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# VACCI [NATION]: NEW YORK AS A STEPPING STONE TO A HEALTHIER COUNTRY

KAYLA HARDESTY\*

## INTRODUCTION

Consider the following scenario: you are the parent of a six year-old boy attending public school in New York State. You are confident you have made good decisions that keep him happy and healthy. One such decision was to get your son vaccinated, as is required for public school children in New York State. Given the increasing media coverage of diseases like the flu and measles, you are satisfied that you made the right decision. Furthering your confidence are public proclamations about the efficacy of childhood vaccination by political leaders like President Obama<sup>1</sup> and New York State Senator Chuck Schumer.<sup>2</sup>

Now imagine that one day your child comes home from school with a fever, a cough, small white spots developing inside his mouth and a letter from his school announcing that an unimmunized student had been diagnosed with measles. You are struck with outrage, fear and confusion. Your child, despite having been vaccinated, was now showing symptoms of measles, a very

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<sup>1</sup> See Eun Kyung Kim, *President Obama On Measles: 'You should get your kids vaccinated,'* TODAY NEWS, Feb. 2, 2015, <http://sys06-public.nbcnews.com/today/news/president-obama-measles-you-should-get-your-kids-vaccinated-2D80467430> ("I understand that there are families that in some cases are concerned about the effect of vaccinations. The science is, you know, pretty indisputable. We've looked at this again and again. There is every reason to get vaccinated, but there aren't reasons to not[.]").

<sup>2</sup> Reuven Blau, *Sen. Chuck Schumer Urges CDC to Offer Free Measles Vaccine*, N.Y. DAILY NEWS, Feb. 8, 2015, <http://www.nydailynews.com/new-york/sen-chuck-schumer-urges-cdc-offer-free-measles-vaccine-article-1.2107386> ("As sure as the sky is blue-vaccines work and are the most reliable safeguard against the spread of this dangerous virus[.]").

serious and deadly disease;<sup>3</sup> he was exposed to the virus through an unimmunized child who had used a religious exemption to avoid receiving a vaccination.<sup>4</sup>

This shocking scenario is not imaginary; it has occurred already in the U.S.<sup>5</sup> Because no vaccine is 100% effective, unvaccinated children are not only facing potential danger to themselves, but they are also posing a danger to those children who are vaccinated.<sup>6</sup> Research suggests that this type of transmission is likely to occur with increasing frequency as the number of reported measles cases in 2014 soared to 644.<sup>7</sup> This is the highest number since 2000.<sup>8</sup> Additionally, in the first two months of 2015, there were already 141 reported cases, or more than one-fifth the number of cases reported in 2014.<sup>9</sup> These statistics are unfortunately not surprising, as research has shown that rates of non-medical exemptions from school immunization requirements

<sup>3</sup> *Measles (Rubeola)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/measles/about/signs-symptoms.html> (last updated Feb. 17, 2015) (Measles typically begins with high fever, cough, runny nose (coryza), and red watery eyes (conjunctivitis). Two or three days after symptoms begin, tiny white spots (Koplik) may appear inside the mouth).

<sup>4</sup> See generally Tara Haelle, *Measles Cases are Spreading Despite High Vaccination Rates. What's going on?*, WASH. POST, June 23, 2014, [http://www.washingtonpost.com/national/health-science/measles-cases-are-spreading-despite-high-vaccination-rates-whats-going-on/2014/06/23/38c86884-ea97-11e3-93d2-edd4be1f5d9e\\_story.html](http://www.washingtonpost.com/national/health-science/measles-cases-are-spreading-despite-high-vaccination-rates-whats-going-on/2014/06/23/38c86884-ea97-11e3-93d2-edd4be1f5d9e_story.html) (In 2014, 10% of measles cases occurred in vaccinated individuals); Michaelen Doucleff, *Why Mumps and Measles Can Spread Even When We're Vaccinated*, NPR, Apr. 18, 2014, <http://www.npr.org/blogs/health/2014/04/18/304155213/why-mumps-and-measles-can-spread-even-when-were-vaccinated> (On rare occasions, a virus will trump the protection that one receives from a vaccine. This happens when large groups of people in a community are left unvaccinated).

<sup>5</sup> Cf. Scott Shulman, *Mom of 3-Year-Old Measles Patient Calls Diagnosis 'Shocking'*, ABC NEWS, Jan. 31, 2015, <http://abcnews.go.com/Health/mom-year-measles-patient-calls-diagnosis-shocking/story?id=28630801> ("He had his vaccination, so it was a little bit shocking to find out that he had still gotten the measles.").

<sup>6</sup> Donald G. McNeil Jr., *When Parents Say No to Child Vaccinations*, N.Y. TIMES, Nov. 30, 2002, <http://www.nytimes.com/2002/11/30/us/when-parents-say-no-to-child-vaccinations.html>; See Gillian Mohny, *Why Even Vaccinated People Can Catch Measles*, ABC NEWS, Feb. 1, 2015, <http://abcnews.go.com/Health/vaccinated-people-catch-measles/story?id=28631939>.

<sup>7</sup> Mariano Castillo, *Measles Outbreak: How Bad Is It?*, CNN, Feb. 2, 2015, <http://www.cnn.com/2015/02/02/health/measles-how-bad-can-it-be/>.

<sup>8</sup> *Id.*

<sup>9</sup> Samantha Tata, *Princeton Student Has Suspected Case of Measles, School Says*, PIX 11, Feb. 19, 2015, <http://pix11.com/2015/02/19/princeton-student-has-suspected-case-of-measles-school-says/>.

in the United States continue to grow at an accelerated pace.<sup>10</sup> The Centers for Disease Control (“CDC”) noted, in regards to a 2008 United States measles report, that the number of reported cases more than doubled averages from the previous seven years. Notably, that “[t]his increase was not the result of a greater number of imported cases, but was the result of greater viral transmission after importation into the United States . . .”<sup>11</sup> The report further stated that “[t]hese importation-associated cases have occurred largely among school-aged children who were eligible for vaccination but whose parents chose not to have them vaccinated.”<sup>12</sup>

Vaccination laws are controlled solely by individual states exercised through their police power authority.<sup>13</sup> The police power is reserved to the states by the Constitution to enact laws that will protect the public health and safety of its citizens.<sup>14</sup> Although all 50 states mandate vaccinations for students when first entering school,<sup>15</sup> all state vaccination laws also provide for exemptions.<sup>16</sup> Every state has an exemption for contraindicating medical conditions, and many also have non-medical exemptions as well.<sup>17</sup>

<sup>10</sup> Nina R. Blank et al., *Exempting Schoolchildren From Immunizations: States With Few Barriers Had Highest Rates of Nonmedical Exemptions*, 32 HEALTH AFFAIRS, 1282, 1282 (2013) (The overall state mean of reported non-medical exemptions for the school age population in the United States doubled from 2006 to 2011) (citing Omer SB et al., *Vaccination Policies and Rates of Exemption From Immunization*, N. ENG. J. MED., 2005–2011), available at [https://www.academia.edu/4367818/Exempting\\_Schoolchildren\\_From\\_Immunizations\\_States\\_With\\_Few\\_Barriers\\_Had\\_Highest\\_Rates\\_Of\\_Nonmedical\\_Exemptions](https://www.academia.edu/4367818/Exempting_Schoolchildren_From_Immunizations_States_With_Few_Barriers_Had_Highest_Rates_Of_Nonmedical_Exemptions).

<sup>11</sup> *Update: Measles—United States, January—July 2008*, CENTERS FOR DISEASE CONTROL AND PREVENTION, Aug. 22, 2008, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5733a1.htm>.

<sup>12</sup> *Id.*; See also Daniel A. Salmon et al., *Health Consequences of Religious and Philosophical Exemptions From Immunization Laws*, 281 J. AM. MED. ASS’N 47, 47 (Jul. 7, 1999), available at <http://jama.jamanetwork.com/article.aspx?articleid=190649>; Paul A. Offit, *The Anti-Vaccination Epidemic*, WALL ST. J., Sep. 24, 2014, <http://www.wsj.com/articles/paul-a-offit-the-anti-vaccination-epidemic-1411598408>.

<sup>13</sup> Kevin M. Malone & Alan R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights*, LAW IN PUBLIC HEALTH PRACTICE, at 271, available at [http://www.cdc.gov/vaccines/imz-managers/guides-pubs/downloads/vacc\\_mandates\\_chptr13.pdf](http://www.cdc.gov/vaccines/imz-managers/guides-pubs/downloads/vacc_mandates_chptr13.pdf); See also *Jacobson v. Massachusetts*, 197 U.S. 11, 29-30 (1905) (holding that the right of states to compel vaccination is a reasonable exercise of the state’s police power and does not violate one’s liberty under the Fourteenth Amendment of the U.S. Constitution).

<sup>14</sup> *Jacobson v. Massachusetts*, 197 U.S. at 25.

<sup>15</sup> Malone & Hinman, *supra* note 13, at 270.

<sup>16</sup> *Id.* at 273.

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

Forty-eight states, (but not Mississippi and West Virginia,) allow religious exemptions, and nineteen states even permit philosophical exemptions.<sup>18</sup> Notably, the vast majority of vaccination exemptions granted are for nonmedical reasons.<sup>19</sup> Because each state governs its own vaccination law, the criteria for allowing these exemptions vary greatly.<sup>20</sup> However, research has shown that one fact remains the same: states with the most nonmedical exemptions also have the highest clusters of vaccine-preventable diseases.<sup>21</sup>

New York State currently offers both a medical and a religious exemption.<sup>22</sup> The religious exemption dominates, with data reported by school officials in the 2013-2014 school year showing that, in comparison to medical exemptions, there was four times the number of religious exemptions granted in upstate New York alone.<sup>23</sup> Further, research from 2000-2011 found that the counties in New York with higher religious exemption rates also had higher rates of pertussis among, not only exempted children, but also among vaccinated children as well.<sup>24</sup> These reports are troubling for parents who follow state mandated immunization laws, thinking that it will keep their children safe; additionally, they raise important public health and public education issues.

This Note focuses on New York State specifically and proposes that all states, including New York, eliminate their religious exemption to mandatory immunization laws and maintain only a medical exemption. Part I of this Note will give a brief backdrop of the development of immunization laws in the United States and

<sup>18</sup> *Exemptions Permitted For State Immunization Requirements*, IMMUNIZATION ACTION COALITION, <http://www.immunize.org/laws/exemptions.asp> (last updated Feb. 17, 2017).

<sup>19</sup> Blank, *supra* note 10 at 1283 (“About 80 percent of all exemptions in the 2011-12 school year were nonmedical.”).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; See Yevgeniy Feyman, *Philosophical Vaccine Exemptions are Poison*, N.Y. DAILY NEWS, (Feb. 12, 2015) <http://www.nydailynews.com/opinion/yevgeniy-feyman-philosophical-vaccine-exemptions-poison-article-1.2112482> (“Mississippi’s strict vaccination policies have resulted in the nation’s highest measles vaccination rate, which has helped to protect the state from the current outbreak”).

<sup>22</sup> N.Y. PUBLIC HEALTH LAW § 2164(8) and (9) (2017).

<sup>23</sup> See Jeff Platsky, *Thousands of N.Y. Children Lack Immunization*, PRESSCONNECTS, Feb. 6, 2015, <http://www.pressconnects.com/story/news/local/2015/02/06/school-age-immunizations/22977265/>.

<sup>24</sup> Aamer Imdad et al., *Religious Exemptions for Immunization and Risk of Pertussis in New York State, 2000-2011*, 132 J. AMERICAN ACAD. OF PEDIATRICS 1, 38 (2013).

will detail the history of New York's vaccination exemption laws. Part II will then analyze recent statistics along with the health, judicial and economic consequences created by the increased rates of religious exemptions in New York. Part III will address New York's social distancing policy where unimmunized children are forced to leave school for extended periods of time during an outbreak of a vaccine preventable illness. The constitutionality of this policy will be analyzed through the lenses of the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Finally, Part IV will present arguments against propositions that New York adopt a "philosophical exemption," and will instead propose that New York eliminate its religious exemption to mandatory immunization.

## I. THE HISTORY OF VACCINATION LAWS

### A. *The Supreme Court Upholds State-Enforced Compulsory Vaccination Laws*

Over a century ago in 1905, the United States Supreme Court decided *Jacobson v. Massachusetts*, which is often regarded as the most important judicial decision in public health.<sup>25</sup> The decision upheld the authority of states to pass compulsory vaccination laws, and articulated that individual freedoms must sometimes be subordinate to the common welfare.<sup>26</sup> *Jacobson* has since served as strong precedent in numerous cases challenging vaccination laws.<sup>27</sup>

In 1902, the Board of Health in Cambridge, Massachusetts, adopted a regulation requiring all inhabitants of the city who had not been vaccinated during the previous five years against

<sup>25</sup> See Lawrence O. Gostin, *Jacobson v. Massachusetts at 100 Years: Police Power and Civil Liberties in Tension*, 95 AM. J. PUB. HEALTH 576, 576 (2005) available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1449223>; *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (the court "distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description . . .").

<sup>26</sup> See *Jacobson v. Massachusetts*, 197 U.S. 11 at 26.

