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# The Right To Refuse Vaccination: Revisiting Vaccination Exemptions and the “Best Interests of the Child Standard”

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# The Right To Refuse Vaccination

## *Revisiting Vaccination Exemptions and the “Best Interests of the Child Standard”*

### **Introduction**

The medical field has classified vaccination as one of the top ten achievements of public health in the 20<sup>th</sup> century.<sup>1</sup> Up until the 20<sup>th</sup> century, infectious diseases such as smallpox, the bubonic plague, polio, diphtheria, tuberculosis, measles, mumps, and rubella caused a majority of human deaths. However, because of the advent of vaccination and its widespread use in America, many of these illnesses have been reduced and even eliminated.<sup>2</sup> In recent times, most outbreaks of infectious disease have effected as few as dozens or hundreds of Americans (excluding the thousands affected by an outbreak of measles between 1989 and 1991). This stands in contrast to the outbreak rates of countries with fewer vaccination resources and implementation.<sup>3</sup> The Centers for Disease Control (CDC) estimated that vaccination saved 732,000 American children from death and prevented 322 million cases of childhood illness between 1994 and 2014.<sup>4</sup>

In spite of its success, vaccination has ironically become a victim of it as a growing anti-vaccination sentiment in the county has lead to decreasing rates of childhood vaccination. Parents are becoming more complacent as the perception of infectious diseases has changed and become less of a threat in the passing decades.<sup>5</sup> The size of government has also rapidly expanded and parents are becoming weary and skeptical of mandatory vaccination, seeing it as a form of government intrusion.<sup>6</sup> As a result, the nation is experiencing decreasing vaccination

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<sup>1</sup> CDC, *Ten great public health achievements*, 48 (12):241-243 (last updated July 2014).

<sup>2</sup> Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?*, 37 U. Mich.J.L. Reform 353, 362 (2004).

<sup>3</sup> *Id.* at 353 (2004).

<sup>4</sup> Bahar Gholipour, *Vaccination Has Saved 732,000 Children's Lives Since 1994, Says Report*, [http://www.huffingtonpost.com/2014/04/25/vaccination-saved-childrens-lives\\_n\\_5214740.html](http://www.huffingtonpost.com/2014/04/25/vaccination-saved-childrens-lives_n_5214740.html) (last updated Apr. 25, 2014).

<sup>5</sup> The History of Vaccines, *Vaccine Exemptions*, <http://www.historyofvaccines.org/content/articles/vaccination-exemptions> (July 2014).

<sup>6</sup> *Id.*

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rates and outbreaks are starting to manifest once again. Namely, measles, an illness virtually eradicated due to vaccination has resurged in the past few months due to lower childhood vaccination rates in California.<sup>7</sup> State legislatures and the courts should be working together to increase vaccination compliance and strengthen mandatory vaccination laws. Anti-vaccination parents are currently seeking refuge in easily obtainable religion or philosophy-based vaccination exemptions that a majority of states offer. States should no longer be allowed to offer non-medical blanket exemptions and should parents should no longer have the broad ability to refuse childhood vaccination as they currently can under the “best interests of the child standard” that they are held to in healthcare decision-making. Rather, states should be mandating childhood vaccination, offering only blanket medical exemptions. Parents who oppose the mandatory vaccines should have to make their case in court, where their religion and philosophy can be considered one of many factors for exemption and not a per se reason for it. This new approach to analyzing vaccination exemptions would be akin to a heightened “best interests of the child standard.”

Part I of this paper highlights the origins of vaccination and its widespread success in the medical community. Part II discusses the anti-vaccination movement across the country, the resulting infectious disease outbreaks that have occurred and factors that have lead to anti-vaccination sentiment. Part III details the authority of the federal and state governments to mandate childhood vaccination. Part IV purports how exemptions to mandatory childhood vaccination should be reformed, namely that states should be banned from offering non-medical exemptions and that courts should heighten the “best interests of the child standard” used in

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<sup>7</sup> The Council of State Governments Knowledge Center, *Vaccine Rates for Measles Decline as Exemptions Grow*, <http://knowledgecenter.csg.org/kc/content/vaccine-rates-measles-decline-exemptions-grow> (Feb. 2015).

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parental healthcare decision-making. Part IV also discusses policy reasons for why this is a better approach and the concerns that may arise from it.

### **I. Vaccination and its Success**

Vaccines are a preparation created by killed or weakened microbes (i.e. disease-causing microorganisms) to provide immunity to infectious diseases. Vaccines work by triggering the body's immune system to recognize, kill and store information about the microbe so the body is better prepared in the case of future exposures.<sup>8</sup> There is a general consensus in the medical community verifying the success of vaccination. For instance, there is a multitude of studies documenting the success behind the influenza vaccine,<sup>9</sup> the HPV vaccine,<sup>10</sup> and the chicken pox vaccine.<sup>11</sup> Internationally, vaccination has largely eradicated smallpox and drastically reduced the occurrence of polio, measles, and tetanus. According to the World Health Organization (WHO), vaccines are currently available to prevent and control 25 infections.<sup>12</sup>

Vaccines can be used to treat diseases (i.e. therapeutic) or prevent against them (i.e. prophylactic).<sup>13</sup> The term “vaccine” is taken from the term designating cowpox, “*Variolae vaccinae*” (i.e. smallpox of the cow). This term was created by Edward Jenner, an English doctor and scientist who invented the world’s first vaccine, the smallpox vaccine. The term was used in his 1798 publication describing how the receipt of cowpox inoculated against small pox, “An

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<sup>8</sup> National Institute of Allergy and Infectious Diseases, *How Vaccines Work*, <http://www.niaid.nih.gov/topics/vaccines/understanding/pages/howwork.aspx> (last updated April 19, 2011).

<sup>9</sup> Fiore AE, Bridges CB, Cox NJ, *Seasonal influenza vaccines*, *Curr. Top. Microbiol. Immunol. Current Topics in Microbiology and Immunology* 333: 43–82, (July 2009).

<sup>10</sup> Chang Y, Brewer NT, Rinas AC, Schmitt K, Smith JS, *Evaluating the impact of human papillomavirus vaccines*, *Vaccine*, (27) 32: 4355–62, (July 2009).

<sup>11</sup> Liesegang TJ, *Varicella zoster virus vaccines: effective, but concerns linger*, *Can. J. Ophthalmol.* 44 (4): 379–84 (August 2009).

<sup>12</sup> World Health Organization, *Global Vaccine Action Plan 2011-2020*, Geneva (2012) available at [http://www.who.int/immunization/global\\_vaccine\\_action\\_plan/GVAP\\_doc\\_2011\\_2020/en/](http://www.who.int/immunization/global_vaccine_action_plan/GVAP_doc_2011_2020/en/).

<sup>13</sup> Rambout L, Hopkins L, Hutton B, Fergusson D, *Prophylactic vaccination against human papillomavirus infection and disease in women: a systematic review of randomized controlled trials*, *CMAJ Epub* 177(5):469-79, (Aug. 2007).

