious exemption laws.<sup>123</sup> Fearing that religious exemptions could encourage parents to opt out of vaccination, some states limited the availability of religious exemptions to parents who could prove membership in a church that the state recognized as having anti-vaccination teachings.<sup>124</sup> In several states, however, courts have struck down church membership requirements for violating the First and Fourteenth Amendments.<sup>125</sup>

A less stringent but more constitutionally sound strategy that states have used to limit the availability of religious exemptions has been to require that the beliefs be “genuine,” “bona fide,” or “sincerely held.”<sup>126</sup> Some states, notably New York, authorize school officials to question both the religiousness and sincerity of parental exemption requests. In *Sherr v. Northport-East Northport Union Free*

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<sup>122</sup> See Jennifer S. Rota et al., *Processes for Obtaining Nonmedical Exemptions to State Immunization Laws*, 91 AM. J. PUB. HEALTH 645, 645 (2001) (“Waivers designated as religious exemptions originally were available so that followers of certain recognized religions whose tenets do not admit modern medical practices such as immunization have legal recourse to observe their beliefs.”); see also COLGROVE, *supra* note 23, at 180 (discussing how the first religious vaccine exemptions appeared during the 1960s and 1970s, at the same time as mandatory school vaccination requirements).

<sup>123</sup> COLGROVE, *supra* note 23, at 180.

<sup>124</sup> *Id.*; see *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 89 (E.D.N.Y. 1987) (“The restriction . . . may have been intended as a guard against . . . risking lessened effectiveness of the state’s inoculation program due to the granting of a large number of exemptions . . . .”); see also *Kleid v. Bd. of Educ.*, 406 F. Supp. 902 (W.D. Ky. 1976) (upholding a Kentucky religious exemption that required membership in “a nationally recognized and established church or religious denomination, the teachings of which are opposed to medical immunization against disease”).

<sup>125</sup> See, e.g., *McCarthy v. Boozman*, 212 F. Supp. 2d 945 (W.D. Ark. 2002); *Sherr*, 672 F. Supp. at 92 n.5 (noting that because the First Amendment has been violated, the court need not address Plaintiff’s Fourteenth Amendment challenges); *Dalli v. Bd. of Educ.*, 267 N.E.2d 219 (Mass. 1971); *Davis v. State*, 451 A.2d 107, 114 n.10 (Md. 1982) (holding First Amendment was violated but did not need to address the Fourteenth Amendment argument); see also *Avard v. Dupuis*, 376 F. Supp. 479, 483 (D.N.H. 1974) (holding that a statute which gave school officials the discretion to grant or reject a petition for a religious exemption was unconstitutional because it was “vague and standardless, and, therefore, violative of the due process clause of the Fourteenth Amendment”); *Kolbeck v. Kramer*, 202 A.2d 889, 892–93 (N.J. Super. Ct. Law Div. 1964), *modified on other grounds*, 214 A.2d 408 (N.J. 1965) (holding that Rutgers University’s practice of granting religious exemptions to Christian Scientists but not others professing religious beliefs contrary to vaccination was both illegal and unconstitutional).

<sup>126</sup> Hodge & Gostin, *supra* note 21, at 860; see Salmon et al., *supra* note 102, at 779 fig.1 (illustrating that exemptions which permit the state to scrutinize the sincerity of an objector’s beliefs are more “legally secure” than exemptions which can only be obtained through membership in a group with certain characteristics).

*School District*, for example, the court held that the Sherrs' request for a religious exemption, although phrased in religious terms, was actually based on a belief in chiropractic ethics, which did not suffice as a religious belief.<sup>127</sup> Furthermore, the court also ruled that their membership in a mail-order church which opposed vaccination was not sincere.<sup>128</sup> In *Farina v. Board of Education*, the court rejected a family's petition for a religious exemption based on its Roman Catholic faith because evidence showed that the motivation for the exemption was based primarily on concerns about adverse health effects, not on the family's interpretation of Catholicism or the Bible.<sup>129</sup> In *Berg v. Glen Cove School District*, by contrast, the court held that a family's objection to vaccination was "religious" because, even though vaccination did not conflict with the tenets of their Jewish faith, their peculiar interpretation of biblical passages also affected their choices in prenatal, pediatric, and dental care.<sup>130</sup>

Rather than embroil parents and the government in litigation over the definition of "religious belief," some states offer only religious exemptions but define the term so broadly that strong personal beliefs against immunization are accepted as constituting religious exemptions.<sup>131</sup> Finally, some states, like New Jersey, cloak their religious exemptions in language that prohibits all but those few espousing sincere religious beliefs that oppose vaccination. In practice, however, these states never actually reject petitions for religious exemptions.<sup>132</sup>

## 2. Philosophical Exemptions

A minority of states have included philosophical exemptions in their school vaccination laws since at least the 1970s.<sup>133</sup> Philosophical exemptions lost some popularity during the 1990s following a

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<sup>127</sup> *Sherr*, 672 F. Supp. at 96.

<sup>128</sup> *Id.*

<sup>129</sup> 116 F. Supp. 2d 503, 513 (E.D.N.Y. 2000).

<sup>130</sup> 853 F. Supp. 651, 655 (E.D.N.Y. 1994).

<sup>131</sup> *Rota et al.*, *supra* note 122, at 647. *See, e.g., In re Exemption from Immunization Requested by Lepage*, 18 P.3d 1177, 1180 (Wyo. 2001) (holding that WYO. STAT. ANN. § 21-4-309(a) gives the state no authority to question the sincerity of a parent's request of a religious exemption).

<sup>132</sup> *See infra* Part VI.A.1. In New Hampshire, no philosophical exemption exists, but a federal court ruled that no state entity had authority to reject a parent's request for a religious exemption. *See also Avard v. Dupuis*, 376 F. Supp. 479, 483 (D.N.H. 1974) (holding that the lack of standards in the statute providing a religious exemption rendered it unconstitutionally vague).

<sup>133</sup> *See Hanzel v. Arter*, 625 F. Supp. 1259 (S.D. Ohio 1974) for a case from the mid-1970s involving the interpretation of a philosophical exemption statute.

national measles epidemic.<sup>134</sup> Between 1993 and 1998, four states dropped their philosophical exemptions, no states added one, and two states made the process for obtaining philosophical exemptions more difficult.<sup>135</sup> But in more recent years, philosophical exemptions have become more popular. In 1999, a research study found that fifteen states offered philosophical exemptions.<sup>136</sup> By 2004, a report noted twenty states with philosophical exemptions.<sup>137</sup> As of 2007, that number had not changed.<sup>138</sup> A number of philosophical exemption bills are pending in state legislatures.<sup>139</sup> Experts have linked the increasing public pressure for philosophical exemptions to the increasingly vocal dissent against vaccination.<sup>140</sup>

*B. Justifications for Non-Medical Exemptions*

While the Supreme Court has never ruled explicitly on the right to a belief-based exemption from vaccination, its case law strongly indicates that it would find no such right.<sup>141</sup> In the seminal case of *Jacobson v. Massachusetts*, the Supreme Court granted wide deference to the discretion of public health officials when it upheld a municipal ordinance that required residents to receive a smallpox vaccination or pay a fine of five dollars.<sup>142</sup> Believing that the vaccine would harm

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<sup>134</sup> See Rota et al., *supra* note 122, at 646 (noting changes in state philosophical exemptions between 1993 and 1998); Orenstein et al., *supra* note 38, at 1363 (noting a national measles epidemic between 1989 and 1991).

<sup>135</sup> Rota et al., *supra* note 122, at 646.

<sup>136</sup> *Id.* at 645.

<sup>137</sup> JOHANNA M. DONLIN, NATIONAL CONFERENCE OF STATE LEGISLATURES, IMMUNIZATIONS: A SNAPSHOT OF STATE LEGISLATURES 5 (2004) (noting twenty states with philosophical exemptions).

<sup>138</sup> Offit, *supra* note 120. Arkansas added a philosophical exemption in 2002 and Arizona added one in 2003. Salmon et al., *supra* note 25, at 440.

<sup>139</sup> Salmon et al., *supra* note 102, at 779.

<sup>140</sup> See Miriam Tucker, *Vaccine Exemption Rates are Getting a Closer Look*, FAM. PRAC. NEWS, Sept. 1, 2001 (“[T]he increasing numbers of routine childhood immunizations—and state laws mandating their use prior to school or day care entry—appear to be prompting increasing parental opposition. . . . The number of parents taking exemptions typically goes up when new vaccines are added to the routine schedule.”); see also COLGROVE, *supra* note 23, 236–40; Note, *supra* note 76, at 1826–27.

<sup>141</sup> See Salmon et al., *supra* note 102, at 778 (“There is no constitutional requirement for states to offer nonmedical exemptions.”).