<sup>27</sup> See *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015); *Workman v. Mingo County Bd. of Educ.*, 419 F. App'x 348, 353-54 (4th Cir. 2011); *Caviezel v. Great Neck Pub. Sch.*, 739 F. Supp. 2d 273, 283 (E.D.N.Y. 2010) aff'd, 500 F. App'x 16 (2d Cir. 2012); *Boone v. Boozman*, 217 F. Supp. 2d 938, 954 (E.D. Ark. 2002); *Brock v. Boozman*, No. 4:01CV00760 SWW, 2002 WL 1972086, \*23-\*26 (E.D. Ark. Aug. 12, 2002); *Hanzel v. Arter*, 625 F. Supp. 1259, 1262 (S.D. Ohio 1985).

smallpox to undergo vaccination or pay a five-dollar fine.<sup>28</sup> The refusal by a man named Henning Jacobson, both to being vaccinated and to pay the requisite fine, led to criminal charges being brought against him.<sup>29</sup> An appeal by Jacobson, asserting that the Cambridge regulation violated numerous clauses of the Fourteenth Amendment, eventually made its way to the U.S. Supreme Court.<sup>30</sup> Jacobson insisted that his liberty was invaded when the state subjected him to a fine or imprisonment for refusing to submit to vaccination.<sup>31</sup> He argued that a compulsory vaccination law is unreasonable and hostile to the right of every free man to care for his own health in a way that he sees fit, and that execution of such a law, no matter the reason, is an assault upon his person.<sup>32</sup> The Supreme Court disagreed, upholding the regulation through Massachusetts' police power authority, noting that, ". . . liberty secured by the Constitution . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good."<sup>33</sup>

In its holding, the Supreme Court identified two elements that support the proper exercise of the state police power in reference to public health law: first, that the law is necessary, and second, that the means used to satisfy the law are reasonable as to justify the necessity.<sup>34</sup> The Court explained that a law regarding a certain disease is deemed necessary to protect the public health and

<sup>28</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 at 12 (the regulation was in accordance with a state law that empowered the board of a city or town to require and enforce vaccination when in its opinion, it was necessary for the public health or safety).

<sup>29</sup> *Id.* at 13 (defendant was found guilty of the criminal charges against him and was sentenced by the court to pay a fine of five dollars).

<sup>30</sup> *Id.* at 14 (The Fourteenth Amendment provides that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws); James Colgrove & Ronald Bayer, *Manifold Restraints: Liberty, Public Health, and the Legacy of Jacobson v. Massachusetts*, 95 *AM. J. PUB. HEALTH* 571, 572 (2005) available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1449222/>.

<sup>31</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 at 26.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* ("Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.").

<sup>34</sup> *Id.* at 27-36.

secure public safety if the disease is prevalent to some extent and is increasing.<sup>35</sup> Further, that the means used to justify the necessity of a law are reasonable when they have a substantial relation to the object of the law.<sup>36</sup> Moreover, evidence that other states enforce similar laws bolsters the reasonableness of the law.<sup>37</sup> Lastly, common acceptance of the proposed law acts as a foundation that the law is both a reasonable and proper exercise of the state police power.<sup>38</sup>

In the Court's application of the elements in *Jacobson*, it held that when Cambridge adopted the regulation in question, smallpox was prevalent and increasing with no evidence asserting the contrary.<sup>39</sup> Thus, the principle of vaccination, through the regulation, was determined by the Court to be necessary to protect the public health and secure the public safety.<sup>40</sup> In support of its holding, the Court referred to the fact that vaccination was enforced in many states by statutes making the vaccination of children a condition of their right to enter or remain in public schools.<sup>41</sup> The Court upheld Cambridge's regulation, noting that the safety and health of the citizens of a state are not ordinarily matters of concern for the national government, so long as the action of a state does not invade rights secured by the Federal Constitution.<sup>42</sup> Further, that with the exception of citizens not "fit" for immunization due to risk of serious health impairment, state mandated immunization of citizens does not invade any Federal Constitutional rights.<sup>43</sup>

Although state courts found school vaccination requirements constitutional prior to *Jacobson*, vaccination was compelled only indirectly, by imposing penalties, quarantining students or denying school admission, to avoid making decisions on direct physical mandates.<sup>44</sup> The Supreme Court's decision however, that even liberty, the greatest of all rights, is not an unrestricted

<sup>35</sup> *Id.* at 27.

<sup>36</sup> *Id.* at 31-32.

<sup>37</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 32 (1905).

<sup>38</sup> *Id.* at 35.

<sup>39</sup> *Id.* at 27-28.

<sup>40</sup> *Id.* at 28.

<sup>41</sup> *Id.* at 31-32.

<sup>42</sup> *Id.* at 38.

<sup>43</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905).

<sup>44</sup> Gostin, *supra* note 25, at 577.



license to act according to one's own will, provided the foundation for expanding state powers in the realm of public health.<sup>45</sup>

### B. *School Vaccination Laws*

The first school vaccination requirements were enacted in Massachusetts in the 1850's to prevent smallpox transmission.<sup>46</sup> By the early twentieth century, nearly half the states had requirements for children to be vaccinated against smallpox before entering school.<sup>47</sup> Later, in the late 1960's and early 1970's transmission of measles in schools was recognized as a significant problem, and efforts were undertaken through school vaccination laws to eradicate the disease from the United States.<sup>48</sup> State legislatures were influenced by the significantly lower rates of measles among school aged children in states with comprehensive immunization laws that had strictly enforced vaccination requirements and exclusion policies in outbreak situations.<sup>49</sup>

Today, all states, as a condition of school entry, require proof of vaccination against a number of specified diseases outlined by the Center for Disease Control (e.g., diphtheria, measles, rubella, and polio).<sup>50</sup> State immunization statutes often require schools to maintain records of student immunizations and report information to public health authorities.<sup>51</sup> These laws are consistent with federally funded immunization programs that condition funding grants on implementation and enforcement of immunization among students within the states.<sup>52</sup>

<sup>45</sup> Ben Horowitz, Comment, *A Shot in the Arm: What a Modern Approach to Jacobson v. Massachusetts Means for Mandatory Vaccinations During a Public Health Emergency*, 60 AM. U. L. REV. 1715, 1717-1720 (2011) available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1619&context=aulr>.

<sup>46</sup> Malone & Hinman, *supra* note 13, at 269.

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

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

<sup>49</sup> James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical Social and Legal Perspectives*, CTR. FOR LAW AND THE PUB.'S HEALTH, Feb. 15, 2002, at 47 available at <http://publichealthlaw.net/Research/PDF/vaccine.pdf>.

<sup>50</sup> *General Recommendations on Immunization: Recommendations of the Advisory Committee on Immunization Practices (ACIP)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, Jan. 28, 2011, <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr6002a1.htm>.

<sup>51</sup> See, e.g., N.Y. PUB. HEALTH LAW § 2164(11).

<sup>52</sup> 42 U.S.C. § 247b (2017); See also Malone & Hinman, *supra* note 13, at 268 (federal grants support the purchase of vaccine for free administration at local health departments, support immunization delivery, surveillance, communication and education).

### C. New York's Vaccination Exemption Law

In 1966, New York enacted section 2164 of the New York Public Health Law, which set forth a comprehensive scheme under which every child in New York State was to be immunized against poliomyelitis, mumps, measles, diphtheria, and rubella.<sup>53</sup> Subsection nine of the statute provided:

This section shall not apply to children whose parent, parents or guardian[s] are bona fide members of a recognized religious organization whose teachings are contrary to the practices herein required, and no certificate [of immunization] shall be required as a prerequisite [sic] to such children being admitted or received into school or attending school.<sup>54</sup>

The religious exemption was the direct result of lobbying by a religious group known as the Christian Scientists, who believe that illnesses are only spiritual disorders and should be treated with prayer as opposed to medicine.<sup>55</sup> New York was the first state to provide a religious- based exemption to a vaccination law; other states soon enacted similar exemptions.<sup>56</sup> In addition to expanding the number of children permitted to attend school unvaccinated, creating the exemption also opened the door to claims of religious discrimination.<sup>57</sup> The vaccination statute and its religious exemption remained unchanged until 1987 when the court issued

<sup>53</sup> *Sherr v. Northport-East Northport Union Free School Dist.*, 672 F. Supp. 81, 83-84 (E.D.N.Y. 1987) (holding that the limitation of religious exemption to New York mandatory inoculation program of school children to “bona fide members of a recognized religious organization” violated the First Amendment, and that the statute be revised to offer the exemption to all persons who “sincerely hold religious beliefs” that prohibit the inoculation of their children by the state); *See generally* *Pierce v. Bd. of Ed. of City of Fulton*, 219 N.Y.S.2d 519, 520-521 (N.Y. Sup. Ct. 1961) (Prior to 1966, New York abided by § 2130 of the Public Health Law which provided that a child who had not been vaccinated against smallpox shall not be admitted to schools in a city having a population of fifty thousand or more inhabitants. It also provided that if smallpox existed in any other city or school district, or in the vicinity thereof, and the Commissioner of Health so certified, then it became the duty of the school to exclude all children not vaccination).

<sup>54</sup> N.Y. PUBLIC HEALTH LAW § 2164(9) (McKinney 1966).

<sup>55</sup> Videotape: *Unvaccinated: The Strange Story of Vaccine Exemptions* (Combined Grand Rounds 2016) *available at* <http://mediasite.ouhsc.edu/Mediasite/Catalog/Mobile/FolderPresentation/2c516c8c-9a5b-4f78-8870-211f1197a170/55918b49-c925-46c2-adc9-f8ae1c85f03b/6435a9f036e94a8292945db4630b136d1d/>.

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

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

a ruling in *Sherr v. Northport-East Northport Union Free School District*.<sup>58</sup>

1. New York Public Health Law § 2164 Adopts “Genuine and Sincere Contrary Religious Belief” Standard

In 1987, the Sherr family filed a complaint against defendants Northport-East Northport Union Free School District, alleging constitutional violations of freedom of religion and equal protection when the district refused to allow their son to forego the required vaccinations.<sup>59</sup> The Sherr family asserted that the inoculations were contrary to the family’s sincerely held religious beliefs, and that even though they were not members of any formal religious group, they were entitled to benefit from the exemption set forth in section 2164(9).<sup>60</sup>

In its analysis, the United States District Court quoted the Supreme Court’s framing of the Establishment Clause, “[t]he establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”<sup>61</sup> The three-pronged test adopted by the Supreme Court in *Lemon v. Kurtzman* in 1971<sup>62</sup> is the standard by which the constitutionality of laws challenged under the Establishment Clause must be measured.<sup>63</sup> First, the legislature must have had a secular purpose for adopting the enactment.<sup>64</sup> Second, the primary effect of the law to be scrutinized must be one that neither advances nor inhibits

<sup>58</sup> See *Sherr v. Northport-East Northport Union Free School Dist.*, 672 F. Supp. at 89.

<sup>59</sup> *Id.* at 84 (The school district, the superintendent, the principal of the elementary school, collectively “school district defendants” along with the New York State Commissioner of Education, were also defendants).

<sup>60</sup> *Id.* (A similar case filed by the Levy family on behalf of themselves and their daughter was reassigned and consolidated with the Sherr’s action. The court held that although the Sherr’s genuinely opposed vaccinations, they did not sincerely hold the religious beliefs that they put forth as the basis for their claim and were not entitled to an immunization exemption. The Levy’s on the other hand did sincerely hold the religious beliefs that they put forth as the basis for their claim and therefore were entitled to the religious exemption from immunization that they sought).

<sup>61</sup> *Id.* at 88 (quoting *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947); See also *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15-16 (1947).

<sup>62</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

<sup>63</sup> *Sherr v. Northport-East Northport Union Free School Dist.*, 672 F. Supp. 81, 89 (1987).

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

religion.<sup>65</sup> Third, the statute must not result in an excessive entanglement of government with religion.<sup>66</sup>

The court found that section 2164 as a whole was designed to achieve the purely secular purpose of protecting New York's school children from the outbreak of communicable diseases; therefore, passing the first prong of the test.<sup>67</sup> However, the court then held that the clause manifestly inhibited the religious practices of those who opposed vaccination on religious grounds, but were not members of a state recognized religious organization; thus, violating the second prong.<sup>68</sup> Finally, the court found that New York's restriction of the exemption to only state recognized religious organizations "clearly requires that the government involve itself in religious matters to an inordinate degree;" therefore, violating the third prong.<sup>69</sup> Because section 2164 did not pass all three prongs, it violated the Establishment Clause.<sup>70</sup>

In determining whether section 2164 violated the Free Exercise Clause, the court again referenced Supreme Court precedent by applying its four-step inquiry developed in *Sherbert v. Verner* in 1963.<sup>71</sup> When analyzing a potential violation of the Free Exercise Clause, it must be determined if, (1) a religious belief or practice is involved; (2) such a belief or practice is burdened by the governmental action in question; if so, it must be proven that; (3) a compelling state interest justifies such an infringement; and (4) even if such a compelling state interest is present, that there is no less restrictive alternative in achieving the purpose of the government action.<sup>72</sup>

In its analysis, the court determined that claiming a religiously-based exclusion from section 2164 involved a religious belief or practice, and that the ability of an individual to conform his family life with the dictates of that belief was surely burdened by New York's vaccination requirement, easily satisfying the first two

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

<sup>66</sup> *Id.*

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

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

<sup>69</sup> *Sherr v. Northport-East Northport Union Free School Dist.*, 672 F. Supp. 81, 90 (1987).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* See *Sherbert v. Verner*, 374 U.S. 398, 403-09 (1963).