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*inquiry into the causes and effects of Variolae Vaccinae, known by the name of cow pox.”*<sup>14</sup> In 1881 in Edward Jenner’s honor, French chemist and microbiologist, Louis Pasteur, proposed that “vaccine” and “vaccination” should denote all protective inoculations developed to fight infectious diseases.<sup>15</sup>

Most childhood vaccines have a 90 – 100 percent success rate.<sup>16</sup> Licensed vaccines have been vetted as safe for public use as they must first get approval by the Food and Drug Administration (FDA) before being used in the United States. This entails extensive testing and clinical trials that compare vaccine recipients with individuals who receive a “control” (e.g, either a different vaccine or placebo).<sup>17</sup> There is a multitude of studies that document a negative correlation in disease rate reduction after a vaccine is licensed.<sup>18</sup> In fact, the World Health Organization estimates that vaccination could have prevented 1.5 million deaths of children under five. Specifically, pneumococcal diseases and rotavirus infection consist of two-thirds of these fatalities.<sup>19</sup>

Furthermore, the introduction of Jonas Salk’s poliomyelitis (otherwise known as polio) vaccine was one of the greatest medical advances in American history.<sup>20</sup> In the first half of the 20<sup>th</sup> century, polio afflicted tens of thousands of Americans. Polio struck fear in all Americans as it could cause partial or full body paralysis and everyone, especially children, was at risk. It was not uncommon to see children on crutches and wheelchairs, closed swimming pools and

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<sup>14</sup> Baxby, Derrick, *Edward Jenner’s Inquiry; a bicentenary analysis*, *Vaccine* 17 (4): 301–7 (Aug. 1999).

<sup>15</sup> Pasteur, Louis, *Address on the Germ Theory*, *Lancet* 118 (3024): 271–2 (1881).

<sup>16</sup> *Vaccines.gov*, *Vaccines are Effective*, <http://www.vaccines.gov/basics/effectiveness/> (last updated Oct. 2006).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> BBC News, *The Growth of Global Immunisation*, <http://www.bbc.com/news/health-24519949> (Oct. 2013).

<sup>20</sup> NPR History Dept., *Defeating Polio, the Disease that Paralyzed America*, <http://www.npr.org/blogs/npr-history-dept/2015/04/10/398515228/defeating-the-disease-that-paralyzed-america> (April 2015).

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beaches, and theater warning signs cautioning patrons to adequately distance themselves.<sup>21</sup> Commonplace discomforts such as stomach aches could cause panic as parents were constantly monitoring their children for symptoms. In April 12, 1955 when the first polio vaccine was licensed, the church bells rang, factory whistles blew and Americans ran into the streets weeping in celebration. Salk was even invited to the White House where President Eisenhower thanked him with tears in his eyes for saving children all across the world.<sup>22</sup> Since the polio vaccine, immunization became an accepted and routine mark of pediatric care.<sup>23</sup> Polio has been virtually eradicated due to Salk’s vaccination.<sup>24</sup> In 1988 when the Global Polio Eradication Initiative commenced, 350,000 people were paralyzed by polio in that year alone. By 2014 after massive vaccination, polio rates saw a reeducation of greater than 99 percent.<sup>25</sup>

## **II. The Movement Against Vaccinations and Current Outbreaks**

### **a. The Opposition Movement and Current Outbreaks**

Three years after the 1905 Supreme Court decision in *Jacobson v. MA*, which ruled that states have the right to compel vaccination, the Anti-Vaccination League of America was founded in Philadelphia.<sup>26</sup> The League mobilized the anti-vaccine movement and sought to fight medical tyranny, warning of the dangers of vaccination and intrusion of government and science into private life. It promoted the principle that "health is nature’s greatest safeguard against disease and that therefore no State has the right to demand of anyone the impairment of his or her health."<sup>27</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Toward a Twenty-First-Century*, 121 Harv. L. Rev. 1820 (2008).

<sup>27</sup> *Id.*

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In 1982, the National Vaccine Information Center (NVIC) was founded as the first and largest national, consumer-led, non-profit organization dedicated to informed consent protections during the vaccination movement of the early 1980s.<sup>28</sup> Their goal is to prevent vaccine injuries and deaths through disseminating public education about vaccines and informed consent laws.<sup>29</sup> Even though they explicitly deny that they are an “anti-vaccination” group in their mission statement, they have been accused by some of pushing an anti-vaccination agenda due to their dissemination of studies that have linked autism to vaccination, a theory that has been widely debunked by the medical community.<sup>30</sup> The NVIC deeply values the existence of a religious exemption and in 2011, the group’s president, Barbara Loe Fisher stated, "We must defend the religious exemption to vaccination at all costs. It's all that stands between us and a militant, oppressive forcing of vaccination by those who have at this point in time no accountability or liability for what happens after those vaccines are given."<sup>31</sup>

As a result of anti-vaccination sentiment, inter alia, vaccination rates in the U.S. have been declining.<sup>32</sup> Case in point, one study has shown that due to autism-link theory, the U.S. had a decline of parents obtaining the measles vaccine for their kids, by two percentage points in 1999 and 2000.<sup>33</sup> That decline has remained persistent and the measles vaccination rate has annually declined by a percentage point since 2012.<sup>34</sup> 113 countries have higher measles vaccination rates

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<sup>28</sup> National Vaccine Information Center, *About National Vaccine Information Center*, <http://www.nvic.org/about.aspx> (last updated April 2015).

<sup>29</sup> *Id.*

<sup>30</sup> TPM, *How Vaccine Skeptics Game the System With Religious Exemptions*, <http://talkingpointsmemo.com/news/religious-exemptions-vaccine-skeptics> (Feb. 2015).

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

<sup>32</sup> Science Daily, *Vaccinations of US children declined after publication of now-refuted autism rise*, [http://www.sciencedaily.com/releases/2012/06/120604142726.htm?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=vaccinations-of-us-children-declined-after-publication-of-now-refuted-autism-risk](http://www.sciencedaily.com/releases/2012/06/120604142726.htm?utm_source=rss&utm_medium=rss&utm_campaign=vaccinations-of-us-children-declined-after-publication-of-now-refuted-autism-risk) (June 2012).

<sup>33</sup> *Id.*

<sup>34</sup> News Max, *113 Countries Have Higher Measles Vaccination Rates Than US*, <http://www.newsmax.com/Health/Health-News/vaccination-rates-us-who/2015/02/04/id/622742/> (Feb. 2015).

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than the U.S.<sup>35</sup> Notably, that study found that children were less likely to receive a measles vaccine the higher their mother's education level, possibly due to the fact that more educated mothers have better access to medical information regarding the autism-link theory available in the media.<sup>36</sup>

The rise of anti-vaccination sentiment is documented in the decreasing measles vaccination rates in schools across the U.S.<sup>37</sup> During the 2013-12 academic year in the U.S., the CDC reported that 90,613 children entering school were exempted from the measles vaccine. California had the highest measles vaccination exemption rates in the country that year with 18,270 cases of exemptions.<sup>38</sup> During the 2013-2014 school year, 94.7 percent of children received the measles vaccine. This represents a decline from the 1999-2000 school year in which coverage reached 97.4 percent.<sup>39</sup>

Interestingly, non-medical exemptions have been rising in popularity and availability.<sup>40</sup> Nationwide, 48 percent of all measles vaccine exemptions cited philosophical reasons, 40 percent cited religious reasons, and merely 12 percent of measles exemptions were cited for medical reasons.<sup>41</sup> For instance, in New Jersey, 9,000 children had religious exemptions during the 2013-2014 school year, in contrast to the 1,641 students in the 2005-06 school year.<sup>42</sup> Nationally, from 1991 to 2004, the number of philosophical objections in childhood vaccination

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

<sup>36</sup> Science Daily, *supra*.

