

**Student Vaccination Requirements:
Can Nonmedical Exemptions Be Justified?**

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ABSTRACT

Despite being well established that states can require students attending school to be in good health so as not to endanger others, states increasingly have allowed parents to receive vaccination waivers for their children, not only because of medical necessities, but also for religious and philosophical reasons as well. Such exemptions have become quite controversial during the past year with the outbreak of measles at Disneyland and the subsequent spread of the disease from California to 17 other states. Indeed, student vaccination has received considerable national media attention in 2015, and almost one third of the states recently adopted or are considering amendments to their vaccination laws. This article addresses the tension between parental rights to exercise their religious beliefs and direct the upbringing of their children and the government's duty to ensure the wellbeing of its citizens over religious objections in connection with vaccination requirements. Specifically, it reviews the history of vaccination for communicable diseases and legislative mandates across states, with particular attention to changes in vaccination laws affecting schools that have been proposed and/or enacted in 2015. Then, selected federal and state judicial decisions pertaining to vaccination laws are analyzed. The article concludes with a discussion of the evidence and emotion involved in the current volatile debate over vaccination requirements and makes recommendations for policymakers in terms of strengthening vaccination requirements for diseases that still pose a health threat in our nation.

Student Vaccination Requirements: Can Nonmedical Exemptions Be Justified?

A California bill that would sharply limit vaccination waivers after a measles outbreak at Disneyland has generated such an acidic debate that the proposal's author was under added security . . .¹

It is well established that states have the authority to mandate school attendance.² In addition, they can require students attending school to be in good health so as not to endanger others.³ Accordingly, courts have upheld conditioning public school attendance on students being vaccinated against communicable diseases.⁴ But states increasingly have allowed parents to receive immunization waivers for their children, not only because of medical necessities, but also for religious and philosophical reasons as well.⁵ While perhaps seeming to be a settled issue, this topic has become quite controversial during the past year with the outbreak of measles at Disneyland and the subsequent spread of the disease from California to 17 other states.⁶ Indeed, student vaccination has received considerable national media attention in 2015, and almost one third of the states recently adopted or are currently considering amendments to their vaccination laws.⁷

Controversies over vaccination requirements involve a tension between important interests. Some parents, who oppose immunization, assert that their constitutional rights to exercise their religious beliefs and direct the upbringing of their children entitle them to make

¹ Judy Lin, *California Vaccine Bill Sparks Acidic Debate, Nazi Links*, HUFFINGTON POST, June 22, 2015, available at http://www.huffingtonpost.com/2015/04/10/california-vaccine-bill-nazi_n_7044056.html.

² MARTHA MCCARTHY, NELDA CAMBRON-MCCABE, & SUZANNE ECKES, *PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS* (2014), chapter 3.

³ *Id.*

⁴ See Section III for a discussion of relevant litigation.

⁵ See Nat'l Conference of State Legislatures (NCSL), *States with Religious and Philosophical Exemptions from School Immunization Requirements*, June 30, 2015, available at <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

⁶ Evie Blad, *Measles Outbreak Cues New Action on Vaccination Rules*, ED. WK., Feb. 13, 2015, at 13.

⁷ NCSL, *supra* note 5.

vaccination decisions. Countering this argument is the assertion that the government's duty to ensure the wellbeing of its citizens overrides such parental interests, even those based on religious convictions. And school administrators are often caught in the middle, trying to enforce legal mandates while being responsive to parental concerns.⁸

This article reviews the history of vaccination for communicable diseases and legislative mandates across states, with particular attention to changes in vaccination laws affecting schools that have been proposed and/or enacted in 2015. Then, selected federal and state judicial decisions pertaining to vaccination laws in the United States are analyzed. The article concludes with a discussion of the evidence and emotion involved in the current volatile debate over vaccination requirements and makes recommendations for policymakers.

I. History of Vaccination

Vaccination practices have a lengthy history. In fact, the Chinese used inoculation techniques to fight smallpox as early as 1000 A.D., but creation of the smallpox vaccine that eventually eradicated this disease is attributed to Edward Jenner, English physician and scientist.⁹ He first used the cowpox vaccine to vaccinate a child against smallpox in 1796. By the early 1800s, many European countries had laws requiring smallpox vaccination of infants. Sweden was the first to mention vaccination as a prerequisite to school attendance, and England

⁸ See *Should Any Vaccines Be Required for Children?* ProCon.org., June 10, 2015, available at <http://vaccines.procon.org/>. Immunization is a broader term that refers to the process of artificially inducing immunity. Vaccination is a form of immunization whereby “a killed or weakened infectious organism is injected.” Douglas Diekema, *Personal Belief Exemptions from School Vaccination Requirements*, 35 ANN. REV. PUB. HEALTH 275, 280 (Feb. 5, 2014). See also James Hodge & Lawrence Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L. J. 831, 837 n.19 (2002). Despite the technical differences, the terms vaccination and immunization often are used interchangeably and will be in this article.

⁹ Jenner noticed that milkmaids who had been infected with cowpox rarely became infected with smallpox during outbreaks, which led to his discovery of the smallpox vaccine.

required all children to be vaccinated against smallpox in 1853.¹⁰ In the United States, Benjamin Waterhouse, a physician and president of Harvard Medical School, began using the cowpox vaccine to immunize individuals against smallpox in Massachusetts in 1801.

It was almost a century after Jenner's work that vaccines for other diseases were developed. Louis Pasteur, French chemist and microbiologist, developed the vaccine for avian cholera in 1879 and rabies in 1885. This started a very active period of vaccine development for a number of diseases including typhoid, diphtheria, tuberculosis, and tetanus. In the twentieth century, vaccines were developed for polio (1955), measles (1963), mumps (1967), and rubella (1969).¹¹

The adoption of vaccination requirements as a prerequisite to school attendance paralleled the growth in compulsory school attendance laws in the U. S. and an outbreak of smallpox in the 1830s. In 1827, Boston was the first municipality to require vaccination for school enrollment, and Massachusetts was the first state to enact a law mandating smallpox vaccination for school children in 1855. Massachusetts was followed by New York (1862), Connecticut (1872), Indiana (1881), and Arkansas (1882)¹² By the beginning of the twentieth century, 11 states had enacted vaccinations requirements; 20 states had such requirements by 1970.¹³ All other states rapidly followed with mandatory vaccination laws by 1980.¹⁴

¹⁰ Diekema, *supra* note 8, at 278.

¹¹ Vaccine Education Center, The Children's Hospital of Philadelphia, April 2013, *available at* <http://vec.chop.edu/service/vaccine-education-center/vaccine-schedule/history-of-vaccine-schedule.html>. Not until 1902 did the first federal law address the quality of vaccines used in the U.S., An Act to Regulate the Sale of Viruses, Serums, Toxins, and Analogous Products, 21 U.S.C. § 151 *et seq.* See 24 PUB. HEALTH REPS. (No. 20, May 14, 1909), at 629-633.

¹² *Should Any Vaccines Be Required for Children?* *supra* note 8.

