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Thou Shalt Not Take the Name of the Lord thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements.

*Dorit Rubinstein Reiss*¹

I. Introduction

In a recent survey of exemptors² from New Mexico, 54% of respondents described their reasons for seeking an exemption from school immunization requirements as “philosophical” or based on “personal beliefs.”³ The main reasons for these people’s objection to vaccines were safety concerns, i.e. vaccines “might cause harm,” vaccines “contain dangerous/toxic ingredients,” vaccines “may overwhelm the immune system” (these were chosen in the above order) – together with a general belief that natural immunity is in some way “better.”⁴

¹ Professor of Law, UC Hastings College of the Law. I am grateful to Hadar Aviram, Kate Bloch, Ben Depoorter, Bill Dodge, Craig Egan, Chimene Keitner, David Levine, Radhika Rao, Reuel Schiller, Jodi Short, David Takacs, Bill Wang, and Alice Warning Wasney for their help with this article. Many thanks to Jessica Cassella, David Coolidge, Leah Kaufman and Rob Taboada for their excellent help in researching this topic.

² Exemptors are parents who obtain an exemption from school immunization requirements, not vaccinating their children before sending them to school.

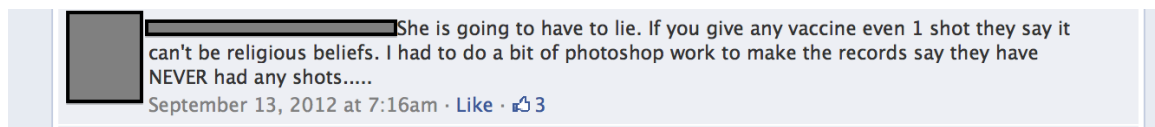
³ *Department of Health Announces Results of Vaccine Exemption Survey*, NEW MEXICO DEP’T OF HEALTH (Nov. 18, 2013), <http://www.health.state.nm.us/CommunicationsOffice/2013%20News%20Releases/NMDOH-PressRelease-20131118-VaccineExemptionSurvey-EN.pdf>.

⁴ *Id.*

The problem is that New Mexico does not have a philosophical exemption.⁵ It has a religious exemption and a medical exemption. These people were using one or the other – even though their reason for not vaccinating was neither medical nor religious.

With over 1.2 billion users and several dedicated anti-vaccine pages, Facebook provides a place for antivaccine activists – a very, very small minority – to create a community of like-minded people, converse and express their views. Facebook also provides a forum to provide advice about obtaining vaccination exemptions. In response to a request for advice on how to exempt someone from school immunization requirements, one online commentator said:

She is going to have to lie. If you give any vaccine even 1 shot they say it can't be religious beliefs. I had to do a bit of photoshop work to make the records say they have NEVER had any shots.⁶



This article argues that, like this commentator and the New Mexico exemptors, many of those who claim a religious exemption lie: their real reasons for not wanting to vaccinate their children are not religious. Since the religious exemption in its current format is so easily and commonly abused, it is inappropriate.

People lie to government in many contexts, of course. But when a statutory exemption is easily and widely abused, in ways that undermine the goals of the statute

⁵ *Id.*; NM Stat § 24-5-3.

⁶ This and other screenshots are taken from public pages in Facebook. Pursuant to an IRB exemption approval, they are posted here with the names and picture hidden and without link to the original thread, to protect the poster's anonymity (capitalized in original).

and may lead to substantial harm, it is probably time to consider changing the law. The more so when the state has substantial leeway to choose its course.

Vaccines save lives. They prevent countless harms and suffering. There are not a lot of ways around that reality.⁷ Before the pertussis vaccine was available, the United States had an annual average of 200,000 cases and 4,000 deaths – mostly in babies – from this disease.⁸ Before the polio vaccine, the United States had an average of almost 20,000 cases of this horrible disease each year, with an average of over 1,800 deaths.⁹ Before the development of the Haemophilus influenzae type b (HiB) vaccine, there were about 20,000 cases of that disease each year, with about 1,000 deaths¹⁰ and additional cases of brain damage and other harms.¹¹

Today, all of those diseases are extremely rare (even though for somewhat complex reasons, pertussis – whooping cough – is making a comeback).¹² High rates of immunization are an important part of this reality. Not only are vaccinated people themselves less likely to catch the disease, but if enough people are immunized, the disease cannot get a foothold in a population, protecting even those who are not immune.

⁷ For the development and history of vaccines and their many benefits, see Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?*, 37 UNIV. MICH. J. L. REFORM 353, 363-81 (2004); PAUL A. OFFIT, *VACCINATED: ONE MAN'S QUEST TO DEFEAT THE WORLD'S DEADLIEST DISEASES* (Harper Perennial, 2008).

⁸ Sandra W. Roush & Trudy V. Murphy, *Historical Comparisons of Morbidity and Mortality for Vaccine-Preventable Diseases in the United States*, 298 JAMA 2155, 2156, table 1 (2007).

⁹ *Id.*

¹⁰ *Id.* at 2158, table 2.

¹¹ PAUL A. OFFIT, *DEADLY CHOICES: HOW THE ANTIVACCINE MOVEMENT THREATENS US ALL* (Basic Books, 2010).

¹² Centers for Disease Control and Prevention, *Pertussis Epidemic—2010*, 61 MORBIDITY & MORTALITY WKLY. REP. 517 (2012), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6128a1.htm>; for more on the decline in diseases rate and the life saving by vaccines, see Willem G. van Panhuis et al., *Contagious Diseases in the United States from 1888 to the Present*, 369 NEW ENG. J. MED. 2152 (2013), available at <http://www.nejm.org/doi/full/10.1056/NEJMms1215400>.

This phenomenon is called herd immunity, or community immunity.¹³ One way to achieve these high rates of immunization is through school immunization requirements, which are laws requiring children to receive certain vaccines before attending public schools.¹⁴ Such laws have withstood challenges on constitutional grounds in the Supreme Court¹⁵ and by every court addressing the issue since.¹⁶

With the decline of vaccine-preventable diseases, however, the balance has changed. The risks of vaccines, real or imagined, have become more frightening to some than the risks of the diseases they prevent. Observers explain that vaccines have become “victims of their own success.”¹⁷

This is especially ironic, since by almost every measure, the risks of modern vaccines, while real enough, are small. The risks of vaccines are an order of magnitude smaller than the risks of diseases they prevent.¹⁸ To give one example, the risk of encephalitis from measles is one per thousand cases, according to the CDC’s “Pink

¹³ Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children*; Douglas S. Diekema, *Choices Should Have Consequences: Failure to Vaccinate, Harm to Others, and Civil Liability*, MICH. L. REV. FIRST IMPRESSIONS (Jan. 16, 2009), <http://www.michiganlawreview.org/assets/fi/107/diekema.pdf>.

¹⁴ Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children*; Walter A. Orenstein & Alan R. Hinman, *The Immunization System in the United States - The Role of School Immunization Laws*, 17 VACCINE S19(1999).

¹⁵ *Zucht v. King*, 260 U.S. 174 (1922).

¹⁶ Most recently in *Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App'x 348 (4th Cir. 2011).

¹⁷ Bruesewitz v. Wyeth, 131 S.Ct. 1068, 1072 (2011); Daniel B. Rubin & Sophie Kasimow, Comment, *The Problem of Vaccination Noncompliance: Public Health Goals and the Limitations of Tort Law*, 107 MICH. L. REV. FIRST IMPRESSIONS 114, 118 (2009). <http://www.michiganlawreview.org/assets/fi/107/rubinkasimow.pdf>.

¹⁸ For comparisons of the risks of diseases to the risks of vaccines in Australia, see: [http://www.health.gov.au/internet/immunise/publishing.nsf/Content/D35CD18A3985212ECA2574E2000F9A4F/\\$File/quick_sideeffects.pdf](http://www.health.gov.au/internet/immunise/publishing.nsf/Content/D35CD18A3985212ECA2574E2000F9A4F/$File/quick_sideeffects.pdf); here for Canada: <http://www.phac-aspc.gc.ca/publicat/cig-gci/cedv-cemv-tab-eng.php>; here for the United States: <http://www.cdc.gov/vaccines/vpd-vac/fact-sheet-parents.html>. See also Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children* at 391-93.

Book.”¹⁹ Contrast that statistic with the following FDA information about results of vaccinating with the MMR vaccine, which covers measles, mumps, and rubella (mumps can also cause encephalitis, although at lower rates):²⁰

Encephalitis has been reported approximately once for every 3 million doses of MMR vaccine. Post-marketing surveillance of more than 400 million doses distributed worldwide (1978 to 2003) indicates that encephalitis is rarely reported after MMR vaccination.²¹

To use another measure, let’s examine, instead, the numbers of cases compensated by the National Vaccine Injury Compensation Program (NVICP). The program, which covers both children and adults, has been in existence for twenty-four years. Approximately four million babies are born in the United States each year,²² and the majority of them are vaccinated.²³ And yet, it only compensated a few more than 3,400 cases in twenty years.²⁴ This is in spite of the fact that NVICP is clearly a more plaintiff-friendly, easy to use scheme than the civil courts.²⁵ Compare that to about 35,000 fatalities – not injuries, just fatalities – from car accidents each year.²⁶ Indeed, a

¹⁹ EDUC. INFO. PARTNERSHIP BRANCH, CENTERS FOR DISEASE CONTROL AND PREVENTION, EPIDEMIOLOGY AND PREVENTION OF VACCINE-PREVENTABLE DISEASES 174 (William Atkinson et al. eds., 12th ed. 2012), available at <http://www.cdc.gov/vaccines/pubs/pinkbook/downloads/meas.pdf>.

²⁰ *Id.* at 206, available at <http://www.cdc.gov/vaccines/pubs/pinkbook/downloads/mumps.pdf>. See here for an example where it did happen: <http://beforevaccines.blogspot.com/2013/09/the-aftermath-of-phils-mumps.html>.

²¹ *Measles, Mumps, Rubella and Varicella Virus Vaccine Live*, U.S. FOOD AND DRUG ADMINISTRATION (Jan. 11, 2010), <http://www.fda.gov/BiologicsBloodVaccines/Vaccines/QuestionsaboutVaccines/ucm070425.htm>.

²² *Statistical Abstract of the United States: 2012*, U.S. CENSUS BUREAU, <http://www.census.gov/prod/2011pubs/12statab/vitstat.pdf>.

²³ *National and State Vaccination Coverage Among Children Aged 19-35 Months*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6034a2.htm#tab1>.

²⁴ *Statistics Reports*, U.S. DEP’T OF HEALTH AND HUMAN SERVICES HEALTH RESOURCES AND SERVICE ADMINISTRATION, <http://www.hrsa.gov/vaccinecompensation/statisticsreports.html#Stats>.

²⁵ Bruesewitz. See also: <http://shotofprevention.com/2013/11/08/congressional-briefing-attempts-to-discredit-vaccine-injury-compensation/>

²⁶ *Summary from Injury Facts- 2011 Edition*, NATIONAL SAFETY COUNCIL, http://www.nsc.org/news_resources/injury_and_death_statistics/Documents/Summary%202011.pdf.

colleague calculated the rate of vaccine injury to be less than 0.003%.²⁷ Nothing is 100% safe, and a child can suffer a vaccine injury or an allergic reaction, but as explained, those are rare – and the risks of not vaccinating are much, much higher.

Over the past decade, rates of nonmedical exemptions from school immunization requirements have increased dramatically.²⁸ This is problematic, since unvaccinated children are at higher risk of preventable diseases.²⁹ Communities with high rates of exemptions are more vulnerable to outbreaks.³⁰

State policies – the existence of exemptions and the ease of obtaining them – affect rates of exemptions, and hence, the risk of outbreaks.³¹ This article examines one type of policy that many states have adopted: an exemption from school immunization requirements based on the exemptor’s religious beliefs that prohibit vaccination.

States began adopting religious exemptions to school immunization requirements in the 1960s.³² The first exemptions were adopted to accommodate Christian Scientists and other similar minorities.³³ But the courts’ reluctance to allow legislators to offer preferential treatment to certain religions over others or to allow state officials to inquire

²⁷ *A look at the numbers in vaccine reactions*, RED WINE AND APPLE SAUCE (March 5, 2013), <http://www.redwineandapplesauce.com/2013/03/05/a-look-at-the-numbers-in-vaccine-reactions/>.

²⁸ Jennifer L. Richards et al., *Nonmedical Exemptions to Immunization Requirements in California: A 16-Year Longitudinal Analysis of Trends and Associated Community Factors*, 31 *VACCINE* 3009 (2013).

²⁹ Daniel R. Feikin et al., *Individual and Community Risks of Measles and Pertussis Associated With Personal Exemptions to Immunization*, 284 *JAMA* 3145 (2000).

³⁰ Aamer Imdad et al., *Religious Exemptions for Immunization and Risk of Pertussis in New York State, 2000–2011*, 132 *PEDIATRICS* 37 (2013); Saad B. Omer, et al., *Geographic Clustering of Nonmedical Exemptions to School Immunization Requirements and Associations with Geographic Clustering of Pertussis*, 168 *AM. J. EPIDEMIOLOGY* 1389 (2008).

³¹ Nina R. Blank et al., *Exempting Schoolchildren from Immunizations: States with Few Barriers Had Highest Rates of Nonmedical Exemptions*, 32 *HEALTH AFF.* 1280 (2013); Omer et al., *supra* note ##; S. Stadlin et al., *Medical Exemptions to School Immunization Requirements in the United States—Association of State Policies with Medical Exemption Rates (2004–2011)*, 206 *J. INFECTIOUS DISEASES* 989 (2012).

³² OFFIT, *DEADLY CHOICES: HOW THE ANTIVACCINE MOVEMENT THREATENS US ALL* at 140.

³³ *Id.* at 141-45.

into and judge individual religious beliefs led to broader religious exemptions.³⁴ The breadth of current religious exemption laws in many states – and the limits on the ability of officials to investigate the validity of religious beliefs that oppose immunization – make religious exemptions from vaccination requirements especially vulnerable to abuse.

This article argues that such abuse does, indeed, occur, and probably frequently. Even if states value religious freedom, a state may not be willing to allow religious exemptions if the majority of those taking advantage of them are refusing vaccines for reasons that are not religious.

Demonstrating abuse is hard, since people are naturally hesitant to openly admit that they are lying about their reasons for rejecting vaccines (although some people do). Comparing the rates of those who have sincere religious beliefs that are in tension with vaccination with those who are using a religious exemption to mask other reasons is hence problematic. However, this article draws on three types of evidence to support the claim that abuse is probably widespread. First, this article examines existing studies and survey data about the reasons people do not vaccinate, highlighting that reasons given are generally not religious. Second, this article demonstrates that mainstream religions support vaccination, or at least do not oppose or prohibit it. While our jurisprudence – correctly in my view – does not require that the exemptor’s religion oppose vaccination, when a given religion supports vaccination, we may plausibly suspect religious exemptions claimed by devoted practitioners of that religion to be not for religious reasons. Finally, the article makes use of Facebook comments from public antivaccine pages in which members openly stated that they lie to get religious exemptions.