<sup>37</sup> The Council of State Governments Knowledge Center, *supra*.

<sup>38</sup> *Id.*

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

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> State of New Jersey Dept. of Health, *Disease Statistics*, <http://www.state.nj.us/health/cd/stats.shtml> (last updated Feb. 2015).



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doubled.<sup>43</sup> According to a recent survey, about 40 percent of parents admit to purposefully delaying or skipping vaccination for their children.<sup>44</sup>

The most recent infectious disease epidemic in the U.S. was a measles outbreak that occurred in December 2014 at the California Disneyland theme park.<sup>45</sup> The outbreak spread to fourteen states, Mexico and Canada. As a result, 147 Americans were infected, including 131 cases in California alone.<sup>46</sup> 40 of the California cases were park visitors and the rest were individuals who came into contact with park visitors in their homes and in health care facilities.<sup>47</sup> Disease detectives traced the highly contagious outbreak and finally declared an end to the U.S. epidemic four months later.<sup>48</sup> The outbreak however is still active in Quebec, having infected 159 individuals. Notably, the cases were mostly contained to a religious community with a low vaccination rate. The first Disney case was traced to a visitor from overseas.<sup>49</sup> The outbreak caused a heated debate about strengthening mandatory vaccinations in the California legislature and in legislatures nationwide as anti-vaccination sentiment is largely blamed for the outbreak.<sup>50</sup> For the public at large to be protected from measles, otherwise known as “herd immunity,” 90 –

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<sup>43</sup> The Council of State Governments Knowledge Center, *supra*.

<sup>44</sup> Vaccine News Daily, *U.S. facing obstacles from declining vaccination rates*, (June 2011).  
<http://vaccinenewsdaily.com/news/249575-u-s-facing-obstacles-from-declining-vaccination-rates/>

<sup>45</sup> The Verge, *The Disneyland measles outbreak is finally over in the US*,  
<http://www.theverge.com/2015/4/17/8445563/disneyland-measels-outbreak-disneyland-statistics> (April 2015).

<sup>46</sup> NBC News, *Measles Outbreak Traced to Disneyland is Declared Over*,  
<http://www.nbcnews.com/storyline/measles-outbreak/measles-outbreak-traced-disneyland-declared-over-n343686> (April 2015).

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

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

<sup>49</sup> *Id.*

<sup>50</sup> The Verge, *supra*.

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95 percent of the entire population must be immune which would entail 95 – 100 percent vaccination coverage which legislatures are now aiming to achieve. <sup>51</sup>

#### **b. Factors That Lead to the Opposition**

There are several factors that are triggering the growing movement against vaccination in America. One factor is that individuals are starting to question the risks posed by vaccination as illustrated by the rise of autism in America.<sup>52</sup> In regards to the autism link theory which has been debunked largely by the medical community, some parents argue that the rate of vaccination (specifically the “MMR” measles, mumps, and rubella vaccine, or vaccines thimerosal - a mercury-based preservative in vaccines) and the rate of autism diagnosis increased dramatically and simultaneously.<sup>53</sup> Today, one in every 150 children has been diagnosed with autism whereas 20 years ago, one in 10,000 kids were diagnosed.<sup>54</sup> The medical community in response has noted that correlation is not the same as causation. The autism link theory started in 1998 with Andrew Wakefield, a British gastroenterologist.<sup>55</sup> He and his colleagues published an article on what they believed to be the cause of autism after they performed colonoscopies on 12 children with intestinal symptoms and developmental disorders, 10 of whom were autistic. He found a pattern of intestinal inflammation which he attributed to the MMR vaccine.<sup>56</sup> Although the article stated that no association between autism and the MMR vaccine were found, Wakefield and his colleagues described the autism link theory during a subsequent press conference, saying the inflamed intestines released toxins in the bloodstream which reached the

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<sup>51</sup> The Washington Post, *Why a few unvaccinated children are an even bigger threat than you think*, <http://www.washingtonpost.com/posteverything/wp/2015/02/03/why-a-few-unvaccinated-children-are-an-even-bigger-threat-than-you-think/> (Feb. 2015).

<sup>52</sup> Steve P. Calandrillo, *supra* at 363.

<sup>53</sup> TPM, *supra*.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

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brain, thus resulting in the neurological disorder.<sup>57</sup> Afterwards, attempts to replicate the study had failed and it was discovered that Wakefield had a pending patent application for a replacement MMR vaccine and was being paid a significant amount of money by an attorney to justify the need for a class action suit against MMR vaccine manufacturers.<sup>58</sup> The Lancet, the paper in which the publication originated, ended up retracting the article and Wakefield was charged for scientific misconduct by the General Medical Council.<sup>59</sup>

Additional factors that have contributed to anti-vaccination sentiment is that some individuals avoid vaccination simply because of a mistrust of pharmaceutical companies and modern medicine, meanwhile some individuals simply see vaccination as government intrusion in their lives.<sup>60</sup> Some individuals argue that people who have been vaccinated are still getting sick, indicating that the vaccine is ineffective or that the immunity itself has weakened.<sup>61</sup> For instance, nearly 1 in 5 of the 156 measles victims in the U.S. between 2011 and 2013 had been vaccinated.<sup>62</sup> However, the biggest factor in the anti-vaccine movement is most likely due to complacency because of the success of vaccination as infectious diseases pose less of a widespread risk as they once have.<sup>63</sup> For instance, baby boomers lived through polio outbreaks and were essentially guinea pigs in the American vaccination movement of the early 1980s. Furthermore, measles, a disease considered virtually eradicated in the U.S. since 2000,<sup>64</sup> has only lead to two American fatalities in 2009 and two in 2010, yet measles is one of the major causes

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Contemporary Pediatrics, *Declining Vaccination Rates*, <http://contemporarypediatrics.modernmedicine.com/contemporary-pediatrics/news/modernmedicine/modern-medicine-now/declining-vaccination-rates?page=full> (Aug. 2011).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Steve P. Calandrillo, *supra* at 362.

<sup>64</sup> Contemporary Pediatrics, *supra*.

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of death among young children worldwide. Ironically, it is likely that vaccination has become a victim of its success and has contributed largely to the anti-vaccination movement.<sup>65</sup>

### **III. Existing Laws Governing Mandatory Childhood Vaccinations**

#### **a. State Law**

The authority to regulate and protect public health in the United States has been the primary responsibility of state and local governments and is derived from the state’s general police powers under the Tenth Amendment.<sup>66</sup> For instance, with regard to infectious disease outbreaks, states can mandate vaccination via their Police Powers.<sup>67</sup> All 50 states impose vaccination requirements as a condition for public school enrollment for children.<sup>68</sup> Varying by state, school children must be vaccinated against some or all of the following diseases: mumps, measles, rubella, diphtheria, pertussis, tetanus, and polio.<sup>69</sup> Recently, some states and cities required children in preschool or daycare to be vaccinated against influenza.<sup>70</sup>

All 50 states allow exemptions for medical reasons such as, *inter alia*, compromised immune systems from illness or other causes and allergic reactions.<sup>71</sup> Medical exemptions usually require documentation from a doctor.<sup>72</sup> 48 states (not including Mississippi and West Virginia) allow exemptions for religious reasons, and 19 states allow exemptions for philosophical reasons.<sup>73</sup> Some states only exempt religious or philosophical beliefs that are “sincere” or “conscientiously held” and will require formal documentation while others only require a statement of dissent

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<sup>65</sup> The History of Vaccines, *supra*.