¹³ Alan R. Hinman et al., *Childhood Immunizations: Laws that Work*, 30 J. LAW, MED. & ETHICS, 122 (Sept. 2, 2002).

¹⁴ Diekema, *supra* note 8, at 278.

The increase in mandatory vaccination was accompanied by a rise in opposition to such government mandates. The Anti-Vaccination Society of America was founded in 1879; in 1882, the New England Anti-Compulsory Vaccination League was created; and the anti-vaccination League of New York was established in 1885.¹⁵ Shortly thereafter anti-vaccination groups became active in other states.

In 1990, the Centers for Disease Control (CDC) and the Food and Drug Administration created the Vaccine Adverse Event Reporting System (VAERS) to collect information about adverse reactions to vaccinations. Of the 30,000 reports VAERS receives each year, most are for mild reactions such as fevers or redness; less than 10 percent are for serious reactions, which may or may not be connected to the vaccines.¹⁶ In 1986, Congress enacted the National Childhood Vaccine Injury Act (NCVIA) to provide cost-effective arbitration for vaccine injury claims, using special masters and the U.S. Court of Federal Claims to provide a no-fault claims process.¹⁷ And in 1993, Congress passed the Comprehensive Childhood Immunization Act to create a program providing free vaccinations to children in need.¹⁸

Since smallpox has virtually been eradicated, children in the U.S. are no longer vaccinated against this disease; the last reported case in the world was in 1977.¹⁹ And state immunization requirements have resulted in eliminating illnesses like measles, mumps, and pertussis, but eradicating such diseases is based on herd immunity being maintained. Herd immunity means that the disease is highly unlikely to spread because of the small probability that

¹⁵ See Robert Wolfe & Lisa Sharp, *Anti-Vaccinationists Past and Present*, August 24, 2002, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1123944/>.

¹⁶ See *Should Any Vaccines Be Required for Children?* *supra* note 8.

¹⁷ 42 U.S.C. §§300aa-34 (2014).

¹⁸ 42 U.S.C. 201 *et seq.* (2014).

¹⁹ World Health Org., *World Health Organization Declares Smallpox Eradicated 1980*, May 8, 1980, available at <http://www.pbs.org/wgbh/aso/databank/entries/dm79sp.html>.

a person with the disease will encounter an unvaccinated individual.²⁰ Herd immunity protects those with compromised immune systems who cannot be vaccinated, such as infants and the elderly.²¹ Public health officials suggest 90-95 percent vaccinated as the threshold to prevent the spread of communicable illnesses, but this percentage varies by disease.²² There is some sentiment that a higher immunization rate may be necessary in school settings, and many school districts have dropped below 90 percent vaccinated because of the waivers allowed.²³

Although vaccination requirements have received judicial endorsement,²⁴ states also have broadened the statutory exemptions allowed. The growth of personal-belief exemptions in immunization laws is attributed to pressure anti-vaccine organizations have placed on policymakers. Anti-vaccination publicity, such as the 1982 NBC story, “Vaccine Roulette,” raised concerns about the pertussis vaccine.²⁵ A benchmark year was 1998, when a study by Andrew Wakfield, MD., connected the measles-mumps-rubella vaccine with “leaky gut” and autism.²⁶ This research was subsequently discredited by studies showing that Wakfield falsified the medical histories of children. In 2010, the medical journal that published the 1998 study,

²⁰ S. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating their Children?* 37 U. MICH. J. L. REFORM 420 (2004); Anthony Ciolli, *Mandatory School Vaccinations: The Role of Tort Law*, 81 YALE J. BIOLOGY & MED. 129 (2008); Diekema, *supra* note 8, at 276.

²¹ Ciolli, *supra* note 20.

²² See Emily Lee et al., *The Effect of Childhood Vaccine Exemptions on Disease Outbreaks*, Center for American Progress (November 14, 2013), at 2. See also Paul Fine et al., ‘Herd Immunity’: A Rough Guide, 52 CLIN. INFECT. DISEASES 911-916 (2011).

²³ See Blad, *supra* note 6, at 13; Diekema, *supra* note 8, at 276.

²⁴ See litigation addressed in Section III.

²⁵ Katie Sanders, *ABC Expert: 19 States Now Allow Personal Exemptions for Measles Vaccine*, ABC THIS WEEK, Feb. 1, 2015, available at <http://www.politifact.com/punditfact/statements/2015/feb/01/richard-besser/abc-expert-19-states-now-allow-personal-exemptionahrd-besser/abc-expert-19-states-mow-allow-personal-exemption->

²⁶ *Id.* See also *Should Any Vaccines Be Required for Children?* *supra* note 8.

Lancet, retracted the article as not credible, and Wakfield lost his medical license.²⁷ But the notoriety given to the claim by celebrities, including Jenny McCarthy among others, has created a media forum that has fueled the parental frenzy over vaccinations.

Outbreaks of vaccine-preventable diseases have periodically focused the spotlight on this topic. In the 2008 outbreak of measles in San Diego, some young children who could not be vaccinated were quarantined as herd immunity had not been reached.²⁸ In 2012, there were more than 48,000 cases of whooping cough (pertussis) as almost all states did not meet the herd immunity for this disease.²⁹ Currently, the CDC recommends 28 doses of 10 vaccines covering 14 diseases for children from birth to age six.³⁰

II. Vaccination Legislation

While there is no federal law mandating immunization for school children, all states have such vaccination requirements.³¹ States vary as to which vaccinations are mandatory and as to what exemptions are allowed. Every state allows medical exemptions for children who are medically fragile, have compromised immune systems, or for some other medical reason should not be vaccinated. Almost all states also grant religious exemptions; California recently joined Mississippi and West Virginia in providing only medical exemptions.³² Eighteen states allow

²⁷ CNN, *Retracted Autism Study an Elaborate Fraud, British Journal Finds*, Jan. 5, 2011, available at <http://www.cnn.com/2011/HEALTH/01/05/autism.vaccines/>.

²⁸ CDC, *Outbreak of Measles—San Diego, California, January-February, 2008*, Feb. 22, 2008, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm57e222a1.html>.

²⁹ CDC, *Pertussis Outbreak Trends*, March 11, 2014, available at <http://www.cdc.gov/pertussis/outbreaks/trends.html>.

³⁰ See Diekema, *supra* note 8, at 276-277; *Should Any Vaccines Be Required for Children?* *supra* note 8.

³¹ See Aila Hoss & Matthew Penn, *State School Immunization Requirements and Vaccine Exemption Laws*, Office for State, Tribal, Local & Territorial Support, CDC, March 27, 2015.

³² *Id.* See also *CA Lawmakers Pass Vaccine Bill Amid Emotional Debate*, HUFFINGTON POST, June 10, 2015, available at http://www.huffingtonpost.com/2015/06/10/california-vaccine-bill_n_7552946.html. The current laws in Louisiana and Minnesota (as was true in California

philosophical exemptions for those who object to immunization based on personal, moral, or other beliefs. This is down from 20 states that had such philosophical exemptions in January, 2015.³³

Vaccination laws in all states apply to public and private schools as well as to daycare programs, but exemptions allowed for daycare in a few states vary from those authorized for K-12 schools.³⁴ In a number of states, the laws specifically authorize excluding exempted students from school during an outbreak or emergency. And even where this is not specified, it is generally assumed that unvaccinated children can be excluded from school if a classmate is diagnosed with a vaccine-preventable disease.