³⁴ See Part II, especially sections II.b and II.c.

The rest of this article proceeds in three parts. Part II describes the legal framework governing religious exemptions. Under our jurisprudence, courts allow states to provide a religious exemption, but do not require it. At the same time, if a state does adopt a religious exemption, our jurisprudence makes it very hard to prevent abuse of it. It does so by adopting positions that are reasonable; courts do not want to allow states to police beliefs. But the effect is to make it difficult, and in a number of states completely impossible, to refuse exemptions that officials think are suspect. Part III marshals the evidence supporting the claim that many people lie when they claim a religious exemption. Part IV then discusses three possible fixes. One possible solution to the problem of abuse of religious exemptions is tightening the requirements for religious exemptions. This is problematic, because tightening exemptions would require state officials to examine and assess sincerity of beliefs, acting as conscience police. I am more inclined to one of the two other solutions, and am conflicted between them, and slightly leaning toward the latter one. One solution would be removing all exemptions except medical ones. This has the advantage of protecting the largest number of children. It has a cost, however. It is a very strong limitation of parental freedoms. It may trigger a backlash, since people may resent what they would see as a more coercive policy. And it may lead more parents to homeschool, depriving their children of the benefits of public education. It may also encourage parents who are strongly opposed to vaccination to lie. The other option is to offer a narrow, hard-to-get personal choice exemption. This would allow those with very powerful opposition to vaccines to exempt their children from vaccination, and can still keep exemption rates low. It still, however, can be open to

abuse and pretense. And it leaves more children vulnerable to preventable diseases, with their potential risks.

Both those latter solutions, experience suggests, would be politically hard to pass. Both will face substantial vocal resistance from the antivaccine movement, which has substantial experience in mobilizing to fight such laws. On the other hand, if there is political will – and changing circumstances, like increased rates of diseases, can generate such will – they are feasible, as highlighted in a recent study by Omer et al.³⁵

II. The Law About Exemptions

As early as the nineteenth century, states have required children to be immunized before attending public schools.³⁶ In 1922, the United States Supreme Court addressed the constitutionality of school immunization requirements.³⁷ Relying on its decision in *Jacobson v. Massachusetts*,³⁸ which upheld mandatory immunization laws as a permissible use of the state's power to protect the public health, the Supreme Court upheld the constitutionality of the requirement. However, these requirements only became widespread in the 1960s, as data showed that states with school immunization requirements had substantially lower rates of measles than those without them.³⁹ Federal government involvement in the 1970s, providing incentives to states to enact such requirements, helped, and soon all states had such requirements.⁴⁰

³⁵ Saad b. Omer et al *Legislative Challenges to School Immunization Mandates, 2009-2012* 311 JAMA 620 (2014).

³⁶ *Duffield v. Williamsport Sch. Dist.*, 29 A. 742 (Pa. 1894).

³⁷ *Zucht v. King*, 260 U.S. 174 (1922).

³⁸ 197 U.S. 11, 25-27 (1905).

³⁹ Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?* at 382.

⁴⁰ *Id.* at 382-83.

States did not create religious exemptions until the 1960s, starting in New York.⁴¹ Today most states have them: forty-eight states offer, in addition to a medical exemption, a religious exemption or a philosophical exemption or both.⁴² Most recently, California passed Assembly Bill (AB) 2109, aimed at making the personal belief exemption harder to get. But in a signing statement, Governor Jerry Brown instructed the California Department of Health to add a religious exemption from the law's new requirements to the exemption forms – and such an exemption has, indeed, been added.⁴³

The jurisprudence surrounding exemptions makes three things clear. States do not have to offer them, but they may do so. If they do offer them, the vast majority of states prohibit discrimination between religions – including between organized religions and personal beliefs. And unless the state is very careful in drafting its exemption law, policing whether an exemptor has sincere religious beliefs can be very tricky. The combinations of these three things makes religious exemptions a potentially bad deal for states, because they can easily be abused, leading to high rates of exemptions by those whose reasons are not sincerely religious.⁴⁴ This article argues that this is, indeed, what has happened.

II.A. Religious Exemptions: A State Prerogative

⁴¹ JAMES COLGROVE, *STATE OF IMMUNITY: THE POLITICS OF VACCINATION IN TWENTIETH-CENTURY AMERICA* 180-81 (Univ. of Cal. Press. 2006).

⁴² Hope Lu, *Giving Families Their Best Shot: A Law–Medicine Perspective on the Right to Religious Exemptions from Mandatory Vaccination*, 63 CASE W. RES. L. REV. 869, 885–86 & 914–15 (2013), available at <http://law.case.edu/journals/LawReview/Documents/63CaseWResLRev3.5.Note.Lu.pdf>.

⁴³ Illegally, in my view. See Dorit Reiss, *Viewpoint: Signing Statement on Vaccines Is Not Law*, THE RECORDER (Oct. 9, 2013), <http://www.therecorder.com/id=1202622728667?slreturn=20140014230826>.

⁴⁴ A state can decide to offer an exemption to people whose reasons are not actually religious, of course. One can argue that the personal belief exemptions adopted by some states fit into that category. But most states do not offer a personal belief exemption, and my impression is that for many of the states that do the impetus was not to respect safety concerns as much as to respect beliefs that are like religions, but not actually religions. Callandrilo, *supra note* #.

The Supreme Court last discussed the tension between religion and vaccines in obiter dictum in *Prince v. Massachusetts*. After discussing the application of child labor laws to a religious minority, in that case Jehovah’s Witnesses, the court discussed generally the tension between freedom of religion and general laws affecting child welfare. Referencing cases that allowed states to mandate immunization,⁴⁵ *Prince v. Massachusetts* said that a parent:

cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.⁴⁶

The basic tenet in *Prince v. Massachusetts* was upheld in subsequent cases. No court – state or federal – has ever required a state to create a religious exemption. Several courts addressing this rejected such a claim. One example from Arkansas – which at the time had only a medical exemption, but has since changed its statute to add in a religious and philosophical exemption – is the *DeWitt* case, in which the Supreme Court of Arkansas allowed reasonable regulation of the right of free exercise for the good of the community.⁴⁷

In the recent case *Workman v. Mingo Board of Education*, the Fourth Circuit relied on these Supreme Court cases in rejecting a challenge to West Virginia’s lack of religious exemption. The Court said:

[T]he state’s wish to prevent the spread of communicable diseases clearly constitutes a compelling interest. In sum, following the

⁴⁵ *Jacobson v. Mass.*, 197 U.S. 11 (1905); *Zucht v. King*, 260 U.S. 174 (1922).

⁴⁶ *Prince v. Mass.*, 321 U.S. 158, 166-67 (1944).

⁴⁷ *Wright v. DeWitt Sch. Dist.*, 385 S.W.2d 644, 649 (Ark. 1965).

reasoning of *Jacobson* and *Prince*, we conclude that the West Virginia statute requiring vaccinations as a condition of admission to school does not unconstitutionally infringe Workman’s right to free exercise. This conclusion is buttressed by the opinions of numerous federal and state courts that have reached similar conclusions in comparable cases [list of citations omitted].⁴⁸

In fact, in several of the cases striking down religious exemption statutes, courts struck down the exemption, but left intact the immunization requirements under the *Prince* logic in order to protect children and the public health.⁴⁹ One court even went further. The Mississippi Supreme Court said:

The exception, which would provide for the exemption of children of parents whose religious beliefs conflict with the immunization requirements, would discriminate against the great majority of children whose parents have no such religious convictions. To give it effect would result in a violation of the Fourteenth Amendment to the United States Constitution which provides that no state shall make any law denying to any person within its jurisdiction the equal protection of the laws, in that it would require the great body of school children to be vaccinated and at the same time expose them to the hazard of associating in school with children exempted under the religious exemption who had not been immunized as required by the statute.⁵⁰

The *Brown* court sees the Fourteenth Amendment as preventing any religious exemption because such an exemption discriminates against children whose parents do not have religious beliefs in opposition to vaccination. I would go the other way: while

⁴⁸ No. 09-2532 (4th Cir. Mar. 22, 2011) (per curiam) at 10.

⁴⁹ See, e.g., *Dalli v. Bd. of Educ.*, 267 N.E.2d 219, 222-23 (Mass. 1971); *Brown v. Stone*, 378 So.2d 218, 223 (Miss. 1979) *cert denied*, 449 U.S. 887 (1980).

⁵⁰ *Brown*, at 223.

vaccinating does impose some burden – you need to go to the doctor, get the vaccine, you face the risk of one of the rare side effects – it seems to me the discrimination is more against the children left unprotected against disease because of their parents’ belief. And it is not exactly discrimination to force children to associate with the exempt children. But the idea of reading religious exemptions as a violation of equal protection is tempting, and has been repeated in several places. For example, it was mentioned in a Novak’s article on exemptions, an article that made a strong case against religious exemptions in the name of children’s rights. (And see below for other constitutional objections to religious exemptions).⁵¹

This view is also appealing to at least one vaccine expert – Dr. Paul Offit – who thinks it is a desirable interpretation of the amendment, for policy reasons.⁵² Specifically, Dr. Offit believes that leaving children unprotected against preventable diseases because their parents hold religious views is inappropriate.⁵³ He seems to interpret this in the more straightforward manner, that it is discrimination against the unvaccinated children to leave them exposed to preventable diseases because of their parents’ religious views.

Using *Brown* to ground a federal rule against exemption, however, runs into a number of problems. *Brown* is a weak precedent for this conclusion. No other court adopted that reasoning, so it stands as somewhat of an outlier. In addition, the *Brown* reasoning was not well developed, and indeed focuses on discrimination against the vaccinated children from the existence of the exemptions. As I said, I think an

⁵¹ Alicia Novak, *The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges*, 7 U. PA. J. CONST. L. 1101, 1115-16 (2005).

⁵² Dr. Paul Offit expressed that view in his lectures in a course about Vaccines. See <http://www.medscape.com/viewarticle/768746>.

⁵³ See more on this in Part 4.b.

interpretation that sees a discrimination against the children left so exposed makes more sense, but it is hard to ground such an interpretation in *Brown*, given the (somewhat unclear) language the court used. To make a case for adopting an interpretation of the Constitution that prohibits exemptions, a scholar will have to make the legal argument better than the court, and to think through some hard questions: what is the justification of seeing this as discrimination, rather than a real distinction? How does this interpretation of the Fourteenth Amendment interact with parental rights and freedom of religion? How does it square with other decisions of the Supreme Court?

In her article, Novak offers a number of other reasons the religious exemption might be unconstitutional. Under the Establishment Clause, she cites the argument made by some scholars that religious exemption statutes advance religion.⁵⁴ She cites the *Lemon* test,⁵⁵ which requires that there be a secular purpose for the act, that the main effect of the act neither advances nor inhibits religion, and that the statute must not result in extensive entanglement between government and religion.⁵⁶ The *Lemon* test has never been interpreted to bar religious exemptions completely, but Novak makes a strong argument that exemptions requiring membership in an organized religion fail the second and third parts (following *Sherr*⁵⁷), and that laws requiring show of sincerity also violate the third prong because they require close scrutiny of an individual's religious beliefs.⁵⁸ She suggests that simple form submission – signing a form that says your opposition is

⁵⁴ Novak, *The Religious and Philosophical Exemption to State-Compelled Vaccination: Constitutional and Other Challenges* at 1111.

⁵⁵ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁵⁶ *Id.* at 612-13.

⁵⁷ *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 89 (E.D.N.Y. 1987).

⁵⁸ Novak, *The Religious and Philosophical Exemption to State-Compelled Vaccination: Constitutional and Other Challenges* at 1111-14.

religion – is most likely to withstand the *Lemon* test.⁵⁹ While only the first type of exemption – the organized religion exemption – has been struck down so far (see below), I think Novak has a point about the second type, and will return to that in Part IV below. But that, as Novak points out, makes the exemption even more vulnerable to abuse.

The United States does value freedom of religion. Some of the early immigrants were from religious minorities. Separation of church and state is embedded in the first amendment. And the United States regularly scores high on religiosity measures.⁶⁰ Therefore, there is a case to be made for respecting and protecting freedom of religion, at least to the extent of allowing states to provide some autonomy to religious minorities. It is not clear that any other court in the United States will be willing to go as far as forbidding a state from having religious exemptions.

The jurisprudence on the level of protection given religious practices in the face of general laws is somewhat confusing. On one hand, in 1972, the Supreme Court struck down conviction of Amish parents who would not send their children to school past eighth grade, emphasizing the importance of parental freedom to control the religious upbringing of their children. (The *Yoder* court, however, explicitly mentioned that state may regulate health and welfare, even if it means restricting religious freedoms).⁶¹ On the other hand, in 1990, the Court upheld the deprivation of unemployment benefits from Native Americans using peyote in religious rituals, ruling that it is Constitutional to apply

⁵⁹ *Id.* at 1114-15.

⁶⁰ Pew Research Center, “*Nones*” on the Rise: One-in-Five Adults Have No Religious Affiliation, PEW FORUM ON RELIGION & PUB. LIFE 14, 16 (Oct. 9, 2012) (the number of Americans who say religion is important in their lives is 58%, as compared to Britain at 17%, France at 13%, Germany at 21%, and Spain at 22%). KENNETH D. WALD & ALLISON CALHOUN-BROWN, RELIGION AND POLITICS IN THE UNITED STATES 11-16 (Rowman & Littlefield 2007).

⁶¹ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

general laws to religious minorities.⁶² The *Smith* court left *Yoder* as a precedent, though, and the relation between the two can be debated. One writer interprets *Yoder* as applying to a subcategory of situations where more than one constitutional right intersect, a “religious freedom plus” approach.⁶³ Lu would include limited protection of the freedom not to vaccinate in that category. That seems problematic; as mentioned, *Yoder* itself carved an exemption by saying that saying that states have “undoubted” power to promote “health, safety, and the general welfare.”⁶⁴ Further, as pointed out by Peters,⁶⁵ the court took pains to craft the opinion so narrowly that it is problematic to apply it to religious minorities that do not resemble the Amish’s unique situation.

In another set of cases, the Court struck down attempts by Congress to legislate a general higher standard of review for laws imposing burdens on religious minorities.⁶⁶ Later, however, the Court did uphold a statute imposing such a statute in relation to limits on the practice of religious freedom by prisoners.⁶⁷ It ended up allowing Congress limited scope to offer protection to religious interests.