<sup>66</sup> Congressional Research Service, *Mandatory Vaccinations: Precedent and Current Laws*, available at <http://fas.org/sgp/crs/misc/RS21414.pdf> (May 2014).

<sup>67</sup> *Id.*

<sup>68</sup> CDC, *School Vaccination Requirements, Exemptions and Web Links*, <http://www.cdc.gov> (July 2011).

<sup>69</sup> CDC, *Vaccines and Immunizations*, [www.cdc.gov](http://www.cdc.gov) (Dec. 2014).

<sup>70</sup> Congressional Research Service, *supra*.

<sup>71</sup> CDC, *supra*.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

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from the student or parent, or guardian.<sup>74</sup> For instance, to receive an exemption, Delaware requires a notarized affidavit that states a sincere belief in “a Supreme Being” and Oregon requires parents to submit a vaccine education certificate which can be obtained from a health care provider or by viewing an online seminar.<sup>75</sup> Meanwhile, Connecticut and a majority of states that grant religious exemptions do not ask for detailed reasons, merely just a statement asking for an exemption.<sup>76</sup> Minnesota is the only state that requires philosophical reasons for exemption to also cite religion in order to be valid.<sup>77</sup> In 1855, Massachusetts was the first state to implement a compulsory vaccination law for school admittance<sup>78</sup>, followed by New York (1862), Connecticut (1872), Indiana (1881), and Arkansas (1882).<sup>79</sup>

### **b. Federal Law**

However, the federal government may also regulate and protect public health within the confines of the Commerce Clause, which states that Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States....”<sup>80</sup> Because no national compulsory vaccination laws exist on a federal level, the federal government would most likely resort to quarantine and isolation measures if necessary.<sup>81</sup> Pursuant to this power, Congress mandates vaccination of incoming immigrants and the military mandates vaccination of troops.<sup>82</sup> The Department of Defense (DOD) mandates annual seasonal influenza vaccination for all

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<sup>74</sup> Congressional Research Service, *supra*.

<sup>75</sup> Pew Research Center, *Nearly all states allow religious exemptions for vaccinations*, <http://www.pewresearch.org/fact-tank/2015/02/25/nearly-all-states-allow-religious-exemptions-for-vaccinations/> (Feb. 2015).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Children’s Hospital of Philadelphia, *Government Regulation*, <http://www.chop.edu> (Jan. 2014).

<sup>79</sup> James G. Hodge, Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, A State of the Art Assessment of Law and Policy, <http://www.publichealthlaw.net> (Feb. 2002).

<sup>80</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>81</sup> CDC, *supra*.

<sup>82</sup> *Id.*

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civilian health care workers in direct contact with patients in DOD military treatment, subject to medical and religious exemptions and the Department of Veterans Affairs encourages patients and employees of the Veterans Health Administration to partake in an annual influenza vaccination program that it offers.<sup>83</sup> Additionally, the *Public Health Service Act* authorizes the Secretary of Health and Human Services to enact laws to prevent the introduction, transmission, and spread of infectious diseases both internationally and intranationally.<sup>84</sup>

#### **c. Constitutionality of Mandatory Vaccinations**

The CDC’s schedule of immunizations serves as a guide for states in the creation of compulsory school vaccination laws.<sup>85</sup> Many of these laws today originated from measles outbreaks throughout the 1960s and 1970s.<sup>86</sup> For university and college admittance, some states require vaccination against hepatitis B and meningococcal disease.<sup>87</sup> Additionally, Virginia and the District of Columbia require female students to get vaccinations for the Human Papillomavirus (HPV) but also offer exemptions for parents who understand and accept the risks.<sup>88</sup> The first compulsory vaccination law took place when Massachusetts mandated smallpox vaccination in 1809.<sup>89</sup> The constitutionality of compulsory school vaccination laws have been challenged in the courts and have created a body of vaccination case law.

In *Jacobson v. Massachusetts*,<sup>90</sup> the Supreme Court upheld the authority of states to enforce compulsory vaccination laws when it reasoned that the personal freedom may not always trump common welfare. This case involved a Massachusetts law permitting cities to mandate

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

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

<sup>89</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 13 (1905).

<sup>90</sup> *Id.*

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smallpox vaccination right around a smallpox outbreak in 1902. Cambridge created a mandatory vaccination ordinance, with some exceptions and the plaintiff Henning Jacobson did not comply and was fined. Jacobson claimed he had suffered ill effects from a vaccination in his childhood and had made his son and others sick as well. Massachusetts was one of only 11 states that allowed mandatory vaccination laws at that time. The court held that the mandatory vaccination law did not violate Jacobson's Fourteenth Amendment right to liberty but was rather a legitimate exercise of the state's Police Power to protect the public health and safety of its citizens. The requirement was not arbitrary or unreasonable in its imposition since local boards of health determined when mandatory vaccinations were needed. Justice John Marshall Harlan mentioned that under certain circumstances, a vaccination mandate could be cruel and inhumane and therefore an overreach of government power. This created a medical exemption for adults however Jacobson was not eligible for it. Harlan also held that personal liberties could be suspended under certain circumstances such as an outbreak.<sup>91</sup>

In *Zucht v. King*,<sup>92</sup> the Supreme Court reaffirmed *Jacobson* when it held that a local ordinance requiring children in schools to get vaccinated was a proper use of Police Power. The Court upheld the ability of schools to refuse admission to unvaccinated students. The ordinance was a valid use of broad discretion necessary to regulate public health and was not an arbitrary use of Police Powers.<sup>93</sup> Due to Supreme Court precedent, lower courts have given deference when states mandate vaccination in the interests of public health.<sup>94</sup> For instance, West Virginia does not offer a religious exemption for school vaccination, but the United States Court of

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<sup>91</sup> CDC, *supra*.

<sup>92</sup> *Zucht v. King*, 260 U.S. 174, 176 (1922).

<sup>93</sup> CDC, *supra*.

<sup>94</sup> The History of Vaccines, *supra*.