A. Obtaining Waivers

States vary as to the process parents must go through to secure a waiver from mandatory vaccination for their children. In some states, such as Alaska, Minnesota, and Virginia, parents must get a notarized statement or affidavit. Eight states require parents to receive education regarding the risks and benefits of vaccination, either from the state department of health or from *a healthcare provider, before receiving a waiver.*³⁵ And nine states require at least an annual recertification for medical exemptions from vaccination.

The increasing numbers of parents seeking personal belief or religious exemptions and the ease of obtaining such waivers have placed many locales below herd immunity, thus putting residents at risk of disease outbreaks. Exemption rates in the entire state of Oregon for

before the 2015 amendment) do not explicitly recognize a religious exemption, but the non-medical exemption in those states can be based on religious as well as philosophical beliefs.³³ See NCSL, *supra* note 5. Missouri allows a personal belief exception for childcare and preschool but not for kindergarten students and above. In five states, the vaccination laws expressly exclude exemptions based on philosophical beliefs (Delaware, Iowa, New Jersey, North Carolina, and West Virginia). See also *infra* text accompanying notes 43-49.

³⁴ Hoss & Penn, *supra* note 31.

³⁵ *Id.*

kindergarten students went from 1 percent in 1986 to 7 percent in 2014.³⁶ Arizona data also indicate that two in five kindergarten classrooms and one in six classrooms at the sixth grade level fell below the herd immunity in that too few pupils were immunized to prevent the spread of measles in 2015.³⁷

There is a direct correlation between the increase in requests for waivers from vaccination and the availability of personal-belief exemptions.³⁸ Exemption rates vary not only across states, but also within states; Washington counties ranged from 4 percent to more than 30 percent of the children enrolled in kindergarten being unvaccinated in 2014-2015, and 95 percent of the exemptions in the state were for unspecified personal reasons.³⁹ Rota and colleagues concluded that in some states getting an exemption is easier than fulfilling vaccination requirements, which led to the conclusion that convenience is important in a parent's decision to vaccinate their children.⁴⁰ Ciolli noted that "thousands of parents have joined mail-order or sham religions, such as the 'Congregation of Universal Wisdom,' so they can qualify for religious exemptions and not have to go to the trouble of vaccinating their children."⁴¹

B. Recently Adopted or Pending Changes to Vaccination Laws

Changes in vaccination laws were proposed in sixteen states in 2015, primarily in response to the recent measles outbreak, and several of these bills have been signed into law.

³⁶ Kristian Foden-Vencil, *Oregon Has Highest Vaccination Exemption Rate in U.S.*, Feb. 4, 2015, available at <http://www.opb.org/news/article/oregon-has-highest-vaccine-exemption-rate-in-us/>.

³⁷ Associated Press, cited in *Ariz. Students Vulnerable to Spread of Measles*, ED. WK., May 13, 2015, at 5.

³⁸ J.S. Rota et al., *Processes for Obtaining Nonmedical Exemptions to State Immunization Laws*, 91 AMER J. PUB. HEALTH 645-648 (2001); Ciolli, *supra* note 20, at 131.

³⁹ Washington State Dep't of Health, *Kindergartners Complete for Required Immunizations by County—Washington School Year 2014-2015*, available at <http://www.doh.wa.gov/Portals/1/Documents/Pubs/348-247-SY2014-15-ImmunizationMaps.pdf>.

⁴⁰ Rota et al., *supra* note 38.

⁴¹ Ciolli, *supra* note 20, at 131.

There is even legislation proposed at the federal level to offer incentives for states to require parents to be informed by physicians about the risks before they are granted exemptions for nonmedical reasons.⁴²

In 2015, Vermont became the first state to eliminate its philosophical exemption. The Vermont Coalition for Vaccine Choice fought against the measure, and initially Governor Shumlin opposed the bill, but he changed his mind and, without much publicity, signed the law on May 28th, 2015.⁴³ A Vermont measure requiring schools and child care facilities to provide vaccination rates to parents also was enacted.⁴⁴ But a bill to remove the religious exemption (H212) as well as the philosophical exemption was considered but not passed by the Vermont legislature.

Amidst far more volatile reactions than in Vermont, a California bill eliminating all but the medical exemption from mandatory vaccination of school children (SB 277) was signed into law on June 30th, 2015.⁴⁵ Unlike Vermont, California has no separate religious exemption, and elimination of the personal-belief exemption has faced strong opposition from groups who contend that the law sweeps far too broadly and represents a huge intrusion on parental rights. They assert that some parents cannot practice their religious faith if required to have their children vaccinated.⁴⁶ Critics claim that lawmakers are improperly influenced by the alliance

⁴² Blad, *supra* note 6, at 1.

⁴³ Michael Specter, *Vermont Says No to the Anti-Vaccine Movement*, THE NEW YORKER, May 29, 2015, available at <http://www.newyorker.com/news/news-desk/vermont-says-no-to-the-anti-vaccine-movement>.

⁴⁴ NCSL, *supra* note 5.

⁴⁵ See Edmund G. Brown, Jr., *To Members of the California State Senate*, June 30, 2015, available at gov.ca.gov/docs/SB_277_Signing_Message.pdf; Patrick McGreevy & Rong-Gong Lin II, *Legislators OK Strict Vaccine Requirement*, L. A. TIMES, June 26, 2015, at A1, A16.

⁴⁶ See Rong-Gong Lin II & Patrick McGreevy, *California's Measles Outbreak is Over, but Vaccine Fight Continues*, L. A. TIMES, Apr. 17, 2015, available at <http://www.latimes.com/local/california/la-me-measles-20150418-story.html#page=1>.

between the public health community and the pharmaceutical companies that produce vaccines.⁴⁷ Senator Carol Liu, chair of the Education Committee, said through a spokesperson that this bill generated more calls to her office than any other this past term, “including measures on immigration, doctor-assisted suicide, and police shootings.”⁴⁸ In one of the opposition’s rallies, Robert F. Kennedy Jr. compared the number of children injured by vaccination to “a holocaust,” a statement that he subsequently apologized for making.⁴⁹

In a few other states, proposals to eliminate personal-belief and/or religious exemptions or make them more difficult to obtain have also been introduced, although not yet enacted. Proposed legislation in the state of Washington to remove the philosophical/personal-belief exemption (HB 2009) was not enacted in the spring but was reintroduced in May, 2015.⁵⁰ And proposed legislation in Minnesota (HB 393, SB 380) would make it harder to get a personal-belief exemption by imposing additional steps.⁵¹

Because the public may not be aware of how high the exemption rate is in certain locales, some of the proposed pieces of legislation would require schools not only to keep track of exemptions but also to report exemption rates to all parents. Colorado passed such a law in 2013.⁵² Several other states have pending legislation that would require such public notification of percentages of children vaccinated and the number of waivers allowed. The Illinois bill (SB 1410) that has been passed by the legislature and is waiting for the governor’s signature, will require the State Board of Education to publish on its website the exemption data for all schools.