The best conclusion is that at present, as it stands, the exemption jurisprudence is enabling, not mandating; it allows states to adopt a religious exemption, but it does not require them to do so. In doing this, the courts seem to be deferring to: the legislature’s balancing of freedom of religion, especially that of religious minorities; parental power to make medical decisions for their children; the interests of the child to be free of vaccine-preventable disease (since, in spite of the insistence of antivaccine activists, it is very,

⁶² *Employment Division, Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

⁶³ *Supra* note ##.

⁶⁴ 406 U.S. at 220.

⁶⁵ SHAWN FRANCIS PETERS, *THE YODER CASE: RELIGIOUS FREEDOM, EDUCATION, AND PARENTAL RIGHTS* 153–54 (2003).

⁶⁶ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁶⁷ *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005).

very clear that for every vaccine we provide children the risks of vaccinating are outweighed by the risk of not vaccinating, by an order of magnitude)⁶⁸; and the interest of the community in preventing outbreaks.⁶⁹

The tension between religious values and the risk of outbreaks is especially interesting in this context, because the legislature's willingness to allow religious exemptions probably depends, at least in part, on legislative assessment of whether this would increase the risk of outbreaks.

The initial New York exemption seems to have been adopted with Christian Scientists in mind.⁷⁰ I have not examined every state, but the fact that quite a few states initially limited the exemption to organized religions opposed to vaccination (an approach, as will be discussed soon, rejected by most courts) suggests they too had in mind small groups of religious minorities, and were not trying to accommodate those driven by fears about safety of vaccines. If that was indeed the goal, the jurisprudence surrounding exemptions, which limited the ability of states to narrowly provide for religious minorities, combined with evidence that there are those who take advantage of these exemptions for non-religious reasons, may, and probably should, lead legislatures to reexamine and reconsider whether these exemptions are appropriate.

⁶⁸ See *Comparison of the Effects of Diseases and the Side Effects of Vaccines*, [http://www.health.gov.au/internet/immunise/publishing.nsf/Content/D35CD18A3985212ECA2574E2000F9A4F/\\$File/quick_sideeffects.pdf](http://www.health.gov.au/internet/immunise/publishing.nsf/Content/D35CD18A3985212ECA2574E2000F9A4F/$File/quick_sideeffects.pdf); *Risk from Disease versus Risk from Vaccines*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/vaccines/vac-gen/6mishome.htm#risk>.

⁶⁹ For a similar discussion of the set of interests involved, see Ross D. Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*, 12 ANNALS HEALTH L. 277 (2003).

⁷⁰ COLGROVE, STATE OF IMMUNITY: THE POLITICS OF VACCINATION IN TWENTIETH-CENTURY AMERICA at 12.

As the number of exemptors grows, so does the risk of outbreaks.⁷¹ Legislatures willing to provide an exemption to small, unique religious sects, assuming, perhaps, those sects are small enough that herd immunity would not be compromised if their members were not vaccinated, may have been less willing to grant that exemption if they knew they would not be allowed to limit it. Of course, once the exemption is in place, it creates its own constituency and may be politically harder to remove.⁷² But harder to remove is not impossible to remove.

For the risk of outbreaks, the basic insight is that the decision not to vaccinate does not affect the unvaccinated child alone. It is not that the rights of the unvaccinated child are unimportant, but the argument about parental choice is stronger in relation to that child than it is in relation to the rest of the community. A parent has more freedom when her choices only affect the child than when her choices affect others.⁷³ While no vaccine is perfect, most childhood vaccines (with the exception of the influenza vaccine) provide very high rates of effectiveness, in the 70%-99% range.⁷⁴ And research has consistently shown that unvaccinated children contract vaccine-preventable diseases at higher rates (although not necessarily higher absolute numbers).⁷⁵ The unvaccinated child – at higher

⁷¹ Omer, et al., *Geographic Clustering of Nonmedical Exemptions to School Immunization Requirements and Associations With Geographic Clustering of Pertussis*; Saad B. Omer, et al., *Nonmedical Exemptions to School Immunization Requirements: Secular Trends and Association of State Policies With Pertussis Incidence*, 296 JAMA 1757 (2006).

⁷² For a similar problem in other contexts, see Paul Sabatier, *Social Movements and Regulatory Agencies: Toward a More Adequate – and Less Pessimistic – Theory of "Clientele Capture,"* 6 POL'Y SCI. 301 (1975). Diffuse majorities may not be able to make changes when those changes are opposed by concentrated minorities that benefit from them.

⁷³ Calandrillo, *supra* note ##; Alexandra M. Stewart, *Challenging Personal Belief Immunization Exemptions: Considering Legal Responses*, MICH. LAW REV. FIRST IMPRESSIONS (Jan. 19, 2009), <http://www.michiganlawreview.org/assets/fi/107/stewart.pdf>.

⁷⁴ *Risk from Disease versus Risk from Vaccines*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/vaccines/vac-gen/6mishome.htm>.

⁷⁵ Feikin et al., *supra* note e ##; Jason M. Glanz et al., *Parental Refusal of Pertussis Vaccination Is Associated with an Increased Risk of Pertussis Infection in Children*, 123 PEDIATRICS 1446 (2009); Stephen P. Teret & Jon S. Vernick, *Gambling with the Health of Others*, MICH. L. REV. FIRST IMPRESSIONS

risk of infection – is also at higher risk of transmitting the disease. The child may transmit the disease to those unimmunized (because they are too young, because they have medical conditions that are contraindications to vaccination, or for other reasons). She may also transmit the disease to the small number of children suffering vaccine failure.

This is not a theoretical possibility. In 2008, an unvaccinated child in San Diego caught measles and infected others, which caused several children to fall ill and an infant too young to vaccinate to be hospitalized.⁷⁶ An even more tragic case happened in Germany. An 11 year-old child left unvaccinated by parental choice was taken to the pediatrician. That child had measles, and infected six others in the doctor's office, including three babies too young to vaccinate. Two of them contracted a rare but horrendous complication of measles called subacute sclerosing panencephalitis (SSPE).⁷⁷ SSPE appears usually years after the measles, after the victim apparently recovers. It causes those that have it to deteriorate slowly, losing cognitive and motoric ability, becoming unable to talk, eat alone, or walk, and finally slipping into a coma and dying. There is no cure, although treatment may slow down the deterioration and death. This was the fate of young Natalie⁷⁸ and young Micha,⁷⁹ who contracted it as babies. For

(Jan. 15, 2009), <http://www.michiganlawreview.org/assets/fi/107/teretvernick.pdf>. To illustrate this, let's do a thought experiment. Imagine a population of 1000 children, maybe in a school, 950 of which – 95% – are vaccinated against measles and 50, or 5%, are not vaccinated. In a measles outbreak, 50% of the unvaccinated children contract measles – 25 children. Five percent of the vaccinated children contract it, or 48 (rounding up). More vaccinated children caught the disease, but your chances would be much better of avoiding it if you were vaccinated than if you were not, and the rates were much higher among the unvaccinated.

⁷⁶ David E. Sugerman et al., *Measles Outbreak in a Highly Vaccinated Population, San Diego, 2008: Role of the Intentionally Undervaccinated*, 125 PEDIATRICS 747 (2010).

⁷⁷ *Subacute sclerosing leukoencephalitis*, PubMed Health (Aug. 1, 2012), available at <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002392/>.

⁷⁸ *So predicable – so sad, Natalie dies of SSPE*, JUST THE VAX BLOG (Oct. 20, 2011), <http://justthevax.blogspot.co.uk/2011/10/so-predictable-so-sad-natalie-dies-of.html>. The video in the post shows the suffering Natalie and her family went through with the SSPE (the video is in German).

years, their families watched the children's slow decline, knowing there was no hope. Then, the children died.

Measles outbreaks in unvaccinated communities also demonstrate how non-vaccination can have impacts beyond the family.⁸⁰

We are lucky that vaccination rates have been reasonably high for a long time. Most vaccine-preventable diseases – or at least the scariest of them – are now rare. A ring of vaccinated individuals makes it harder for the diseases to reach the non-immune. So the chances of an unvaccinated child contracting one, while substantially higher than those of a vaccinated child, are not dramatically high, and the chances of transmitting it are also low. But that reality is dependent on continuing high rates of vaccination; if exemption rates rise, that may change.

To some degree, that is already happening. The most contagious diseases come back first. The United States has seen reemergence of measles, an unusually contagious disease, after a period in which cases averaged around 60 a year.⁸¹ While the number of cases is nowhere near the four million annual cases of the pre-vaccine era⁸² – 222 in 2011⁸³ and 159 by late August 2013⁸⁴ - the increase is concerning.⁸⁵ And measles is just

⁷⁹ *Micha is dead*, JUST THE VAX BLOG (June 13, 2013), <http://justthevax.blogspot.co.uk/2013/06/micha-is-dead.html>.

⁸⁰ See, e.g., Centers for Disease Control and Prevention, *Notes from the Field: Measles Outbreak Among Members of a Religious Community—Brooklyn, New York, March–June 2013*, 62 MORBIDITY & MORTALITY WKLY. REP. 752, 906, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6236a5.htm>; Centers for Disease Control and Prevention, *Notes from the Field: Measles Outbreak Associated with a Traveler Returning from India—North Carolina, April–May 2013*, 62 MORBIDITY & MORTALITY WKLY. REP. 753, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6236a6.htm>. These communities may have sincere religious opposition to vaccination; they are, however, brought as an example of the danger of concentration of unvaccinated individuals.

⁸¹ Centers for Disease Control and Prevention, *Measles—United States, 2011*, 61 MORBIDITY & MORTALITY WKLY. REP. 253 (2012) [hereinafter *Measles 2011*], available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6115a1.htm>.

⁸² Roush & Murphy, *supra* note ##; see table 1.

⁸³ *Measles 2011*, *supra* note 78.

the most contagious; nobody wants rates of diphtheria, HiB, or rubella to soar or polio to reappear in the United States. But if rates of vaccination drop low enough, that might happen. Increase in outbreaks may be one reason several states are currently reexamining their exemption law, and other states have somewhat tightened them.⁸⁶

The balancing of these interests by the states is complicated by the way the courts have interpreted existing exemption laws and the constitutional limitations on them.

II.B. Equal Protection and Religious Beliefs

Initial exemption laws often created exemptions for those belonging to an organized religion that prohibited vaccination.⁸⁷ This suggests that the legislatures had in mind Christian scientists and similar religions, rather than an exemption that will cover anyone. But from an early stage, plaintiffs requesting exemptions challenged the limit of the exemptions to organized religions, claiming that other types of religious beliefs should

⁸⁴ *Measles Outbreaks*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/measles/outbreaks.html> (last updated Jan. 24, 2014). The numbers were lower for 2012.

⁸⁵ I'm not addressing the increase in pertussis cases because while the unvaccinated are more at risk of pertussis. Jason M. Glanz, et al., *Parental Refusal of Pertussis Vaccination Is Associated With an Increased Risk of Pertussis Infection in Children*, 123 *VACCINES* 1446 (2009), available at <http://pediatrics.aappublications.org/content/123/6/1446.full>. While pockets of exemptions are at higher risks of outbreaks, the main reason for the increase seems to be a pertussis vaccine that is not as effective as scientists expected, with reasonable short-term immunity but fast waning long-term immunity. Dr. Saad B. Homer, et al., *Geographic Clustering of Nonmedical Exemptions to School Immunization Requirements and Associations With Geographic Clustering of Pertussis* 168 *AM. J. EPIDEMIOLOGY* 1389 (2008), available at <http://aje.oxfordjournals.org/content/168/12/1389.abstract>; Amer Imdad, et al., *Religious Exemptions for Immunization and Risk of Pertussis in New York State, 2000–2011*, *PEDIATRICS* (June 3, 2013), <http://pediatrics.aappublications.org/content/early/2013/05/29/peds.2012-3449.abstract>.

⁸⁶ Saad b. Omer et al *Legislative Challenges to School Immunization Mandates, 2009-2012* 311 *JAMA* 620 (2014).

⁸⁷ COLGROVE, *STATE OF IMMUNITY: THE POLITICS OF VACCINATION IN TWENTIETH-CENTURY AMERICA* at 182.

also be covered. The first claims were dismissed when the courts found that the real reason behind plaintiffs’ opposition to vaccination was not religion but safety concerns.⁸⁸

But in 1971, in a Massachusetts case, the court addressed head-on the constitutionality of a statute limiting exemption to “members of ‘a recognized church or religious denomination’”⁸⁹ when the plaintiff’s opposition to vaccines stemmed from sincere religious beliefs that were not part of an organized religion. The court found that the only inquiry it may make is whether the plaintiff’s religious beliefs are sincerely held. “If the beliefs be sincerely held they are entitled to the same protection as those more widely held by others.”⁹⁰ The court held that:

It is clear that the third paragraph of G.L. c. 76, s 15, extends preferred treatment to adherents and members ‘of a recognized church or religious denomination’ who object to vaccination on religious grounds. They enjoy the benefit of an exemption which is denied to other persons whose objections to vaccination are also grounded in religious belief. This preferred treatment of one group and discrimination against the other violates the First and Fourteenth Amendments of the United States Constitution, as well as art. 2 of the Declaration of Rights of the Massachusetts Constitution. ... A majority of the court hold [sic] therefore that the third paragraph of s.15 is unconstitutional and must be stricken.⁹¹

⁸⁸ See, e.g., *Matter of Elwell*, 55 Misc.2d 252, 259 (1967) (the court pointed out that the objection was not because of religion but because of “personal opinions, fears unsupported by any competent medical proof, and a purported exercise of their own consciences which would not interfere with their free exercise of the tenets of the Methodist Church”). See also *McCartney v. Austin*, 57 Misc.2d 525, 535 aff’d 31 A.D.2d 370 (the court found the plaintiff’s beliefs were actually based on a “personal moral code or philosophy not based on or by reason of religious training, belief or conviction”).

⁸⁹ *Dalli v. Board of Ed.*, 358 Mass. 753, 754 (1971).

⁹⁰ *Id.* at 758.

⁹¹ *Id.* at 759 (citation omitted).

The court struck down the exemption clause as discriminatory. It then went ahead and upheld the immunization requirement itself as constitutional without an exemption, finding that the plaintiff must comply and immunize her daughter if she wants her daughter to attend school – no doubt to the chagrin of the plaintiff.⁹²

Cases in other states mostly followed the same approach,⁹³ if a state wanted to offer a religious exemption, it cannot limit it to organized religion, because that discriminates in favor of certain religious beliefs and against others.

The one exception was Kentucky. A federal district court upheld as constitutional a statute that only exempted from vaccination “members of a nationally recognized and established church or religious denomination, the teachings of which are opposed to medical immunization against disease.”⁹⁴ However, shortly after the decision, the legislature amended the statute to remove that qualification, establishing a broad religious exemption, and we do not know if even that decision would have been upheld once other courts came down the other way.

The current jurisprudence, therefore, requires that if a state wants to provide religious exemptions, they must apply them to anyone who has a sincere religious belief opposed to vaccination.