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Appeals for the Fourth Circuit has rejected free exercise, equal protection, and substantive due process challenges to the law.<sup>95</sup>

However, there is some disagreement among courts whether requiring an individual to be a member of an established religion violates the Establishment Clause of the First Amendment.<sup>96</sup> Some states that offer religious exemptions have held that the exemptions limited to individuals who are part of “recognized religious organizations,” violate both the Establishment and Free Exercise Clauses of the First Amendment.<sup>97</sup> Additionally, limiting the religious exemption to membership with certain religious groups has also been held to violate the Constitution’s Equal Protection Clause of the Fourteenth Amendment since it should protect all people who claim a religious objection to vaccination, regardless of affiliation with a certain religion with recognized religious objections.<sup>98</sup> Meanwhile, other state district courts have held that these limitations to religious exemptions do not run afoul with the Establishment Clause.<sup>99</sup> Usually, courts interpret religious exemptions broadly thus keeping a state from inquiring into the sincerity of an individual’s religious beliefs. However, some courts have disqualified parents from religious exemptions after finding that their objections are personal and not religious in nature.<sup>100</sup>

#### **IV. How Exemptions to Mandatory Childhood Vaccination Should be Reformed**

Currently, states can mandate vaccinations pursuant to its police powers under the 10<sup>th</sup> Amendment, and the federal government can mandate vaccinations pursuant to its Commerce

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<sup>95</sup> *Id.*

<sup>96</sup> *Sherr v. Northport-East Northport Union Free School District*, 672 F.Supp. 81, 84 (E.D.N.Y. 1994).

<sup>97</sup> *Id.*

<sup>98</sup> The History of Vaccines, *supra*.

<sup>99</sup> *Kleid v. Board of Education*, 406 F. Supp. 902, 903 (W.D., Ken., 1976).

<sup>100</sup> Alicia Novak, The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges, 7 U. Pa. J. Const. L. 1101 (2005).



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Clause powers under Article I, Section 8, Clause 3 of the U.S. Constitution.<sup>101</sup> Although no federal mandatory vaccination programs exist, all states have exercised their Police Powers by requiring school children to have proof of immunization for public school enrollment.<sup>102</sup> Additionally, all states with exception of Mississippi and West Virginia allow exemptions for religious reasons.<sup>103</sup> The religious exemption is derived from the First Amendment right to freely practice one’s religion.<sup>104</sup> This right is not however without limit. The state may infringe upon this right if there is a “compelling State interest” at stake.<sup>105</sup> As a result of the *Jacobson* ruling, limiting the spread of serious infectious diseases qualifies as a compelling State interest. In defining what constitutes a compelling state interest, several state court cases have held that the freedom to practice one’s religion can be reasonably regulated if it substantially threatens the welfare of society as a whole.<sup>106</sup>

#### **A. Step 1 – Banning Non-Medical Exemptions**

Parents can currently obtain a vaccination exemption for philosophical and religious reasons if their state of residence provides one.<sup>107</sup> Under current law, it is clear that states can mandate vaccination pursuant to their Police Powers via the Tenth Amendment, but what is not clear is the constitutional authority for states to grant non-medical exemptions.<sup>108</sup> Currently, all 50 states allow exemptions for religious reasons but vary in the degree of proof and documentation required for individuals to exercise this right.<sup>109</sup> Current law should be changed to no longer

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<sup>101</sup> CDC, *supra*.

<sup>102</sup> Pew Research Center, *supra*.

<sup>103</sup> National Vaccine Information Center, *supra*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

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

<sup>107</sup> CDC, *supra*.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

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allow blanket exemptions for religious reasons and philosophical reasons. An individual’s religion and philosophy should not be irrelevant to the inquiry of whether or not a parent should have the right to refuse mandatory vaccination, but should carry much less weight than they currently do and instead should be considered as factors in a fact-specific inquiry as detailed below.

#### **B. Step 2 - A Heightened “Best Interests of the Child Standard”**

##### **i. The “Best Interests of the Child Standard” as Currently Implemented**

With respect to healthcare decisions, parents are considered surrogates of their children and are held to the “best interests standard.” This is the standard currently used in cases of surrogacy decision-making.<sup>110</sup> When an individual is incapable of making healthcare decisions, a court can appoint someone as their surrogate or proxy.<sup>111</sup> Three main standards exist for surrogates to help guide them in carrying out their duties: 1) Express Interests Standard, 2) Substituted Judgment and 3) Best Interests Standard.<sup>112</sup> The previous two standards only apply to patients who were previously competent and where the surrogate has knowledge about their medical preferences. The latter standard is used for children and also for adults who were never competent or their preferences remain unknown and unattainable.<sup>113</sup> Under the “best interests standard,” because an adult patient’s preferences are unknown or a parent/relative is tasked with determining the interests of a child, the surrogate uses their own subjective judgment to decide what would be in the patient's best interests.<sup>114</sup>

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<sup>110</sup> Drexel University, *Surrogate Decision-Making*, <http://www.pages.drexel.edu/~cp28/surdec.htm> (Feb. 2006).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

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Additionally, the standard also requires surrogates to consider what healthcare decision most people would choose if placed in a similar situation, which can sometimes include second or third opinions to balance potential benefits and burdens to best ensure the adult patient’s or child’s quality of life.<sup>115</sup> Factors that the surrogate is to consider include: 1) The patient’s present level of physical, sensory, emotional, and cognitive functioning; 2) the various treatment options and the risks, side effects, and benefits of each of the options; 3) the life expectancy and prognosis for recovery with and without treatment; 4) the degree of physical pain resulting from the medical condition, treatment, or termination of treatment; and 5) the degree of dependency and loss of dignity resulting from the medical condition and treatment.<sup>116</sup>

If the surrogate and healthcare provider cannot agree on a course of action, any surrogate can petition the court for intervention in the decision-making process.<sup>117</sup> This happens most frequently when family members and physicians cannot agree on life-sustaining treatment, or where state statute requires the court to authorize treatment for an incompetent individual.<sup>118</sup> During this process, courts will appoint a guardian ad litem to determine whether a patient would have approved of the course of action had they been competent.<sup>119</sup> Contrary to its name, under the “best interests standard” the surrogate’s decision need not be “the best” course of action so long as it is a plausible one. In other words, parents have plenty of latitude to make whatever healthcare decisions they prefer for their children as long as it is not so antithetical to the child’s

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<sup>115</sup> Trinity Int’l University, *Competence, Capacity, and Surrogate Decision-Making*, <https://cbhd.org/content/competence-capacity-and-surrogate-decision-making> (March 2004).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Washington State Hospital Association, *End of Life Care Manual*, <http://www.wsha.org/eol-surrogatedecisions.cfm> (last updated Aug. 2007).

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interests as to constitute child endangerment or abuse.<sup>120</sup> Some in the medical ethics field critique the lack of objectivity in the “best interests standard” however that is the current standard parents are held to in medical decision-making for their children.<sup>121</sup>

#### **ii. Implementing a Heightened “Best Interests of the Child Standard”**

With regards to vaccination, parents should not have free latitude to refuse vaccination for their children. Instead, parents should be held to a *heightened* “best interests standard.” Whether or not parents retain the right to refuse mandatory vaccination of their child should be a fact-specific inquiry, an approach very distinct from current law. Parents can currently obtain a vaccination exemption for philosophical and religious reasons if their state of residence provides one. Assuming that states are no longer allowed to offer non-medical exemptions, a heightened “best interests of the child” standard should be used by courts to analyze the claims of any parents who would like to contest the mandatory vaccination of their child. This fact-specific inquiry should direct courts to balance factors that aim to preserve the health and happiness of the child and compliance with parental wishes if possible and prudent.