<sup>142</sup> 197 U.S. 11, 38 (1905) (stating that the judiciary “should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law [because] [t]he safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect”). The Supreme Court has cited *Jacobson* in sixty-nine cases, most in support of state police

him, Jacobson argued that the ordinance violated the Due Process Clause of the Fourteenth Amendment.<sup>143</sup> The Supreme Court did not agree.<sup>144</sup> Key to the decision was the “harm principle,” that one may enjoy his liberty only to the extent that it poses a significant threat to public health.<sup>145</sup> Justice Harlan wrote,

[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.<sup>146</sup>

Relying on the harm principle in *Jacobson*, the Supreme Court in *Zucht v. King*, explicitly held that schools may exclude students for failing to comply with vaccination mandates.<sup>147</sup> In *Prince v. Massachusetts*, the Court further elaborated on religion and the harm principle, stating that an individual’s right to practice religion does not apply where the religious practice harms public health.<sup>148</sup> Many state courts have also come to similar conclusions about vaccination exemptions based on the harm principle.<sup>149</sup>

Although many courts have found that there is no right to a religious exemption, many have determined that these exemptions are an acceptable accommodation to the beliefs of the few where those beliefs do not threaten public health.<sup>150</sup> In order to assure that

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power. LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 123 (2d ed. 2008).

<sup>143</sup> *Jacobson*, 197 U.S. at 13–14 (Plaintiff in Error’s Argument).

<sup>144</sup> *Id.* at 39.

<sup>145</sup> May & Silverman, *supra* note 109, at 13.

<sup>146</sup> *Jacobson*, 197 U.S. at 26.

<sup>147</sup> 260 U.S. 174, 176–77 (1922).

<sup>148</sup> 321 U.S. 158, 166–67 (1944) (“[T]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.” (citation omitted)).

<sup>149</sup> See, e.g., *Wright v. Dewitt Sch. Dist.*, 385 S.W.2d 644, 648 (Ark. 1965) (“[The] freedom to act according to their religious beliefs is subject to a reasonable regulation for the benefit of society as a whole.”); *In re Whitmore*, 47 N.Y.S.2d 143, 145 (N.Y. Dom. Rel. Ct. 1944).

In a democracy laws are not made to meet the predilections of individuals, nor to feed mistaken views which an individual might hold, when that view is detrimental to the people as a whole. Laws are made for the protection of all, and such laws are enforced even if the law is distasteful to some individual—yes, even if the law is hateful to some individual.

*Id.*

<sup>150</sup> See *Dalli v. Bd. of Educ.*, 267 N.E.2d 219, 223 (Mass. 1971) (Religious exemptions are an “appropriate mark of deference to the sincere religious beliefs of the few which” create a minimal hazard to public health.); see also Timothy Aspinwall,

exemptions do not threaten public health, many states include “quarantine” clauses in their exemption statutes, which permit the state to exclude unvaccinated children during the threat of an outbreak.<sup>151</sup>

Religious exemptions have received greater legislative and judicial support than philosophical exemptions because of their narrowness and because of the special characteristics of religious beliefs. In *Sherr*, the court emphasized that the legislature had constructed religious exemptions narrowly to prevent de facto philosophical exemptions from undermining public health goals.<sup>152</sup> Other cases have emphasized that religious objections to vaccination deserve greater deference than moral or philosophical objections in our legal system.<sup>153</sup> Furthermore, secular authorities could not persuade those who chose not to vaccinate due to deeply held religious beliefs because the anti-vaccination sentiment of the religious extends from the dictates of an authority higher than science or government.<sup>154</sup> The truly religious would still choose not to vaccinate their children, even if shown conclusive proof of the safety and necessity of vaccinations.<sup>155</sup> That is not the case for those objecting on moral, philosophical, or political grounds. This group

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*Religious Exemptions to Childhood Immunization Statutes: Reaching for a More Optimal Balance Between Religious Freedom and Public Health*, 29 LOY. U. CHI. L.J. 109, 111 (1997) (“[L]egislative exemptions are a reasonable accommodation if the public health is not seriously threatened by them.”).

<sup>151</sup> See, e.g., ARIZ. REV. STAT. § 15-873 (LexisNexis 2010) (“Pupils who lack documentary proof of immunization shall not attend school during outbreak periods of communicable immunization-preventable diseases . . . .”); LA. REV. STAT. ANN. 17:170 (2010) (“In the event of an outbreak of a vaccine-preventable disease . . . the [school] administrators . . . are empowered . . . to exclude from attendance unimmunized students . . . .”); N.J. ADMIN. CODE § 8:57-4.4 (2010) (“School . . . may exclude children with religious exemptions . . . during a vaccine-preventable disease outbreak or threatened outbreak . . . .”).

<sup>152</sup> *Sherr v. Northport-East Northport Union Free School Dist.*, 672 F. Supp 81, 91 (E.D.N.Y. 1987) (stating that granting exemptions “on the basis of personal moral scruples or unsupported fear of vaccinations” could harm public health).

<sup>153</sup> See, e.g., *Hanzel v. Arter*, 625 F. Supp. 1259, 1265 (W.D. Ohio 1985) (“[P]hilosophical beliefs do not receive the same deference in our legal system as do religious beliefs . . . .” (citing *Yoder v. Wisconsin*, 406 U.S. 205 (1972))).

<sup>154</sup> See *Aspinwall*, *supra* note 150, at 110–11.

A common characteristic of religious values is that they are developed around or inspired by a source of ultimate authority, something to which all else refers. As a consequence, religious beliefs and priorities are often more responsive to religious teachings than to the social concerns and epidemiological data that motivate public health advocates.

*Id.*

<sup>155</sup> *Id.*

of objectors is essentially second-guessing the appropriateness of the legislature's decisions based upon their own empirical considerations.<sup>156</sup>

*C. State Approaches to Non-Medical Exemptions*

The extent to which a person should be allowed to reject vaccination based upon a belief, whether religious, scientific, political, or otherwise has been a contentious issue.<sup>157</sup> As a result of that contention, a plethora of state approaches to issuing non-medical exemptions have developed.<sup>158</sup> Although some states make distinctions between religious and philosophical exemptions, the line between the two types of exemptions can be spurious.<sup>159</sup> Therefore, studies of the procedures for obtaining non-medical exemptions often do not differentiate between religious and philosophical exemptions.<sup>160</sup>

The procedures required to obtain either type of exemption vary significantly from state to state.<sup>161</sup> Some states use very simple

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<sup>156</sup> Cf. *Yoder v. Wisconsin*, 406 U.S. 205 (1972).

A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. . . . [T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.

*Id.*; see also *Syska v. Montgomery Cnty. Bd. of Educ.*, 415 A.2d 301, 304 (Md. 1980).

<sup>157</sup> Cf. Feudtner & Marcuse, *supra* note 25, at 1164 (“What is the ideal immunization program? Certainly no single answer exists.”).

<sup>158</sup> See generally Rota et al., *supra* note 122.

<sup>159</sup> Univ. of Penn., Ctr. for Bioethics, *Vaccination Requirements and Exemptions*, VACCINEETHICS.ORG, [http://www.vaccineethics.org/issue\\_briefs/requirements.php](http://www.vaccineethics.org/issue_briefs/requirements.php) (last visited Sept. 28, 2010) (“The distinction between a philosophical (personal belief) and a religious exemption is often ambiguous.”); see Daniel A. Salmon et al., *Exemptions to School Immunization Requirements: The Role of School-Level Requirements, Policies, and Procedures*, 95 AM. J. PUB. HEALTH 436, 436 (2005) (“The distinctions between [religious and philosophical] exemptions have been controversial and some groups have attempted in recent years to broaden state religious exemptions to include philosophical exemptions.”). Because some states offering only religious exemptions accept strong personal convictions as “religious” exemptions, “the distinction between a religious exemption . . . and the philosophical or personal conviction [exemption] may be negligible in actual practice.” Rota et al., *supra* note 122, at 648. In the Rota study discussed below, seven states that only offered religious exemptions reported that “strong personal beliefs against immunization were accepted as constituting a religious exemption.” *Id.* at 647.

<sup>160</sup> See generally Rota et al., *supra* note 122 (study focusing on different state immunization requirements and their impact on nonmedical exemptions).

<sup>161</sup> *Id.*

paperwork procedures. For example, Washington only requires parents to check off a box on an immunization form and Colorado only requires parents to sign a statement requesting an exemption.<sup>162</sup> Other states have more complicated paperwork requirements, such as special forms that parents must obtain from the health department, written parent statements explaining the reason for the exemption, and signature notarization.<sup>163</sup> Some states go significantly further by requiring parent education about the dangers of not vaccinating,<sup>164</sup> and some require parents to renew the exemptions.<sup>165</sup>

*D. Criticisms of Philosophical Exemptions*

Parts of the public health community have condemned philosophical exemptions. The American Medical Association (“AMA”) opposes philosophical exemptions because they endanger the health of unvaccinated individuals, their neighbors, and the community at large.<sup>166</sup> The AMA’s objection reflects two typical criticisms of philosophical exemptions: threats to public health and fairness to people other than exempting parents.

Critics of philosophical exemptions warn that these exemptions lead to outbreaks of infectious diseases.<sup>167</sup> Outbreaks of measles and pertussis occur every few years, and epidemiological investigation often traces these outbreaks to vaccine exemptors.<sup>168</sup> For example, a 2008 measles outbreak in San Diego, which sickened

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<sup>162</sup> Calandrillo, *supra* note 22, at 357 n.11; COLO. REV. STAT § 5-4-903 (2009).

<sup>163</sup> Rota et al., *supra* note 122, at 647.

<sup>164</sup> *Id.* at 648 (“[Six] states had policies that referred parents who request exemptions to counseling with school or local health personnel.”).

<sup>165</sup> *Id.* at 646 (“[I]n 5 states, requests for religious or philosophical exemptions had to be renewed annually at each grade level.”).