⁴⁷ *Should Any Vaccines Be Required for Children?* *supra* note 8.

⁴⁸ Lin, *supra* note 1.

⁴⁹ CBS/AP, *Robert F. Kennedy Jr. Apologizes for “Holocaust” Comment in Vaccine Debate*, April 13, 2015, available at <http://www.cbsnews.com/news/robert-f-kennedy-jr-apologizes-for-holocaust-comment-in-vaccine-debate/>.

⁵⁰ NCSL, *supra* note 5.

⁵¹ *Id.* See also *infra* text accompanying note 57.

⁵² COLO. REV. STAT. §§ 23-4-903; 25-4-910 (2014).

In addition, the measure will make the religious and medical exemptions more difficult to secure in that a form will have to be presented to the Department of Public Health that details the objection. Religious waivers will require a notarized signature from a religious official attesting to the objection, and the medical exception will require the child's primary care provider to verify that the child should not receive one or more immunizations for medical reasons.⁵³

West Virginia currently has only a medical exemption, and in 2015 it adopted legislation (SB 286) requiring the Public Health Commissioner to notify parents of new students about immunization requirements. In addition, requests for exemptions will have to be accompanied by certification from a licensed physician stating that the child would be medically at risk if immunized. The law also authorizes the Bureau for Public Health to make exemption determinations through an immunization officer appointed by the Bureau.⁵⁴ West Virginia has the most stringent vaccination requirements of any state to date, but California is close behind with its recent elimination of the nonmedical exemption.

Several bills in other states have not yet received legislative endorsement. In Arizona, for example, a bill (H2466) was not passed during the 2015 legislative session that would require each public school, including charter schools, to post immunization rates of enrolled pupils. The proposed Texas law (S547) also would require each school district to provide an annual report on the immunization status for the district as a whole and each school. The Department of State Health Services would have to make this report electronically available to the public.

Another popular strategy in the efforts to reduce requests for exemptions is to require those seeking waivers to meet first with a physician or the health department to discuss

⁵³ NCSL, *supra* note 5.

⁵⁴ *Id.* South Dakota also enacted a change in its vaccination law (HB 1059) in 2015, requiring immunization records to be disclosed to health care providers and other authorized agencies unless guardians refuse such disclosure.

vaccination risks. Oregon passed such a measure in 2013.⁵⁵ California also adopted such a requirement in 2013, but the Governor by Executive Order directed the Department of Public Health to allow a religious exemption from the required certification of such a discussion of vaccination risks.⁵⁶ Measures proposed, but not yet enacted in Missouri (H846) and Minnesota (HB 393, SB 380) also would require certification of a discussion of risks with a physician to receive personal-belief exemptions.⁵⁷ The Missouri provision would further require parental notification if a nonimmunized child attends the school.

Only one of the 2015 proposals for legislative changes in vaccination laws clearly would make it easier to secure waivers from state immunization requirements, but it has not yet been enacted. The New York legislature considered a measure (SB 1536, AB 943) to add an exemption for opposition based on philosophical beliefs. This bill may be in response to recent New York litigation, discussed in the next section, which has not been favorable to parents trying to broaden application of the religious exemption.⁵⁸

III. Litigation

There have been regular challenges to vaccination requirements as a prerequisite to school attendance, and courts consistently have upheld such requirements. However, courts have issued a range of opinions as to the legality of exemptions from mandatory vaccination. In this section, selected cases are reviewed that highlight the issues that have been judicially addressed.

⁵⁵ OR. REV. STAT. §§ 433.267, 433.273, 433.284 (2014). Oregon's proposed legislation (SB 442) would require parents/guardians to submit a document that declines immunization, and the law would require all families to meet the vaccination requirements not only those newly entering school. See NCSL, *supra* note 5.

⁵⁶ Edmund G. Brown, Jr., *Executive Order*, Office of the Governor, Sept. 30, 2012.

⁵⁷ NCSL, *supra* note 5.

⁵⁸ See, e.g., *Phillips v. City of New York*, 775 F.3d 538, 313 Ed.Law Rep. 452 (2d Cir. 2015); *Caviezel v. Great Neck Pub. Schs.*, 500 Fed. Appx. 16, 291 Ed.Law Rep. 2 (2d Cir. 2012); *infra* text accompanying notes 85-92.

A. Supreme Court Decisions

Only two decisions involving vaccination requirements have been rendered by the U.S. Supreme Court. An early non-school case, *Jacobson v. Commonwealth of Massachusetts*,⁵⁹ often is cited in subsequent litigation challenging vaccination requirements for school children. In *Jacobson*, the Supreme Court ruled that mandatory vaccination for smallpox was within the state's legitimate police power and rejected the assertion that the U.S. Constitution's guarantee of individual liberties prevailed over the state's conclusion that mandatory vaccination was necessary to protect the general population.

Subsequently, in a school case, *Zucht v. King*, the Supreme Court rejected a challenge to city ordinances in San Antonio, Texas that required vaccination as a prerequisite to attending public or private schools. A child without the required certificate of vaccination was denied admission to a public and then a private school. The ordinances were challenged as depriving the child of liberty rights without due process of law by compelling vaccination. It was also alleged that the ordinances gave the board of health discretion to determine enforcement, leading to arbitrary action. The Supreme Court concluded that the ordinances conveyed only the broad discretion necessary to protect public health.⁶⁰

Although these two early cases are the only Supreme Court decisions that directly address vaccination requirements, a third Supreme Court decision often is cited in lower court vaccination cases because it is relevant to the tension between parental rights to direct the upbringing of their children and the state's interest in guaranteeing the welfare of its citizens. In *Prince v. Massachusetts*, the Supreme Court in 1944 upheld the state's authority to prohibit child

⁵⁹ 197 U.S. 11 (1905).

⁶⁰ 260 U.S. 174 (1922); *see also Braunfels v. Waldschmidt*, 207 S.W. 303 (Tex. 1918) (upholding a city ordinance mandating vaccination as a prerequisite to school attendance and ruling that the state's police power to enact reasonable health regulations can be delegated to municipalities).

labor over parents' religious objections.⁶¹ The Supreme Court found no free exercise or equal protection impairments in not allowing Jehovah's Witnesses youth to use public streets to distribute pamphlets and collect money for them. In dicta, the Supreme Court in *Prince* stated that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The 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."⁶²

In a fourth Supreme Court decision, parents sought damages for product liability against a vaccine manufacturer for injuries their child allegedly suffered because of being vaccinated. The Court held that the National Childhood Vaccine Injury Act (NCVIA) of 1986 preempts any design-defect claims against vaccine manufacturers. Under the law, claims are paid from an excise tax on vaccine doses, and in return, manufacturers enjoy protection against liability for unavoidable vaccine side effects.⁶³

B. Lower Court Rulings Upholding Vaccination Requirements

Despite only one Supreme Court decision directly addressing a challenge to mandatory immunization as a prerequisite to school attendance, there have been a number of state and lower federal court decisions that have addressed vaccination requirements.⁶⁴ Indeed, federal circuit courts have rendered several decisions addressing the constitutionality of state vaccination statutes in the past five years, and New York alone has generated more than a dozen lower

⁶¹ 321 U.S. 158 (1944).