II.C. Policing Religious Exemptions: A Real Challenge

States’ choice of organized religions opposing vaccination as a test of sincerity is understandable. While focusing on organized religions’ position does discriminate

⁹² *Id.*

⁹³ *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 87-88 (E.D.N.Y. 1987); *Bowden v. Iona Grammar Sch.*, 726 N.Y.S.2d 685, 686-87 (App. Div. 2001); *In re LePage v. State Dep’t of Health*, 18 P.3d 1177, 1180 (Wyo. 2001).

⁹⁴ *Kleid v. Board of Ed. of Fulton*, 406 F. Supp. 902, 904 (1976).

against those who are not members but still have sincere belief, it is also relatively easy to verify both an established religion's positions – they will probably be public – and membership. This method is not foolproof - religions have been created for the purpose of providing exemptions. For example, the Congregation of Universal Wisdom,⁹⁵ created by a chiropractor, whose members are “primarily parents who are seeking exemptions to vaccination requirements”.⁹⁶ Part 3.d below also provides additional examples of spurious religions and also of people joining religions just to claim an exemption. But while a requirement of organized religion can be gotten around, it is easier to verify than a focus on sincere beliefs, where at least at times all you would have is the exemption-requestor's word.

Courts' reluctance to police religious beliefs is understandable. There is something immensely troubling in the idea of a state determining which religious beliefs are valid and which are not. The first amendment was created exactly to prevent the state from determining whose religion is permissible and whose is not. Freedom of conscience and religion means that the state may not tell me if my beliefs are legitimate. Bluntly put, it is none of the state's business what I believe, and it does not get to tell me that my beliefs are not worthy.

But the concern about a state having the ability to judge religious beliefs and determine which are legitimate is in tension with the ability of a state's executive to limit a religious exemption to those who are really acting for religious reasons. It is hard to draw the line between evaluating the worth of a belief and evaluating its sincerity, and

⁹⁵ *Home Page*, CONGREGATION OF UNIVERSAL WISDOM, <http://www.cuwisdom.org>.

⁹⁶ Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children* at 357.

courts were understandably careful. That said, if a health department is to limit the religious exemption to real cases of beliefs, it needs tools to do so. Current jurisprudence does not offer very good tools. Removing the ability to limit the exemption to organized religion is one example of this tension between religious freedom and enforcement. There are many other tensions.

As detailed below, most religions either fail to prohibit vaccinations or explicitly support them. This would naturally raise the suspicion that a member of such a religion who is expressing opposition to vaccination on religious grounds is lying. But several cases rejected such a common sense interpretation, and again, with reason: these courts' unwillingness to allow state administration to determine what is legitimate for a member of a religion to believe is another manifestation of their disinclination to allow states to determine which beliefs are legitimate. But by taking this approach, courts are depriving state administrations from another way to assess sincerity.

For example, in *Berg v. Glen Cove*⁹⁷ the court upheld an exemption request by Jewish parents although most theologians agree that Judaism favors immunization (see below) and a rabbi submitted an opinion to the effect that “there is nothing in the teaching of the Jewish religion that would proscribe immunization for children.”⁹⁸ The court accepted the parents' own idea of Judaism, and because it saw their claims as sincere, upheld their request for an exemption.⁹⁹ A similar result was reached in *Shmuel v. Rivka*.¹⁰⁰

⁹⁷ *Berg v. Glen Cove City Sch. Dist.*, 853 F. Supp. 651 (E.D.N.Y. 1994) (an older case, *McCartney v. Austin*, 293 N.Y.S.2d 188, 200 (1968) denied exemption to Roman Catholic parents because the religion did not oppose immunization).

⁹⁸ *Id.* at 655.

⁹⁹ *Id.*

¹⁰⁰ 800 N.Y.S.2d 357 (2005).

I have not seen any other cases in this vein in other jurisdictions. New York’s religious exemption is known as one of the hardest to get, and New York is one of the few states that requires a show of sincere religious beliefs.¹⁰¹ Quite a few other states do not require that. If a state statute does not require show of sincerity, courts have ruled that administrative agencies may not demand proof of sincerity.¹⁰² Again, this makes enforcing the statute difficult.

In short, in many states officials face real challenges in limiting the religious exemption to people whose reasons for not vaccinating are really religious. In quite a few states this is impossible to do (if officials may not inquire after sincerity). The courts’ reluctance to allow government to police religious beliefs leaves health department with very limited tools in policing the exemptions and preventing abuse.

III. It is Not Usually About Religion:

The problems of enforcing religious exemptions are especially serious since there are multiple indications that the majority of parents who take an exemption do not do so for religious reasons. This section uses three types of evidence to support the argument: what we know about reasons given by those who do not vaccinate from studies, buttressed with a small number of examples from cases; what religions actually say about vaccines; and what some non-vaccinating parents themselves tell their social network.

¹⁰¹ Other such states include North Carolina and Maryland. See Alan G. Phillips, *THE AUTHORITATIVE GUIDE TO VACCINE LEGAL EXEMPTIONS* 41, 50 (2013).

¹⁰² *LePage v. State Dep’t of Health*, 18 P.3d 1177, 1180 (Wyo. 2001) (“[T]he statutory language lacks any mention of an inquiry by the state into the sincerity of religious beliefs. As a result, the Department of Health exceeded its legislative authority when it conducted a further inquiry into the sincerity of Mrs. LePage’s religious beliefs.”). For a detailed analysis of this, see ##, at 289–92. See also *Department of Health v. Curry*, 722 So. 2d 874 (Fla. App. 1 Dist. 1998).

III.a Reasons for Not Vaccinating: The Literature

Studies examining why parents do not vaccinate – as well as studies looking at Internet content on antivaccine sites – highlight a number of safety concerns and mistrust of government, doctors, pharmaceutical companies or all of the above – but not religious concerns. Safety concerns figure prominently.¹⁰³ Non-vaccinating parents also doubt the effectiveness of vaccines and see vaccine preventable diseases as mild.¹⁰⁴ They mistrust health professionals and government sources.¹⁰⁵ A recent survey of those taking advantage of exemptions in New Mexico also demonstrated that their main concerns were not religion-based, even though the state provides only a religious and a medical exemption, so these parents were using one of those.¹⁰⁶

In her excellent article on the topic, Grabenstein points out that even among religious communities concerns about vaccines are often safety or social concerns rather than theological ones.¹⁰⁷

Similar themes can be seen on antivaccination websites.¹⁰⁸

¹⁰³ Allison Kennedy et al., *Vaccine Attitudes, Concerns, and Information Sources Reported by Parents of Young Children: Results from the 2009 HealthStyles Survey*, 127 *PEDIATRICS* S92 (2011); Allison M. Kennedy et al., *Vaccine Beliefs of Parents Who Oppose Compulsory Vaccination*, 120 *PUB. HEALTH REP.* 252 (2005); Katrina F. Brown et al., *Factors Underlying Parental Decisions about Combination Childhood Vaccinations Including MMR: A Systematic Review*, 28 *VACCINE* 4235 (2010).

¹⁰⁴ Brown, et al., *Factors underlying parental decisions about combination childhood vaccinations including MMR: A systematic review*; Kennedy, et al., *Vaccine Attitudes, Concerns, and Information Sources Reported by Parents of Young Children: Results From the 2009 HealthStyles Survey*; Kennedy, et al., *Vaccine Beliefs of Parents Who Oppose Compulsory Vaccination*.

¹⁰⁵ *Id.* See also E. Allison Hagood & Stacy Mintzer Herlihy, *Addressing heterogeneous parental concerns about vaccination with a multiple-source model: A parent and educator perspective*, 9 *HUMAN VACCINES & IMMUNOTHERAPEUTICS*, available at http://www.landesbioscience.com/journals/vaccines/article/24888/?show_full_text=true(2013).

¹⁰⁶ *Department of Health Announces Results of Vaccine Exemption Survey*, NEW MEXICO DEP'T OF HEALTH (Nov. 18, 2013), <http://www.health.state.nm.us/CommunicationsOffice/2013%20News%20Releases/NMDOH-PressRelease-20131118-VaccineExemptionSurvey-EN.pdf>.

¹⁰⁷ JD Grabenstein, *What the world's religions teach, applied to vaccines and immune globulins*, 31 *VACCINE* 2011 (2013).

Closer examination of two claims for religious exemptions can provide a close up picture of how this works. In Mary Check’s story, publicized on the web through a fundraising site created by her mother¹⁰⁹ and a petition her mother created through change.org,¹¹⁰ Mary Check’s mother talks about Mary “crying and nothing would console her” after being vaccinated, and suggests that a variety of health problems Mary suffers are related to vaccines.¹¹¹ The mother applied for a medical exemption, but unsure she will get it, she also applied for a religious one. Mary’s mother emphasizes her strong religious conviction and appeal to God, but without doubting her sincerity, it is fairly clear that her reasons for not wanting to vaccinate Mary are that she believes vaccines have harmed and will harm Mary. That is what the court examining the issue concluded.¹¹²

Dina Check’s explanation of the religious aspects of her decision is:

I am requesting this religious exemption because it is my strong belief that all vaccines are made with toxic chemicals that are injected into the bloodstream by vaccination. According to the FDA all vaccines are made with foreign proteins (viruses & bacteria's), and some vaccines are even made with genetically engineered viral and bacterial materials.... I believe that man is made in God's image and the injection of toxic chemicals and foreign proteins into the bloodstream is a violation of

¹⁰⁸ Richard K. Zimmerman, et al., *Vaccine Criticism on the World Wide Web*, 7 J. MEDICAL INTERNET RESEARCH e17 (2005); Anna Kata, *A Postmodern Pandora's box: Antivaccination misinformation on the Internet*, 28 VACCINE 1709 (2010) (also mentions moral reasons, but they figure alongside the other reasons).

¹⁰⁹ *Meet Mary*, SUPPORT MARY’S RIGHTS, <http://www.supportmarysrights.com/meet-mary.html>.

¹¹⁰ *The Legislature of the State of New York: Change the law in NYS allowing for exemptions to vaccines for any reasons*, CHANGE.ORG, <http://www.change.org/petitions/the-legislature-of-the-state-of-new-york-change-the-law-in-nys-allowing-for-exemptions-to-vaccines-for-any-reasons-2>.

¹¹¹ *Letter to the Public*, SUPPORT MARY’S RIGHTS, <http://www.supportmarysrights.com/letter-to-the-public.html>.

¹¹² Check *ex rel.* MC v. New York City Dept. of Educ. E.D. N.Y., 2013. Slip Copy, 2013 WL 2181045.

God's directive to keep the body, (which is to be treated as a temple),
holy and free from impurities....

This reflects common arguments among antivaccination activists (and is, as is common among such groups, inaccurate in several ways: vaccines are not injected into the blood stream, the substances in them are found in nature, and the amounts of ingredients is too small to be toxic).

Explaining how she developed her views on vaccination, Dina – Mary's mother – explained:

Q: When did you adopt your religious views on vaccination?

A: When my daughter was an infant.

Q: Was there something that occurred that prompted—

A: Well, first of all, dealing with her situation, I—it did. I should say, yes. Because dealing with her as a child, having her be so delicate to everything that we did or g[ave] her as far as formula, food, anything she would have a reaction to.... After she had her first shot, she had chronic diarrhea, vomiting, screaming uncontrollably.... I was sick. I knew I—I had a very bad feeling then, but I was not sure. I then would go and reach for God and ask [H]im for the answers and what am I doing, am I doing the proper thing. I was reaching for [H]is guidance.

...

The court quoted Dina as saying:

Plaintiff testified that she believes vaccinations pose a threat to her daughter's physical safety, saying that any immunization “could hurt my daughter. It could kill her. It could put her in anaphylactic shock. It

could cause any number of things.” ... She also doubts that vaccines are effective....

Unsurprisingly, the court rejected Dina’s claim that her opposition to vaccines was religious. The court concluded that

in light of Plaintiff’s medical concerns, her refusal to vaccinate her child is based on her belief that vaccines can, and indeed have, caused harm to her child. As succinctly stated in the R & R, “Plaintiff’s resolve to protect her child does not constitute a religious belief.

...

[I]n light of Plaintiff’s extensive testimony emphasizing the malignant effects that she believes past vaccinations have had on her daughter, the harmful composition of the vaccinations, and her belief that further vaccinations would physically endanger her daughter, the court concludes only that Plaintiff’s aversion to immunization is here based on her conviction that vaccines pose a severe medical risk to her child’s welfare. The court in no way means to diminish or minimize Plaintiff’s fear of immunization. That fear, however, is not a proper basis for a religious exemption.¹¹³

I do not know if Mary’s mother has a valid medical claim or not, and it is not relevant for the purpose of this analysis: I think the court was correct to say that Mary’s mother’s reasons for not wanting to vaccinate are primarily health concern. Not religious reasons. Her deep religious convictions may help strengthen her resolve and hold on in her fight to get her daughter, unvaccinated, into the public schools; but they are not at the bottom of her opposition to vaccines.

¹¹³ *Id.*

In *Farina v. Board of Education*,¹¹⁴ Mr. and Mrs. Farina submitted forms obtained from the Internet to support their request for a religious exemption. Here too, the court highlighted that the main issue was not religion:

Mrs. Farina's repeated statements that her older son, who had been immunized before the age of eight months, “regressed in speech and behavior” during the summer of 1997 raises the likelihood that the Farinas' concerns are for their child's physical rather than his spiritual health.¹¹⁵

III.B Major Religions Support Vaccinations

While the courts in the United States interpret religion broadly, focusing not on organized religion but on the existence of a personal religious belief, positions of organized religion can be instructive in assessing the credibility of the claims of religion objection. Simply put, if a person’s religion does not object – or even supports – vaccination, that person’s claim to a religious objection to vaccination can be regarded somewhat suspiciously. This section will demonstrate that, some small radical sects aside, no major religion actually prohibits vaccines, and that several religions actively recommend or in the view of at least some scholars actually require that parents vaccinate their children against vaccine preventable diseases. Where there are religious scholars who speak against vaccines, it is often on the grounds of safety concerns, not religious concerns, and there, too, it is not a prohibition, but permission to avoid.¹¹⁶

See also Appendix A.

¹¹⁴ *Farina v. Bd. of Educ. of N.Y.*, 116 F. Supp. 2d 503 (S.D.N.Y. 2000).

¹¹⁵ *Id.* at 510-11.

¹¹⁶ For another comprehensive, in depth discussion of this, see Grabenstein, *What the world's religions teach, applied to vaccines and immune globulins*.