<sup>166</sup> AM. MED. ASSOC., HEALTH AND ETHICS POLICIES OF THE AMA HOUSE OF DELEGATES § H-440.970, available at <http://www.ama-assn.org/ad-com/polfind/Hlth-Ethics.pdf>.

<sup>167</sup> See Hodge & Gostin, *supra* note 21, at 835 (Exemptions “may be unacceptable to public health authorities because [they] can destroy the collective immunity of a population, thus leading to outbreaks of diseases among vaccinated and unvaccinated children.”).

<sup>168</sup> Calandrillo, *supra* note 22, at 422–24; see also Kevin B. O’Reilly, *Time to Get Tough? States Increasingly Offer Ways to Opt Out of Vaccine Mandates*, AMEDNEWS.COM (Sept. 8, 2008), <http://www.ama-assn.org/amednews/2008/09/08/prsa0908.htm> (“Measles are coming back. The Centers for Disease Control and Prevention reported that measles outbreaks have reached a peak not seen since 1996. By late August, 131 cases had been confirmed in 16 states. Almost half of the cases occurred in children who had not been vaccinated because their parents claimed religious or personal exemptions to vaccine mandates.”).



eleven children, began when a seven-year-old boy with an exemption brought the disease back with him from Europe.<sup>169</sup>

Several studies have linked philosophical exemptions to increased risks of infection, both for the children who take exemptions and for others in the community. A 1999 study of exemptors in California and other states found that students with exemptions had an average thirty-five percent increased risk of contracting measles.<sup>170</sup> A 2000 study in Colorado found that children with vaccine exemptions were 22.2 times more likely to contract measles than vaccinated children and 5.9 times more likely to contract pertussis.<sup>171</sup> The presence of exemptors also increases the risks of an outbreak affecting the entire community.<sup>172</sup> The 2000 Colorado study also found that schools with pertussis outbreaks had more exemptors than schools without outbreaks.<sup>173</sup> Finally, a 2005 study found a higher incidence of pertussis in states with philosophical exemptions.<sup>174</sup>

Critics also argue that vaccine exemptions are unfair. Exemptors benefit from “herd immunity” without shouldering their share of the risk of vaccination.<sup>175</sup> Furthermore, the choice of some parents not to vaccinate their own children increases the risk of infection for children who cannot take vaccinations for medical reasons or for children who get vaccinated but do not acquire immunity.<sup>176</sup>

The tendency of exemptors to cluster in certain regions poses another set of problems.<sup>177</sup> An outbreak within a state is likely to

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<sup>169</sup> Ctrs. for Disease Control & Prevention, *Outbreak of Measles—San Diego, California, January–February 2008*, 57 MORBIDITY & MORTALITY WKLY. REP. 203 (2008), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5708a3.htm>.

<sup>170</sup> Salmon et al., *Health Consequences of Religious and Philosophical Exemptions from Immunization Laws: Individual and Societal Risk of Measles*, 218 J. AM. MED. ASS’N 47, 47–49 (1999).

<sup>171</sup> Daniel R. Feiken et al., *Individual and Community Risks of Measles and Pertussis Associated with Personal Exemptions to Immunization*, 284 J. AM. MED. ASS’N 3145, 3145 (2000).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Saad B. Omer et al., *Nonmedical Exemptions to School Immunization Requirements: Secular Trends and Association of State Policies with Pertussis Incidence*, 296 J. AM. MED. ASS’N 1757, 1757 (2006).

<sup>175</sup> May & Silverman, *supra* note 109, at 13.

<sup>176</sup> *Id.*

<sup>177</sup> See Salmon et al., *supra* note 170, at 52 (“Exemptors tend to cluster within local and state boundaries, thereby increasing the effect that they may have on the rest of the population in comparison with a dispersed pattern.”).

occur in a region with a high number of exemptors. For example, a 1996 outbreak in Utah involved 118 cases of measles, 107 of which were in Washington County, a region with an exemption rate of 3.7%—more than seven times the national average.<sup>178</sup> Studies have shown that where exemptors cluster in high concentrations, the risk of nonexempt children becoming infected also increases substantially.<sup>179</sup> The outbreaks are likely to start among exemptors and then spread into the non-exempt population.<sup>180</sup>

Critics also argue that philosophical exemptions incentivize opting out of vaccination. A 2005 study found that states offering philosophical exemptions had higher “non-medical exemption rates than states that offered only religious exemptions.”<sup>181</sup> A survey of state exemption rates revealed that states with philosophical exemptions also tend to have higher overall exemption rates.<sup>182</sup> A CDC survey for the 2009–10 school year indicated that non-medical exemption rates for kindergarteners in public schools in states with philosophical exemptions range from 0.4% in Louisiana to 7.8% in Minnesota.<sup>183</sup> States with only religious exemptions have non-medical exemption rates ranging from 0.1% in the District of Columbia to 4.7% in Oregon.<sup>184</sup>

While critics of philosophical exemptions express valid concerns, some anti-exemption literature may over-dramatize the risks that exemptions pose to public health.<sup>185</sup> The National Vaccination Advisory Committee has stated that philosophical exemptions do not pose a serious threat to public health.<sup>186</sup> For example, since the measles outbreak of 1989–91, there has not been another major

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<sup>178</sup> *Id.* at 51.

<sup>179</sup> *Id.* at 49–50 (“If the number of exemptors doubled, the incidence of measles infection in non-exempt individuals would increase by 5.5%, 18.6%, and 30.8% respectively for intergroup mixing ratios of 20%, 40% , and 60%.”).

<sup>180</sup> *Id.*

<sup>181</sup> Omer et al., *supra* note 197, at 1757.

<sup>182</sup> See CTRS. FOR DISEASE CONTROL & PREVENTION, NAT’L CTR. FOR IMMUNIZATION & RESPIRATORY DISEASES, SCHOOL VACCINATION COVERAGE REPORTS, <http://www2.cdc.gov/nip/schoolsurv/report.asp> (follow “2009-10” hyperlink under “Report Menu”; then select “# of surveyed kids exempted for philosophical reasons”) (last modified July 15, 2010).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> See, e.g., Anthony Ciolli, *Mandatory School Vaccinations: The Role of Tort Law*, 81 YALE J. OF BIOLOGY & MED., 129, 129 (2008) (“The United States is on the verge of a public health crisis.”).

<sup>186</sup> May & Silverman, *supra* note 109, at 13.

outbreak of measles,<sup>187</sup> which is one of the most difficult vaccine-preventable diseases to eliminate.<sup>188</sup> In fact, the CDC declared in 2000 that the United States had “eliminated measles,” meaning that the transmission of endemic measles had been eliminated.<sup>189</sup>

Moreover, studies indicate that the *ease* of obtaining a non-medical exemption, rather than its classification as religious or philosophical, plays the paramount role in determining the overall number of exemptions.<sup>190</sup> These findings, in turn, suggest that states might be able to enact philosophical exemptions without endangering the public health in any significant way, provided that the state places substantial burdens upon parents seeking exemptions.<sup>191</sup>

A study by Jennifer Rota et al. found a correlation between the ease with which a parent could claim a non-medical exemption and the rate of exemptions.<sup>192</sup> The researchers in the Rota study collected data about each state’s procedure for obtaining non-medical exemptions and classified them into one of three categories based upon the difficulty of obtaining an exemption.<sup>193</sup> The study found that states in the group having the most complex procedures also had the lowest exemption rates (below 0.5%).<sup>194</sup> The study also found that no state in the group with the most complex exemption

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<sup>187</sup> In the outbreak of 1989–91, 55,000 Americans became ill from measles. CTRS. FOR DISEASE CONTROL & PREVENTION, MEASLES MORTALITY REDUCTION AND GLOBAL MEASLES ELIMINATION (2009), available at <http://www.cdc.gov/ncird/progbriefs/downloads/global-measles-elim.pdf>. Between 1993 and 2001, a total of 1804 measles cases were reported in the United States, most of them imported from other countries, or traced to the imported cases. Fuyuen Y. Yip et al., *Measles Outbreak Epidemiology in the United States 2001–2003*, 189 J. INFECTIOUS DISEASES S54, S54 (2004). Between 2000 and 2007, the number of measles cases reported annually ranged from 29 to 116. Ctrs. for Disease Control & Prevention, *Measles—United States, January 1–April 25, 2008*, 57 MORTALITY & MORBIDITY WKLY. REP. 494, 494 (2008); see also Calandrillo, *supra* note 22, at 424 n. 444 (“By 1996, the vaccination goal of 90% among two-year olds have been met. No large-scale U.S. measles outbreaks have occurred since.”). But see *Vaccine Refusals Fuel Measles Outbreak*, REUTERS (Aug. 21, 2008), <http://www.reuters.com/article/idUSN2146685120080821> (reporting 131 cases of measles in 2008, most of which occurred in unvaccinated people).

<sup>188</sup> Berger, *supra* note 70, at 1466 (stating that measles is highly infectious and therefore can require immunization coverage as high as 99%, in some locations, in order to eliminate it).

<sup>189</sup> Ctrs. for Disease Control & Prevention, *supra* note 187, at 494.

<sup>190</sup> See *infra* notes 191–96 and accompanying text.

<sup>191</sup> *Id.*

<sup>192</sup> See Rota et al., *supra* note 122, at 645.

<sup>193</sup> *Id.* at 646.