The fact-specific inquiry under a heightened “best interests of the child standard” would firstly incorporate the finding that mandatory vaccination is a legitimate exercise of the state’s Police Powers (or legitimate exercise of federal government’s commerce clause powers). Therefore the burden of proof would rest on the parent requesting exemption that the mandatory vaccination is unconstitutional. Several factors would be relevant in this inquiry. Analyzing the disease itself, the court should consider, *inter alia*: *How is obtained? How does it spread? How*

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<sup>120</sup> Norman L. Cantor, *The Bane of Surrogate Decision Making: Defining the Best Interests of Never-Competent Persons*, Rutgers Law School (Newark) Faculty Papers: Working Paper 24 (June 2004).

<sup>121</sup> Stanford Encyclopedia of Philosophy, *Advance Directives and Substitute Decision-Making*, <http://plato.stanford.edu/entries/advance-directives/> (March 2009).

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*quickly can it spread? How severe are the consequences of infection? Is it fatal? What is the likelihood of infection for unvaccinated children?*

The heightened “best interests of the child standard” would also allow a parent to challenge the validity of the science behind the vaccine itself. A state cannot have a compelling interest to mandate vaccination and would be exceeding the boundaries of its Police Powers if the vaccine itself is founded on questionable science. The burden of proof would rest on the parent requesting exemption that vaccine itself is unsafe. Several questions that the court should consider, inter alia, are: *How sound is the science behind the vaccine (i.e. how much consensus is there in the medical community behind the vaccine)? How effective has the vaccine proven thus far? (If it is a new vaccine under consideration, this factor should carry less weight.) What are the risks? What is the severity of the risks? What is the likelihood of risk?* The court should determine from the *totality of the circumstances*, whether or not the parent can meet their burden of proof. If the parent succeeds, vaccination should no longer be mandated.

If the parent cannot meet their burden of proof challenging the constitutionality of the state’s interest in mandatory vaccination or the science behind the vaccination itself, the parent would have to meet their burden of proof in arguing that an exemption should apply to their child. Factors that the court should consider, inter alia, are: *the child’s medical history, the parent’s and family’s medical history (assuming the parent and family are genetically related to the child), the degree of risk assumed by vaccination and any religious or philosophical objections of the parent.*

In terms of assigning weight to the aforementioned factors, medical history should be given the greatest weight for a child to qualify for an exemption. It will be up to the court to determine whether the parent has enough evidence to validate an argument for exemption. The

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other factors such as the parent’s religious and or philosophical objections should be given weight, but these non-medical factors should by no means be determinative on their own. A parent should not be able to qualify their child as exempt purely for religious and or philosophical reasons. In the scenario that a court finds a parent has *some* medical evidence to suggest an exemption but not enough, an individual’s religion or philosophy can be used to *tip the scale*. Thus, analyzing exemptions under a heightened “best interests of the child standard” would make it more difficult for parents to receive exemptions. Medical reasons should essentially be the only valid reason on its own weight for an exemption to mandatory vaccination.

### **C. Policy Reasons Behind Banning Non-Medical Exemptions and Imposing a Heightened “Best Interests of the Child” Standard**

There are several reasons the law should follow this approach. Firstly, religion or philosophy does not entitle parents to endanger the lives of their children. This sentiment was echoed in 1990, when the Supreme Court held that mandatory vaccination laws do not interfere with an individual’s First Amendment right to free exercise of religion as long as the law is religion-neutral and generally applicable: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."<sup>122</sup> Additionally, the Arkansas Supreme Court stated in a 1964 case that, "In cases too numerous to mention, it has been held, in effect, that a person's right to exhibit religious freedom ceases where it overlaps and transgresses the rights of others."<sup>123</sup> Even the most conservative libertarian (i.e. one who favors little to no government intervention) would

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<sup>122</sup> *Employment Division v. Smith*, 494 U.S. 872, 876 (1990).

<sup>123</sup> *Cude v. State*, 237 Ark. 927, 929 (1964).

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agree that an individual has the right to do as he/she pleases (i.e. pursue their personal liberty) and that government has no right to intervene unless their actions may rob another individual of their personal liberty. In other words, even a conservative libertarian would agree that a parent’s right to parent can be infringed upon by the state if their actions put their child at risk. The key here is whether resisting vaccination is considered “endangerment” to the child. Not all mandatory vaccinations may be found valid or constitutional. Therefore a parent who resists vaccination may not necessarily be endangering the lives of others or their children by resisting vaccination. This “best interests of the child” approach would therefore allow a parent to challenge the validity of the science behind the vaccine and whether the state truly has a compelling interest in mandating it to begin with.

These inquiries however will be voluntary and not necessary to establish exemption under the “best interests of the child standard.” A parent may not choose to challenge the state’s interest in mandating vaccination and or they may not question the science of the vaccination itself. However if they did want to pursue either or both inquiries, the “best interests of the child” standard will provide them guidance so they can gauge how likely they will be able to meet their burden of proof. For instance, if a state was to mandate all girls to receive an HPV vaccine for public school enrollment, the state would fail under the constitutional inquiry under its interest in mandating vaccination. HPV is spread through sexual transmission and it would not be reasonable for the state to assume girls in elementary school are sexually active. Hence, the likelihood of young girls being exposed to HPV is so inconsequential that the state could never reason that it had a compelling enough interest in mandating HPV vaccination of school girls. A parent could challenge a mandatory vaccine such as this under current law by showing the state is acting beyond the scope of its Police Powers, however this inquiry should also built

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into the “best interests of the child standard” so parents have a clear and uniform standard to challenge any mandatory vaccination they oppose. Neither the parent nor finder of fact is expected to have a scientist’s understanding of science behind vaccination, but the finder of fact must determine whether a consensus in the medical community exists regarding it. Otherwise, the state would be able to mandate all vaccines, which would not be desirable since not all vaccines and illnesses are alike. The validity of the science behind a vaccine would be determined by testimony from expert witnesses. If no consensus exists, the vaccination can no longer be mandated.

Another reason behind this approach is that it helps to better achieve public health standards by increasing the rate of childhood vaccination. There is widespread consensus in the medical community that vaccinations have completely transformed the field of public health by drastically reducing if not eradicating, many once fatal infectious diseases. Society should be striving to reduce the weight of less compelling reasons for exemptions in the eyes of the law (i.e. religious and philosophical reasons), while still preserving legitimate reasons for exemption (i.e. medical reasons) to achieve the highest vaccination compliance rate possible. To illustrate the importance of this policy goal, it is important to note that the American Medical Association opposes religious exemptions and believes it impedes upon protection of the public health.<sup>124</sup> In the late 1990s and early 2000s, religious exemptions rose greatly. In Massachusetts, for instance, the rate of individuals seeking exemptions increased from 0.24% in 1996 to 0.60% in 2006. This is in part or in whole due to some insincere parents claiming religious exemptions.<sup>125</sup> Tens of thousands of parents of kindergarten students in the United States have sought

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<sup>124</sup> American Medical Association, *Health and Ethics Policies of the AMA House of Delegates*, (PDF) H-440.970 Religious Exemptions from Immunizations (May 2009).

<sup>125</sup> USA Today, *Parents use religion to avoid vaccines*, [http://usatoday30.usatoday.com/news/health/2007-10-18-religion-vaccines\\_N.htm](http://usatoday30.usatoday.com/news/health/2007-10-18-religion-vaccines_N.htm) (Oct. 2007).