<sup>72</sup> *Sherr v. Northport-East Northport Union Free School Dist.*, 672 F. Supp. 81, 90 (1987).

factors.<sup>73</sup> The court then noted that although there was a compelling interest in preventing disease, New York lacked a compelling interest that justified burdening the free religious exercise of individuals who did not belong to a religious organization to which the state “has given a stamp of approval.”<sup>74</sup> The court ruled that because there surely existed a less restrictive alternative to achieve the state’s aim, section 2164 also failed the last factor of the inquiry, and thus, violated the Free Exercise Clause.<sup>75</sup>

The court held that New York’s statute violated both religion clauses of the First Amendment.<sup>76</sup> Despite no constitutional requirement to do so, if New York wished to allow a religiously based exemption from compulsory school immunization, it may not limit the exemption to specific religious groups, but must offer it to all persons who “sincerely hold religious beliefs that prohibit the inoculation of their children by the state.”<sup>77</sup> In 1990, the New York State legislature amended New York Public Health Law section 2164(9), and replaced the requirement of “bona fide membership in a recognized religious organization” with “genuine and sincere contrary religious belief” in order to qualify for a religious exemption.<sup>78</sup> The new exemption put the burden on the parents of proving that the basis of their opposition to immunization is a personal and sincerely held religious belief.<sup>79</sup>

## 2. Obtaining a Religious Exemption in New York State

Today, to obtain a religious exemption in New York State, a parent or student, may submit a written and signed letter, or request a “religious exemption to immunization” form.<sup>80</sup> This form

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

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 90-91.

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

<sup>77</sup> *Id.* at 92 (fn.5) (Because the court found that New York’s statute violated the First Amendment, they needed not address the plaintiff’s challenges to the limitation under the Equal Protection Clause of the Fourteenth Amendment).

<sup>78</sup> N.Y. PUBLIC HEALTH LAW § 2164(9) (McKinney 1990).

<sup>79</sup> *Id.*

<sup>80</sup> N.Y. STATE EDUC. DEP’T, *Immunization Guidelines for Schools* 13 (2014), available at <http://www.p12.nysed.gov/sss/documents/IMMUNIZATIONGUIDELINESFORSCHOOLS.pdf>.

or letter must state that that individual objects to immunizations because of sincere and genuine religious beliefs, which prohibit immunization.<sup>81</sup> A religious exemption that is granted is valid throughout the time the student attends school in that district.<sup>82</sup>

Schools that deny a request for religious exemption to immunization must inform the parent/guardian of their decision in writing with the specific reasons, and inform the parent/guardian of their right to an appeal.<sup>83</sup> Finally, schools must inform the parent/guardian of exempted students about the school policy for exclusion of students with exemptions during the outbreak of a vaccine preventable disease for the vaccines the student does not have, as required by the New York State Department of Health.<sup>84</sup>

## II. THE CONSEQUENCES OF INCREASED RELIGIOUS EXEMPTIONS IN NEW YORK STATE

The number of parents in New York applying for section 2164 exemptions for their children is on the rise,<sup>85</sup> despite assurances from public health officials and the scientific community that childhood vaccines are safe and are essential to stopping the spread of infectious diseases.<sup>86</sup> Further, the increase in exemptions threatens not only the health of New York citizens, but also their access to resources within the court system, along with creating a substantial economic burden. Researcher Dr. Jana Shaw, an assistant professor of pediatrics at SUNY Upstate

<sup>81</sup> *Id.*

<sup>82</sup> *Immunization Guidelines for Schools*, *supra* note 80, at 3-4 (The principal or designee of the school decides whether to grant the exemption, and may require supporting documents to explain or clarify the religious beliefs).

<sup>83</sup> *Id.* at 13 (Any party may appeal by petition to the Commissioner of Education.).

<sup>84</sup> *Id.* See also, 10 N.Y. COMP. CODES R. & REGS. 66-1.10(a) ("For those diseases listed in PHL § 2164 only, in the event of an outbreak, as defined in section 2.2(d) of this Title, of a vaccine-preventable disease in a school, the commissioner, or his or her designee, or in the City of New York, the Commissioner of Health of the New York City Department of Health and Mental Hygiene, may order the appropriate school officials to exclude from attendance all students who either have been exempted from immunization under section 66-1.3 (c) or (d) of this Subpart, or are in the process of receiving required immunizations pursuant to section 66-1.3(b) of this Subpart.").

<sup>85</sup> Jonathan D. Rockoff, *More Parents Seek Vaccine Exemption Despite Assurances, Fear of Childhood Shots Drives Rise*, WALL ST. J., Jul. 6, 2010, available at <http://online.wsj.com/article/SB10001424052748703322204575226460746977850.html>.

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

Medical Center noted that although the reasons underlying the rising rates for religious exemptions are unknown, preliminary results suggest that it is not for religious reasons alone.<sup>87</sup>

A. *Number of Religious Exemptions in New York Continues to Rise*

Although New York is one of the states in which obtaining religious exemptions to vaccinations is considered to be either “moderately difficult”<sup>88</sup> or “difficult,”<sup>89</sup> when compared to other states that offer religious exemptions, the rate of religious exemptions granted in New York State was found to be tantamount to those states that permit easy non-medical exemptions.<sup>90</sup> The average amount of religious exemptions to immunizations granted in New York State nearly doubled from 2000 to 2011 among school-aged children from kindergarten to twelfth grade.<sup>91</sup> Most recently in New York, during the 2013-2014 school year, 1,547 children enrolled in kindergarten were granted a religious exemption; whereas only 302 children were granted a medical exemption in the same school year.<sup>92</sup>

The American Academy of Pediatrics conducted a retrospective study published in 2013 on the risk of pertussis in New York State from 2000 to 2011.<sup>93</sup> The study found that of the 62 counties in New York, thirteen counties had what was considered “high religious exemption rates” in 2011, as compared to only four counties in 2000.<sup>94</sup> Because there are many counties within New

<sup>87</sup> Serena Gordon, *Whooping Cough Cases Rise as Parents Opt Out of Vaccine*, HEALTH DAY (Jun. 3, 2013), <http://consumer.healthday.com/diseases-and-conditions-information-37/misc-diseases-and-conditions-news-203/whooping-cough-cases-rise-as-parents-opt-out-of-vaccine-676912.html>.

<sup>88</sup> Imdad, *supra* note 24, at 38 (Example of an easy non-medical exemption could be exemptions granted due to a personal, moral or philosophical belief).

<sup>89</sup> Blank, *supra*, note 10, at 1285.

<sup>90</sup> Imdad, *supra* note 24, at 40.

<sup>91</sup> *Id.* (Mean rate of religious exemption granted within New York State in 2000 was 0.23% of all children K-12 enrolled in school as compared to 0.45% of all children K-12 enrolled in school in 2011).

<sup>92</sup> Ranee Seither et al., *Vaccination Coverage Among Children in Kindergarten-United States 2013-14 School Year*, CENTERS FOR DISEASE CONTROL AND PREVENTION, Oct. 17, 2014, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6341a1.htm>.

<sup>93</sup> Imdad, *supra* note 24, at 38-39.

<sup>94</sup> *Id.* at 39 (A county was considered to have a high exemption rate if its overall exemption rate was above 1% of the total school-aged population in that county. The overall

York State, there are also many different school districts that may handle exemptions differently than others. This is problematic because if a certain school district does not apply the exemption qualifications as stringently as another, the exemptions will accumulate in that district and a cluster of exemptions will form, creating a greater risk that a disease will spread within a community.<sup>95</sup> This is exemplified in the study, which showed that religious exemptions among school-aged children enrolled in grades K-12 in New York's 62 counties ranged throughout 2000-2011 from a low of 0.06% of the school-aged population in one county to a peak of 5.58% of the school-aged population in another county.<sup>96</sup>

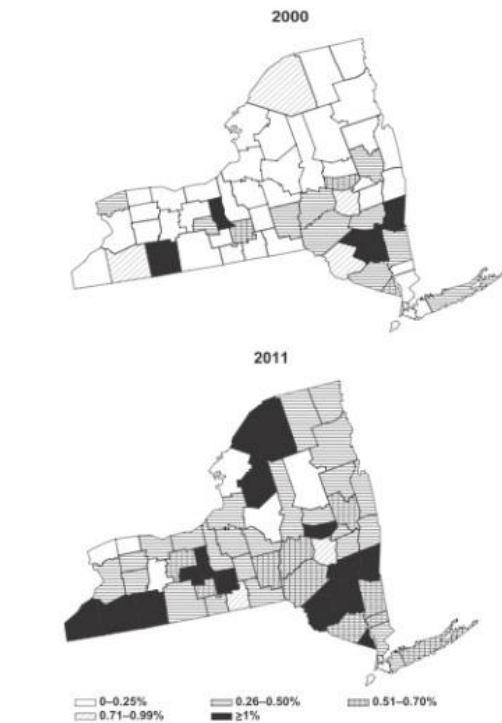


FIGURE 1  
County religious exemption rates in NYS schools in 2000 and 2011.

exemption rate per county was calculated by dividing the sum of all the students that were exempted by the total amount of students enrolled in the study).

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

<sup>96</sup> *Id.*



The study concluded that, not surprisingly, counties with high exemptions had overall higher rates of reported pertussis, whereas counties with low exemption rates did not show significant increases in pertussis incidences.<sup>97</sup> The study also concluded that under-vaccination<sup>98</sup> in just one community puts not only unvaccinated, but also vaccinated children, at a statistically increased risk of catching a disease.<sup>99</sup>

B. *The Religious Exemption Threatens New York Health, Resources, and Economy*

1. The Rise in Religious Exemptions Weakens the Health of New York Citizens by Jeopardizing New York's "Herd Immunity"

When a sufficiently high proportion of a population is vaccinated against communicable diseases, the entire population is protected.<sup>100</sup> As the number of vaccinated people within a given population increases, the likelihood that a susceptible person will come into contact with an infected person decreases, thus making it more difficult for a disease to maintain a chain of infection.<sup>101</sup> However, if there is a large enough "cluster" of exempt individuals within the same community, then the community risks losing its "herd immunity."<sup>102</sup> Herd immunity is an effective indirect protection for a community.<sup>103</sup> It is established when a high

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

<sup>98</sup> Rachael Rettner, *Many Kids Vaccinated Late or Not At All*, LIVESCIENCE, Jan. 21, 2013, <http://www.livescience.com/26461-children-vaccines-delayed.html> (Being under-vaccinated means that you have received at least "one vaccine or more a month later than is recommended by the current vaccine schedule").

<sup>99</sup> Imdad, *supra*, note 24, at 42.

<sup>100</sup> Emily Oshima Lee et al., *The Effect of Childhood Vaccine Exemptions on Disease Outbreaks*, CTR. FOR AM. PROGRESS, Nov. 14, 2013, <https://www.americanprogress.org/issues/healthcare/reports/2013/11/14/76471/the-effect-of-childhood-vaccine-exemptions-on-disease-outbreaks/>; see also Daniel A. Salmon, *Mandatory Immunization Laws and the Role of Medical, Religious and Philosophical Exemptions* 2, Aug. 2002, (unpublished commentary) available at <http://www.vaccinesafety.edu/exemptreview101503.pdf> ("This increase in community risk is due to pockets of unprotected or susceptible people who create a weakness in our armor against infectious diseases.").

<sup>101</sup> Lee, *supra* note 100. ("Although the vaccination rate required to achieve herd immunity varies by vaccine, it typically ranges from 80 percent to 95 percent of a given population.").

<sup>102</sup> *Id.* See also Salmon, *supra* note 12.

<sup>103</sup> Salmon, *supra* note 12, at 48.

enough proportion of the community is immunized to interrupt transmission of a disease.<sup>104</sup> The loss of herd immunity increases the risk of infection not only for exempt individuals, but also for individuals who have been vaccinated, since no vaccine is 100% effective.<sup>105</sup>

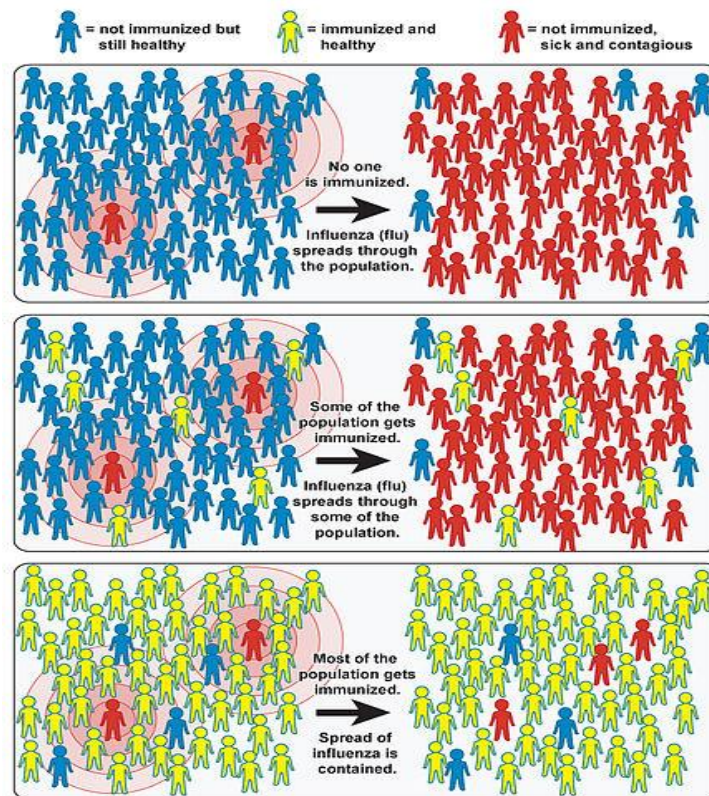
Dr. Kristen A. Feemster, a pediatric infectious disease physician and health services researcher at the Children's Hospital of Philadelphia and the University of Pennsylvania School of Medicine, likened the community effects of obtaining vaccines to other public laws,

[Those who cannot obtain vaccinations] depend on those around them to be protected. Vaccines aren't the only situation in which we are asked to care about our neighbors. Following traffic laws, drug tests at work, paying taxes – these may go against our beliefs and make us bristle, but we ascribe to them because without this shared responsibility, civil society doesn't work. Public health is no different.<sup>106</sup>

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

<sup>105</sup> McNeil, *supra* note 6; *see also* Salmon *supra*, note 12, at 51 (“When vaccination coverage levels are high, herd immunity results in low incidence of VPDs [vaccine preventable diseases], and reports of vaccine adverse events compared with disease incidence are more visible.”).