<sup>194</sup> *Id.*

processes had non-medical exemption rates above 1.0%.<sup>195</sup> A 2005 study by Daniel A. Salmon et. al., which studied exemption practices in individual school districts in Colorado, California, Missouri, and Massachusetts, found that more complex exemption procedures resulted in reduced non-medical exemption rates.<sup>196</sup>

Philosophical exemptions may appear to correlate to higher exemption rates because states with philosophical exemptions tend to make those exemptions very easy to obtain. A 2005 study by Saad B. Omer et al. found that of seventeen states that had philosophical exemptions, twelve of them had easily obtained exemptions, and only one was classified as having “difficult procedures” for obtaining an exemption.<sup>197</sup>

Another report even found that school funding laws in some states with easily obtained philosophical exemptions inadvertently incentivized opt-outs.<sup>198</sup> Where a state ties school funding to the school’s accounting for all students’ vaccination statuses, and an unvaccinated student appears at the school, the school can comply with the funding law more easily by asking a parent to check off a box as an exemptor rather than asking the parent to vaccinate the child.<sup>199</sup>

The results of these studies indicate that many people who take non-medical exemptions may be (1) making uninformed or misinformed decisions and (2) taking exemptions based on convenience.<sup>200</sup> These studies also indicate that states need to make the process of obtaining an exemption more difficult than getting a vaccination.<sup>201</sup> Doing so would discourage all but those with sincere beliefs against vaccination from seeking an exemption rather than a vaccination.<sup>202</sup>

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<sup>195</sup> *Id.* at 647 fig.1.

<sup>196</sup> Salmon et al., *supra* note 159, at 436 (“This study revealed that the complexity of paperwork or effort required to complete the exemption process was inversely related to the proportion of exemptions filed.”).

<sup>197</sup> Saad B. Omer et al., *Nonmedical Exemptions to School Immunization Requirements: Secular Trends and Association of State Policies with Pertussis Incidence*, 296 J. AM. MED. ASS’N 1757, 1761 fig.3 (2006).

<sup>198</sup> Bruce Jancin, *Exemptions to Mandatory School Immunization Laws Are Climbing*, 32 FAM. PRAC. NEWS, Aug. 15, 2002, at 38.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*; see also Hinman et al., *supra* note 29, at 125; Rota et al., *supra* note 122, at 647–48; Calandrillo, *supra* note 22, at 359.

<sup>201</sup> Salmon et al., *supra* note 159, at 440 (stating that schools should “use administrative procedures that have been associated with decreased likelihood of a child having an exemption”).

<sup>202</sup> *Id.*; see also Rota et al., *supra* note 122, at 647–48.

## IV. THE “BACKLASH” AGAINST VACCINATION

The New Jersey flu vaccine rally exemplifies a parental “backlash” against vaccination that has arisen in recent years.<sup>203</sup> The backlash has been linked to the growing number of vaccines that states have been mandating since the 1990s,<sup>204</sup> and more specifically, to a fear that increasing the number of vaccines poses unjustified health risks to children.<sup>205</sup> The vocal backlash, composed largely of educated and affluent parents,<sup>206</sup> has put pressure on state legislatures to enact broad philosophical exemptions.<sup>207</sup> While parent efforts to broaden exemptions have not been very successful,<sup>208</sup> public health officials should be cognizant of legitimate claims of coercion as well as the backlash’s tendency to spread misinformation and undermine the legitimacy of immunization programs. A legislative response that gives parents the autonomy to refuse vaccination but which simultaneously makes the exemption contingent upon engaging in dialogue with the public health community would both nullify the parental sense of outrage that is provoking the backlash and create opportunities for the public health community to dispel misperceptions about vaccines.

A. *The Vaccine Safety Issue*

At the core of the backlash are fears about the safety of vaccines.<sup>209</sup> All recommended childhood vaccines come with certain scientifically accepted risks of adverse reactions,<sup>210</sup> which in rare cases

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<sup>203</sup> See COLGROVE, *supra* note 23, at 227.

<sup>204</sup> *Id.*; see also Miriam Tucker, *supra* note 140.

<sup>205</sup> Robert M. Wolf et al., *Content and Design Attributes of Anti-Vaccination Websites*, 287 J. AM. MED. ASS’N 3245, 3245 (2002) (“[D]uring the last few decades an increasingly vocal antivaccination movement has challenged the safety and effectiveness of recommended vaccines.”); Katherine Seligman, *Vaccination Backlash*, S.F. CHRON., May 25, 2003, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2003/05/25/CM171959.DTL>. (“Although diseases may have waned, a backlash has grown. It is fueled by gripping stories about children whose parents say they developed autoimmune or developmental disorders such as autism after getting immunized.”).

<sup>206</sup> Smith et al., *supra* note 93, at 189. A study of the 2001 National Immunization Survey found that completely unvaccinated children between the ages of nineteen months and thirty-five months were significantly more likely to be white, have mothers who were college-educated and over thirty, and live in households with incomes over \$75,000. *Id.*

<sup>207</sup> See Salmon et al., *supra* note 25, at 439.

<sup>208</sup> Salmon et al., *supra* note 102, at 782.

<sup>209</sup> COLGROVE, *supra* note 23, at 230.

<sup>210</sup> Robert T. Chen et al., *Safety of Immunizations*, in VACCINES 1557, 1571 (Stanley Plotkin & Walter Orenstein eds., 4th ed. 2004). See *Possible Side-Effects from Vaccines*,

can be severe or fatal; the risks that the government acknowledges, however, are not at the core of the current backlash.<sup>211</sup> More prominently, parents fear that vaccines might cause chronic health problems, autoimmune disorders, or developmental disabilities, notably autism—diseases for which science has no explanation.<sup>212</sup> Parents point to the correlation between the increase in these health problems and the increasing number of vaccines over the last few decades as the primary evidence of the connection.<sup>213</sup> No epidemiological studies give support to the theories that vaccines cause autism, asthma, autoimmune, or other chronic health problems; however, the popular belief that vaccines might cause long-term health problems persists.<sup>214</sup> Experts attribute parental resistance to the weight of scientific evidence to (1) faulty risk perception,<sup>215</sup> (2) the emotional power of persistent parental anecdotes that do link

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CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/vaccines/vac-gen/side-effects.htm> (last modified June 3, 2010), for a list of scientifically accepted adverse reactions.

<sup>211</sup> See *Vaccine Side Effects, Adverse Reactions, Contraindications, and Precautions Recommendations of the Advisory Committee on Immunization Practices (ACIP)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://wonder.cdc.gov/wonder/prevguid/m0046738/m0046738.asp> (stating that vaccine-induced anaphylaxis can be fatal) (last updated Oct. 1998).

<sup>212</sup> See Carl T. Hall, *Report Calls Vaccine-Autism Link Unfounded*, S.F. CHRON., May 19, 2004, at A5 (“The unanimous judgment of a 13-member Institute of Medicine committee came down to a mixed message for worried parents: although some of the most commonly administered vaccines against childhood diseases appear to be safe, the real culprits for autism are as much a mystery as ever.”).

<sup>213</sup> See Barbara Loe Fisher, *Q: Should Parents Be Allowed to Opt Out of Vaccinating Their Kids?*, INSIGHT ON THE NEWS, Apr. 24, 2000, at 40 (“Instead of epidemics of measles and polio, we have epidemic chronic autoimmune and neurological disease . . . [T]o what extent has the administration of multiple doses of vaccines in early childhood . . . been a cofactor in epidemics of chronic diseases?”).

<sup>214</sup> COLGROVE, *supra* note 23, at 230. Those advocating for philosophical exemptions, however, do make the valid point that vaccines do harm a small group of children, but that science is often unable to predict who those children will be. See, e.g., Charlotte Vandervalk, *Immunizations: Protecting an At-Risk Population*, MDADVISOR 12, 12–15 (Spring 2009). Some people caution against completely dismissing parent concerns about unknown health consequences of vaccines for some children, as this dismissal may inflame the backlash against vaccination. Cf. John S. Poling, *Vaccines and Autism Revisited*, 359 NEW ENG. J. MED. 655, 655 (2008) (implying that recklessly zealous vaccine advocacy “does not improve confidence in the immunization program”).

<sup>215</sup> See Calandrillo, *supra* note 22, at 404; Gostin & Hodge, *supra* note 21, at 876.

vaccines to the onset of childhood disabilities,<sup>216</sup> and (3) distrust of the government and pharmaceuticals.<sup>217</sup>

*B. The Coercion Issue*

Some in the public health community would agree that parent concerns, though motivated by questionable health beliefs, do raise legitimate political issues.<sup>218</sup> Principally, coercion in medical procedures is anathema to American liberty.<sup>219</sup> State courts have typically relied on *Jacobson* to uphold coercive immunization mandates, a judicial practice that some have come to criticize.<sup>220</sup> Though *Jacobson* granted public health officials wide deference to implement coercive vaccination mandates, some critics, such as George Annas, have criticized the decision as “a relic of a bygone era when civil liberties were seen as less important.”<sup>221</sup> Even those who support the theory that *Jacobson* is still relevant to guiding public health decisions admit that *Jacobson* implies boundaries between the competing demands of public health and personal liberty—boundaries that some aspects of state immunization programs may trample.<sup>222</sup>

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<sup>216</sup> Wolf et al., *supra* note 205, at 3247. See also PAUL M. OFFIT, *AUTISM’S FALSE PROPHETS* 237–47 (2008) for an examination of the power of parental anecdote to persuade parents more powerfully than scientific evidence.