Judaism:

Starting with my own religion, while there is no one authoritative voice in Judaism, all scholarly opinions I saw on conclude that the religion either strongly recommends vaccines or, in the extreme case, requires them. The basis for this approach, explains Rabbi Yitzchak Breitowitz from Yeshivas Ohr Somayach, are two religious principles.¹¹⁷ First, a Jew is prohibited from placing his health or life in unreasonable danger, because your life are not your own, they belong to God.¹¹⁸ Second, a Jew is required to not expose others to danger, and in fact, to take positive steps to rescue others from peril.¹¹⁹ From these principles, the Rabbi points to two possible approaches. According to Rabbi Auerbach, he says, as long as there is 90% or higher compliance with vaccination, providing herd immunity protection to the unvaccinated child and the larger community, parents would not have an halachic obligation to vaccinate, although vaccinating is highly desirable and recommended (although he may support excluding unvaccinated children from school because they pose a risk to others).¹²⁰ According to Rabbi Yosef Shalom Elyashiv, on the other hand, as long as society supports vaccinating, not vaccinating is negligent even if the risk of an outbreak is small.¹²¹ Rabbi Breitowitz quotes Rabbi Tatz:

“failure to immunize would amount to negligence...refusing childhood immunizations on the basis of unsubstantiated fears of vaccine side-effects is irresponsible...the danger of precipitating epidemics of measles, poliomyelitis and other diseases with potentially devastating complications is far more real than the dangers attributed to vaccines on the basis of anecdotal claims. Until objective evidence to the contrary

¹¹⁷ Rabbi Yitzchak Breitowitz, *Vaccinations and Halacha*, <http://new.ohr.edu/5503/print>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

accrues, the halachically correct approach is to do what is normal.”
(Tatz, *Dangerous Disease and Dangerous Therapy*, p.48).¹²²

Echoing this view, several scholars weighed in in response to the question of whether immunizations of children who will attend school is obligatory or optional.¹²³

All concluded it was justified to require and that immunizations are appropriate.

Says Rabbi Milgram:

To summarize for those who wish a quick answer, found the school to absolutely have such a right and an obligation [to require that children be immunized before attending. D.R.] to a) the law of the land (state requirements), b) the principles of the mitzvah known as pikuach nefesh, saving lives, as many as possible....

Judaism, across the board, within every denomination, aspires to life for those born into this world. In Deuteronomy (Devarim) 4:15 we learn: V'nishmartem m'ode l'nafshoteikhem, “Greatly guard your souls,” which has long been read in Jewish bioethics as a duty to protect ourselves from disease. Reb Nachman of Breslov, who died in 1810 of tuberculosis long before treatment and a vaccine had been identified in the second half of the twentieth century, wrote: “One must be very very careful about the health of children...One must inoculate every baby against smallpox before one-fourth (3 months) of the year, because if not, it is like spilling blood (murder).” (Kuntres Hanhagot Yesharot)¹²⁴ [he adds more sources].

Rabbi Elliot Kaplowitz said:

The overwhelming consensus in the medical community is that immunization is a necessary and simple step to prevent the spread of

¹²² *Id.*

¹²³ Rabbi Dr. Goldie Milgram, et al., *Regarding immunizations for children who will be attending day (Jewish or parochial) schools: what is the Jewish view on whether this is obligatory or optional? What Jewish values or ethics are involved in this question?*, JEWISH VALUES ONLINE, <http://www.jewishvaluesonline.org/566> (last visited Sept. 15, 2013).

¹²⁴ *Id.*

disease. Certainly if one takes the approach that there is a positive commandment to proactively safeguard one's health, it seems to me that immunization is a necessary measure. In the context of this debate one also hears the argument that it is selfish to not immunize because of the potential threat this poses to others. An analogy may be built to discussions in the Talmud of one who places a hazardous item in the public thoroughfare. Such a person is negligent for any damages caused.

As a final thought, there are those who undoubtedly will refuse to immunize their children. I am reminded of the Gemara's discussion of the verse from Psalms 116:6 The Lord protects the foolish/simple.¹²⁵

From Conservative Judaism, Rabbi Noam Raucher says:

The Jewish view regarding immunizations for children at either Jewish day or parochial schools is one of obligation on the part of the parent to do so. The Jewish tradition considers fulfilling this obligation under and number of precepts which pertain to: The health and safety of the child, the health and safety of the community at large, the need for preventative health care and abiding by the law of the land. (All extensively addressed in Rabbi Joseph Prouser's *teshuvah*, Jewish legal ruling, on this matter for the Conservative movement's Committee on Jewish Law and Standards).¹²⁶

A Reform answer is provided by Rabbi Mark Washofsky:

[from the] Responsa Committee of the Central Conference of American Rabbis (CCAR), the association of Reform Rabbis. In 1999, the committee was asked about a congregation's policy to require certain immunizations before children would be allowed to attend the congregational school. Some parents, who regarded immunization as excessively risky, refused to have their children immunized and

¹²⁵ *Id.*

¹²⁶ *Id.*

challenged the policy. The congregation wanted to know whether its policy was “correct and justifiable according to Jewish tradition.”

In its responsum (opinion; teshuvah), the committee answered “yes.” In arguing for its conclusion, the responsum makes several points. First, Jewish law defines the practice of medicine as a mitzvah, an act that enables us to fulfill the obligation of pikuach nefesh (the preservation of human life), which our tradition regards as perhaps the greatest mitzvah of all. Second, immunization has become accepted the world over as an integral and vital element in the practice of medicine. As with any other medical procedure, there are indeed risks involved with immunization. But the responsum found that: a) these risks are far outweighed by the benefits that immunization provides; b) the scientific community has established effective programs to supervise vaccine safety; and c) by refusing to immunize their children, parents endanger not only the health of those children but of other members of the community who remain susceptible to the disease even after they have been immunized. For all these reasons, the responsum concluded that a congregation or school is well within its rights to adopt a compulsory immunization policy.¹²⁷

Even the presence of pork gelatin in some vaccines did not lead scholars to conclude otherwise. Public Health England asked the question, and say:

Rabbi Abraham Adler from the Kashrus and Medicines Information Service, said:

It should be noted that according to Jewish laws, there is no problem with porcine or other animal derived ingredients in non-oral products.

¹²⁷ *Id.*

This includes vaccines, including those administered via the nose, injections, suppositories, creams and ointments.¹²⁸

When a specific Rabbi voiced opposition to vaccination,¹²⁹ he based his opposition not on halachic principles, but on safety concerns based on his acceptance of antivaccine claims, including the debunked claim that vaccines cause autism.¹³⁰ I have found no Halachic analysis that opposed vaccines.

Islam:

Some fundamentalist Muslim organizations in some regions have denounced vaccination efforts as American plots to sterilize Muslim populations and as efforts to avert the will of Allah.¹³¹¹³² There are also Muslim organizations who oppose vaccines alleging that they disrupt the order of Allah's creation in that they are money-making plots for drug companies of doubtful benefit (general antivaccine theory through the lense of Islam).¹³³¹³⁴ However, other Islamic sources have indicated that immunizations are consistent with Islamic principles.

¹²⁸ *Vaccines and gelatin: PHE response*, GOV.UK, <https://www.gov.uk/government/news/vaccines-and-gelatine-phe-response>. See also *Religious Approval for Porcine-containing Vaccines*, INSTITUTE FOR VACCINE SAFETY (July 21, 2003), <http://www.vaccinesafety.edu/Porcine-vaccineapproval.htm>; Kashrut Authority of Australia & NZ, FACEBOOK, https://www.facebook.com/groups/221124927937142/permalink/516889978360634/?comment_id=524087324307566&offset=0&total_comments=123 (discussing an Australian point of view by Rabbi Gutnick).

¹²⁹ Rabbi William Handler, *The Measles Scare and CDC Politics*, THE JEWISH PRESS, <http://www.jewishpress.com/indepth/the-measles-scare-and-cdc-politics/2013/07/10/> (last updated July 11, 2013).

¹³⁰ *Id.* For an analysis of the problematic nature of that claim, see:

¹³¹ Maryam Yahya, Institute of Development Studies, *Working Paper 261, Polio Vaccines – Difficult to Swallow, The Story of a Controversy in Northern Nigeria 9-10*, available at <http://www.ids.ac.uk/files/Wp261.pdf>.

¹³² Haider J. Warraich, *Religious Opposition to Polio Vaccination*, 15 EMERGING INFECTIOUS DISEASES 978 (2009), available at http://wwwnc.cdc.gov/eid/article/15/6/09-0087_article.htm.

¹³³ Dr. Aisha Hamdan, *Immunizations- Harmful to Your Child or Not?*, Mission Islam, <http://www.missionislam.com/health/immunizationhurtornot.htm>.

¹³⁴ *Farrakhan Suspicious of H1N1 Vaccine*, UNITED PRESS INTERNATIONAL, INC. (Oct. 19, 2009), http://www.upi.com/Top_News/US/2009/10/19/Farrakhan-suspicious-of-H1N1-vaccine/UPI-63931256011008/.

For example, in one Fatwa (religious opinion on a matter of Islamic Law by an Islamic scholar) Shayh Bin Baaz said:

because the Prophet (peace and blessings of Allaah be upon him) said, according to the saheeh hadeeth, “Whoever eats seven dates of Madeenah in the morning will not be harmed by witchcraft or poison.” This is a kind of warding off a problem before it happens. So if there is the fear of sickness and a person is vaccinated against an infection that is present in the land or elsewhere, there is nothing wrong with that, because it is a kind of protection.¹³⁵

Similarly, a fatwa by the Islamic Fiqh Academy says that:

Prevention of disease through vaccination is not a negation of trust in Allah....Indeed, real trust in Allah cannot be achieved except by embracing the apparent causes which Allah has designed, by destiny or by law, as requirements to produce effects. Thus, not giving vaccination could be a prohibition if it causes harm.¹³⁶

And Dr. Hatem Al-Hajj, Dean of Shari’ah Academy of America, said:

As for the use of vaccines in general, the late Mufti of Saudi Arabia Sheikh Abdul-Aziz Ibn Baz said, "There is nothing wrong with giving medicine to ward off a feared disease, because the Prophet (peace and blessings be upon him) said, '**Whoever eats seven dates of Medina in the morning will not be harmed by witchcraft or poison**'" (Al-Bukhari).

¹³⁵ Shayh Bin Baaz (rahimahullah), Fataawa al-Lajnah al-Daa’imah, *Ruling on Giving Treatment Before Sickness Occurs*, available at <http://islamicarticles.wordpress.com/medicine/>.

¹³⁶ *Statement from the International Islamic Fiqh Academy to Encourage Vaccination Against Polio*, POLIO COMMUNICATION (Aug. 9, 2009), <http://www.comminit.com/?q=polio/node/303223>.

In fact, the Islamic Fiqh Academy of the Organization of the Islamic Conference (OIC) considered vaccines important enough for public safety that they did not require the patient's permission for vaccination (especially in such cases as epidemics). OIC decision no. 67 (7/5) stipulated, "A guardian is entitled to obligate patients to have medical treatment in some cases, such as if they suffer an infectious disease or in the case of preventive vaccination."¹³⁷

Most recently, a group of Muslim scholars from several Islamic states held a conference on how to protect Islamic children from the poliovirus, and concluded that vaccinating children is a religious obligation of Muslim parents.¹³⁸

Muslim scholars also addressed the issue of pork gelatin in some vaccines and concluded it does not prevent vaccination. In 1995, The Islamic Organization for Medical Sciences convened a seminar in Kuwait on the topic of "The Judicially Prohibited and Impure Substances in Foodstuff and Drugs". The World Health Organization reports on the conclusions thus:

The seminar issued a number of recommendations, included in the attached statement, stipulating that 'Transformation which means the conversion of a substance into another substance, different in characteristics, changes substances that are judicially impure . . . into pure substances, and changes substances that are prohibited into lawful and permissible substances'."

¹³⁷ *Doubts About Vaccination- Fiqh- counsels*, ONISLAM.NET (Feb. 20, 2011), <http://www.onislam.net/english/ask-the-scholar/fiqh/451044-vaccines-and-the-dangerous-ingredients-therein.html>.

¹³⁸ Tahir Khan, *Polio Eradication: Muslim Scholars Deny Polio Vaccine Rumours*, THE EXPRESS TRIBUNE (March 10, 2013), available at: <http://tribune.com.pk/story/518534/polio-eradication-muslim-scholars-deny-polio-vaccine-rumours/> (last visited Sept. 19, 2013).

Consequently, the scholars determined that the transformation of pork products into gelatin alters them sufficiently to make it permissible for observant Muslims to receive vaccines containing pork gelatin and to take medicine packaged in gelatin capsules.¹³⁹

Dr. Hatem Al-Hajj mentioned above said:

As for impure additives, if any, they are too insignificant to be considered, and they are often processed into completely different substance. The ruling adopted by majority of contemporary Muslim scholars, and supported by a decision of the Islamic Fiqh Academy, is to avoid impurities such as gelatin in medicines unless there is no alternative to a particular impurity-containing medicine, in which case it may be consumed (that does not include unconsumed wine specifically).¹⁴⁰

Christianity:

It is impossible to cover all sub-divisions of Christianity, so this section only addresses some of the larger groups.

Catholicism:

The focus of discussion in Catholic sources was on whether it is permissible for parents to vaccinate children with vaccines in which the viruses were grown using cell lines derived from abortion. Speaking in this context, the Catholic Church made a strong statement in support of vaccination, as protecting the public health, the children, and others. The Pontifical Academy for Life discussed the question in 2005, and issued a

¹³⁹ Hussein A. Gazeiry, *Letter Reporting On Islamic Legal Scholars' Verdict on the Medicinal Use Of Gelatin Derived From Pork Products* (July 17, 2001), REGIONAL OFFICE OF THE WORLD HEALTH ORGANIZATION (WHO) FOR THE EASTERN MEDITERRANEAN, *available at* <http://www.vaccinesafety.edu/Porcine-vaccineapproval.htm>. Also available in original form at <http://www.immunize.org/concerns/porcine.pdf>.

¹⁴⁰ *Doubts About Vaccination- Fiqh- counsels*, ONISLAM.NET (Feb. 20, 2011), <http://www.onislam.net/english/ask-the-scholar/fiqh/451044-vaccines-and-the-dangerous-ingredients-therein.html>.

thorough document concluding that if an alternative product is accessible and just as effective parents should use that product – but if there is no such alternative, parents may use the vaccines derived from the cell line, and in fact, should, to prevent harm to their own children and others, especially pregnant women.¹⁴¹ In fact, footnote 15 of the opinion explained the moral obligation parents have to vaccinate against rubella:

This is particularly true in the case of vaccination against German measles, because of the danger of Congenital Rubella Syndrome. This could occur, causing grave congenital malformations in the foetus, when a pregnant woman enters into contact, even if it is brief, with children who have not been immunized and are carriers of the virus. In this case, the parents who did not accept the vaccination of their own children become responsible for the malformations in question, and for the subsequent abortion of foetuses, when they have been discovered to be malformed.¹⁴²

In other words, if a family decided not to vaccinate and a child infected a pregnant woman in rubella, the parents who chose not to vaccinate are responsible for harm to the fetus.