<sup>106</sup> Kristen A. Feemster, *Eliminate Vaccine Exemptions*, N.Y. TIMES, Mar. 25, 2015, <http://www.nytimes.com/roomfordebate/2014/03/23/making-vaccination-mandatory-for-all-children/eliminate-vaccine-exemptions> (“Vaccines work by protecting individuals, but their strength *really* lies in the ability to protect one's neighbors. When there are not enough people within a community who are immunized, we are all at risk.”).



## 2. The Rise in Religious Exemptions Wastes The Resources of New York's Citizens by Clogging the New York Court System

Parents that are denied a religious exemption often seek to appeal the decision by filing a plea to the commissioner of education or by filing a civil action in court.<sup>107</sup> Parents who opt for the civil action usually seek restraining orders or preliminary injunctions against the school district.<sup>108</sup> The court must then go through a tedious and time consuming subjective analysis of

<sup>107</sup> See N.Y. EDUC. LAW § 310 (MCKINNEY 1979); 8 N.Y. COMP. CODES R. & REGS. § 276.8(d).

<sup>108</sup> See generally *Farina v. Bd. of Educ.*, 116 F. Supp. 2d 503, 504 (E.D.N.Y. 2000).

whether the plaintiff's beliefs are not only religious, but also whether they are "genuinely" and "sincerely" held.<sup>109</sup>

Analysis of the religious exemption was laid out in *Berg v. Glen Cove City School District* in 1994.<sup>110</sup> The United States District Court for the Eastern District of New York held that it must first determine whether the plaintiff's purported beliefs are truly "religious."<sup>111</sup> Only if they are indeed religious is the court to determine whether those beliefs are genuinely and sincerely held.<sup>112</sup> The court notes that a sincerity analysis seeks to determine subjective good faith and to protect only those beliefs that are held as a matter of conscience.<sup>113</sup> Further, the United States Court of Appeals held that an individual's belief is not "sincere" if he has acted in a manner inconsistent with the belief, or if there was evidence that the individual materially gains by fraudulently hiding secular interests "behind a veil of religious doctrine."<sup>114</sup>

Applying this standard, the district court in *Berg* granted an injunction for the plaintiffs. The district court ruled that although plaintiff's strongly held beliefs did not fit within any recognized classification of Judaism, they were based on their own interpretation of passages from certain Hebrew scripture, and were hence "religious."<sup>115</sup> Further, the court held that plaintiff's medical and dental records substantiated their claim that they had those beliefs for at least six years, and thus proved that their beliefs were genuine and sincere.<sup>116</sup>

Due to the subjectivity of the analysis, courts must use extreme caution in ascertaining the sincerity of claimed religious beliefs.<sup>117</sup> Although the plaintiffs in *Berg* were found to have genuine and sincere religious beliefs sufficient to grant a preliminary injunction, many appeals are denied and only serve to

<sup>109</sup> See *Berg v. Glen Cove City Sch. Dist.*, 853 F. Supp. 651, 655 (E.D.N.Y. 1994).

<sup>110</sup> *Id.*

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

<sup>112</sup> *Id.* ("Moreover, the Court is mindful that attempts to ascertain the sincerity of claims of religious belief must be undertaken with extreme caution.")

<sup>113</sup> *Id.* See *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981).

<sup>114</sup> See *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d at 441.

<sup>115</sup> *Berg v. Glen Cove City Sch. Dist.*, 853 F. Supp. at 655.

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

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

waste the commissioner's and the court's valuable time and resources in undertaking this analysis.<sup>118</sup>

In 2010, the plaintiffs in *Caviezel v. Great Neck Public Schools* sought a preliminary injunction to compel registration of their daughter in the Great Neck School District without being vaccinated.<sup>119</sup> When the mother was asked why she applied for an exemption, she set forth a lengthy and complicated series of explanations: "I just believe if you look at the human being, if you look at the universe, we're divine, we're just divine. It's just the design is perfect. There's no other way to say it. It's just perfect."<sup>120</sup> In addition, when asked how her religion affected her choice not to vaccinate, she responded evasively: "I believe it's not necessary. I believe that the human body, the way it's designed is just perfect. It's a miracle in itself."<sup>121</sup>

Not surprisingly, on cross-examination she admitted that she also objected to vaccinations because she did not know if they were safe, and thought that they may cause autism.<sup>122</sup> Additionally, the mother admitted that although the body is divine and therefore does not need medications, she herself takes and gives her children Motrin for headaches, which the court cited as evidence of a selective personal belief and not a religious belief.<sup>123</sup> Eventually, the court held that although the plaintiff showed a sincere and genuine opposition to vaccinations, the opposition was rooted more in the nature of a secular philosophy, rather than a

<sup>118</sup> From 2010 to 2014 every case appealed to the commissioner of education was denied. *See* Appeal of R.R., on behalf of his son M.V.L.R., 54 N.Y. Educ. Dep't. Rep. No. 16,663 (2014) (appeal regarding immunization); Appeal of L.L., on behalf of her daughter J.L., 54 N.Y. Educ. Dep't. Rep. No. 16,670 (2014) (appeal regarding immunization); Appeal of O.M. & R.M., on behalf of their children X.J.M. and S.B.M., 52 N.Y. Educ. Dep't. Rep. No. 16,414 (2012) (appeal regarding immunization); Appeal of K.N.N.M. & E.A.Y., on behalf of their son O-S.E.M., 52 N.Y. Educ. Dep't. Rep. 16,410 (2012) (appeal regarding immunization); Appeal of M.C. & A.S.C., on behalf of their daughter C.C., 51 N.Y. Educ. Dep't. Rep. 16,324 (2011) (appeal regarding immunization); Appeal of, on behalf of her son O.F., 50 N.Y. Educ. Dep't. Rep. 16,175 (2010) (appeal regarding immunization); Appeal of L.S., on behalf of her daughter P.S., 50 N.Y. Educ. Dep't. Rep. 16,180 (2010) (appeal regarding immunization). *See* *Caviezel v. Great Neck Pub. Sch.*, 701 F. Supp. 2d 414, 416 (E.D.N.Y. 2010), *aff'd*, 500 F. App'x 16 (2d Cir. 2012); *Check v. N.Y. City Dep't of Educ.*, No. 13-CV-791 SLT LB, 2013 WL 2181045 at \*1 (E.D.N.Y. May 20, 2013), *appeal dismissed* (Oct. 10, 2013).

<sup>119</sup> *See* *Caviezel v. Great Neck Pub. Sch.*, 701 F. Supp. at 416.

<sup>120</sup> *Id.* at 417.

<sup>121</sup> *Id.* at 420.

<sup>122</sup> *Id.* at 421.

<sup>123</sup> *Id.* at 422.

religious belief, and therefore, denied the request for a preliminary injunction.<sup>124</sup>

Another more recent case occurred in 2013. In *Check v. New York City Department of Education*, the plaintiff also sought a preliminary injunction to compel the New York City Department of Education to admit her daughter to school without being immunized.<sup>125</sup> The plaintiff was asked about the basis of her request for exemption, and similar to the plaintiff in *Caviezel*, the plaintiff in *Check* spewed off a series of bizarre responses that did not seem to be religious in nature.<sup>126</sup> She voiced a particular concern for not knowing where the vaccine ingredients came from, stating:

When you mix the blood of animals, the blood of beasts with the blood of human, it is defiling the body. You don't do it. You just don't do it. You don't put ... it's ... we don't know how this animal was killed, how it was presented forward. We don't know where it came from. We—just don't do it.<sup>127</sup>

Further, when asked a direct question as to why she was seeking protection from vaccines, the plaintiff responded: “It could hurt my daughter. It could kill her. It could put her in anaphylactic shock. It could cause any number of things . . .”<sup>128</sup> Based on these and other responses by the plaintiff, the court held that the medical concerns that the plaintiff had about her daughter's health were the true driving force behind her opposition to immunizations, not a religious belief.<sup>129</sup>

These are only two examples of parents seeking an appeal in an attempt to take advantage of New York's religious exemption in order to satisfy irrational fears about the safety of vaccinations.

<sup>124</sup> *Id.* at 430.

<sup>125</sup> See *Check v. N.Y. City Dep't of Educ.*, No. 13-CV-791 SLT LB, 2013 WL 2181045 at \*1 (E.D.N.Y. May 20, 2013), *appeal dismissed* (Oct. 10, 2013).

<sup>126</sup> *Id.* at \*2-\*6.

<sup>127</sup> *Id.* at \*5

<sup>128</sup> *Id.* (The plaintiff further stated: “A lollipop that you can eat or you can have, anybody in this room could eat a lollipop and they could enjoy the pleasure of this taste. My daughter cannot because she will break out in rashes all over her face and she will break out in rashes through her body. So we do not try to-to just do anything that's unnatural or that could affect her in any way and I'm just using the smallest thing, a lollipop, because I have to use open eyes and open mind and open heart and open spirit with everything that I do to protect this child”). *Id.* at \*5-\*6.

<sup>129</sup> *Id.* at \*2-\*3.

These individuals abuse court time and resources in bringing these appeals, invoking a time consuming, subjective analysis only to get struck down time and time again.

### 3. The Rise in Religious Exemptions Creates Negative Economic Effects in The United States and New York Specifically

Exemption seekers create an enormous economic burden on the state by increasing the likelihood of an outbreak.<sup>130</sup> Communicable disease outbreaks are not cheap. Research shows that vaccinating children by the recommended U.S. schedule of vaccinations saves the U.S. \$13.5 billion dollars in direct costs, and \$68.8 billion dollars in total societal costs.<sup>131</sup> Although anti-vaccine advocates claim that big pharmaceutical companies and physicians make a lot of money from vaccines,<sup>132</sup> researchers and health experts report that routine childhood immunization programs remain one of the most cost-effective prevention programs in public health.<sup>133</sup>

Communicable disease outbreaks take a huge financial toll on the areas that they infect. A March 2013 outbreak in New York City stemmed from an intentionally unvaccinated adolescent with measles who returned from the United Kingdom, leading to 58

<sup>130</sup> See Amina Khawja et al., *The Cost of a Measles Outbreak in 2013, New York City, United States*, Oct. 10, 2014, available at <https://idsa.confex.com/idsa/2014/webprogram/Paper46126.html>; Preeta Krishnan Kutty et al., *Epidemiology and The Economic Assessment of a Mumps Outbreak in a Highly Vaccinated Population, Orange County, New York, 2009-2010*, 10 HUMAN VACCINES & IMMUNOTHERAPEUTICS, 1373, 1373 (2014), available at <http://www.tandfonline.com/doi/pdf/10.4161/hv.28389?needAccess=true>.

<sup>131</sup> Fangjun Zhou et al., *Economic Evaluation of the Routine Childhood Immunization Program in the U.S. 2009*, 133 PEDIATRICS 577, 581 (2014), available at <http://pediatrics.aappublications.org/content/pediatrics/133/4/577.full.pdf> (Direct costs include both direct medical costs such as those associated with treating an initial infection as well as costs associated with complications and sequelae of diseases, along with direct non-medical costs such as travel costs, costs for special education of children disabled by diseases, and costs for other supplies for special needs. Indirect costs include the productivity losses owing to premature mortality and permanent disability among cohort members, as well as opportunity costs associated with parents who miss work to care for their sick children or cohort members themselves who miss work owing to vaccine-preventable illness).

<sup>132</sup> Todd W., *The Truth About the Evils of Vaccination*, ANTIANTIVAX, Jun. 25, 2009, <http://antiantivax.flurf.net>.

<sup>133</sup> Zhou, *supra* note 131, at 581-582 (The study also found that routine childhood immunization will prevent ~42,000 early deaths and 20 million cases of disease.).

diagnosed cases.<sup>134</sup> Researchers found that that outbreak cost the city approximately \$394,448 in direct costs alone.<sup>135</sup> The researchers noted that the estimated figure likely underestimates the total cost, as it does not account for in-kind costs or costs to medical facilities, outside agencies, patients, and society.<sup>136</sup>

In addition, an outbreak of mumps in Orange County, New York, from September 2009 through June 2010 was estimated to have cost approximately \$463,000, with the estimated cost per household being \$827.<sup>137</sup> The outbreak was believed to have occurred from an eleven year-old boy who was unimmunized, and returned to New York from a trip to the United Kingdom where confirmed cases of mumps were present.<sup>138</sup> Reports on the outbreak concluded that the two major exposure settings were schools (71.8%) and households (22.5%).<sup>139</sup>

The financial toll that these outbreaks take on the infected area is huge, and will only continue to grow with the number of unimmunized persons that can spread the disease. These are merely examples from specific areas in New York. If exemptions continue to increase, these outbreaks that infect relatively small amounts of people could turn into epidemics that spread to even larger amounts of people.<sup>140</sup> Aside from the obvious public safety issues that it presents, the economic consequences of an epidemic would be insurmountable.

### C. *New York's Religious Exemption, A Facade for the Fearful*

Despite the fact that religious leaders from every major religion continue to support vaccination, increased rates of religious exemptions persist.<sup>141</sup> Researchers suspect that this may be due

<sup>134</sup> Khawja, *supra* note 130.

<sup>135</sup> *Id.*

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

<sup>137</sup> Kutty, *supra* note 130, at 1373.

<sup>138</sup> *Update: Mumps Outbreak — New York and New Jersey, June 2009—January 2010*, CENTERS FOR DISEASE CONTROL AND PREVENTION, Feb. 12, 2010, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5905a1.htm>.

<sup>139</sup> Kutty, *supra* note 130, at 1373.

<sup>140</sup> *See generally Outbreaks Epidemics and Pandemics*, UNIV. OF OTTAWA, [http://www.med.uottawa.ca/sim/data/Pandemic\\_e.htm](http://www.med.uottawa.ca/sim/data/Pandemic_e.htm) (last updated Jan. 15, 2015).