<sup>217</sup> Robert M. Wolf et al., *Content and Design Attributes of Anti-Vaccination Websites*, 287 J. AM. MED. ASS’N 3245, 3247 (2002); see also COLGROVE, *supra* note 23, at 248 (discussing conflicts of interest involving the fact that the CDC’s National Immunization Program was responsible for both promoting vaccines and ensuring their safety); Calandrillo, *supra* note 22, at 397 (“Skeptics contend that the government is in bed with the vaccine industry.”); Barbara Loe Fisher, *In the Wake of Vaccines*, MOTHERING, Sept. 1, 2004, at 38 (“[T]he challenge to our system of mass vaccination is also part of the move by educated healthcare consumers away from a technology and a medical model that many believe have failed.”).

<sup>218</sup> See COLGROVE, *supra* note 23, at 238–40 (detailing political objections to mandatory vaccinations and experts’ willingness to take the backlash into account when creating vaccination mandates).

<sup>219</sup> See COLGROVE, *supra* note 23, at 239; Salmon et al., *supra* note 25, at 441; Vandervalk, *supra* note 214, at 14 (“Most medical decisions are made with informed consent. A school nurse . . . cannot give an aspirin to a child without parental approval.”).

<sup>220</sup> See Note, *supra* note 76, at 1839 (citing the plaintiff’s argument in *Boone v. Boozman*, 217 F. Supp. 2d 938, 956 (E.D. Ark. 2002), that *Jacobson* was archaic and should not justify the Arkansas hepatitis B vaccine mandate).

<sup>221</sup> See *id.* at 1835 (citing George Annas, *Blinded by Bioterrorism: Public Health and Liberty in the Twenty-First Century*, 13 HEALTH MATRIX 33, 56 (2003)).

<sup>222</sup> See Silverman, *supra* note 113, 280 (stating that the *Jacobson* court “did not envision a boundless power to protect the public’s welfare . . . the *Jacobson* decision describes a state police power that balances public health protections with the principles of necessity, reasonableness, proportionality, and harm avoidance”); see

In light of the fact that not all aspects of a state's immunization program are as important as others, some people question whether mandates for vaccines need to be redesigned in order to prevent them from becoming unduly coercive.<sup>223</sup> Similarly, some parents, and even some doctors, criticize immunization programs for being "one-size-fits-all"—meaning that all vaccines are mandated with the same force of law for almost all children.<sup>224</sup> Some parents have particularized health concerns which make the mandate more coercive to them than it is for other parents.<sup>225</sup> For example, a family with a history of adverse vaccine reactions might feel more hesitant about completely following the ACIP recommendations than a family that has never experienced an adverse reaction.<sup>226</sup> Given that (1) American culture frowns upon coercive medical procedures, (2) not all vaccines are as important as others, (3) vaccine mandates are more coercive to some parents than others, and (4) herd immunity to the most dangerous vaccine-preventable diseases is not currently threatened by exemptions, a reformulation of state vaccination laws to permit parents more autonomy is an appropriate legislative measure.

C. *Acknowledging the Backlash by Providing Annual Philosophical Exemptions*

By ignoring the New Jersey parents' pleas for the Conscientious Exemption Bill, DHSS may have been inadvertently harming the state's immunization program more than the availability of a philosophical exemption would. When public health officials ignore complaints of coercion, and instead, as New Jersey has done, make the immunization program *more* coercive, they fuel the fire of the

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*also* Note, *supra* note 76, at 1837 (citing Lawrence O. Gostin, *Jacobson v. Massachusetts at 100 Years: Police Power and Civil Liberties in Tension*, 95 AM. J. PUB. HEALTH 576, 580 (2005)).

<sup>223</sup> See Feudtner & Marcuse, *supra* note 25, at 1163 (“[A] spectrum of policy enforcement strength is warranted, titrating the degree of coerciveness to the particular disease and vaccine-specific tradeoffs.”); Note, *supra* note 76, at 1838–41 (suggesting that vaccines be divided into those that are “medically necessary” to prevent epidemics and those that are merely “practically necessary” to achieve less pressing public health goals and that mandates be adjusted accordingly).

<sup>224</sup> See Rosen, *supra* note 60, for an example of a doctor using the term “one-size-fits-all.” See *Preschoolers’ Parents Protest*, *supra* note 6, for an example of a parent using the term.

<sup>225</sup> See Salmon et al., *supra* note 102, at 781 (“[T]he perceived burden of vaccination is greater for parents with strongly held beliefs against vaccination compared with parents who are in favor of vaccination.”).

<sup>226</sup> See Vandervalk, *supra* note 214, at 14 (discussing the distress of a family denied an exemption for their son after his sister suffered a severe adverse reaction).



backlash, which may contribute to the spread of misinformation and undermine the immunization program's legitimacy. A philosophical exemption, which requires annual interaction with a doctor, would diminish the sting of coercion that fuels the backlash while at the same time giving the public health community the opportunity to dispel myths about vaccines one parent at a time.

One notable aspect of the backlash has been its tendency to spread fear and misinformation, especially on the internet.<sup>227</sup> Finding the government deaf to their complaints, many angry parents have taken to the web to gain political strength. A 2002 study found that a parent who searches for vaccine information online is likely to come across anti-vaccination sites that have misinformation about vaccines and use emotionally manipulative attributes, such as pictures and stories of harmed children, designed to scare parents out of vaccinating their children.<sup>228</sup> Because many Americans who look for health information online believe that "most" or "almost all" of the information they find is credible, the researchers suggested that these websites might persuade parents to make misinformed or irrational choices not to vaccinate.<sup>229</sup> When the government takes measures that add fuel to the fire of the backlash, they risk provoking further erosion of public confidence in the immunization program via protests on the steps of the state house and on the internet.

The appropriate legislative response might help reverse the tendency of the backlash to undermine immunization programs. If New Jersey had a policy to accommodate the sincere objections that New Jersey parents have to the flu vaccine mandate, the impetus for angry outbursts against the immunization program would have been significantly lower—perhaps there would not have been a protest at all. At the same time, states should not completely concede to the demands of parents by granting broad philosophical exemptions because these would encourage exemptions of convenience and reduce the state's opportunity to dispel the myths that send many fretful parents looking for exemptions in the first place. A policy that permits parents to have the ultimate say over the vaccination of their children, but which simultaneously forces them into an ongoing dialogue with the public health community is the best compromise. Such a policy would nullify the political aspect of the vaccine backlash. It would also create an incentive for parents who are thinking about opting out to have a persuasive encounter with the

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<sup>227</sup> Calandrillo, *supra* note 22, at 402–03.

<sup>228</sup> Wolf et al., *supra* note 205, at 3247.

<sup>229</sup> *Id.*

proper health authorities. Such encounters may convince hesitant parents to partially or completely comply with immunization requirements, whereas parents might completely and permanently opt out of all vaccines otherwise.

#### V. A LEGAL FRAMEWORK FOR ADDRESSING THE BACKLASH

The difficulties that have arisen from the public demand for a philosophical exemption in New Jersey and elsewhere might be resolved using a framework proposed for—and largely adopted by—Arkansas in the early years of the last decade. In 2002, two federal district courts in Arkansas ruled that the state’s religious exemption was unconstitutional because it required proof of church membership.<sup>230</sup> Arkansas then briefly became the third state to have only medical exemptions. The loss of non-medical exemptions became a rallying point for groups opposed to mandatory vaccination.<sup>231</sup> The backlash against the increasingly coercive immunization program resulted in several bills that, if passed, would have given Arkansas a broad non-medical exemption.<sup>232</sup> Meanwhile, health advocacy groups, clinical providers, and insurance companies expressed concern that a broad philosophical exemption might threaten the state’s immunization program.<sup>233</sup> The Arkansas Department of Health asked the Arkansas Chapter of the American Academy of Pediatrics to evaluate the non-medical exemption issue, which then developed new principles that should guide the creation of non-medical exemptions by working with the Johns Hopkins Institute for Vaccine Safety, the Johns Hopkins Center for Law and the Public’s Health, and the Arkansas Medical Society (“The Johns Hopkins Group”).<sup>234</sup> In the end, the group drafted legislation for a new non-medical exemption.<sup>235</sup>

##### A. *The Johns Hopkins Group Framework*

In drafting Arkansas’s new non-medical exemption, the Johns Hopkins Group ensured high levels of immunization while respecting

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<sup>230</sup> Boone v. Boozman, 217 F. Supp. 2d 938, 951 (E.D. Ark. 2002); McCarthy v. Boozman, 212 F. Supp. 2d 945, 947 (W.D. Ark. 2002).

<sup>231</sup> Salmon et al., *supra* note 102, at 780.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> Daniel A. Salmon et al., *Draft Exemption*, available at <http://www.vaccinesafety.edu/DraftExemption.html> [hereinafter *Draft Exemption*].

the beliefs of those genuinely opposed to vaccination.<sup>236</sup> Keeping immunization levels high and keeping the exemptions fair—meaning that all parents with sincere objections could obtain them—were the two objectives.<sup>237</sup>

At the outset, the group rejected the option of a religious exemption without a church membership requirement for two reasons. First, a religious exemption without a church membership requirement is a broad exemption that could permit uninformed parents without a sincere belief to opt out.<sup>238</sup> Second, drawing arbitrary lines between religion and philosophy may not be fair and poses the risk of public backlash.<sup>239</sup> The group decided that the factors that made a parent's request for an exemption acceptable, in the absence of an overriding public health need, were (1) that the parental belief be sincere and (2) that the decision not to vaccinate be fully informed.<sup>240</sup> The group determined that the best way to test the sincerity of the parent's belief was to make exemptions more difficult to obtain than mere compliance with vaccination mandates.<sup>241</sup> Such an exemption gives parents full autonomy over the decision to vaccinate and thus quells the concern that coercion will undermine the state's immunization program. At the same time, non-medical exemptions that are difficult to obtain discourage abuse of the exemption and keep vaccination rates high.