⁶² *Id.* at 166-167.

⁶³ *Bruesewitz v. Wyeth, LLC*, 562 U.S. 223 (2011); *see also Cedillo v. Sec., Health & Human Servs.*, 617 F.3d 1328 (Fed. Cir. 2010) (finding that the special master acted within his discretion in denying claim for damages under the NCVIA to parents who alleged that their daughter suffered autism and gastrointestinal injuries from vaccination).

⁶⁴ Anthony Ciolli has suggested that class action tort suits should be brought against those seeking religious or philosophical exemptions based on convenience, since such individuals have caused specific locales to drop below herd immunity. *See Ciolli, supra* note 20, at 129-137.

federal court and state court rulings on this topic. Early cases addressed the state's authority to impose vaccination requirements, even over religious objections, and most of the recent rulings have focused on interpretations of statutory exemptions, primarily waivers for religious reasons.

Courts in the initial challenges uniformly upheld state and municipal vaccination requirements and endorsed the conviction of parents for violating compulsory attendance laws because their unvaccinated children were not allowed to enroll in school.⁶⁵ Since these cases are numerous and quite consistent, only illustrative rulings will be briefly reviewed.

In an early case, the Kentucky Supreme Court in consolidated appeals upheld the school board's authority to require smallpox vaccination as a prerequisite to school attendance. Plaintiffs claimed that their religious and conscientious beliefs prevented injecting foreign substances into their children's veins, but the Kentucky high court concluded that there was an overriding state concern in not endangering the community.⁶⁶

Supporting a vaccination requirement in 1964, the Arkansas Supreme Court upheld the conviction of parents for persistent violation of the school attendance law by not having their children vaccinated, which resulted in his children being placed in custody of the Child Welfare Division. The court accepted that the parents acted on their religious belief but held that they have no legal right to prevent vaccination against smallpox. The fact that the parents would not permit vaccination and thus enable their children to attend school provided evidence of neglect.⁶⁷ In short the court reasoned that parents do not have the right to make martyrs of their children.

C. Judicial Interpretations of Statutory Exemptions

⁶⁵ See *infra* text accompanying notes 66-67; Hodge & Gostin, *supra* note 8.

⁶⁶ *Mosier v. Barren County Bd. of Health*, 215 S.W.2d 967 (Ky. 1948).

⁶⁷ *Cude v. State*, 237 Ark. 927, 930-931 (Ark. 1964).

Most of the recent cases have focused on the application of various vaccination exemptions and have reflected more diverse reasoning than have opinions upholding the state's authority to mandate immunization. Medical exemptions usually have not generated litigation, perhaps because only a few children receive such exemptions from compulsory vaccination. This may change soon if a number of states eliminate exemptions based on religious or personal beliefs.

One recent federal appellate decision did focus on a denial of a medical exemption in a state without other vaccination waivers. In *Workman v. Mingo County Board of Education*, the Fourth Circuit recognized West Virginia's compelling interest in requiring children to be immunized as a prerequisite to attending schools in the state.⁶⁸ Under the state law, exemptions are allowed with a certificate from a physician indicating that the child should not be vaccinated for medical reasons. After being denied a medical exemption, the parent brought suit seeking a declaratory judgment, injunctive relief, and damages. She charged that the denial of her application for a medical exemption abridged her First and Fourteenth Amendment rights. The district court rejected all the constitutional claims, and Workman appealed. Since there were no genuine issues of material fact, the appeals court ruled that the district court did not err in issuing summary judgment for the state agencies. Noting the split in opinions as to whether rational basis, strict scrutiny, or a hybrid should be applied in analyzing a claim under the Free Exercise Clause of the First Amendment, the court reasoned that even applying the most stringent strict scrutiny standard, mandatory vaccination laws would be upheld. The appeals court rejected Workman's argument that the vaccination requirement is for diseases that are not very common, concluding that preventing an outbreak of these diseases is indeed a compelling government

⁶⁸ 419 Fed. Appx. 348, 268 Ed.Law Rep. 744 (4th Cir. 2011).

interest. In addition, the court found no evidence of purposeful discrimination to support a Fourteenth Amendment equal protection claim. Also rejecting the facial challenge to the denial of religious exemptions, the court held that a state may provide a religious exemption but is not obligated to do so. The court further found no fundamental right to avoid mandatory vaccination, and thus rejected the Fourteenth Amendment substantive due process claim.

Perhaps due to the judicial consistency in upholding vaccination requirements, parents have lobbied for statutory exemptions, which have been broadened in recent years.⁶⁹ In addition to exemptions for medical necessities, by far the most common are for religious reasons, and courts have issued a range of opinions when parents have based their objections on statutory religious exemptions. Some courts have broadly interpreted the reach of such exemptions, holding that parents do not have to be members of an organized sect that disavows vaccination to be eligible for religious waivers.

For example, a New York lower court granted parents an injunction that required the school to admit their unvaccinated children under the religious exemption. The court reasoned that the parent was a bona fide Christian Scientist even though not a formal church member.⁷⁰ In a subsequent New York case, parents sued the school district challenging the application of the religious exemption because they were not allowed to use it. The federal district court held that limiting the religious exemption to “bona fide members of a recognized religious organization” violated the Establishment and Free Exercise Clauses of the First Amendment by requiring the

⁶⁹ Philosophical exemptions have been adopted more recently and have not generated a body of litigation as have challenges to the application of religious waivers. This is likely because of the broad application of personal-belief exemptions; parents who are successful in obtaining such waivers are not going to initiate legal challenges.

⁷⁰ *Maier v. Besser*, 341 N.Y.S.2d 411 (N.Y. Sup. Ct. 1972).

government “to become involved in religious matters to an inordinate degree.”⁷¹ The court reasoned that parents' opposition to mandatory inoculation based on their pantheistic views was religious in nature and thus entitled to an exemption. However, in this case, not all of the plaintiffs met the test of basing their opposition on sincerely held religious beliefs. The court found that members of the American National Hygiene Society did not base their opposition to vaccination on theological concerns.

Other courts also have endorsed a broad interpretation of the reach of religious exemptions. For example, the Maryland high court upheld a vaccination requirement but found the narrow religious exemption unconstitutional.⁷² The defendant, Davis, was charged and convicted of unlawfully permitting his minor child to remain away from elementary school without just cause, and his conviction was affirmed by the circuit court. The Maryland Court of Appeals held that the statute prohibiting school officials from admitting pupils who had not been immunized, except pupils whose parents were members or adherents of a “recognized church or religious denomination” opposing immunization, violated the Establishment Clause by favoring certain religious beliefs. But the court concluded that no matter how broadly the religious exemption was interpreted, Davis’s personal opposition to vaccination would not be covered, so his conviction was upheld. The court found the unconstitutional religious exemption severable from the rest of statute, and reasoned that the legislature could remedy the problem with the exemption. A New Jersey Superior Court similarly ruled that being members of a recognized

⁷¹ *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 90, 42 Ed.Law Rep. 1103 (E.D.N.Y. 1987).