<sup>141</sup> Offit, *supra*, note 12; *See also* Mark A. Kellner, 'Religious' Objections to Vaccinations? There Really Aren't Any, DESERET NEWS, Feb. 7, 2015, <http://national.deseretnews.com/article/3483/religious-objections-to-vaccinations-there->



to parents who seek religious exemptions as a way of addressing non-religious personal beliefs and concerns regarding vaccine safety and efficacy.<sup>142</sup> One such researcher, Dr. Kenneth Bloomberg, chairman of pediatrics at the Brooklyn Hospital Center, thinks that parents may be using the religious exemption as a surrogate for their anxieties about vaccination.<sup>143</sup>

Furthermore, reports from other states indicate that a growing number of parents are becoming more and more comfortable with lying in order to obtain a religious exemption.<sup>144</sup>

New York case law supports this notion, as a number of appeals in request of a religious exemption are denied, with the plaintiffs seeming to hold medically related fears regarding immunization, as opposed to genuine and sincere contrary religious beliefs.<sup>145</sup>

really-arent-any.html (“But the world’s major faiths- Buddhism, Christianity, Hinduism, Judaism and Islam- have no explicit prohibitions against oral or injected vaccines.”).

<sup>142</sup> Imdad, *supra*, note 24, at 40; *see also Parents Claim Religion to Avoid Vaccines for Kids*, NBC NEWS, Oct. 17, 2007, [http://www.nbcnews.com/id/21347434/ns/health-childrens\\_health/t/parents-claim-religion-avoid-vaccines-kids/#.VFU8U747bzJ](http://www.nbcnews.com/id/21347434/ns/health-childrens_health/t/parents-claim-religion-avoid-vaccines-kids/#.VFU8U747bzJ) (A growing number of parents around the country claim religious exemptions to avoid vaccinating their children when the real reason may be skepticism or concern that the shots cause other illnesses); Kellner, *supra* note 141 (“Mark S. Movsesian, a law professor at St. John’s University in Queens, New York, who specializes in religious liberty issues, agrees. ‘The people who are claiming these exemptions, it’s not religious exemption, but ‘personal belief,’ he said. ‘My impression is, that’s what most of the objection is about.’”).

<sup>143</sup> Gordon, *supra* note 87.

<sup>144</sup> *See Parents Claim Religion to Avoid Vaccines for Kids*, NBC NEWS, Oct. 17, 2007, [http://www.nbcnews.com/id/21347434/ns/health-childrens\\_health/t/parents-claim-religion-avoid-vaccines-kids/#.VFU8U747bzJ](http://www.nbcnews.com/id/21347434/ns/health-childrens_health/t/parents-claim-religion-avoid-vaccines-kids/#.VFU8U747bzJ) (“Sabrina Rahim doesn’t practice any particular faith, but she had no problem signing a letter declaring that because of her deeply held religious beliefs, her 4-year-old son should be exempt from the vaccinations required to enter preschool.”); *See also* Tracy Seipel & Lisa M. Krieger, *Measles Outbreak: California Bill Would End All Vaccination Loopholes Except Medical*, THE MERCURY NEWS, Feb. 19, 2015 (updated Aug. 12, 2016), [http://www.mercurynews.com/health/ci\\_27562696/measles-outbreak-california-bill-would-end-all-vaccination](http://www.mercurynews.com/health/ci_27562696/measles-outbreak-california-bill-would-end-all-vaccination) (“Critics of religious exemptions to vaccination also argue that parents could easily transform their secular anti-vaccination sentiment into a religious belief. They note that numerous websites offer relevant biblical quotations to include in letters of petition for exemption. Others offer mail-order religious groups, such as the Congregation of Universal Wisdom, headquartered in New Jersey.”).

<sup>145</sup> *See* Check v. N.Y. City Dep’t of Educ., No. 13-CV-791 SLT LB, 2013 WL 2181045 at \*10 (E.D.N.Y. May 20, 2013), *appeal dismissed* (Oct. 10, 2013); Caviezel v. Great Neck Pub. Sch., 701 F. Supp. 2d 414, 416 (E.D.N.Y. 2010), *aff’d* 500 F. App’x 16 (2d Cir. 2012); Farina v. Bd. of Educ. of City of New York, 116 F. Supp. 2d 503, 513 (E.D.N.Y. 2000); Appeal of R.R., on behalf of his son M.V.L.R., 54 N.Y. Educ. Dep’t. Rep. No. 16,663 (2014) (appeal regarding immunization); Appeal of L.L., on behalf of her daughter J.L., 54 N.Y. Educ. Dep’t. Rep. No. 16,670 (2014) (appeal regarding immunization); Appeal of O.M. & R.M., on behalf of their children X.J.M. & E.A.Y., 52 N.Y. Educ. Dep’t. Rep. No. 16,414 (2012) (appeal regarding immunization); Appeal of K.N.N.M. & E.A.Y., on behalf of their son O.S.E.M., 52 N.Y. Educ. Dep’t. Rep. No. 16,410 (2012) (appeal regarding immunization); Appeal of M.C. & A.S.C., on behalf of their daughter C.C., 51 N.Y. Educ. Dep’t. Rep. No. 16,324 (2011)

When identifying these anxieties and fears that are suspected to be responsible for the continued rise in religious exemptions, Dr. Paul Offit, Chief of the Division of Infectious Diseases at the Children's Hospital of Philadelphia,<sup>146</sup> suggests that we just call religious, philosophical, and personal belief exemptions what they are: fear exemptions.<sup>147</sup>

### 1. Vaccine Efficacy and the Autism Link

Although many people question the safety of vaccines, experts say that it is the refusal to immunize that pose risks to children's health.<sup>148</sup> Both the American Academy of Pediatrics and the Centers for Disease Control and Prevention (CDC) have vouched for the safety of today's vaccine regimen, insisting that vaccines are not toxic or taxing to a normal immune system.<sup>149</sup> Dr. Dyan Hes, the medical director at Gramercy Pediatrics in New York City, analogized that "you have more chance of being eaten by a shark when you go to the beach" than having a bad reaction to a vaccine, yet, anxieties continue to persist.<sup>150</sup>

These anxieties regarding vaccines most notoriously stem from a purported and widely disproved link with autism, which was circulated by researcher Andrew Wakefield in 1998.<sup>151</sup> Even though the research has since been found to have been nothing

(appeal regarding immunization); Appeal of A.C., on behalf her son O.F., 50 N.Y. Educ. Dep't. Rep. No. 16,175 (2010) (appeal regarding immunization); Appeal of L.S., on behalf of her daughter P.S., 50 N.Y. Educ. Dep't. Rep. No. 16,180 (2010) (appeal regarding immunization).

<sup>146</sup> *About Paul A. Offit, MD*, <http://paul-offit.com/about/> (last visited Feb. 28, 2017).

<sup>147</sup> Offit, *supra* note 12.

<sup>148</sup> *Id.*

<sup>149</sup> Karen D. Brown, *Parents Refusing Vaccines: Raising fears among the medical community of disease outbreaks*, BOSTON GLOBE, Nov. 11, 2013, available at <http://www.bostonglobe.com/lifestyle/health-wellness/2013/11/11/more-parents-are-refusing-immunizations-for-their-children-raising-fears-among-medical-community-disease-outbreaks/m3mGJgFhxrT7PUehai87tN/story.html>; See also *Frequently Asked Questions About Vaccine Safety*, CENTERS FOR DISEASE CONTROL AND PREVENTION, [http://www.cdc.gov/vaccinesafety/Vaccines/Common\\_questions.html](http://www.cdc.gov/vaccinesafety/Vaccines/Common_questions.html) (last updated Aug. 28, 2015).

<sup>150</sup> Videotape: NY Sen. Schumer wants measles vaccine more accessible (The Associated Press 2015) available at <http://pix11.com/2015/02/08/ny-sen-schumer-wants-measles-vaccine-more-accessible/>.

<sup>151</sup> *Wakefield's Article Linking MMR Vaccine and Autism Was Fraudulent*, THE BMJ, Jan. 6, 2011, <http://www.bmj.com/content/342/bmj.c7452>; See also *Vaccine-Autism Connection Debunked Again*, CNN HEALTH (Mar. 29, 2013), <http://thechart.blogs.cnn.com/2013/03/29/vaccine-autism-connection-debunked-again/>.

more than an elaborate fraud, the damage to public health continues to be fueled by unbalanced media reporting, and ineffective responses from the government, researchers, journals, and the medical profession.<sup>152</sup> Additionally, although most parents believe the vaccine information they receive from their children's doctors, one study from the *Journal of Pediatrics* found that nearly one in four parents trust in what celebrities say about immunization safety.<sup>153</sup> This statistic is extremely worrisome as celebrities are usually not experts in immunizations, pediatrics or any type of vaccine science.<sup>154</sup>

One such celebrity, Jenny McCarthy, a former *Playboy* playmate and TV personality, has been described as the "leading light of the anti-vaccine movement."<sup>155</sup> McCarthy began her public crusade against vaccinations in 2007 after announcing that her son had been diagnosed with autism, suggesting that the autism was linked to the MMR vaccination that he had received.<sup>156</sup> McCarthy published several books referencing her suspicions and was quickly treated like an expert on the topic by the media, being interviewed by big names such as Oprah and Larry King.<sup>157</sup> The publicity glorified McCarthy's dangerous campaign, influencing parents with her unscientific claims, even being referred to by Oprah as a "mother warrior."<sup>158</sup> McCarthy "now claims that her

<sup>152</sup> *Wakefield's Article*, *supra* note 151.

<sup>153</sup> *Physicians The Most Trusted Source of Child Vaccine Information*, AMEDNEWS.COM, Apr. 18, 2011, <http://www.amednews.com/article/20110418/health/304189943/6/>.

<sup>154</sup> *Id*; See also Susan Rohwer, *Will the Pro-Vaccine Celebs Please Speak Up?*, L.A. TIMES, Apr. 25, 2014, <http://www.latimes.com/opinion/opinion-la/la-ol-vaccines-kardashian-beyonce-jenny-mccarthy-alicia-silverstone-20140425-story.html>, (Well known celebrities such as Jenny McCarthy, Kristen Cavallari and even Donald Trump speak out against childhood vaccinations, questioning their safety).

<sup>155</sup> Rich Lowry, *Jenny McCarthy's Dangerous Anti-Vaccine Crusade*, N.Y. POST, Mar. 18, 2014, <http://nypost.com/2014/03/18/anti-vaccine-activist-jenny-mccarthy-mother-of-plagues/>.

<sup>156</sup> Cavan Sieczkowski, *Jenny McCarthy Slams Rumors Claiming Her Son Does Not Have Autism*, HUFFINGTON POST, Jan. 6, 2014, [http://www.huffingtonpost.com/2014/01/06/jenny-mccarthy-son-rumors-autism\\_n\\_4548244.html](http://www.huffingtonpost.com/2014/01/06/jenny-mccarthy-son-rumors-autism_n_4548244.html).

<sup>157</sup> See Michael Hiltzik, *Jenny McCarthy: Anti-Vaxxer, Public Menace*, L.A. TIMES, Jan. 27, 2015, <http://www.latimes.com/business/hiltzik/la-fi-mh-jenny-mccarthy-antivaxxer-public-menace-20150127-column.html#page=1>; *Mothers Battle Autism*, OPRAH WINFREY SHOW, Sept. 18, 2007, <http://www.oprah.com/oprahshow/Mothers-Battle-Autism; Transcript of Interview with Jenny McCarthy by Larry King, CNN, http://www.cnn.com/TRANSCRIPTS/0709/26/lkl.01.html> (aired Sep. 26, 2007).

<sup>158</sup> *Mothers Battle Autism*, *supra* note 157, at 12; See generally Katrina vanden Heuvel, *Jenny McCarthy's Vaccination Fear-Mongering and the Cult of False Equivalence*, THE

son was cured from autism after being put on a gluten-free diet and subjected to chelation therapy, which extracts metals from the body,” neither of which have been scientifically verified to cure autism.<sup>159</sup> The amount of people potentially persuaded against vaccination by McCarthy’s fear based message is insurmountable, to the degree that a website was made entitled, “jennymccarthybodycount.com,” which documents links to disease outbreaks due to anti-vaccination beliefs reported by the CDC.<sup>160</sup>

Despite no scientific link to autism, and widespread support of vaccination from the medical profession, fear and hesitation to vaccinate remains, and is fueled by the opinions of celebrities in the media without any scientific data or research as evidence.<sup>161</sup>

## 2. The “Vaccine Confidence Gap”

Because we live in an era in which we rarely see many vaccine-preventable diseases, the risk of these diseases seems minimal, while the perceived risk of vaccination becomes larger.<sup>162</sup> Dr. Karen Sawitz, a pediatrician with Union Community Health Center in New York City, opined that without having seen these vaccine-preventable diseases, people do not realize how horrible they are, that “[t]he vaccine program is a victim of its own success[.]”<sup>163</sup> This, compounded with misinformation through the media, has created a “vaccine confidence gap” that must be

NATION, Jul. 22, 2013, <http://www.thenation.com/blog/175388/jenny-mccarthys-vaccination-fear-mongering-and-cult-false-equivalence> (“By giving science deniers a public forum, media outlets implicitly condone their claims as legitimate.”).

<sup>159</sup> Michael Specter, *Jenny McCarthy’s Dangerous Views*, NEW YORKER, Jul. 16, 2013, <http://www.newyorker.com/tech/elements/jenny-mccarthys-dangerous-views>; see also *Beware of False or Misleading Claims for Treating Autism*, U.S. FOOD AND DRUG ADMIN., <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm394757.htm> (last updated Nov. 20, 2015) (“There is no cure for autism.”).