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<sup>236</sup> See generally *id.*

<sup>237</sup> *Id.*

<sup>238</sup> Salmon et al., *supra* note 102, at 779.

<sup>239</sup> Daniel Salmon and Andrew Seigel, two members of the group at Johns Hopkins, had previously written that drawing arbitrary lines between religion and philosophy may not be just and risks public backlash. Daniel A. Salmon & Andrew W. Seigel, *Religious and Philosophical Exemptions from Vaccination Requirements and Lessons Learned from Conscientious Objectors from Conscriptio*, 116 PUB. HEALTH REP. 289, 291 (2001).

<sup>240</sup> Letter from Inst. for Vaccine Safety, Johns Hopkins Univ. to Fay Boozman, Dir., Ark. Dep't of Health (Aug. 27, 2002), *available at* <http://www.vaccinesafety.edu/Boozman-letter.pdf> ("The balance between the clear public benefit of vaccination and the importance of parental autonomy in making vaccination decisions can be optimally achieved by focusing on assuring the sincerity of fully informed parents' beliefs rather than whether those beliefs are grounded in religion or philosophy.")

<sup>241</sup> Salmon et al., *supra* note 102, at 781 tbl.2 ("The legislation should ensure the path of least resistance encourages parents to comply with school immunization requirements rather than claiming an exemption simply because it is more convenient than having the child immunized.")

B. *The Arkansas Draft Legislation*

The group produced draft legislation for a philosophical exemption, which the drafters have referred to as a “conscientious exemption” because it permits the exemption only after the parent has proven that the decision is well-informed and the beliefs are sincere.<sup>242</sup> The parent proves that the belief is sincere by complying with several inconvenient procedural requirements. These include: (1) meeting with a doctor or public health official for individual counseling; (2) composing and having witnessed a statement stating (a) that the parent has received individual counseling concerning the risks and benefits of vaccination to the child and to public health, (b) the reason for requesting the exemption, (c) the strength of the belief that the vaccination is inappropriate for the child, (d) the duration of the belief, (e) the parent’s understanding of the risks and benefits of vaccination to the child and to public health, and (f) the parent’s understanding that the child may be removed from school in the event of an outbreak; and (3) annually renewing the exemption.<sup>243</sup> The significant number of administrative requirements assures that the exemption process is at least as inconvenient as going to a vaccination clinic, thus reducing the chances of an initial opt-out merely due to convenience.<sup>244</sup> The required documentation of face-to-face counseling and the required parent statement assure that parents do not make uninformed decisions to opt out.<sup>245</sup> The annual renewal process further assures that parents who opt out continually re-evaluate their decision not to vaccinate by requiring them to learn about the latest developments in medicine and public health.<sup>246</sup> The annual renewal requirement also makes the decision to opt out continually inconvenient for parents, thus further discouraging permanent opting out.

The draft legislation also includes provisions to protect the public health. One such provision permits the health department to deny an exemption based on community health risks.<sup>247</sup> Another

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<sup>242</sup> *Draft Exemption, supra* note 235. The English government used the “conscientious exemption” to describe similar exemptions to smallpox vaccination in the Nineteenth Century. See Salmon et al., *supra* note 25, at 437 (“The Commission recommended a conscientious exemption for people who were ‘honestly opposed’ to vaccination and distinguished them from those who were too lazy or indifferent to have their children vaccinated.”).

<sup>243</sup> *Draft Exemption, supra* note 235; Salmon et al., *supra* note 102, at 780 tbl.1.

<sup>244</sup> Salmon et al., *supra* note 102, at 781, tbl.2.

<sup>245</sup> *Id.* at 781.

<sup>246</sup> *Id.*

<sup>247</sup> *Draft Exemption, supra* note 235.

provision mandates ongoing central exemption tracking by the state to monitor exemption rates and trends and to facilitate profiling child, school, and community health risks.<sup>248</sup> This monitoring might help authorities take appropriate action in a community where exemptors have clustered. Finally, the legislation gives public health departments, rather than schools, the authority to grant or deny any vaccine exemption.<sup>249</sup> Vesting the authority to grant and deny exemptions in the state, as opposed to the school system, prevents lackadaisical school system enforcement, which can lead to a higher number of exemptions.<sup>250</sup>

#### VI. NEW JERSEY

The flu vaccine mandate controversy underscores New Jersey's need for a new exemption policy that better balances public health and parental autonomy. The New Jersey Conscientious Exemption Bill is a step in this direction, but further reforms could better assure that New Jersey retains its high vaccination rates. The bill does not do all that it could to de-incentivize opting out of vaccination. In order to further the goals of high immunization rates and fairness, the Legislature should abolish the unenforced religious exemption and replace it with an exemption that (1) encompasses all sincere beliefs and (2) forces parents to prove their sincerity by meeting stricter procedural obstacles—obstacles that take more time and effort to overcome than choosing to vaccinate. Specifically, the procedure for receiving a non-medical exemption should involve a face-to-face medical consultation that must be repeated annually. The change from an easily obtained and unenforced religious exemption to an exemption that encompasses all beliefs, but which parents cannot obtain without exerting significant efforts, is not likely to result in a significant drop in New Jersey's high vaccination coverage.<sup>251</sup>

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<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> See Salmon et al., *supra* note 159, at 439 (reporting that just under twenty percent of schools in Massachusetts and Missouri granted philosophical exemptions even though the state statutes do not permit philosophical exemptions)..

<sup>251</sup> See Salmon & Siegel, *supra* note 239, at 294.

A. *The Trouble with New Jersey's Current Exemption Policy*

While New Jersey's current exemption policy has successfully kept vaccination rates high,<sup>252</sup> it has various flaws that underscore the need for revision. First, New Jersey's unenforced religious exemption encourages parents to make uninformed decisions to completely and permanently opt out of the state's immunization program. Second, New Jersey's medical exemptions are very strict, which can force a small number of parents into very upsetting situations in which undue coercion exists. Third, New Jersey's policy leaves no room for the large number of parents who are "partial vaccine exemptors"—people who only disagree with limited aspects of the increasingly burdensome immunization program. By ignoring these people, New Jersey's vaccination policy drives partial exemptors towards backlash and total exemption.

1. Unenforced Religious Exemption

New Jersey's religious exemption states the following:

A child shall be exempted from mandatory immunization if the parent or guardian objects thereto in a written statement submitted to the school, preschool, or child care center, signed by the parent or guardian, explaining how the administration of immunizing agents conflicts with the pupil's exercise of bona fide religious tenets or practices. General philosophical or moral objection to immunization shall not be sufficient for an exemption on religious grounds.<sup>253</sup>

The wording of the religious exemption prevents all but a very small number of parents from claiming an exemption, as immunization conflicts with the "bona fide religious tenets or practices" of very few people.<sup>254</sup> But in practice, New Jersey officials never question the sincerity of a religious exemption letter. In a memorandum sent to the state's school administrators shortly after the flu vaccine mandate, DHSS related the following advice from the department's legal council:

When a parent or guardian submits their written religious exemption to immunization, which contains some religious reference, those persons charged with implementing

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<sup>252</sup> New Jersey's total exemption rate was 0.8% in the 2009–10 school year. Medical exemptions constituted .01% of exemptions and religious exemptions constituted .07%. CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR IMMUNIZATION & RESPIRATORY DISEASES, *supra* note 182.

<sup>253</sup> N.J. ADMIN. CODE § 8:57-4.4 (2010).

<sup>254</sup> See Sean Coletti, Comment, *Taking Account of Partial Vaccination Law, Policy, and Practice*, 36 CONN. L. REV. 1341, 1350 (2004).

administrative rules at N.J.A.C. 8:57-4.4 should not question whether the parent's professed religious statement or stated belief is reasonable, acceptable, sincere and bona fide. In practice, if the written statement contains the word "religion" or "religious" or some reference thereto, then the statement should be accepted and the religious exemption of mandatory immunization(s) granted.<sup>255</sup>

Covertly instructing school administrators to ignore the strict language of the religious exemption statute can only be described as a fraud upon the public health. If DHSS is concerned about maintaining high immunization levels and engendering respect for compliance, instructing school administrators to accept every religious exemption form letter a parent downloads off the internet is an unequivocally self-defeating policy.<sup>256</sup>

Granted, the end result of this policy is perhaps tolerable. Parents have de facto autonomy over their children's health, and the number of exemptions does not endanger herd immunity; the lack of transparency in the process, however, is unacceptable. It favors those parents who decide to brazenly ignore the statute and punishes parents who decide to acquiesce, even when doing so violates their sincere beliefs. This policy only serves to further the distrust of government that fuels the vaccination backlash.