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exemptions for their children claiming religious and philosophical reasons. For kindergarteners during the 2013-2014 school year, California granted 17,253 non-medical waivers, Michigan and Texas granted over 6,000 and 5,000 waivers, and Florida granted 4,000 religious waivers.<sup>126</sup>

It is also important to understand why a religious exemption exists in the first place and what importance should society place on it. Up until now, only two religions have voiced opposition to vaccination, and their opposition is less than clear: Christian Scientists and the Dutch Reformed Church.<sup>127</sup> Even though Christian Scientists are secretive about their stance on modern medicine, they believe that the power of prayer can cure illnesses yet they do not have an official stance on vaccination. However their founder, Mary Baker Eddy has been questioned on vaccination and has publically stated: “Rather than quarrel over vaccination, I recommend, if the law demand, that an individual submit to this process, that he obey the law, and then appeal to the gospel to save him from bad physical results.”<sup>128</sup> In 1994, Christian Science schools in Missouri and Illinois experienced a measles outbreak.<sup>129</sup> The Dutch Reformed Church originally objected to vaccination based on fear of its possible adverse effects. However, their reasoning has evolved into fear that vaccines interfere with one’s relationship with God since vaccination makes people less dependent on God and more dependent on medicine. In 2013 throughout the Dutch “Bible Belt,” over 1,200 people caught the measles during an outbreak due to low rates of vaccination. However, a portion of the congregation believes that vaccinations are creations from God and should be fully taken advantage of.

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<sup>126</sup> CDC, *supra*.

<sup>127</sup> Grabenstein, JD, *What the world's religions teach, applied to vaccines and immune globulins.*, *Vaccine* (16):2011-23 available at <http://www.ncbi.nlm.nih.gov/pubmed/23499565> (Feb. 2013).

<sup>128</sup> Slate, *Why Is There a Religious Exemption for Vaccinations?*, [http://www.slate.com/articles/health\\_and\\_science/medical\\_examiner/2015/02/religious\\_exemption\\_for\\_vaccine\\_s\\_christian\\_scientists\\_catholics\\_and\\_dutch.html](http://www.slate.com/articles/health_and_science/medical_examiner/2015/02/religious_exemption_for_vaccine_s_christian_scientists_catholics_and_dutch.html) (Feb. 2015).

<sup>129</sup> Pew Research Center, *supra*.

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With regard to other commonly discussed religions, although the Catholic Church has objected in the past to the rubella vaccine and any that are developed in laboratory cell lines derived from aborted fetuses (due to the Church’s opposition to abortion), the church does not oppose vaccination per se and merely states that Catholics should find alternatives to the rubella vaccine when available. Although Christians who do need to cite to scripture to obtain a vaccination exemption in their state will cite obscure and vague passages referencing the need to preserve the sacredness of the human body.<sup>130</sup> Meanwhile, Jehovah’s Witnesses have rules regarding blood transfusions however they do not oppose vaccination.<sup>131</sup> Certain vaccines contain gelatin which is derived from pigs, and even though Jews and Muslims refrain from consumption of pork and swine products, neither religion opposes vaccination.<sup>132</sup> The Amish tend to avoid vaccination due to their reclusive behavior and not because of any faith-based opposition to vaccination.<sup>133</sup> The reasons substantiating a religious exemption in theory seems much more compelling than the reasons substantiating it in practice.

It is also noteworthy that there is legal precedent to support this approach. Because there is a gray area on whether or not states even have the constitutional authority to allow religious exemptions to mandatory vaccination laws, it is best to air on the side of caution and maintain the status quo by allowing religion to factor into exemptions. This approach however will reduce the weight of religion as a factor for exemption since it will be considered amongst other factors under a “best interests of the child” standard. Since there is a wealth of case law that exists which holds that the right to practice one’s religion is not without limit, it is not consistent to continue to allow blanket exceptions for religion or philosophy under mandatory childhood

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<sup>130</sup> K.N.O.W. Vaccines, Religious Exemptions, [http://www.know-vaccines.org/?page\\_id=28](http://www.know-vaccines.org/?page_id=28) (last updated Dec. 2014).

<sup>131</sup> Slate, *supra*.

<sup>132</sup> Pew Research Center, *supra*.

<sup>133</sup> TPM, *supra*.

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vaccination laws. This approach achieves a middle ground between banning outright religious exemptions and allowing blanket exceptions as is currently done. Furthermore, philosophical objection should also be considered a factor under this approach since case law indicates that it may not be constitutional to permit religion-based but not philosophy-based exemptions even if the two are looked at as separate and distinct. This is derived from a 1970 Supreme Court case that directly addressed the question of what constitutes religious objection to war. Even though the facts of the case were specific to war and not mandatory vaccination, the analysis of what constitutes “religion” for the purposes of objection remains the same. The Court held that exemptions to those who oppose wartime drafting based on “political, sociological, or philosophical views or a merely personal moral code” applies to “those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency.” Therefore, a sincere objection based upon “moral, ethical, or religious beliefs about what is right or wrong” falls within the Courts’ definition of “religion”. Although the holding was not unanimous, even concurring Justice Harlan agreed that it would run afoul of the Establishment Clause to only allow religious but not philosophical exemptions.<sup>134</sup>

Although states do not have a constitutional obligation to enact religious exemptions for mandatory vaccination, it unsettled whether states have the constitutional authority to enact them in the first place. Two states have rejected challenges to their lack of religious and philosophical exemptions to mandatory vaccination laws. In 1979, the Mississippi Supreme Court struck down a religious exemption, holding that they violate the Equal Protection clause under the Fourteenth Amendment if the exemptions "require the great body of school children to be vaccinated and at

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<sup>134</sup> *Welsh v. United States*, 398 U.S. 333, 334 (1970).

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the same time expose them to the hazard of associating in school with children exempted . . . who had not been immunized as required by the statute.”<sup>135</sup> Additionally, a U.S. District Court in West Virginia rejected a mother’s challenge to its mandatory vaccination law. The U.S. Supreme Court has not ruled directly the validity of non-medical exemptions but did hold in a 1944 case that “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. Parents may be free to become martyrs themselves. But it does not follow that they are free in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”<sup>136</sup>

If the validity behind granting non-medical exemptions is as tenuous as the facts show, one might ask, “Why offer them at all?” Again, the constitutional authority for granting non-medical exemptions to mandatory vaccination has not clearly been established, however it is prudent from a policy stance to not implement drastic reform and change the entire status quo. Allowing courts to still consider religious and philosophical objections to mandatory childhood vaccination in exemption analysis strikes a balance between the public health interests of the state and the First Amendment interests of the parent. Even though less than 1% of the U.S. population does not believe in vaccination, allowing non-medical objections to play some role in determining exemptions should help to alleviate the concerns of any who believe mandatory vaccination is merely an exercise in state coercion.<sup>137</sup> Of course there are those who will think just the same should the “best interests of the child” standard be implemented, however it is important for states to achieve higher vaccination rates. In regards to medical exemptions for mandatory

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<sup>135</sup> *Brown v. Stone*, 376 So.2d 218, 221 (Sup. Ct. Mississippi, 1979).

<sup>136</sup> *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 163 (1944).