<sup>160</sup> JENNY MCCARTHY BODY COUNT, <http://www.jennymccarthybodycount.com/> (last visited Feb. 28, 2017).

<sup>161</sup> See Heuvel, *supra* note 158.

<sup>162</sup> *Id.*; *Parents Claim Religion to Avoid Vaccines for Kids*, NBC NEWS, *supra* note 142 (One mother, despite attending a Protestant church that allows vaccinations, sought a religious exemption for her children because, “I felt that the risk of the vaccine was worse than the risk of the actual disease[.]”).

<sup>163</sup> Meredith Engel, *How New York City Doctors Talk to Anti-Vaxxers*, N.Y. DAILY NEWS, Feb. 6, 2015, <http://www.nydailynews.com/life-style/health/new-york-city-doctors-talk-anti-vaxxers-article-1.2106157>.

addressed by the scientific and public health community to ensure that vaccines are safe.<sup>164</sup>

Ironically, a growing number of parents that fall victim to the vaccine confidence gap are highly educated and fairly wealthy, coined as the “educated uninformed.”<sup>165</sup> Because these individuals are highly educated they tend to be relatively well-informed, but also question a lot of things at the same time. Physicians caution that not vaccinating is not only an uneducated choice, but also a dangerous choice.<sup>166</sup> Measles, for example, a highly contagious air born disease, spreads to 90% of unvaccinated individuals after being exposed to an infected person.<sup>167</sup> Moreover, Dr. Anne Schuchat, the director of the National Center for Immunization and Respiratory Diseases at the CDC, reported that “[e]ven in developed countries like the U.S., for every thousand children who get measles, one to three of them die despite the best treatment[.]”<sup>168</sup> Alternatively, the likelihood that an individual will have a severe allergic reaction from a vaccine is over one and a million.<sup>169</sup> Dr. Guthrie Birkhead, New York State’s Deputy Commissioner for Public Health warned that, “[t]hese diseases haven’t gone away. They are just a plane ride

<sup>164</sup> See Heuvel, *supra* note 158; Cf. Heidi J. Larson et al., *Measuring Vaccine Confidence: Analysis of Data Obtained by a Media Surveillance System Used to Analyse Public Concerns About Vaccines*, LANCET, May 13, 2013, at 2 (“Various factors amplify the spread of information, and misinformation, affecting perceptions and behaviours and creating . . . ‘social amplification of risk,’ by which [ ] amplification of the spread of information via social, cultural, and institutional processes, and amplification of society’s response.”), available at <http://www.isid.org/news/downloads/LANCET.ID.FINALMay2013.pdf>; Martin Downs, *Autism-Vaccine Link: Evidence Doesn’t Dispel Doubts*, WEBMD, <http://www.webmd.com/brain/autism/searching-for-answers/vaccines-autism?page=7> (reviewed Mar. 31, 2008) (“Parents are bombarded with information that can take a life of its own online. The concepts around scientific testing are difficult to understand, making it tough to separate good science from bad.”).

<sup>165</sup> Meghan Hoyer and Steve Reilly, *Low Vaccination Rates at Schools Put Students at Risk*, USA TODAY, Feb. 4, 2015, <http://www.usatoday.com/story/news/2015/02/04/schoolvaccinationrates/22840549/>.

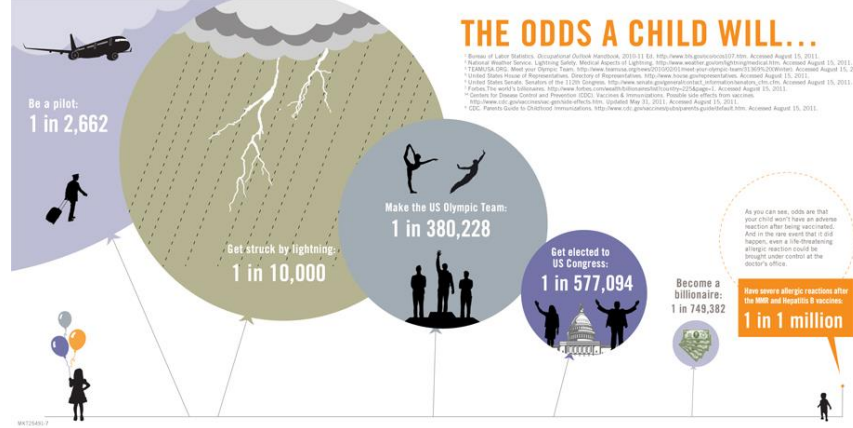
<sup>166</sup> Offit, *The Anti-Vaccination Epidemic*, *supra* note 12.

<sup>167</sup> *About Measles*, KIDS HEALTH, <http://kidshealth.org/parent/infections/lung/measles.html#> (last reviewed Feb. 2015).

<sup>168</sup> Denise Grady, *Measles: Perilous But Preventable*, N.Y. TIMES, Feb. 2, 2015, [http://well.blogs.nytimes.com/2015/02/02/measles-perilous-but-preventable/?\\_r=0](http://well.blogs.nytimes.com/2015/02/02/measles-perilous-but-preventable/?_r=0).

<sup>169</sup> *Vaccines and Immunizations*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/vaccines/vac-gen/side-effects.htm> (last updated Dec. 2, 2016).

away, and unvaccinated kids can present a danger not only to themselves but to other kids in the school.”<sup>170</sup>



In addition to the religious exemption harboring a safe haven for those too fearful to accept life saving vaccination practices, its existence also threatens public health, wastes valuable court resources, and presents major economic consequences, which will only escalate as the number of religious exemptions granted in New York increases. However, the problems presented by the religious exemption do not end there, as the growing rates also threaten some of New York’s public school students their education.

### III. UNIMMUNIZED CHILDREN BEING BANNED FROM SCHOOL DURING A DISEASE OUTBREAK IS PROBLEMATIC, BUT CONSTITUTIONAL

According to the New York State Education Department’s Immunization Guidelines for Schools in 2014, “schools must inform the parent/guardian of exempted students about the school policy/procedure for exclusion of students with exemptions during the outbreak of a vaccine preventable disease for the vaccine(s) the student does not have as required by 10 NYCRR 66-1.10.”<sup>171</sup> This practice, known as “social

<sup>170</sup> *More Parents Seek Vaccine Exemption Despite Assurances*, NCPA, July 7, 2010, [HTTP://WWW.NCPA.ORG/SUB/DPD/INDEX.PHP?ARTICLE\\_ID=19547](http://www.ncpa.org/sub/dpd/index.php?article_id=19547); Accord Lauren F. Friedman, *In 2000, Measles Was Basically Eradicated In The US- Here's Why It's Now At An 18- Year High*, BUS. INSIDER, May 13, 2014, 11:30AM, <http://www.businessinsider.com/ohio-measles-outbreak-18-year-high-2014-5>.

<sup>171</sup> *Immunization Guidelines for Schools*, supra note 80, at 13.

distancing,”<sup>172</sup> is controversial. The concept makes sense because it protects the unvaccinated child from catching the disease, and also thwarts the spread of the disease.<sup>173</sup> However, social distancing is problematic from an educational standpoint because unvaccinated children are forced to miss school until the Commissioner of Health determines that it is permissible for them to return, potentially an extended period of time.<sup>174</sup>

Recently, due to a December 2014 measles outbreak that occurred in Disneyland, one school district in California removed two dozen high school students from school for at least twenty-one days,<sup>175</sup> preventing them from taking required end of the semester final exams,<sup>176</sup> while another school district removed sixty six students for two weeks.<sup>177</sup>

<sup>172</sup> Ross D. Silverman, *NY Court Upholds Social Distancing Policy Requiring Unvaccinated To Stay Out of School*, HARV. L. BLOG, June 24, 2014, <http://blogs.law.harvard.edu/billofhealth/2014/06/24/ny-court-upholds-social-distancing-policy-requiring-unvaccinated-to-stay-out-of-school/>.

<sup>173</sup> See generally Benjamin Mueller, *Judge Upholds Policy Barring Unvaccinated Students During Illnesses*, N.Y. TIMES, June 22, 2014, [http://www.nytimes.com/2014/06/23/nyregion/judge-upholds-policy-barring-unvaccinated-students-during-illnesses.html?\\_r=2](http://www.nytimes.com/2014/06/23/nyregion/judge-upholds-policy-barring-unvaccinated-students-during-illnesses.html?_r=2) (In 2014, among the 25 people who contracted measles in an outbreak in New York City, two were unvaccinated school aged children. “When one of the children who was homeschooled, contracted the measles, city health officials barred that child’s sibling, who had a religious exemption, from attending school. The sibling eventually contracted measles as well. Health officials credited the decision to keep the exempted second child out of school with stopping the spread of the disease in that community.”).

<sup>174</sup> *Immunization Guidelines for Schools*, supra note 80, at 9; See generally Jann Bellamy, *NY Federal Court Hands Triple Loss to Anti-Vaccination Ideology*, SCIENCE-BASED MED., June 26, 2014, <http://www.sciencebasedmedicine.org/ny-federal-court-hands-triple-loss-to-anti-vaccination-ideology/> (“Two sets of parents whose children had religious exemptions sued New York City and the state in federal court when their children were temporarily excluded from school under the policy, in some cases for up to a month.”); *Chicken Pox Causes Unvaccinated Kids to Miss Class*, WCSH6, Mar. 22, 2012, <http://www.wcsh6.com/story/news/local/2014/03/14/6418373/> (Children with personal belief exemption slated to be banned from school for at least seven weeks during a chicken pox outbreak.).

<sup>175</sup> Rong-Gong Lin II et al., *As Disneyland Measles Outbreak Spreads, O.C. Bars Students Lacking Proof of Shots*, L.A. TIMES, Jan. 20, 2015, <http://www.latimes.com/local/orangecounty/la-me-measles-huntington-beach-20150121-story.html#page=1>.

<sup>176</sup> Lisa Fogarty, *Unvaccinated Kids Banned From School After Classmate Gets Sick*, CAFÉ MOM, Jan. 21, 2015, [http://thestir.cafemom.com/parenting\\_news/181719/measles\\_high\\_school\\_unvaccinated\\_tens](http://thestir.cafemom.com/parenting_news/181719/measles_high_school_unvaccinated_tens) (“If another student contracts the measles during the time they are quarantined, the school may reportedly extend what they’re calling a ‘medical suspension’ for another 21 days.”).

<sup>177</sup> Veronica Rocha, *California School Bans 66 Students Without Measles Vaccinations*, L.A. TIMES, Jan. 28, 2015, <http://www.latimes.com/local/lanow/la-me-ln-66-students-california-measles-20150128-story.html>.

When an unvaccinated child is barred from school, it results in missed classroom instruction, not to mention the social stigma that the child faces, likely feeling that he or she is under quarantine.<sup>178</sup> One California teenager expressed concerns about missing two weeks of Advanced Placement classes, suggesting to her parents that she simply get the vaccinations.<sup>179</sup> Sadly, the student's parents were not persuaded by their daughter's plea, asserting that they would rather her miss an entire semester of school than get the shot.<sup>180</sup>

The constitutionality of New York's "social distancing" policy under 10 NYCRR 66-1.10(a) was recently challenged in *Phillips v. City of New York* in 2014. The parents of minor unvaccinated children brought an action against New York City and the New York City Department of Education under the First and Fourteenth Amendments.<sup>181</sup> The plaintiffs argued that their children were "arbitrarily, capriciously, and unreasonably denied" the right to the free exercise of religion because they were forced to keep their children home from school as a result of their religious beliefs.<sup>182</sup> In terms of the plaintiff's Equal Protection claim, they argued that the school had treated their children differently from all the other students, who were similarly situated by virtue of going to the same school as the plaintiff's children.<sup>183</sup> The court granted the city's motion to dismiss on all claims, holding that New York's social distancing policy did not violate the First Amendment, and that the plaintiffs failed to allege the necessary facts to state a claim under the Fourteenth Amendment.<sup>184</sup> Because the court did not address the reasoning behind its ruling at length, this section of the Note will be a more thorough analysis of New York's policy through both the Free Exercise and Equal Protection Clauses.

<sup>178</sup> Michele Zipp, *It's Official: Non-Vax Moms Better Be Ready to Homeschool*, CAFÉ MOM, June 26, 2014, [http://thestir.cafemom.com/big\\_kid/174118/its\\_official\\_nonvax\\_moms\\_better](http://thestir.cafemom.com/big_kid/174118/its_official_nonvax_moms_better) ("The child is not contagious- she's just unvaccinated. Should the child be placed in another school with a similar curriculum during the contagious period?").

<sup>179</sup> Jack Healy & Michael Paulson, *Vaccine Critics Turn Defensive Over Measles*, N.Y. TIMES, Jan. 30, 2015, [http://www.nytimes.com/2015/01/31/us/vaccine-critics-turn-defensive-over-measles.html?\\_r=0](http://www.nytimes.com/2015/01/31/us/vaccine-critics-turn-defensive-over-measles.html?_r=0).

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

<sup>181</sup> *Phillips v. City of New York*, 27 F. Supp. 3d 310, 311 (E.D.N.Y. 2014).

<sup>182</sup> See Notice of Removal at 11, *Phillips v. City of New York*, 27 F. Supp. 3d 310 (E.D.N.Y. 2014) (No. CV 12-098).

<sup>183</sup> *Id.* at 11-12.

<sup>184</sup> *Phillips v. City of New York*, 27 F. Supp. 3d 310, 312-313 (E.D.N.Y. 2014).



A. *10 NYCRR 66-1.10(a) Does Not Violate the Free Exercise Clause Because it is Neutral and of General Applicability*

New York's social distancing policy under 10 NYCRR 66-1.10(a) does not violate the Free Exercise Clause of the First Amendment because it is neutral and of general applicability.