Methodists:

The United Methodist Church expressed its opposition to mercury-containing vaccines and urged removal of the preservative thimerosal from vaccines.¹⁴³ In spite of its concern on the topic, however, the UMC did not recommend avoiding vaccines,

¹⁴¹ Pontifical Academy for Life, *Moral Reflections On Vaccines Prepared From Cells Derived from Aborted Human Foetuses*, 6 NAT'L CATH. BIOETHICS Q. 541 (2006), available at <http://www.nbccenter.org/Document.Doc?id=7> (last visited Sept. 26, 2013). See also Rev. Tadeusz Pacholczyk, Ph.D., *The Morality of Vaccinating our Children*, NATIONAL CATHOLIC BIOETHICS CENTER, <http://www.nbccenter.org/page.aspx?pid=251>.

¹⁴² Pontifical Academy for Life, MORAL REFLECTIONS ON VACCINES PREPARED FROM CELLS DERIVED FROM ABORTED HUMAN FETUSES at n15.

¹⁴³ United Methodist Church, *Protecting Children from Mercury-Containing Drugs* (2008), available at <http://www.umc.org/site/apps/nlnet/content2.aspx?c=1wL4KnN1LtH&b=4951419&ct=6869465>.

instead recommending: “until mercury is banned from medicine, the medical missions, hospitals, clinics and ministries of The United Methodist Church strongly encourage use of mercury-free vaccines over mercury-containing ones.” So even when advocating for a change, and expressing concern about part, the church is not recommending avoidance of vaccines.

As a side issue, thimerosal has been removed from childhood vaccines in 2001, with the exception of multi-dose flu vaccines, and has never been connected to harm.¹⁴⁴

Lutherans:

The Evangelical Lutheran Church in America has expressed its support of vaccination at different times in several different contexts. For example, in a position paper on death in 1982, the church said:

“Today it is commonplace to speak of the triumphs of modern medicine—achievements such as open heart surgery and organ transplants, dialysis machines that substitute for the kidneys, pacemakers that regulate the beating of the heart, and vaccines that have made once-dreaded diseases almost forgotten words. Each of these discoveries has saved countless lives and relieved much suffering.”¹⁴⁵

The church engages in numerous efforts to provide vaccines to those who need them, demonstrating in action its support of immunization. For example, one of its donations options is a vaccination option:

¹⁴⁴ <http://www.chop.edu/service/vaccine-education-center/vaccine-safety/vaccine-ingredients/thimerosal.html>.

¹⁴⁵ <http://www.elca.org/Who-We-Are/History/ELCA-Archives/Archival-Documents/Predecessor-Body-Statements/Lutheran-Church-in-America/Death-and-Dying.aspx>

“It is estimated that more than 5,000 children and adults die each day from diseases that could be prevented by vaccinations. Immunizing a child against preventable diseases like polio, tetanus, diphtheria, pertussis and measles will help him or her live a long, healthy life.”¹⁴⁶

A quick Google search reveals any number of Lutheran Schools’ vaccination requirements¹⁴⁷, as well as Lutheran churches offering low cost vaccination clinics¹⁴⁸.

Mormons – official name: Latter Day Saints (LDS):

Since at least 1978, the LDS has been adamantly pro-vaccine, as indicated from this quote from the First Presidency, ““We urge members of The Church of Jesus Christ of Latter-day Saints to protect their own children through immunization. Then they may wish to join other public-spirited citizens in efforts to eradicate ignorance and apathy that have caused the disturbingly low levels of childhood immunization.”¹⁴⁹ Recently, LDS has made immunization an official initiative, joining other humanitarian initiatives such as clean water and food production as a focus for LDS volunteer efforts.¹⁵⁰

Episcopalians:

¹⁴⁶ *Vaccinations for a Child*, EVANGELICAL LUTHERAN CHURCH IN AMERICA, https://community.elca.org/GoodGifts-Health-care?&nccsm=21&_nccspID=1059.

¹⁴⁷ <http://www.plu.edu/health-center/new-students/immunizations/home.php>, <http://www.rcls.net/wpweb/flu-vaccine-faq/>.

¹⁴⁸ <http://www.concordialm.org/news/press-room/2-uncategorised/98-clinic-at-oktoberfest>, <http://www.lolchurch.net/blood-drive-and-flu-shot-clinic/>.

¹⁴⁹ *Immunize Children, Leaders Urge*, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (July 1978), available at <http://www.lds.org/liahona/1978/07/immunize-children-leaders-urge?lang=eng>.

¹⁵⁰ Heather Whittle Wrigley, *Church Makes Immunizations an Official Initiative, Provides Social Mobilization, Church News and Events* (June 13, 2012), <http://www.lds.org/church/news/church-makes-immunizations-an-official-initiative-provides-social-mobilization>.

The Episcopalian church expressed its support of vaccination efforts in Africa in several places. Among other things, they said:

“Polio is a terrible disease, that’s been eradicated from most parts of the world. People, especially children, still get the disease in Pakistan, Afghanistan, and Nigeria – and almost nowhere else. The campaign to end polio has been working very hard to vaccinate children and wipe out the virus, and it could probably be accomplished within five years. Only a few hundred children are infected and paralyzed each year, but eliminating the disease means vaccinating large populations so no one can pass on the virus. Those nations where polio still survives have large groups of people who are very suspicious of the vaccine campaigns. A number of health workers have been murdered because of those suspicions – that the vaccine actually has HIV in it, or some kind of poison or contraceptive, or that American spies are using the campaign for other purposes. There aren’t enough security forces to protect all the health workers, but brave people keep signing up to help because they believe so fervently in the possibility of healing. That’s mission – offering yourself as a living sacrifice.”¹⁵¹

Similarly, Church officials said:

In some parts of the world, those who vaccinate children or educate girls or liberate the poor are offering their very lives out of this audacious and holy hope. In all those labors we believe that God has given us what is necessary. We believe this underlies efforts toward self-sustainability.¹⁵²

¹⁵¹ Katharine Jefferts Schori, *St. Peter’s- Confirmation/Eucharist*, EPISCOPAL CHURCH (July 23, 2013), <http://www.episcopalchurch.org/page/st-peters-confirmationeucharist>.

¹⁵² Katharine Jefferts Schori, *Day of Ascension- Global Episcopal Mission Network*, EPISCOPAL CHURCH (May 9, 2013), <http://www.episcopalchurch.org/page/day-ascension-global-episcopal-mission-network>.

An email query by one of my research aides to the church led to the following response.¹⁵³

Hello David,

Thank you for contacting the Domestic and Foreign Missionary Society
By way of this reply, your message is being forwarded to the Archives
of the Episcopal Church for follow up.

Somewhat related, this is what we released during the H1N1 crisis:

Announcement Regarding the H1N1 Flu
Virus: <http://www.episcopalchurch.org/notice/announcement-regarding-h1n1-flu-virus>

Resources available for H1N1
preparedness: <http://www.episcopalchurch.org/notice/resources-available-h1n1-preparedness>

Hope this information is helpful, please let me know if you need anything else.

Lisa Webb | ASSOCIATE OFFICER, PUBLIC AFFAIRS |
Communication | The Episcopal Church | 212-716-6138

Presbyterian:

A request for information to the Presbyterian Church led to the following email response.¹⁵⁴

We appreciate your inquiry as to formal statements of our General
Assembly on the subject of vaccination of children or adults in relation
to our faith stance. You are correct in understanding our position in

¹⁵³ Email on file with author.

¹⁵⁴ Copy on file with author.

general to support scientific medicine at every point, without denying the holistic reality of our embodied selves. Susan Stack and Bonnie Hoff have both gone through our past social policies and found one recent instance where vaccination campaigns are endorsed (probably with the assumption that these campaigns are needed overseas).

My own quick look at sources not online shows missionary nurses in New Mexico in 1928 putting an emphasis on vaccination (p. 161, 1928 Report of the Board of National Missions). A 1937 report supportive of the US Public Health Service went so far as to affirm their work in preventing venereal diseases among old and young: "We urge the fullest cooperation with national, state, and local agencies in the promotion of social hygiene activities."

Thus, while voluntary language and encouragement may be used at various points in our social witness policies, the presumption would be in favor of public resources being used for the highest possible levels of public health and safety.

Please let us know if there are other concerns. We have fairly extensive health policies and continue some health work, mainly overseas.

III.C Even Sects Opposed to Modern Medicine Do Not Prohibit Vaccines

Supporters of religious exemptions often suggest that they are especially important for small, potentially persecuted minorities like Jehovah's Witnesses and Christian Scientists. Upon examining those groups positions, I was somewhat surprised by what I found.

Jehovah's Witnesses:

Early Jehovah's Witnesses were strongly against vaccination, based on Biblical prohibition against the eating of blood.^{155,156} However, in response to a 1961 question regarding vaccination and the eating of blood, the Watchtower responded that the entire medical practice involving the use of blood is objectionable,

however, vaccination is a virtually unavoidable practice in many segments of modern society, and the Christian may find some comfort under the circumstances in the fact that this use is not in actuality a feeding or nourishing process, which was specifically forbidden when that man was not to eat blood, but it is a contamination of the human system. So, as was stated in *The Watchtower* of September 15, 1958, page 575, 'It would therefore be a matter of individual judgment whether one accepted such types of medication or not.' That is still the Society's viewpoint on the matter.¹⁵⁷

This position appears to be consistent with current Jehovah's Witness position that prohibits blood transfusion, but accepts that the majority of medical procedures do not conflict with the Bible.¹⁵⁸ Therefore, personal choice is involved and "one Witness might decide to accept a particular ... treatment, while another Witness might reject that same treatment."¹⁵⁹

Christian Scientists:

¹⁵⁵ *The Golden Age*, JEHOVAH'S WITNESSES (Jan. 3, 1923) 214 ("Vaccination summed up is the most unnatural, unhygienic, barbaric, filthy, abhorrent, and most dangerous system of infection known. Its vile poison taints, corrupts, and pollutes the blood of the healthy...").

¹⁵⁶ *The Golden Age*, JEHOVAH'S WITNESSES (Feb. 4, 1931) 294 ("Vaccination is a direct violation of the everlasting covenant that God made with Noah after the flood").

¹⁵⁷ *The Watchtower* (Nov. 1, 1961) 670.

¹⁵⁸ *Jehovah's Witness Frequently Answered Questions*, JEHOVAH'S WITNESSES, <http://www.jw.org/en/jehovahs-witnesses/faq/jehovahs-witnesses-medical-treatment/> (last accessed Sept. 17, 2013).

¹⁵⁹ *Id.*

Of all religions, Christian Scientists can probably make the most credible claim that they oppose vaccines. However, a believer would not be put in a position of choosing between obeying the law and their faith by the lack of religious exemptions. While Christian Scientists believe in the healing power of prayer rather than modern medicine,¹⁶⁰ Mary Eddy's book says, on the topic of vaccination:

Rather than **quarrel** over **vaccination**, I recommend, if the law demand, that an individual submit to this process, that he obey the law, and then appeal to the gospel to save him from bad physical results.¹⁶¹

Based on this and other things, a Christian Scientists told by the military to be vaccinated before being sent to Indonesia and the Philippines decided to agree to the vaccines:

First, I reasoned that the work I was to undertake as a chaplain would be a blessing for the troops involved in the training exercise. Then, I checked what Mary Baker Eddy had written about one form of inoculation—in this case, vaccination: "Rather than quarrel over vaccination, I recommend, if the law demand, that an individual submit to this process, that he obey the law, and then appeal to the gospel to save him from bad physical results" (*The First Church of Christ, Scientist, and Miscellany*, pp. 219-220).

Finally, I reasoned that the military personnel who had established these rules were trying to take care of others out of honest concern for their protection—and I respected their stance. This was their way of loving their neighbor. So I took the inoculations the afternoon we left, without

¹⁶⁰ *Science and Health*, CHRISTIAN SCIENCE, [http://christianscience.com/read-online/science-and-health/\(chapter\)/chapter-i-prayer#anchor.1.1](http://christianscience.com/read-online/science-and-health/(chapter)/chapter-i-prayer#anchor.1.1).

¹⁶¹ Mary Baker Eddy, *Prose Works, Miscellaneous*, http://alternate-healing-science-christian.ca/christian_science/christiansciencebooks/ 219-20; CHRISTIAN SCIENCE SENTINEL, <http://sentinel.christianscience.com/concordapi/view?q=quarrel+vaccination&book=tfccs.main.pw.my&verbatim=1>.

in any way surrendering my standpoint that God was the greater protective power. I'm grateful to say I didn't have any of the side-effects I was told I might suffer.¹⁶²

III.D People Say That It's Not About Religion

In multiple statements on antivaccination sites, people openly say that this is not about religion. There are substantial amounts of advice on antivaccination sites helping parents seeking a religious exemption to get one; this section does not address this advice. Instead, it focuses on people actually saying, openly, that they lie about religion. Types of advice that this section does not focus on include drafts to help write your request for religious exemption;¹⁶³ advice on specific religious claims parents can make and how to word them;¹⁶⁴ warnings not to go into too much detail about your religious beliefs;¹⁶⁵ and so on.

¹⁶² Ryder Stevens, *Worldwide Immunity through Prayer*, CHRISTIAN SCIENCE SENTINEL (May 26, 2003), <http://sentinel.christianscience.com/shared/view/119mvxk1tvc?s=t>.

¹⁶³ *Hints for Religious Exemptions to Immunizations*, VACCINEINFO.NET (April 5, 2008), <http://www.vaccineinfo.net/exemptions/relexemptlet.shtml>; *Sample Religious Exemption Letter and Supporting Documentation*, PLANET INFOWARS (Feb. 5, 2013), <http://planet.infowars.com/health/vaccine-exemption-example-letter-2>.