Additionally, the religious exemption discourages vaccine-related dialogue between parents and doctors. Because the current religious exemption requires no proof of parental education, parents have no incentive to speak to a doctor about their wish to opt out. But even if New Jersey required parent education in order to obtain the religious exemption, the state could not theoretically sustain this kind of dialogue. Because religious exemptions are based on the premise that the parent is following the dictates of a higher authority, a parent who writes a religious exemption is either impervious to a medical dialogue or lying about her religious convictions.<sup>257</sup> In reality, however, many of the parents writing religious exemptions

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<sup>255</sup> Memorandum from Janet DeGraaf, Dir., Communicable Disease Serv., Dep't of Health and Human Servs., State of N.J., to N.J. Sch. Admins. (Dec. 1, 2008).

<sup>256</sup> Forms and form letters to meet the religious exemption requirements are readily available online. See, e.g., *Vaccine Liberation Exemptions*, VACCINATION LIBERATION, <http://www.vaclib.org/exemption.htm> (last modified Dec. 29, 2010).

<sup>257</sup> See *Farina v. Bd. of Educ.*, 116 F. Supp. 2d 503, 505-06 (E.D.N.Y. 2000), for an example of a parent being pressured into admitting to a school official that she was lying about religious beliefs in order to obtain a vaccine exemption for her son who was exhibiting autism-like symptoms.

could be convinced to vaccinate their children because their reasons for seeking the exemptions are more medical than religious.

## 2. Strict Medical Exemptions

Some states provide an escape hatch for parents with health-related concerns about vaccination through permissive medical exemptions.<sup>258</sup> New Jersey's medical exemption, however, is very strict. Doctors may only issue medical exemptions that are based upon medical reasons enumerated by ACIP or AAP guidelines.<sup>259</sup> These guidelines are not expansive enough, however, to prevent coercion. For example, scientists have theorized that some people might be genetically predisposed to adverse reactions,<sup>260</sup> yet the sibling of a child who experiences a severe reaction is not entitled to a medical exemption.<sup>261</sup> Assemblywoman Vandervalk related the story of a distraught constituent whose son did not qualify for a medical exemption even after his sister had been hospitalized with paralysis following a vaccination.<sup>262</sup> The son was traumatized, and the family feared the anguish and expense of another potential hospitalization.<sup>263</sup>

In a similar case, the family physician of Jennifer Frank, who expressed faith in vaccination, recommended that her two-year-old son Caleb go on a delayed vaccination schedule due to severe eczema that covered his entire body and twice hospitalized him.<sup>264</sup> When the flu vaccine mandate went into effect, however, the preschool

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<sup>258</sup> See *In re* Exemption from Immunization Requested by LePage, 18 P.3d 1177, 1180 (Wyo. 2001).

<sup>259</sup> N.J. ADMIN. CODE. 8:57-4.3 (2010).

<sup>260</sup> The government called for new vaccine safety studies to evaluate whether gene variations may make some children more susceptible to vaccine injury. Deborah Kotz, *A Closer Look at Vaccines*, U.S. NEWS & WORLD REPORT, Feb. 1, 2009. The impetus for these studies came from the case of Hannah Poling. *Id.* Poling developed autism after receiving five shots against nine diseases in one day. *Id.* The government acknowledged that Poling had an underlying mitochondrial disorder that may have made her susceptible to a vaccine injury. *Id.*

<sup>261</sup> Vandervalk, *supra* note 214, at 12. Being a sibling of a person who has an adverse vaccine reaction is not one of the ACIP or AAP contraindications to vaccination. See IMMUNIZATION ACTION COAL., GUIDE TO CONTRAINDICATIONS AND PRECAUTIONS TO COMMONLY USED VACCINES 1-2, *available at* <http://www.immunize.org/catg.d/p3072a.pdf>.

<sup>262</sup> Vandervalk, *supra* note 214, at 14.

<sup>263</sup> *Id.*

<sup>264</sup> Melissa Morgenweck & Aparnaa Seshadri, *Some Parents Oppose New Jersey's New Flu Vaccination Law*, CNN.COM (Jan. 16, 2009), [http://articles.cnn.com/2009-01-16/health/children.flu.vaccines\\_1\\_flu-vaccine-flu-shot-vaccination-schedule?\\_s=PM:HEALTH](http://articles.cnn.com/2009-01-16/health/children.flu.vaccines_1_flu-vaccine-flu-shot-vaccination-schedule?_s=PM:HEALTH).



excluded him because the local health department would not accept his medical exemption—eczema is not a considered a valid reason to skip a flu vaccine.<sup>265</sup> The Conscientious Exemption Bill would function as an important safety-valve for parents on the margins of a medical exemption, such as Assemblywoman Vandervalk's constituent and Jennifer Frank, whose experiences with the vaccine mandates will be much more burdensome than for most other parents.

### 3. Partial Exemptors Not Accommodated

The current New Jersey exemption law does not have enough nuance to take account of parents, like Jennifer Frank, who believe in the importance of vaccination generally but oppose certain limited aspects of the increasingly burdensome immunization program.<sup>266</sup> New Jersey's policy, following the lead of many legal and medical journals, approaches the subject of vaccine objectors as if they all oppose vaccination in general.<sup>267</sup> In fact, many parents are not opposed to vaccination generally, but are "partial exemptors" who are concerned that the state requires too many vaccines too quickly for their children or have objections to particular vaccines.<sup>268</sup>

Zealous vaccine advocates often label parents who express a wish for an exemption as "anti-vaccine," but the truth is that many people advocating for the availability of exemptions do not consider themselves "anti-vaccine." Some parents at the New Jersey rally, for example, stated that they were not against all vaccines but had a very particular complaint against being compelled to give their children a large number of vaccines or specifically the flu vaccine.<sup>269</sup> New Jersey's inflexible policy pushes parents who are generally inclined towards vaccination, but have only limited concerns about it, towards political backlash.

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<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> Coletti, *supra* note 254, at 1344.

<sup>268</sup> *Id.* at 1344–45.

<sup>269</sup> Robyn Stavola, one of the parents at the rally, stated, for example, "I am not against vaccines, but I do believe there are too many." *Preschoolers' Parents Protest*, *supra* note 6. Stavola's daughter Holly died in 2000 at age five from encephalopathy following an MMR booster. *Our Purpose*, HOPEFROMHOLLY, <http://www.hopefromholly.com/blog/our-purpose> (last visited Jan. 5, 2011). Louis Kuo-Habukus, one of the spokespeople for New Jersey Coalition for Vaccination Choice, stated at the rally, "I have a really big problem with mandatory flu shots in this country." Sharyn Alfonsi, *N.J. Mandatory Flu Shots for Preschoolers Cause Outrage*, ABCNEWS.COM (Oct. 17, 2008), <http://abcnews.go.com/Health/ColdandFluNews/story?id=6051917&page=1>.

A law which accommodates partial vaccine exemptions would be particularly appropriate in light of the fact that some of the vaccines that are crowding the New Jersey vaccination schedule are less important than others.<sup>270</sup> Unlike measles or pertussis, which spread rapidly through schools and pose serious health threats when contracted, some of the newer vaccines are less imperative for the child's health and the public's health.<sup>271</sup>

Hepatitis B, for example, is generally passed through sexual contact or intravenous drug use and therefore not likely to be contracted by children.<sup>272</sup> It is rarely fatal, and, in a significant number of cases, the vaccine-induced immunity wears off before the child reaches adulthood.<sup>273</sup> Further, chicken pox rarely causes death or serious complications in healthy children.<sup>274</sup> Even the flu is not that serious for most children.<sup>275</sup>

New Jersey law does not recognize the parents who are worried that too many vaccines can harm their children's health, who believe that some vaccines are less important than others, or who feel that the vaccine schedule is not right for their child given particularized health issues. New Jersey law thus pushes such parents towards backlash, either by forcing them to suffer coercion or by encouraging them to write phony religious exemptions. A philosophical exemption that has to be renewed annually, after a vaccine consultation, could help parents with concerns over particular aspects of the immunization program to prioritize. A more nuanced law could transform some complete exemptors into partial exemptors and convince partial exemptors to fully vaccinate, if not immediately, then eventually.<sup>276</sup>

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<sup>270</sup> See Rosen, *supra* note 60 (“[W]e’re starting to see that all vaccines are not created equally. Preventing predominantly deadly diseases like HiB, pneumococcal meningitis, and pertussis must take priority over requiring chicken pox and hepatitis B vaccines for all children at young ages.”).

<sup>271</sup> *Id.*

<sup>272</sup> Coletti, *supra* note 254, at 1351. Vaccine advocates, however, state that “up to 40% of hepatitis B infections come from unknown sources and that children under age 5, although a small minority of those with hepatitis B, have the greatest chance of getting chronic hepatitis B.” Charles Marwick & Mike Mitka, *Debate Revived on Hepatitis B Vaccine Value*, 281 J. AM. MED. ASSOC. 15, 15 (1999).

<sup>273</sup> Coletti, *supra* note 254, at 1351; Rosen, *supra* note 60.

<sup>274</sup> SEARS, *supra* note 4, at 100.

<sup>275</sup> *Id.* at 123; see statistical information about flu, *supra* note 4.

<sup>276</sup> Cf. Rosen, *supra* note 60 (“Most [concerned parents] become more willing to vaccinate after we have these conversations and they see that I’m willing to work with them.”).