The First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."<sup>185</sup> This prohibition has been construed to apply to the States through the Fourteenth Amendment by incorporation.<sup>186</sup> But, "[e]ven this most essential freedom of religious belief, worship, and practice, however, cannot be absolute in a society continually striving to achieve the proper balance between the liberties of its individual members and the shared needs of the community at large."<sup>187</sup> Further, "the free exercise clause of the First Amendment does not provide *a right* for religious objectors to be exempt from New York's compulsory inoculation law" (emphasis added).<sup>188</sup>

To bring a claim under the Free Exercise Clause, plaintiffs would have had to prove that New York's social distancing policy "[a]t a minimum . . . discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."<sup>189</sup> Additionally, they would have to prove that New York's legislation "intentionally or unintentionally places a burden upon religiously motivated practice[.]"<sup>190</sup> At that point, the defendant would have to justify the burden of the state's law through a compelling government interest, with the law narrowly tailored to advance that interest.<sup>191</sup> However, a law that is "neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."<sup>192</sup> In making this determination, one must note that a neutral law does not have the objective of infringing or restricting practices because of their

<sup>185</sup> U.S. CONST. amend. I.

<sup>186</sup> *Phillips v. City of New York*, 27 F. Supp. at 312.

<sup>187</sup> *See Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 82, 83 (E.D.N.Y. 1987).

<sup>188</sup> *Phillips v. City of New York*, 27 F. Supp. at 312-313 (quoting *Caviezel v. Great Neck Pub. Sch.*, 739 F. Supp. 2d 273, 285 (E.D.N.Y. 2010) *aff'd*, 500 F. App'x 16 (2d Cir. 2012)).

<sup>189</sup> *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993). *See, e.g.*, *Braunfeld v. Brown*, 366 U.S. 599, 607-609 (1961); *Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953).

<sup>190</sup> *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. at 578 (1993).

<sup>191</sup> *Id.* at 531-32.

<sup>192</sup> *Id.* at 531.

religious motivation,<sup>193</sup> and a law of general applicability does not selectively impose burdens only on conduct motivated by religious beliefs.<sup>194</sup>

Here, because the object of New York's social distancing policy is to promote and protect the public health of New York citizens and not on infringing religious beliefs, it is neutral. Further, because New York's policy burdens all exemptions in general, including medical exemptions, it is of general applicability. As a result, it need not be justified by a compelling government interest, even if it has incidental effects that burden a particular religious practice.<sup>195</sup> Further, in 1993 the Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith*, named "compulsory vaccination laws" as an example of laws that should not be required to be justified through a compelling state interest, even if it adversely affects the practice of religion.<sup>196</sup>

*B. 10 NYCRR 66-1.10(a) Does Not Violate the Equal Protection Clause Because It Does Not Have a Discriminatory Purpose and It Maintains a Rational Basis*

New York's social distancing policy under 10 NYCRR 66-1.10(a) does not violate the Equal Protection Clause of the Fourteenth Amendment because it does not have a discriminatory purpose, and it maintains a rational basis.

The Fourteenth Amendment provides that ". . . No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>197</sup> The amendment guarantees the right to be free from "invidious discrimination in statutory classifications and other governmental activity."<sup>198</sup> Equal protection thus prohibits "adverse treatment of individuals compared with other similarly situated individuals" based on religion.<sup>199</sup>

<sup>193</sup> *Id.* at 533.

<sup>194</sup> *Id.* at 543.

<sup>195</sup> *Id.*

<sup>196</sup> *Employment Div. v. Smith*, 494 U.S. 872, 889 (1990). *See also* *Caviezel v. Great Neck Pub. Sch.*, 739 F. Supp. 2d 273, 283-84 (E.D.N.Y. 2010) *aff'd*, 500 F. App'x 16 (2d Cir. 2012).

<sup>197</sup> U.S. CONST. amend. XIV.

<sup>198</sup> *Bernheim v. Litt*, 79 F.3d 318, 323 (2d Cir.1996) (quoting *Harris v. McRae*, 448 U.S. 297, 322 (1980)).

<sup>199</sup> *Incantalupo v. Lawrence Union Free Sch. Dist. No. 15*, 380 F.App'x 59, 62 (2d Cir. 2010) (quoting *Miner v. Clinton County*, 541 F.3d 464, 474 (2d Cir.2008) (internal quotation marks omitted)).

The plaintiffs in the *Phillips* case argued that New York's vaccination policies denied their children the constitutional right to equal protection under the law.<sup>200</sup> But, as the court held while dismissing the complaint, the plaintiffs failed to assert any facts tending to show that the defendants favored any religion over another, or that the plaintiffs were part of a protected class.<sup>201</sup> It is unclear whether the plaintiffs were arguing that they were being classified as being religious versus being unimmunized; however, neither classification presents a constitutional problem.

To bring a claim under the Equal Protection Clause, plaintiffs have to prove purposeful or intentional discrimination by a government actor that is directed towards a suspect class, such as a particular religious group.<sup>202</sup> This intentional discrimination may be demonstrated by pointing to a law or policy that, (1) expressly classifies on the basis of race [or other suspect class such as sex or religion];<sup>203</sup> (2) is facially neutral but has been applied in an unlawfully discriminatory manner; or (3) is facially neutral but has adverse effects that were motivated by discriminatory animus.<sup>204</sup> Absent evidence of intentional discrimination, the government action is subject to rational basis review.<sup>205</sup> Finally, under rational basis review, "[a] classification must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."<sup>206</sup>

Here, regarding plaintiff's potential claim based on religion, New York's social distancing policy is facially neutral because it does not explicitly identify or classify any specific religious group. In terms of unlawful and discriminatory application, the policy is general in nature and applies to all exemptions, including medical exemptions, so it cannot be said that its application is discriminatory. Further, those who fall under the policy are suffering the adverse effects of their children missing

<sup>200</sup> *Phillips v. City of New York*, 27 F. Supp. 3d 310, 313 (E.D.N.Y. 2014).

<sup>201</sup> *Id.*; *Accord Caviezel v. Great Neck Pub. Sch.*, 739 F. Supp. 2d 273, 282 (E.D.N.Y. 2010).

<sup>202</sup> *Am. Atheists, Inc. v. Port Auth. of NY & NJ*, 936 F. Supp. 2d 321, 338 (S.D.N.Y. 2013) (quoting *Congregation Rabbinical Coll. of Tartikov, Inc.*, 915 F.Supp.2d 574 (S.D.N.Y. 2013)).

<sup>203</sup> *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 915 F. Supp. 2d 574, 615 (S.D.N.Y. 2013).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Am. Atheists, Inc. v. Port Auth. of NY & NJ*, 936 F. Supp. 2d 321, 338-339 (S.D.N.Y. 2013) (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 319-320 (1993)).

school, but these effects were motivated by public health concerns and the safety of students, not to disadvantage or negatively impact students that qualify for a religious exemption.<sup>207</sup> Because New York's policy is not intentionally discriminatory, it is subject only to rational basis review. Obviously, the rational basis to bar unvaccinated students during an outbreak is to protect those students and the rest of the school population from catching or spreading a communicable disease.

The statute does facially discriminate against unimmunized students because it expressly identifies and classifies them as a specific group. However, immunization is not considered a suspect classification such as race, sex or religion; therefore, the policy would only need a rational basis for the classification to be upheld. Much like the basis for the classification in the religion analysis, there is obviously a rational basis of health and safety behind barring unvaccinated students from school during a vaccine preventable outbreak. New York's social distancing policy under 10 NYCRR 66-1.10(a) does not violate the Fourteenth Amendment.

#### IV. NEW YORK MUST ELIMINATE THE RELIGIOUS EXEMPTION

New York's social distancing policy is constitutional, but at what cost? Although New York's legislature believed that creating a religious exemption to mandatory immunization was the right thing to do, when do the amount of problems created by this exemption outweigh the benefits that it is supposed to bring? In an effort to please a minority of citizens that "goes beyond what the Supreme Court has declared the First Amendment to require[.]"<sup>208</sup> New York's religious exemption has put the entire state at an increased risk of catching a number of deadly preventable diseases.<sup>209</sup> In addition, the subjective nature of the exemption opened the door not only to abuse of court time and resources, but also abuse of the exemption's purpose, often sought by citizens that hold misguided medical fears as opposed to genuine and sincere religious

<sup>207</sup> See *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 915 F. Supp. at 613 ("Discriminatory intent or purpose typically refers to those instances when a government actor seeks to disadvantage or negatively impact a group of persons") (quoting *Hayden v. County of Nassau*, 180 F.3d 42, 50 (2d Cir.1999)).

<sup>208</sup> *Phillips v. City of New York*, 27 F. Supp. 3d 310, 313 (E.D.N.Y. 2014) (quoting *Sherr v. Northport-E. Northport Union Free Sch. Dist.* 672 F. Supp. 81, 88 (E.D.N.Y. 1987)).

<sup>209</sup> See generally *Salmon*, *supra* note 12, at 51.

beliefs. Finally, New York's religious exemption has created economic consequences by increasing the number of outbreaks and the likelihood of future outbreaks that cost citizens hundreds of thousands of dollars.<sup>210</sup> The public health and education of New York State citizens should be a priority over catering to a minority of citizens that have no constitutional right to be exempt from the inoculation laws that New York creates.<sup>211</sup>

The only solution that prioritizes both the health and education of New York's citizens is to eliminate the religious exemption to school immunization. Part IV of this Note will make two recommendations: first, that New York not adopt a philosophical exemption to mandatory vaccination because the rationale underlying the bill is baseless, and increasing access to non-medical exemptions will lead to increased clusters of vaccine preventable diseases. Second, that New York acknowledges the positive effects of the public health laws maintained by West Virginia and Mississippi, two states that only provide medical exemptions, and similarly maintains only a medical exemption to alleviate the growing problems created by the religious exemption.

A. *New York Seeks to Adopt a "Philosophical Exemption" to Mandatory Immunization*

Despite the issues already created by the religious exemption, in 2013 the New York Senate introduced a bill that would amend New York Public Health Law section 2164(6) by adding a "philosophical exemption" to the existing medical and religious exemptions.<sup>212</sup> In addition to the bill being replete with spelling and grammatical errors, the rationales for amending the statute are made in error as well.<sup>213</sup> The rationales offered in support of this bill lack a "uniform criteria" in granting religious exemptions and supposed raging debates within medical circles pertaining to a link between vaccines and autism.<sup>214</sup> Both rationales are flawed both factually and scientifically. Additionally, enacting this bill would increase rates of non-medical exemptions, accelerating the current

<sup>210</sup> See Khawja, *supra* note 130.

<sup>211</sup> See generally *Jacobson v. Massachusetts*, 197 U.S. 11, 37-38 (1905); see also *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 88 (E.D.N.Y. 1987).

<sup>212</sup> S. 3934, 2013-2014 Leg., 236th Leg. Sess. (N.Y. 2013) available at <https://www.nysenate.gov/legislation/bills/2013/s3934/amendment/original>.

<sup>213</sup> *Id.* ("Claimants are asked to submit to [sic] myriad and lengthy verbal affidavits . . .") ("Religious beliefs entail a faith in God, [sic] or absolutes.") ("Conversely, disease outbreaks are [sic] known to occur . . .").

<sup>214</sup> *Id.*

problem that New York faces with clusters of vaccine preventable diseases; this was exemplified by Arkansas after they adopted a philosophical exemption to immunization in 2003.<sup>215</sup>

### 1. New York Public Health Law § 2164 Maintains Uniform Criteria

One rationale used in support of the Senate's philosophical exemption bill is that determinations for granting the religious exemption have "no apparent uniform criteria" leading claimants to feel that they were denied the exemption unfairly.<sup>216</sup> However, in *Berg v. Glen Cove City School District*, the New York District Court laid down clear criteria for interpreting whether an individual holds "genuine and sincere religious beliefs" to assist in deciding whether a religious exemption qualifies under the statute.<sup>217</sup>

The first determination for granting a religious exemption is whether the belief is indeed religious, as opposed to being a belief based on medically related fears.<sup>218</sup> Only if the belief is found to be religious will determinations be made on whether the belief is genuinely and sincerely held.<sup>219</sup> For determining genuineness and sincerity, the belief must be held in subjective good faith, evidence of this are actions taken that are consistent with the purported belief.<sup>220</sup> Although the criteria are subjective, they have been uniformly applied in subsequent New York cases addressing the issue.<sup>221</sup> Notably, the philosophical exemption bill

<sup>215</sup> Joseph W. Thompson et al., *Impact of Addition of Philosophical Exemptions on Childhood Immunization Rates*, 32 AM. J. PREV. MED. 194, 194 (2007) available at [http://www.ajpmonline.org/article/S0749-3797\(06\)00497-1/pdf](http://www.ajpmonline.org/article/S0749-3797(06)00497-1/pdf) ("Legislation allowing philosophical exemptions from school immunization requirements was linked to increased numbers of parents claiming nonmedical exemptions, potentially causing an increase in risk for vaccine-preventable diseases.").

<sup>216</sup> S. 3934, 2013-2014 Leg., 236th Leg. Sess. (N.Y. 2013) available at <https://www.nysenate.gov/legislation/bills/2013/s3934/amendment/original>.