⁷² *Davis v. State*, 451 A.2d 107, 6 Ed.Law Rep. 1009 (Md. 1982).

religious sect could not be a condition of receiving a religious exemption from the state's vaccination requirement.⁷³

In a Wyoming decision appearing to strengthen grounds for individuals to use a religious exemption, the Wyoming Supreme Court reviewed the State Department of Health's denial of a mother's request for a religious exemption from the school immunization requirement.⁷⁴ The exemption requested was from the hepatitis B vaccination, and the department required the mother to define her beliefs as being religious and to explain how her faith required the waiver. The Department was not satisfied with her responses and concluded that her objection was based on personal, moral, or philosophic beliefs rather than religious convictions. Disagreeing, the court ruled that the Department exceeded its authority by inquiring into the sincerity of the mother's religious beliefs. The state law specifies that "waivers shall be authorized by the state or county health office upon submission of written evidence of religious objection or medical contraindication to the administration of any vaccine."⁷⁵ The court reasoned that use of "shall" in the law was mandatory with presentation of the evidence requested. Furthermore, the court held that the Department did not follow its own regulations which do not require hepatitis B vaccination, so the waiver in this case was not even necessary. The court concluded that if its interpretation of the waiver creates problems with too many requests being made, the legislature should remedy the problem with revised legislation.

An Arkansas federal district court held that free exercise rights do not override a state's compulsory immunization requirement, but like several other courts, found the statutory

⁷³ *Kolbeck v. Kramer*, 202 A.2d 889, 893 (N.J. Super. Ct. 1964), *modified on other grounds*, 214 A.2d 408 (N.J. 1965); *see also Dalli v. Bd. of Educ.*, 267 N.E.2d 219 (Mass. 1971) (finding the religious exemption too narrow by requiring evidence that vaccination conflicted with the tenets and practices of a recognized church or denomination).

⁷⁴ *In re LePage*, 18 P.3d 1177, 151 Ed.Law Rep. 605 (Wyo. 2001).

⁷⁵ *Id.* at 1179.

religious exemption faulty in its narrow application.⁷⁶ The parent brought suit on behalf of her daughter who was suspended from school for failing to receive the immunizations required by Arkansas law. The amendment was limited to members or adherents of a church or religious denomination recognized by the state whose tenets oppose vaccination. The plaintiff had no church affiliation, so the Arkansas Department of Health denied the exemption that assertedly was based on the belief that “God gave us our immune systems, and we must not defile the body with immunizations.”⁷⁷ Recognizing that the state need not provide a religious exemption at all, the court held that any waiver adopted must satisfy the Federal Constitution.⁷⁸ The court concluded that this exemption ran afoul of the Free Exercise, Establishment, and Equal Protection Clauses. The primary effect of the exemption was to inhibit “the earnest beliefs and practices of those individuals who oppose immunization on religious grounds but are not members of an officially recognized religious organization.”⁷⁹ Even though the court required the religious exemption to be stricken, the remainder of the immunization law was upheld. The court noted that the legislature could act to adopt a constitutional exemption provision.

Some courts have not been as receptive toward broadly interpreting religious exemptions. The Supreme Court of Mississippi in 1979 upheld the state law requiring immunization against certain diseases before children could be admitted to school, finding an overriding and compelling public interest in the requirement even over religious objections.⁸⁰ Moreover, instead of broadly interpreting the religious exemption, the court struck it down as discriminating against parents who objected to vaccination on nonreligious grounds. Under the law, a duly licensed

⁷⁶ *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 168 Ed.Law Rep. 258 (W.D. Ark. 2002).

⁷⁷ *Id.* at 947.

⁷⁸ *Id.* at 948.

⁷⁹ *Id.* at 949.

⁸⁰ *Brown v. Stone*, 378 So. 2d 218 (Miss. 1979).

physician can submit a certificate of exemption for medical reasons, and a certificate of religious exemption can be submitted by an officer of a church of a recognized denomination. The court declared: “To give it effect would result in a violation of the Fourteenth Amendment . . . which provides that no state shall make any law denying to any person within its jurisdiction the equal protection of the laws, in that it would require the great body of school children to be vaccinated and at the same time expose them to the hazard of associating in school with children exempted under the religious exemption who had not been immunized as required under the law.”⁸¹ The court did not go so far as to say that a religious exemption would negate a state’s compelling interest in enacting the vaccination requirement in the first place, but it hinted at this conclusion by noting that if religious exemptions are easy to get, the statute’s purpose of protecting school children would be defeated.⁸² And the Mississippi legislature has not attempted to reestablish a religious exemption that would satisfy the judicial ruling.

In a more recent case, the Second Circuit held that parents could not use a religious exemption to receive a vaccination waiver based on their asserted religious belief.⁸³ The parents, who were members of the Universal Life Church, claimed that immunization was contrary to the “genetic blueprint,” but the court found their beliefs to be secular chiropractic ethics and not religiously based. An Ohio federal district court similarly disallowed using a religious exemption based on “chiropractic ethics,” declaring that “philosophical beliefs do not receive the same deference in our legal system as do religious beliefs.”⁸⁴ This court also rejected claims that the required immunization impaired constitutional privacy, equal protection, or due process rights.

⁸¹ *Id.* at 223.

⁸² *Id.* at 221.

⁸³ *Mason v. Gen. Brown Cent. Sch. Dist.*, 851 F.2d 47, 49, 48 Ed.Law Rep. 19 (2d Cir. 1988).

⁸⁴ *Hanzel v. Arter*, 625 F. Supp. 1259, 1265, 30 Ed.Law Rep. 347 (S.D. Ohio 1985).

In a subsequent New York case, the Second Circuit in 2012 reviewed a series of lower court orders holding that parents failed to establish valid religious objections to vaccination as required to be eligible to use the statutory religious exemption.⁸⁵ The lower courts found no federal claims necessitating a preliminary injunction and granted the defendants summary judgment on the remaining state law claims.⁸⁶ The district court found that the objections were not religious in nature so there was no valid religious opposition to the New York State Public Health Law. On appeal to the Second Circuit, the court found that the parents had not been injured and thus affirmed the district court holdings.⁸⁷

As noted, New York has witnessed many challenges to its statutory vaccination requirement. The most recent decision rendered by the Second Circuit, *Phillips v. City of New York*, entailed two consolidated cases in 2015.⁸⁸ In one case, parents of unvaccinated children challenged the constitutionality of the state's vaccination law and its regulation allowing unvaccinated children to be excluded from public school if there is an outbreak of a vaccine-preventable disease. Under this provision, school officials excluded two unvaccinated students, who had received waivers, because of a classmate being diagnosed with chicken pox, a vaccine-preventable disease. In the second case, Catholic parents challenged their denial of a religious exemption. The Department of Education concluded that the requested exemption was not based on genuine and sincere religious beliefs pertaining to her Catholic religion, noting that previously a medical exemption had been denied because no certification was presented from a physician.