*B. How the Conscientious Exemption Bill Improves Upon the Current Exemption Policy*

The New Jersey Conscientious Exemption Bill would remove the sting of coercion in New Jersey's vaccination policy while giving doctors the opportunity to convince hesitant parents who might otherwise seek religious exemptions to partially vaccinate their children. The New Jersey Conscientious Exemption Bill builds upon the same framework proposed by the Johns Hopkins group in that it requires a parent to prove that the belief against vaccination is sincere and that the decision is well-informed. Like the Arkansas exemption, the New Jersey Bill tests the sincerity of the parent by requiring many of the procedural hurdles that the Rota study found to have deterred exemptions of convenience. For example, the paperwork filing requirements in the Conscientious Exemption Bill are complex, a characteristic that the Rota study associated with low exemption levels. The paperwork involves both a standardized form and a signed statement of the parent.<sup>277</sup> The paperwork requires a trip to the public health department because a public health officer must witness the parent's signed statement.<sup>278</sup> The Conscientious Exemption Bill also contains a parent education component, a feature that the Rota study found correlated to non-medical exemption levels below 0.5%.<sup>279</sup> According to the Bill, the parent must indicate on the standardized form that he or she has been educated about "potential benefits of immunization and the risks in not immunizing."<sup>280</sup> The witnessing-public-health-official's signature assures that the parent has actually completed the education requirement.<sup>281</sup>

The Bill also contains elements, similar to those in the Arkansas Draft Legislation, to protect the public health. The parent statement must identify the student who is receiving the exemption and the school where he or she attends. This information helps the state to monitor dangers that might result from a clustering of exemptors and to take quarantine action when the threat of an outbreak exists. The Conscientious Exemption Bill also has a very strong quarantine provision, which permits the Commissioner of DHSS to suspended

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<sup>277</sup> Assemb. 243.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*; Rota et al., *supra* note 122, at 646–47.

<sup>280</sup> Assemb. 243.

<sup>281</sup> *See id.*

the exemption when there are overriding public health considerations.<sup>282</sup>

*C. How the Conscientious Exemption Bill Could Be Improved*

DHSS objected to the Conscientious Exemption Bill on the grounds that it was a “broad based exemption” that could interfere with the goal of vaccinating as many children as possible.<sup>283</sup> The research indicating that the number of exemptions correlates to the ease of obtaining exemptions shows that DHSS’s characterization of the Bill is inaccurate. The procedure for obtaining a conscientious exemption under the Bill is complex and, therefore, probably would not result in a substantial escalation of exemptions. DHSS’s opposition, however, takes on some validity when one considers that the Conscientious Exemption Bill does not repeal New Jersey’s automatic religious exemption. Keeping both the unenforced religious exemption on the books *and* creating a new philosophical exemption could in fact encourage more opt-outs. Parents who realize they can avoid the hassles involved with obtaining a conscientious exemption by claiming a religious exemption will still be inclined to do so. In order to alleviate DHSS’s fear that the addition of the philosophical exemption might reduce the number of children who get vaccinated, the religious exemption procedure should be subsumed into the conscientious exemption procedure.

The Conscientious Exemption Bill also lacks what is perhaps the most important part of the Arkansas Draft Legislation—the annual-renewal requirement. By limiting the dialogue between a dissenting parent and the health community to one encounter, the government loses the chance to capitalize on changes in scientific knowledge or changes in the parent’s own attitude. For example, a parent might make the choice to opt out of vaccination because of objections to a vaccine additive that pharmaceuticals later take out of vaccines.<sup>284</sup> A parent might be disturbed by negative publicity about a vaccine that

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<sup>282</sup> *Id.*

<sup>283</sup> See N.J. Dep’t of Health and Senior Servs., *supra* note 15.

<sup>284</sup> For example, pharmaceuticals use a mercury-containing preservative called thimerosal in many vaccines. See OFFIT, *supra* note 216, at 81–116 (narrating the rise and fall of the thimerosal controversy). When some scientists noted a similarity between mercury poisoning and certain aspects of autism, the public began to blame thimerosal for the increasing rate of autism. *Id.* As a precautionary measure, pharmaceuticals took thimerosal out of all vaccines. *Id.* No epidemiological study supports a thimerosal-autism link. *Id.*

is later discredited.<sup>285</sup> A parent might decide against vaccination based upon membership in a particular church that the parent later leaves. A parent like Jennifer Frank just wants to wait until the stress of an auto-immune problem passes.<sup>286</sup> But in order to put a child into day care, a parent must either vaccinate or obtain an exemption. Under the current incarnation of the Conscientious Exemption Bill, such a parent is forever freed from government persuasion to vaccinate once the exemption has been obtained. Without an annual renewal requirement, the government loses the important opportunity to engage the parent in a continuing persuasive dialogue that could benefit both the child and the public health.

Finally, the Conscientious Exemption Bill could be improved by ensuring that the parental education component includes a face-to-face dialogue. While the New Jersey Bill makes the parent sign a form attesting that he or she has been educated about the risks and benefits of vaccination, the Arkansas draft legislation requires that a physician or health official sign a statement stating that the parent has received “individual counseling concerning the risks and benefits of vaccination to the child and to the public.”<sup>287</sup> Requiring an actual in-person interview, rather than permitting the parent to read literature to satisfy the education component, is better for two reasons. First, the scheduling of an interview presents another procedural hurdle for the parent to overcome. Second, because doctors remain a trusted source of medical information for most families, forcing parents to speak with a doctor could have a greater persuasive impact upon parents considering an opt-out from the state’s vaccination program.<sup>288</sup>

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<sup>285</sup> For example, a Special Master for the U.S. Court of Federal Claims recently stated that “[t]he overall weight of the evidence is *overwhelmingly contrary*” to parents’ theories that the MMR, thimerosal, or some combination of the two causes autism. *Cedillo v. Sec’y Health & Human Servs.*, No. 98-916V, 2009 U.S. Claims LEXIS 146, at \*459 (Fed. Cl. Feb. 12, 2009).

<sup>286</sup> Morgenweck & Seshadri, *supra* note 264.

<sup>287</sup> *Draft Exemption*, *supra* note 235.

<sup>288</sup> See Orenstein & Hinman, *supra* note 75, at S23 (“[P]arents in the United States rely on physicians recommendations in making their immunization decisions and most physicians in the United States are supportive of . . . immunization.”); Dennis Thompson, *People Still Trust Their Doctors Rather than the Internet*, US NEWS & WORLD REP.: HEALTH (March 3, 2010), <http://www.usnews.com/health/managing-your-healthcare/insurance/articles/2010/03/03/people-still-trust-their-doctors-rather-than-the-internet.html> (summarizing a seven-year study that concluded that popular trust in doctors has increased with the rise of medical information availability on the internet).

*D. Change Is Not Possible Without a Hearing in the Legislature.*

New Jersey can achieve the correct balance between public health and parental autonomy by making the appropriate amendments to the Conscientious Exemption Bill, but nothing can happen until the Bill is scheduled for a hearing. Assemblywoman Vandervalk introduced the Bill into the Assembly Health and Senior Services Committee in 2004.<sup>289</sup> The chairman of that committee, Assemblyman Herb Conaway, has expressed his opposition to the Bill and has not posted it for a hearing.<sup>290</sup> Because the Bill has never had a hearing, it has never been amended.<sup>291</sup> In a state where the interests of pharmaceuticals are so prominent, silencing the dialogue about the conscientious exemption does nothing to dispel the popular suspicion that the government's vaccine mandates place corporate profits above the health of children.<sup>292</sup> Meanwhile, parents in New Jersey who are frustrated with the flu vaccine mandate may be finding that an automatic religious exemption quells all their immediate fears—but in quelling those fears, they leave their children vulnerable to infectious diseases, the consequences of which they may not have considered.

#### VII. CONCLUSION

New Jersey needs an open dialogue about vaccine exemptions. The legislature needs to discuss them, and parents need to discuss them with school administrators and doctors. The 2008 protest outside the State House was not a dialogue, the DHSS's response was not a dialogue, and a parent's religious exemption letter to a school administrator is not a dialogue—a dialogue involves listening and responding. Allowing those who sincerely oppose vaccination the opportunity to make an informed decision not to vaccinate is the correct policy where the public health is not seriously threatened. Studies have shown that non-medical exemptions, obtainable only through significant parental efforts, can exist without eroding herd immunity. Furthermore, a philosophical exemption would prevent further growth of the vaccine backlash.

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<sup>289</sup> Assemb. 2616, 211th Leg., 2004–05 Sess. (N.J. 2004), *available at* [http://www.njleg.state.nj.us/2004/Bills/A3000/2616\\_I1.PDF](http://www.njleg.state.nj.us/2004/Bills/A3000/2616_I1.PDF).

<sup>290</sup> E-mail from Assemblywoman Charlotte Vandervalk, *supra* note 13.

<sup>291</sup> Assemb. 2616., The 2010 version of the bill remains identical to the original 2004 version. E-mail from Beth Staples, Chief of Staff for Assemblywoman Charlotte Vandervalk, *supra* note 13.

<sup>292</sup> *See* Calandrillo, *supra* note 217.

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The New Jersey Conscientious Exemption Bill is a step in the right direction because it increases parental autonomy while it prevents uninformed exemptions of convenience and exemptions based upon misinformation. The Bill, however, could better assure public health by eliminating New Jersey's automatic religious exemption and requiring annual renewal. Legislation could change New Jersey's policy from one that encourages perverse behavior on the part of parents and schools to one that promotes an open dialogue, an equitable balance of power between the state and parents, and informed decision-making.