<sup>217</sup> *Berg v. Glen Cove City Sch. Dist.*, 853 F. Supp. 651, 655 (E.D.N.Y.1994) (The court must first determine whether purported beliefs are "religious," and not based on medical, moral, scientific, or secular theories. Only if they are is the court to determine whether those beliefs are genuinely and sincerely held. A sincerity analysis seeks to determine the subjective good faith of the adherent, to protect only those beliefs held as a matter of conscience.).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> See *Turner v. Liverpool Cent. Sch.*, 186 F. Supp. 2d 187, 191 (N.D.N.Y. 2002); *Check v. N.Y. City Dep't of Educ.*, No. 13-CV-791 SLT LB, 2013 WL 2181045, at \*9 (E.D.N.Y. May 20, 2013), *appeal dismissed* Oct. 10, 2013; See generally *Caviezel v. Great Neck Pub. Sch.*, 701 F. Supp. 2d 414, 428-29 (E.D.N.Y. 2010) *aff'd*, 500 F. App'x 16 (2d Cir. 2012).

does not list any criteria to be assessed when granting a philosophical exemption, stating only that the existing form be amended to accommodate “personal objections” to immunization.<sup>222</sup> In addition, individuals seeking the religious exemption are afforded the opportunity to appeal the decision if they are denied an exemption, which would be the appropriate measure for a claimant who feels that he or she was denied the exemption unfairly.<sup>223</sup>

## 2. Supposed Raging Debates Linking Vaccines and Autism are Meritless

Another rationale used in support of the Senate’s philosophical exemption bill is that “[d]ebates [ ] are currently raging within medical circles concerning the role that vaccinations may play” in the development of autism along with neurological and autoimmune diseases.<sup>224</sup>

To consider the misguided, yet unfortunately, widely held belief that vaccinations are linked to autism or neurological and autoimmune diseases a “raging debate” is misplaced. The scientific and medical community has emphatically denied any link between vaccination and autism, debunking research maintaining such a link as fraudulent.<sup>225</sup> In addition, both the American Academy of Pediatrics and the CDC, two highly recognized institutions in the medical community, continue to support vaccination, insisting that they are not toxic or taxing to a normal immune system.<sup>226</sup>

The rationales set forth for the passage of the Senate’s philosophical exemption bill are unsubstantiated and inaccurate. Moreover, enactment of the bill would only insight more problems for the citizens of New York, creating the potential for a public health emergency.

<sup>222</sup> *Immunization Guidelines for Schools*, *supra* note 80, at 13.

<sup>223</sup> *Id.*

<sup>224</sup> S. 3934, 2013-2014 Leg. 236th Leg. Sess. (N.Y. 2013) available at <https://www.nysenate.gov/legislation/bills/2013/s3934/amendment/original>.

<sup>225</sup> See Debra Goldschmidt, *Journal Questions Validity of Autism and Vaccine Study*, CNN HEALTH, Aug. 28, 2014, 10:38 AM, <http://www.cnn.com/2014/08/27/health/irpt-cdc-autism-vaccine-study/>; Elizabeth Cogen, *Vaccine-Autism Connection Debunked Again*, CNN HEALTH, Feb. 9, 2017, 2:09 PM, <http://thechart.blogs.cnn.com/2013/03/29/vaccine-autism-connection-debunked-again/>; Scott Hensley, *Study Linking Childhood Vaccine and Autism Was Fraudulent*, NPR, Jan. 6, 2011, <http://www.npr.org/blogs/health/2011/01/06/132703314/study-linking-childhood-vaccine-and-autism-was-fraudulent>; T.S. Sathyanarayana Rao et al., *The MMR Vaccine and Autism: Sensation, Refutation, Retraction, and Fraud*, *INDIAN J. PSYCHIATRY* 1, 9 (2011).

<sup>226</sup> Brown, *supra* note 149.

### 3. New York's Proposed "Philosophical Exemption" Would Accelerate Rates of Non-Medical Exemptions and Clusters of Vaccine Preventable Diseases

The addition of a philosophical exemption to mandatory immunization has been shown to increase overall exemption rates,<sup>227</sup> which increases the likelihood of a vaccine preventable outbreak.<sup>228</sup> Where available, parents are taking advantage of philosophical exemptions with growing regularity.<sup>229</sup> In states that offer both religious and philosophical exemptions, "the number of philosophical exemptions far exceeds the number of religious and medical exemptions."<sup>230</sup>

Arkansas offers a clear empirical example.<sup>231</sup> In 2003-2004 new legislation made philosophical exemptions available in Arkansas, prior to that, like New York, Arkansas had both medical and religious exemptions.<sup>232</sup> A retrospective study in 2006 surveyed the impact that the exemption had on the state.<sup>233</sup> The research found that the total number of exemptions granted increased by 90% over four years, additionally, that nonmedical exemptions accounted for 95% of all exemptions granted by 2010.<sup>234</sup> The study concluded that availability of a philosophical exemption resulted in an increased number of children at risk for disease in Arkansas, which increases the potential for disease outbreak, and thus, creates a public health risk.<sup>235</sup>

Further, due to the recent spike in reported measles cases in 2014 and 2015, states such as California, Oregon, Washington, and Vermont, who currently have a philosophical exemption, are now seeking to repeal them.<sup>236</sup> California Senator Richard Pan, also a pediatrician, stated in

<sup>227</sup> Blank, *supra* note 10, at 1284.

<sup>228</sup> *Id.* at 1282.

<sup>229</sup> Ross D. Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*, 12 ANNALS HEALTH L. 277, 284 (2003) available at <http://lawcommons.luc.edu/cgi/viewcontent.cgi?article=1241&context=annals>.

<sup>230</sup> *Id.*

<sup>231</sup> Thompson, *supra* note 215, at 196.

<sup>232</sup> *Id.* at 195.

<sup>233</sup> *Id.* at 194.

<sup>234</sup> *Id.* ("The total number of exemptions granted increased by 23% (529 to 651) from Year 1 to 2; by 17% (total 764) from Year 2 to 3 after philosophical exemptions were allowed; and by another 50% from Year 3 to 4 (total 1145).).

<sup>235</sup> *Id.* at 200.

<sup>236</sup> Sheila V. Kumar, *Oregon Considers Banning Most Nonmedical Immunization Exemptions*, BOSTON GLOBE, Mar. 1, 2015, <https://www.bostonglobe.com/news/nation/2015/03/01/oregon-considers-banning-most-vaccine-exemptions/8VQExoiWtXP6Lgr6156CWP/story.html>.



reference to the bill, “[w]e’re not reaching sufficient immunization rates and we want to reach the rates necessary to protect the public from those diseases[.]”<sup>237</sup> Proposed bills in both California and Oregon would maintain exemptions only in cases where it is prevented by physical or medical conditions, much like West Virginia and Mississippi.<sup>238</sup>

The addition of a philosophical exemption in New York would create an extreme public health risk, especially in large highly populated areas like New York City. The Senate’s bill, if enacted, would very likely accelerate the problems that New York is already having with outbreaks of vaccine preventable diseases. A philosophical exemption would put New York in an even worse position health wise than it already is in, likely leading to dangerously low rates of immunization like California and Oregon.<sup>239</sup> The dangers of the philosophical exemption are being acknowledged by states who previously adopted it, but who are now trying to repeal it. New York should learn from their mistake.

### B. *West Virginia and Mississippi: The Effects of No Non-Medical Exemptions*

As was stated in the *Sherr* case, “[i]t has long been settled that one area in which religious freedom must be subordinated to the compelling interests of society involves protection against the spread of disease.”<sup>240</sup> This sentiment is exemplified in states like West Virginia and Mississippi, who allow only a medical exemption, and have been associated with on average, a lower annual incidence of pertussis when compared to states with non-medical exemptions.<sup>241</sup> Although New York’s inclusion of a religious exemption reflects a “highly praiseworthy” attempt to minimize state imposition of mandatory vaccination, it is not

<sup>237</sup> Steve Almasy, *California Lawmakers Want to Repeal ‘Personal Beliefs’ Exemption*, CNN HEALTH, Feb. 4, 2015, <http://www.cnn.com/2015/02/04/health/california-measles-outbreak/>.

<sup>238</sup> Lydia O’Connor, *California Bill Would Make It Harder For Parents To Say No To Vaccines*, HUFFINGTON POST, Feb. 4, 2015, [http://www.huffingtonpost.com/2015/02/04/california-vaccination-bill-repeal-personal-belief-exemption\\_n\\_6615490.html](http://www.huffingtonpost.com/2015/02/04/california-vaccination-bill-repeal-personal-belief-exemption_n_6615490.html); Kumar, *supra* note 236.

<sup>239</sup> See Seither, *supra* note 92 (The CDC targets 95% vaccination levels among states in order to prevent disease outbreaks, both California and Oregon reported below this level with 92.2-92.3% and 93.2-93.3% respectively).

<sup>240</sup> *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 83 (E.D.N.Y. 1987).

<sup>241</sup> Saad B. Omer et al., *Nonmedical Exemptions to School Immunization Requirements*, 296 J. AM. MED. ASS’N 1757, 1761 (2006) available at <http://jamanetwork.com/article.aspx?articleid=203593>.

constitutionally required,<sup>242</sup> and has created many issues that will only get worse with time.

West Virginia and Mississippi both scored well above the median percentage of vaccination rates among children enrolled in kindergarten for the 2013-2014 school year.<sup>243</sup> According to the CDC, West Virginia approved only thirty-five medical exemptions among kindergarten students for the 2013-2014 school year.<sup>244</sup> Even more impressive was Mississippi, who approved just seventeen medical exemptions among kindergarteners for the same year.<sup>245</sup> This number is worth comparing to neighboring Arkansas, which despite having reported twenty-four medical exemptions among a similarly sized kindergarten population, reported a total of 492 exemptions, the vast majority being religious or philosophical.<sup>246</sup>

Notably, in respect to the enormous spike in reported measles cases in 2014 and 2015, Mississippi has not seen a case of measles since 1992, and West Virginia has not seen one since 1994.<sup>247</sup> A drastically different reality is present in states like California, Colorado, and Pennsylvania, all three falling below the median percentage of vaccination rates among children enrolled in kindergarten for the 2013-2014 school year, and all reporting cases of measles in 2015.<sup>248</sup>

In addition, in a study of rates of pertussis among individuals aged eighteen years or younger within the United States, West Virginia and Mississippi ranked among the states having the lowest average incidences annually. Further, Mississippi was the state with the lowest incidences in the entire United States from 1986 to 2004.<sup>249</sup> New York on the other hand, fell among the upper middle of states in terms of average incidences of pertussis annually.<sup>250</sup> If New York eliminated its

<sup>242</sup> *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. at 88.

<sup>243</sup> Seither, *supra* note 92 (Mississippi's vaccination rate was 99.7% and was the highest among all the states, West Virginia's was approximately 95.5-96.5%, the median among states is 94.7%).

<sup>244</sup> *Id.*

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

<sup>246</sup> *Id.*; accord Alan Blinder, *Mississippi a Vaccination Leader, Stands by Its Strict Rules*, N.Y. TIMES, Feb. 4, 2015, [http://www.nytimes.com/2015/02/05/us/mississippi-a-leader-on-vaccination-rates-stands-by-strict-rules.html?\\_r=0](http://www.nytimes.com/2015/02/05/us/mississippi-a-leader-on-vaccination-rates-stands-by-strict-rules.html?_r=0).

<sup>247</sup> Tony Yang, *Mississippi Hasn't Had Measles in Over Two Decades*, NEW REPUBLIC, Feb. 6, 2015, <http://www.newrepublic.com/article/120999/mississippi-avoids-measles-outbreaks-limiting-school-exemptions>.

<sup>248</sup> *Measles Cases and Outbreaks*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/measles/cases-outbreaks.html> (last updated Feb. 9, 2017).

<sup>249</sup> Omer, *supra* note 241, at 1761.

<sup>250</sup> *Id.*

religious exemption and focused more on promoting the health and well being of the majority, it could see low rates of vaccine preventable diseases similar to those of West Virginia and Mississippi.

Of course not every citizen is going to be happy about their state mandating that they do something, but when it comes to public health, states like Mississippi and West Virginia think that it is worth it.<sup>251</sup>

## CONCLUSION

A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations. . . . [T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.<sup>252</sup>

New York's religious exemption has become more burdensome and problematic than it is worth. The rising rates of religious exemptions granted in New York not only harm its citizens economically, but also educationally and most importantly, medically. To continue to permit this exemption would put New York's society as a whole at an increased risk over something that is not constitutionally guaranteed, but solely in place to cater to a minority of individuals who hold religious oppositions.

Eliminating the religious exemption would solve many problems facing New York State. Because a medical exemption involves certification from a doctor,<sup>253</sup> this takes away the abundance of parents seeking exemptions out of fear, masking their beliefs as religious. In addition, those parents will not be filing appeals on denial of an exemption, which will save on court resources that are now being expended. Further, this proposal also reduces the likelihood that New York's herd immunity will become jeopardized because there will be a greater majority of citizens being vaccinated, which decreases the likelihood of an outbreak.<sup>254</sup> Fewer outbreaks would then decrease the amount of money New York

<sup>251</sup> Brandy Zadrozny, *Mississippi: Last In Everything, First In Vaccinations*, THE DAILY BEAST, Oct. 17, 2014, <http://www.thedailybeast.com/articles/2014/10/17/mississippi-last-in-everything-first-in-vaccinations.html> ("Mississippi's high immunization rates for children enrolled in kindergarten indicate a success for providing the best protection to our children.").

<sup>252</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972).

<sup>253</sup> N.Y. PUBLIC HEALTH LAW § 2164(8)(McKinney 1990).

<sup>254</sup> Lee, *supra* note 100.

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has to spend to maintain and treat an outbreak. Finally, eliminating the religious exemption benefits New York from an educational standpoint. The amount of students being sent home for extended periods of time during an outbreak will decrease exponentially because the majority of students that are exempted are for religious reasons, not medical.

It is counterintuitive to believe that a solution to this growing health problem can be found in permitting even more vaccination exemptions in New York through a philosophical exemption. The most effective solution is to eliminate the religious exemption. It is time for New York State to take the economic, educational, and health concerns facing its citizens seriously, and act in the interest of society as whole.