⁸⁵ *Caviezel v. Great Neck Pub. Schs.*, 500 Fed. Appx. 16, 291 Ed.Law Rep. 2 (2d Cir. 2012).

⁸⁶ See *Caviezel III*, 814 F. Supp. 2d 209, 276 Ed.Law Rep. 774 (E.D.N.Y. 2011) (issuing summary judgment on remaining state law claims); *Caviezel II*, 739 F. Supp. 2d 273, 264 Ed.Law Rep. 166 (E.D. N.Y. 2010) (dismissal of parents' federal law claims); *Caviezel I*, 701 F. Supp.2d 414, 258 Ed.Law Rep. 555 (E.D.N.Y. 2010) (denying parents' motion for an injunction against enforcing the vaccination requirement).

⁸⁷ *Caviezel v. Great Neck Pub. Schs.*, 500 Fed. Appx. 16, 291 Ed.Law Rep. 2 (2d Cir. 2012).

⁸⁸ 775 F.3d 538, 313 Ed.Law Rep. 452 (2d Cir. 2015).

The department concluded that opposition was primarily health-related rather than based on religious beliefs.

In a *per curiam* decision, the Second Circuit affirmed the federal district court’s ruling upholding the vaccination requirement.⁸⁹ The appeals court found the statute and regulation at issue to be a constitutionally permissible exercise of the state’s police power, noting that the law allows a medical exemption signed by a licensed physician and a religious exemption for parents or guardians holding genuine and sincere religious beliefs that are contrary to vaccination. The Second Circuit agreed with the Fourth Circuit that mandatory vaccination as a condition of school enrollment does not abridge the Free Exercise Clause.⁹⁰ The court stated that the Supreme Court has recognized that “a law that is neutral and of general application need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.”⁹¹ The court also rejected the due process and equal protection claims.⁹² The court noted that New York could require vaccination with no waivers but is more lenient by allowing an exemption for genuine and sincere religious beliefs; only during an outbreak is the religious exemption revoked in this state.

IV. The Controversy Continues: Evidence and Emotion

Vaccinations protect most of those immunized by inducing immunity to the disease. They also guard against transmission based on herd or community immunity. But it must be remembered that 3 percent of the people vaccinated will not get the full benefit, either because

⁸⁹ Application of the medical exemption also was challenged on state and municipal law grounds and the Ninth Amendment to the U.S. Constitution, but the court did not have to address these arguments.

⁹⁰ *Phillips*, at 543, citing *Workman v. Mingo County Bd. of Educ.*, 419 Fed.Appx. 348, 353–354 (4th Cir.2011).

⁹¹ *Phillips, id.*, quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

⁹² *Phillips, id.* at 542-543.

they cannot produce enough antibodies or the ones produced are not effective.⁹³ In the recent outbreak associated with Disneyland, a few of the stricken individuals had been vaccinated.⁹⁴

There is evidence that vaccination can reduce or eliminate such outbreaks. The CDC estimated that 732,000 American children were spared death and 322 million childhood diseases were prevented through vaccination from 1994 to 2014.⁹⁵ The American Academy of Pediatrics has issued a statement that vaccination is 90-99 percent effective in preventing disease.⁹⁶ Among other agencies and associations supporting the safety of vaccinations are the Food and Drug Administration, the American Medical Association, UNICEF, and the World Health Organization.⁹⁷

Several studies have also documented the effectiveness of vaccination. For example, a CDC study in 1977 found that states requiring measles vaccination as a condition of school attendance experienced measles cases at a rate 40-50 percent lower than states without such a requirement.⁹⁸ Salmon and colleagues studied individuals ages 5-19 from 1985 until 1992 and reported that unvaccinated children were 35 times more likely to contract measles than

⁹³ Mayrav Saar, *Private Schools Putting NYC at Risk for Measles Outbreak*, N. Y. POST, Jan. 31, 2015, available at <http://nypost.com/2015/01/31/private-schools-putting-NYC-at-risk-for-measles-outbreak/>.

⁹⁴ *Id.*

⁹⁵ Bahar Gholipour, *Vaccination Has Saved 732,000 Children's Lives Since 1994, Says Report*, HUFFINGTON POST, Apr. 25, 2014, available at http://www.huffingtonpost.com/2014/04/25/vaccination-saved-childrens-lives_n_5214740.html.

⁹⁶ Amer. Med. Ass'n, *AMA Encourages Community-Clinical Partnerships to Increase Use of Preventative Health Services Among Boomers*, Nov. 19, 2009, available at <http://www.ama-assn.org>; Amer. Acad. Family Physicians, *Confusion, Safety Concerns Contribute to Low Seasonal Flu Vaccine Coverage among Pregnant Women*, Aug. 4, 2009, available at <http://www.aafp.org>; U.S. Dep't Health & Human Servs, *Safety*, June 5, 2014, available at <http://www.vaccines.gov>; *Should Any Vaccines Be Required for Children?* *supra* note 8.

⁹⁷ *Should Any Vaccines Be Required for Children?* *supra* note 8.

⁹⁸ CDC, *Measles—United States*, 26 MORBIDITY & MORTALITY WEEKLY REP. (14), 109-111 (1977).

vaccinated individuals.⁹⁹ According to UNICEF, vaccination reduced deaths from measles, mumps, rubella, and diphtheria by 99 percent between the mid-20th century and 2012.¹⁰⁰ Additionally, there are societal fiscal benefits in terms of the billions of dollars saved that would be devoted to treating these preventable diseases.¹⁰¹

Under most state laws, parents retain the options of having their children vaccinated, seeking an exemption, or home schooling their children. Because of these options, vaccination as a condition of school attendance is actually less intrusive than a general requirement that all citizens must be vaccinated.¹⁰² Nonetheless, opposition to mandatory vaccination for school children is quite strident from a vocal minority.

Controversies over vaccination requirements are particularly sensitive as they pit individual freedom and parental rights to direct the upbringing of their children against the common good and general welfare. And the political debates have become increasingly explosive. The issue of student vaccination has even entered the presidential race. Republican candidates, Governor Chris Christie of New Jersey and Senator Rand Paul of Kentucky, have advocated some level of choice for parents as to whether their children are vaccinated. Paul stated in an CNBC interview that there are “many tragic cases of walking, talking, normal

⁹⁹ Daniel A. Salmon et al., *Health Consequences of Religious and Philosophical Exemptions from Immunization Laws: Individual and Societal Risk of Measles*. 282 J. AMER. MED. ASS’N (1), 47–53 (1999).

¹⁰⁰ *Should Any Vaccines Be Required for Children?* *supra* note 8.

¹⁰¹ *Id.* See also S. Calandrillo, *supra* note 20, at 421 (noting that vaccine-preventable diseases cost \$10 billion in healthcare costs every year).