<sup>137</sup> Daniel Salmon, *Mandatory Immunization Laws and the Role of Medical, Religious and Philosophical Exemptions*, available at <http://www.vaccinesafety.edu/exemptrview101503.pdf> (Oct. 2003).

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vaccination, the weight accorded to this should never be diminished since all vaccinations come with a degree of risk. Since 1990, the Vaccine Adverse Event Reporting System (VAERS) tallied 30,000 annual cases of adverse reactions to vaccination, with 10-15% classified as serious (i.e. associated with permanent disability, hospitalization, life-threatening illness, or death).<sup>138</sup> Although it is important to note that this figure may be overstated. Almost anyone, whether it is a healthcare professional or vaccine recipient, can input information on VAERS about any medical issues occurring subsequent to vaccination. The CDC prompts all users with a notice prior to posting: *“When evaluating data from VAERS, it is important to note that for any reported event, no cause-and-effect relationship has been established. Reports of all possible associations between vaccines and adverse events (possible side effects) are filed in VAERS. Therefore, VAERS collects data on any adverse event following vaccination, be it coincidental or truly caused by a vaccine. The report of an adverse event to VAERS is not documentation that a vaccine caused the event.”*<sup>139</sup> In 1988, the National Vaccine Injury Compensation Program (VICP) was created to help compensate individuals who have been injured by vaccines. Between 1989 and July 1, 2014, VICP made 3,645 compensation awards (over \$2.7 billion in awards and \$113.2 million to cover legal costs) and 9,786 claims have been dismissed (\$62.8 million paid to 4,925 dismissed claimants to cover legal costs).<sup>140</sup> Thus, because risks exist to varying degrees, opposition to mandatory vaccination for medical reasons should always be the most influential factor in whether or not an exemption is valid.

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<sup>138</sup> Vaccine Adverse Event Reporting System, *About the VAERS Program*, <http://www.vaers.hhs.gov> (last updated Aug. 4, 2014).

<sup>139</sup> Tampa Bay Times, *What CDC statistics say about vaccine-related illnesses, injuries and death*, <http://www.politifact.com/punditfact/statements/2015/feb/03/bob-sears/what-cdc-statistics-say-about-vaccine-illnesses-in/> (Feb. 2015).

<sup>140</sup> U.S. Dept. of Health and Human Services, *National Vaccine Injury Compensation Program*, available at <http://www.hrsa.gov/vaccinecompensation/index.html> (last updated Aug. 2014).

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Additionally, strengthening mandatory vaccination policies nationwide is a worthy public policy pursuit not just from a public health perspective but also from a fiscal standpoint. A recent economic analysis by the CDC found that the current U.S. childhood vaccination schedule prevents approximately 42,000 deaths and 20 million cases of disease, resulting in a net savings of \$14 billion in direct costs and \$69 billion in total societal costs. This can be illustrated by a measles outbreak that resulted when an unvaccinated woman from Switzerland visited Tucson, Arizona. She went to a local hospital after becoming symptomatic infected 14 people, including 7 kids, over a span of three months. Seven of the victims were infected after frequenting health care facilities and four individuals required hospitalization. In terms of fiscal cost, the outbreak cost 2 local hospitals a total of nearly \$800,000. The outbreak additionally cost tens of thousands more for state and local health departments to track and quarantine cases while providing notice to the thousands who may have been exposed.<sup>141</sup>

Furthermore, creating a higher standard for exemptions from mandatory vaccination is not only consistent with established case law, but it is truly the most effective way of increasing vaccination rates. The National Vaccine Advisory Committee (NVAC) Working Group found no correlation between vaccination rates and the type and frequency of exemptions. Said another way, states that offer philosophical exemptions in addition to religious exemptions did not experience lower vaccination rates or higher exemptions rates. Furthermore, a 2000 study found that states that easily permitted exemptions experienced a significantly higher rate of exemption than states that made exemptions more difficult to obtain.<sup>142</sup> It was also found that half of the states that did not offer philosophical exemptions had never denied a request and were thus de

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<sup>141</sup> Contemporary Pediatrics, *supra*.

<sup>142</sup> Rota JS, *supra*.

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facto allowing them. Reforming how exemptions are obtained rather than which type of exemptions are permitted will have the greatest effect in increasing vaccination rates.

#### **D. Concerns About Implementing the Best Interests of the Child Standard**

Instead of allowing mandatory vaccination to have blanket exceptions for religion and philosophy, this proposal favors a fact-specific inquiry and assigns different weights to three factors (i.e. medical, religious, philosophical). This makes the administration of mandatory vaccines easier for the state, but harder for the individual to challenge. Parents would have to have the financial resources to challenge a mandatory vaccination policy. One way of challenging a policy is commencing a class action suit. If this method does not seem like an achievable way to challenge a policy due to the fact-specific nature of each child’s medical history and each parent’s religious and philosophical views, another possibility would be to create an administrative-type court system, such as the Social Security courts, that are in charge of determining whether a parent fits the criteria for exemption. This solution would depend on the demand that exists for it, and whether or not from a public policy perspective, the costs of this will outweigh the benefits of widespread vaccination. However, to reduce the pool of plaintiffs and in the interest of avoiding a drainage of judicial resources, a parent should be able to qualify their child for an exemption if they can provide medical documentation regarding their medical history/degree of risk/medical fragility or a signed physician’s note that vaccination is not recommended for the individual, or can prove that they are sick at the time of vaccination (but the state would be allowed to “defer” their vaccination until after the individual is no longer ill). This would reserve only the *medically ambiguous* individuals in the pool of potential challengers to mandatory vaccination.

#### **V. Conclusion**

## **The Right To Refuse Vaccination**

### *Revisiting Vaccination Exemptions and the “Best Interests of the Child Standard”*

Current law is too broad in granting parents exemptions from having their children vaccinated. There is an increasing anti-vaccination movement growing in the U.S. due to flawed science behind the autism-link theory and mostly due to complacency amongst parents who take for granted that vaccination has significantly reduced or eradicated the occurrences of infectious diseases their parents once had to live through. Because of the growing anti-vaccination movement, states need to figure out a way to increase vaccination rates while still respecting the First Amendment rights of parents. States have been able to mandate vaccination via their Police Powers under the Tenth Amendment, yet it remains unclear whether states have the constitutional authority to grant non-medical exemptions (the right to grant medical exemptions was established in *Jacobson*). Current law should change to account for this uncertainty by allowing non-medical objections to vaccination to continue playing a role in exemption analysis, however it should be considered as part of a factor test under a heightened “best interests of the child” standard and not allowed as a per se reason for exemption. Courts should aim to narrow the field of parents who apply for exemptions, leaving only those with legitimate medical objections and a combination of medical and non-medical justifications. Under a heightened “best interests of the child” standard, a parent would have the ability to challenge a state’s interest in mandating vaccination in the first place, the science behind vaccination, and would be able to argue that their child should qualify for an exemption. The finder of fact would determine from the totality of the circumstances whether or not the parent has met their burden of proof. This would be a fact-specific inquiry since every child has a different medical history and their parents may have varying religious or philosophical views regarding vaccination. Putting an end to non-medical blanket vaccination exemptions and implementing a heightened



## **The Right To Refuse Vaccination**

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“best interest of the child standard” would increase vaccination rates while still preserving First Amendment rights of parents.