¹⁰² Douglas Diekema, *Public Health, Ethics, and State Compulsion*. 14 J. PUB. HEALTH MANAGE. PRACT. 332-334 (2008).

children who wound up with profound mental disorders after vaccines.”¹⁰³ Amesh Adalja, an infectious-disease physician at the University of Pittsburgh, declared that “elected officials giving credence to things that have been completely debunked” is “very concerning.”¹⁰⁴ Even President Obama at one point noted the inconclusive science on vaccination, but he has since recognized that the science is settled and has urged vaccination for all school children, and Hillary Clinton has repeatedly supported mandatory vaccination as a prerequisite to school attendance.¹⁰⁵

As mentioned, medical exemptions rarely are controversial, and they are so few that others are not put at risk. However, this could change if such medical exemptions become too easy to obtain. New York City public schools require vaccinations for all students except for those receiving religious or medical exceptions, but private schools have discretion in deciding what medical and religious exceptions they will accept. In part because of broadly interpreting the medical exemptions allowed, more than 90 private schools in the city have vaccination rates below that recommended for herd immunity, and almost one third of those schools had rates below 80 percent.¹⁰⁶ A handful of doctors may be willing to give parents what they want regardless of the medical necessity for the exemption.¹⁰⁷ Indeed, with the efforts to reduce personal-belief and religious exemptions, some doctors may make a “cottage industry” out of

¹⁰³ Rand Paul, *Defensive? Sen. Rand Paul on Voluntary Vaccines*, CNBC interview, Feb. 2, 2015, available at <http://video.cnbc.com/gallery/?video=3000351424>. See also Philip Rucker & Rosalind Helderman, *Vaccination Debate Flares in GOP Presidential Race, Alarming Medical Experts*, THE WASH. POST, Feb. 2, 2015, available at http://www.washingtonpost.com/politics/chris-christie-remarks-show-vaccines-potency-in-political-debate/2015/02/02/f1c49a6e-aaff-11e4-abe8-e1ef60ca26de_story.html.

¹⁰⁴ Amesh Adalja, quoted in Rucker & Helderman, *supra* note 103.

¹⁰⁵ Rucker & Helderman, *id.*

¹⁰⁶ Saar, *supra* note 93.

¹⁰⁷ *Pass the Vaccination Law* (editorial), L. A. TIMES, May 29, 2015, at A12.

giving parents documentation for medical exemptions from vaccination requirements for their children.¹⁰⁸

Personal-belief exemptions from vaccination requirements clearly are the most controversial. And it is unfortunate that the steady increase in personal-belief waivers remains under the radar until an outbreak, like the recent measles cases, makes the vaccination issue front-page news. For example, in California, the number of parents using the personal-belief exemption increased from less than 1 percent of kindergartners in 2000 to more than 3 percent in 2014, with some school districts above 20 percent.¹⁰⁹ Several studies have linked the number of exemptions granted with the ease of securing the waivers, and the higher the percentage of waivers in specific locales, the greater the risk of contracting the disease.¹¹⁰

National and state groups that oppose vaccination have become increasingly vocal. For example, the National Vaccine Information Center asserts that the liability-free drug companies and government health officials are taking families' freedom to make voluntary health decisions.¹¹¹ These groups keep pressuring state legislatures to adopt or expand personal-belief waivers as currently proposed in New York.¹¹² There is a vast amount of non-evidenced-based information on the Internet, and it can be difficult for parents to judge the validity of the claims being made. And some reports indicate that resistance increases if exemptions are not

¹⁰⁸ *Id.*

¹⁰⁹ Jennifer Medina, *Bill Requiring Vaccination of Children Advances in California, but Hurdles Remain*, THE N. Y. TIMES, April 22, 2013, available at http://www.nytimes.com/2015/04/23/us/bill-to-require-vaccination-of-children-advances-in-california.html?partner=rss&emc=rss&_r=0.

¹¹⁰ See T. A. Lieu et al., *Geographic Clusters in Underimmunization and Vaccine Refusal*, 135 PEDIATRICS 280-289 (2015); E. Wang et al., *Nonmedical Exemptions from School Immunization Requirements: A Systematic Review*. 104 AMER. J. PUB. HEALTH (no. 11), e62-e84 (Nov. 2014).

¹¹¹ Barbara Fisher, *Blackmail and Medical Vaccine Exemption*, Nat'l Vaccine Information Center, May 18, 2015, available at <http://www.nvic.org/about.aspx>.

¹¹² See New York bills, SB 1536 and AB 943; *supra* text accompanying note 58.

allowed.¹¹³ However, parents on the other side are fearful that their children, particularly babies too young to be vaccinated, will contract preventable diseases from those not vaccinated.

Although the opposition is more likely to organize and be vocal, some groups are being formed that favor immunization, such as the California Immunization Coalition.¹¹⁴

Of course, with increasing vaccines available, any required vaccinations must be based on evidence that an outbreak is possible if herd immunity is not maintained. The health threat from unvaccinated children must be real, because there is no reason to subject children to even very minor risks for diseases that have been eradicated.¹¹⁵ Assuming that only necessary vaccinations are mandated, the lax enforcement of immunization requirements and the increase in nonmedical exemptions seem to negate the compelling governmental interest in imposing compulsory vaccination at all. In short, if exemptions are easy for parents to get, the state's need to mandate immunization for the targeted diseases seems to be undermined.

V. Conclusion

The current efforts in a few states to strengthen vaccination requirements by eliminating most exemptions (except for medical necessities) are long overdue. This is one place where parental beliefs should be subjugated to the state's interest in protecting the health and welfare of its citizens. Policymakers need to do the right thing and not capitulate to a vocal minority. Preferably, they should reduce or eliminate the availability of personal-belief exemptions and perhaps religious exemptions as well for those diseases that still pose a threat. If these exemptions are not eliminated, at least they should be more difficult to obtain. In some states it

¹¹³ J. W. Leavitt, *Public Resistance or Cooperation? A Tale of Smallpox in Two Cities*. 1 *BIOSECURITY & BIOTERRORISM* (no. 3), 185-192 (2003).

¹¹⁴ Cal. Immunization Coalition, *Vaccinate California*, available at <http://www.immunizeca.org/>.

¹¹⁵ For example, efforts to add HPV (human papillomavirus) vaccination have not been successful as the infection is sexually transmitted and not a threat in classroom settings. See Diekema, *supra* note 8, at 288.

is easier to register for an exemption than to have children vaccinated—getting an exemption should not be the course of least resistance.

Laws also should obligate parents seeking exemptions to get sound medical information before waivers are granted. In addition, states should strengthen vaccination monitoring and reporting requirements for all schools, including private schools and daycare facilities, and they should require schools to report the percentage of students that are vaccinated and the percentage receiving exemptions. Such data, if well publicized can bring local pressure to bear on school districts and states to strengthen requirements that have been too lax.

Although lawmakers in almost one third of the states recently had the opportunity to make some of the needed changes in state vaccination requirements, only a handful of the proposed measures have been enacted to date. And it is unfortunate that it took a measles outbreak to convince policymakers to put vaccination on their legislative agendas. Given the vocal parent groups who oppose vaccination, continued legal activity—both litigation and amended legislation—seems assured.