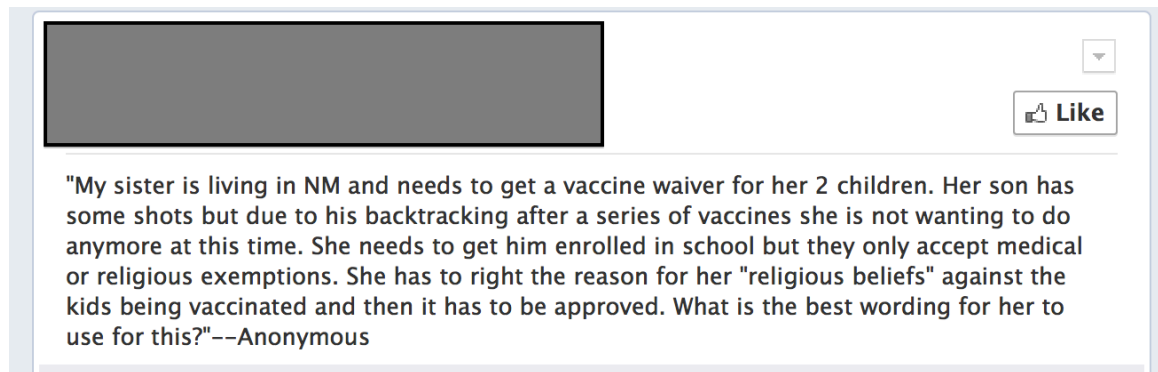
¹⁶⁴ *FAQ: Religious Exemption*, K.N.O.W. VACCINES, http://www.know-vaccines.org/?page_id=28 (“Vaccines are made with toxic chemicals that are injected into the bloodstream by vaccination. All vaccines are made with foreign proteins (viruses and bacteria), and some vaccines are made with genetically engineered viral and bacterial materials. A conflict arises if you believe that man is made in God’s image and the injection of toxic chemicals and foreign proteins into the bloodstream is a violation of God’s directive to keep the body/temple holy and free from impurities. A conflict arises if you accept God’s warning not to mix the blood of man with the blood of animals. Many vaccines are produced in animal tissues. A conflict arises if your religious convictions are predicated on the belief that all life is sacred. God’s commandment "Thou Shall Not Kill" applies to the practice of abortion.”); *Letter for Religious Exemption to Mandatory Vaccination*, GOLDRUST.NET, <http://www.goldrust.net/religion.htm> (citing various religious scripture references to use in letters); *Religious Convictions*, K.N.O.W. VACCINES, http://www.know-vaccines.org/?page_id=247 (citing various religious scripture references to use in letters); *Letter Requesting Religious Exemption for Forced Flu Vax*, BABYCENTER (Aug. 12, 2012), http://community.babycenter.com/post/a35633233/letter_requesting_religious_exemption_for_forced_flu_vax...what_do_you_think (“As a practicing Christian, I believe that my body is a gift from God and a temple of the Holy Spirit (see I Corinthians 6:19,20), and that it must not be polluted (see 2 Corinthians

To preserve the identity of the people who said online that they are lying about exemptions, their names were hidden.¹⁶⁶

Real concern: safety

One set of comments indicate – as in the case of Mary Check discussed in part 3.a – that a parent’s real concern is a safety concern, and the religious argument is used as an excuse. For example, this commentator’s sister is seeking an exemption because she is worried that her child “backtracked” because of his vaccines – but she is seeking a way to write a religious exemption that will get the child out of school. The real reason is clearly not religious:

Photo 1

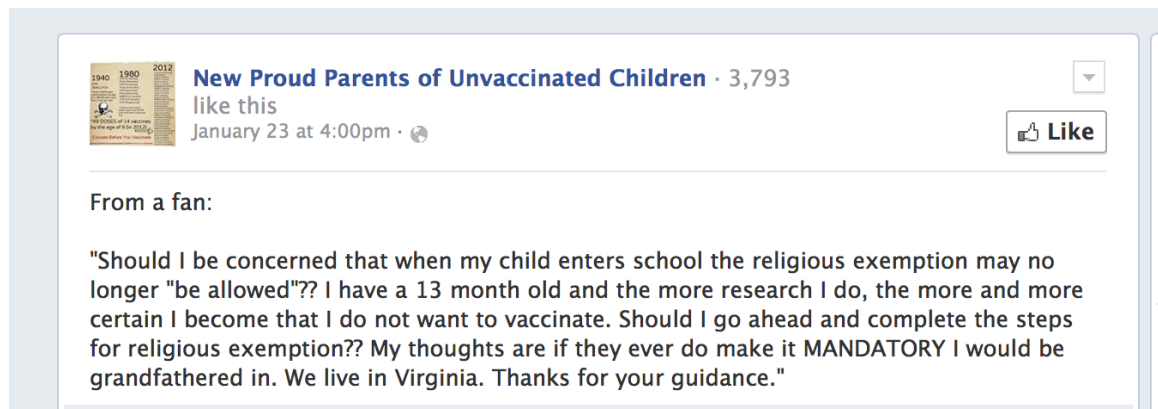


Similarly, this parent wants to refuse vaccines based on her “research”, and clearly wants to use the religious exemption although her main concern is not religious:

7:1).”); *Religious Conviction*, VACCINATION LIBERATION, <http://www.vaclib.org/news/religion.htm> (citing various religious scripture references to use in letters).
¹⁶⁵ *Vaccination Exemption Affidavit*, VACCINATION LIBERATION, <http://www.vaclib.org/exemption.htm#misc> (“My clients’ religious beliefs include the following...[editor’s note: amend the beliefs below as needed to have them apply to you; what you put here is up to you. Should your exemption be challenged, it will be up to the challenger to prove that what you state here is not your bona fide religious belief, a generally difficult thing to prove]”). *New Jersey Religious Exemption draft letter*, VACCINATION LIBERATION, <http://www.vaclib.org/chapter/exemptnj.htm> (“In June of this year one family in Senator Martin’s District 26 used my religious exemption letter and the Health Department rejected it because it was “too long”). *Immunization Exemption Letter*, MOTHERING, <http://www.mothering.com/community/t/890537/immunization-exemption-letter>.

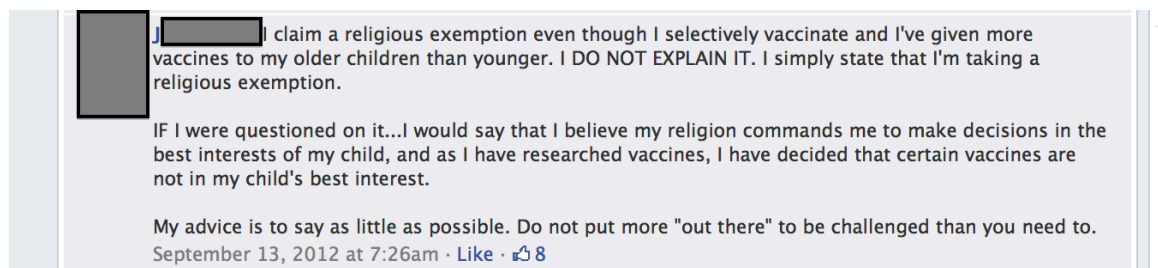
¹⁶⁶ Also pursuant to the IRB exemption determination.

Photo 2:



This parent too is clearly focused on her child's safety rather than having real religion motivation:

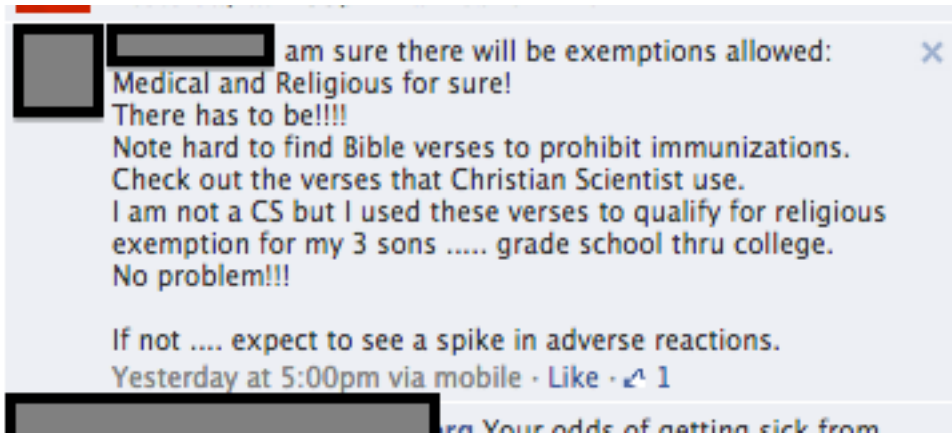
Photo 3:



People using a religion they do not believe in or supporting a fake religion:

In other cases, parents explain clearly that they are going to claim a religion that is not their own or even create a fake religion just to obtain an exemption. For example, this parent explain how she drew on Christian Scientists' use of certain biblical verses in spite of not being a Christian scientist to obtain exemptions:

Photo 5:



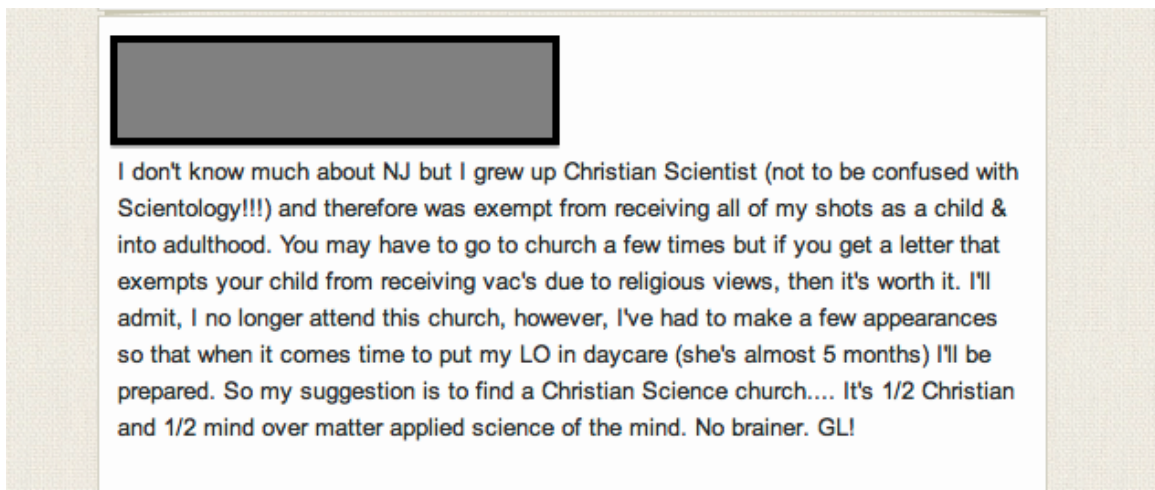
Similarly, this non-Catholic parent used a Catholic organization to get her exemption:

Photo 6:



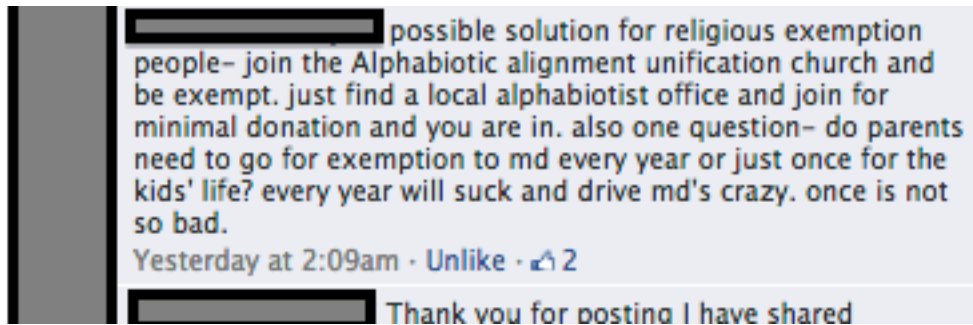
And this parent – no longer a practicing Christian Scientist – put in appearance just to get the exemption:

Photo 7:



Finally, this parent encouraged others to join a church – for a donation – for the sole purpose of obtaining the religious exemption, no sincerity needed:

Photo 8:

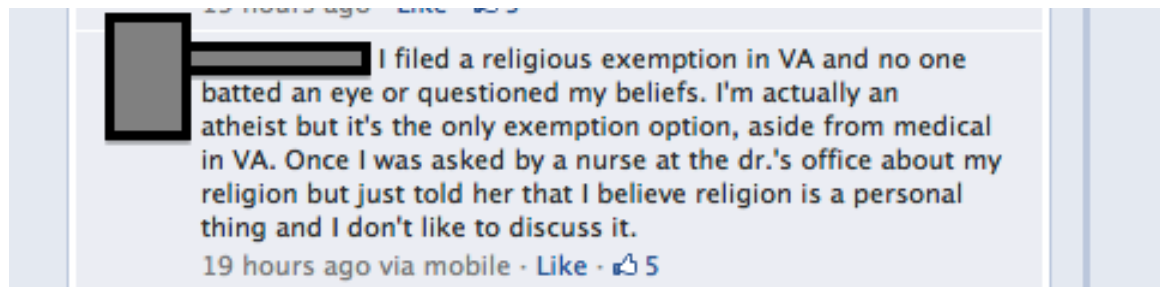


Clear lies:

Several people say openly that they lie and discuss the morality or otherwise of it.

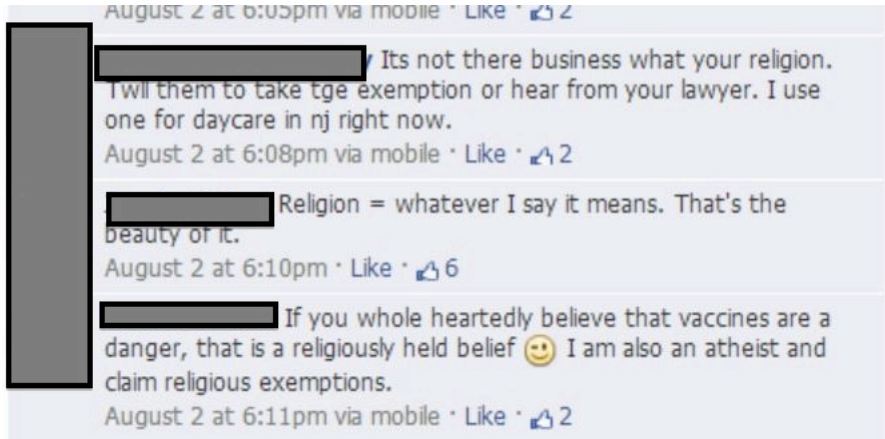
This parent, for example, uses a religious exemption in spite of being an atheist:

Photo 9:



As does this one:

Photo 10:



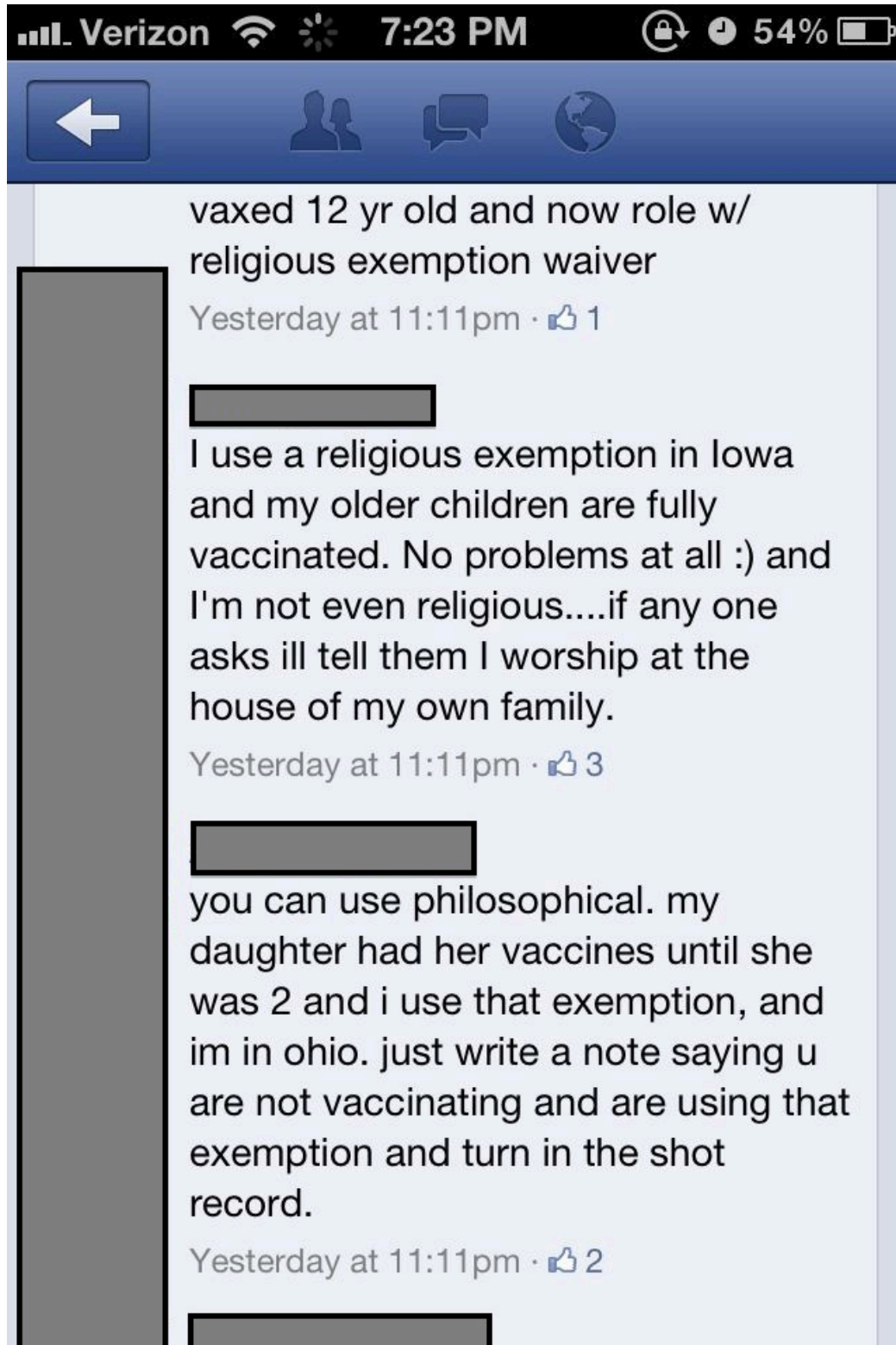
This parent openly stated that she lied on her religious exemption:

Photo 11:



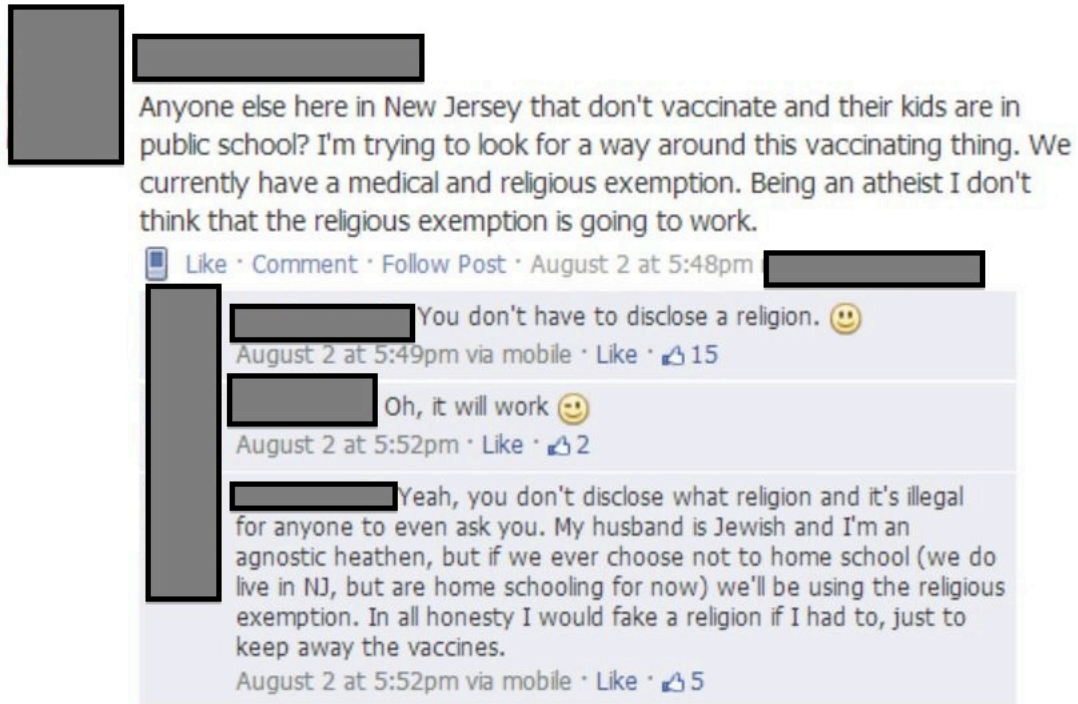
And this one openly admits that she claims the religious exemption although she's "not even religious":

Photo 12:



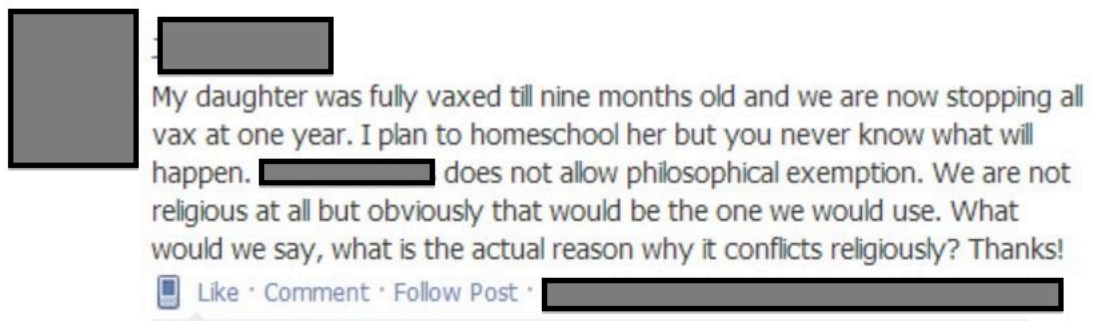
These parents counseled a parent who openly stated that she was an atheist that she can, nonetheless, get the religious exemption:

Photo 13:



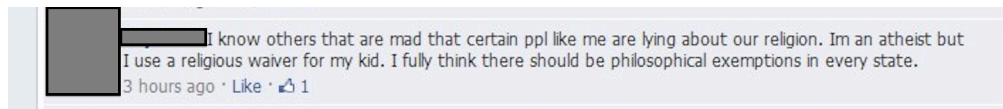
Openly admitting she is not religious, this parent asked what she should say – untrue though it will be – to obtain a religious exemption:

Photo 14:



This parent is unrepentant about her decision to lie to obtain a religious exemption, blaming her state for not having a philosophical one.

Photo 15:



In short, these parents openly admit to lying to obtain their religion exemption. And these are only the parents who are willing to say so on an open forum on the Internet.

IV. What Are the Options?

As discussed, the religious exemption offered by certain states is vulnerable to abuse, and indeed abuse. Part of what makes it vulnerable to abuse is our jurisprudence, as set out in part II. I agree with much of this jurisprudence: I think there are real dangers in allowing states to police religion (as will be clear from my discussion of the first option). Courts' cautious hesitance to allow the executive to monitor religion is understandable, and potentially justified. But the cost of this may be an increase in insincere religious exemptions. This is problematic on two fronts. First, as the rates of exemptions rise, herd immunity is eroded and the chances of an outbreak increase.¹⁶⁷ Second, by making the exemption religious, states that do not have a philosophical exemption are pushing those who do not wish to vaccinate for reasons other than religious to lie.

These two problems can be handled in one of three ways. Keep a religious exemption, but make it hard to get and provide agencies with strong tools to police the

¹⁶⁷ Alison Buttenheim, et al., *Exposure of California Kindergartners to Students With Personal Belief Exemptions From Mandated School Entry Vaccinations*, 102 AM. J. PUB. HEALTH; Imdad, et al., *PEDIATRICS*, (2013); Omer, et al., *Geographic Clustering of Nonmedical Exemptions to School Immunization Requirements and Associations With Geographic Clustering of Pertussis*; Amy Parker Fiebelkorn, et al., *Measles in the United States during the Postelimination Era*, 202 J. INFECTIOUS DISEASES.

exemption. Remove all exemptions except medical ones. Or provide a personal choice exemption but make it hard to get. I believe the first option is problematic, but the two latter ones each have a different balance of costs and benefits to consider. The main actor in deciding between these options would be the legislature, although I am addressing the potential of a judicial move for the second and third option.

Let's examine each in turn.

IV.A. Tightening Religious Exemptions:

New York has an exemption that requires the applicant to demonstrate – under the courts' jurisprudence – that their opposition to vaccines is both religious in nature and sincere.¹⁶⁸ One option to the problem is to model other states' exemptions on the New York, both in terms of statutory language and in terms of enforcement. Nothing would completely prevent people from getting a religious exemption with false pretenses (or lying in other ways), but this can reduce the extent of the misuse of the exemption.

There are a number of problems with this approach, in my view. First, as Alicia Novak points out, there is an argument that inquiry by the state into the sincerity of a religious exemption is unconstitutional. Novak points out that evaluating sincerity requires high levels of entanglement in the individual's beliefs, and may therefore violate the *Lemon* test.¹⁶⁹

Note, that no court actually struck down an exemption requiring show of sincerity because of this. But I agree with it on policy grounds. The reason behind Novak's view is that it really is extremely problematic to allow the state to police and judge religious

¹⁶⁸ Berg v. Glen Cove City School Dist., 853 F. Supp. 651, 655 (E.D.N.Y. 1994).

¹⁶⁹ Novak, *The Religious and Philosophical Exemption to State-Compelled Vaccination: Constitutional and Other Challenges*.

beliefs. While I do not doubt the good faith of health department officials (although many of the antivaccine activists will), it is easy – even with the best intent – to misuse such power, especially if the decision maker does not share the values of the exemption-seeking parent, which is almost by definition the case. Says Novak:

Under the sincerity test, the party desiring exemption must demonstrate to the satisfaction of the court that his or her asserted beliefs are "sincerely" held. Evidence a court might use in a sincerity analysis includes (1) whether the adherent acted inconsistently with the belief at issue; (2) whether the adherent materially gained by masking secular beliefs with a religious veneer; and (3) the religion's history and size. Courts must further exercise "extreme caution" when conducting a sincerity analysis because the inquiry "in essence puts the individual on trial for heresy." The court therefore becomes excessively involved and "entangled" in an analysis of an individual's religious beliefs when it engages in a sincerity analysis. This excessive entanglement therefore does not satisfy the third prong of the Lemon test.¹⁷⁰

In addition, any religious exemption is an invitation to people whose reasons for not vaccinating are not religious to lie to try to fit into the exemption, using one of the tried and true tactics mentioned in part III – joining a church for the purpose of an exemption or misrepresenting their real reasons.¹⁷¹ There is substantial likelihood that the end result of this approach is to privilege those who have the money, time and sophistication to

¹⁷⁰ *Id.* at 1114.

¹⁷¹ In several places, Attorney Alan Phillips, who specializes in vaccine-related issues, including helping people obtain exemptions, and who had written an e-book on the topic, mentions that "the law in this area is not consistent with most people's common sense approach to the task. In my experience, most people who write a statement of religious beliefs opposed to immunizations on their own end up falling into one or more legal pitfalls that can cost them the exemption." Phillips, *THE AUTHORITATIVE GUIDE TO VACCINE LEGAL EXEMPTIONS* at 104. Perhaps unfairly, I interpret this to mean "since for many of you the real reasons for wanting out of vaccination are not religious but safety concerns, you may write something that reflects that and not get an exemption that focuses on religious reasons."

consult a lawyer before applying for an exemption. It also probably privileges the better liars or more sophisticated liars among those requesting exemptions. A policy that incentivizes people to lie, and rewards them for lying well – or places them in a bind if they do not – seems problematic. Not that it does not happen in a variety of contexts in our country, but when there are alternatives it is probably not the best first choice.

For those reasons, I would not recommend tightening the religious exemption as the solution to the problem.

IV.b. Only Provide a Medical Exemption

Another way to handle the problem would be for a state to abolish all exemptions but a medical exemption. In other words, the only way a child may be sent to school without the required immunizations would be if that child had an acknowledged medical reason – acknowledged by the state – not to get the vaccine. This option places the strongest limitation on parental autonomy, but may minimize the number of exempt children, reducing the chances of outbreaks and protecting the large possible number of children against diseases.

Dr. Paul Offit,¹⁷² from the Children’s Hospital of Philadelphia, has in recent times probably the most eloquent proponent of this approach. Dr. Offit sees religious exemptions as a wrong against, first and foremost, the unvaccinated children themselves - although also to those the unvaccinated children may infect. Describing an outbreak of measles in Philadelphia in 1991 that centered around two non-vaccinating churches, Dr. Offit criticizes the decision not to vaccinate and its cost in lives:

¹⁷² <http://paul-offit.com>; <http://paul-offit.com/about/>.

The nine who died were all children. Church members had made a decision for their own children as well as those with whom their children had come in contact.¹⁷³

He goes on to say:

Children whose parents hold certain religious beliefs shouldn't be afforded less protection than other children. That the commonwealth has allowed children to die from measles, bacterial pneumonia, or leukemia in the name of religion is inexplicable. That it continues to allow such abuse in the face of recent deaths is unconscionable.

Pennsylvania should repeal its religious exemptions for medical neglect.

Otherwise, children will continue to suffer and die needlessly.¹⁷⁴

It is a powerful argument. Most of us no longer see the harms of vaccine preventable diseases. Dr. Offit does. As an infectious diseases doctor, he gets to see children suffering from diseases most of us don't see, including vaccine preventable diseases. On occasion, he sees them die because their parents did not vaccinate them. It is not surprising that he sees the cost of non-vaccination as too high. Dr. Offit believes that every harm or death that can be prevented should be prevented. Since serious harms from vaccines are an order of magnitude less frequent than those of the diseases, and actually very rare indeed,¹⁷⁵ vaccinating is the way to prevent harms to the children for whom the choice is made. Since vaccinating will contribute to herd immunity and prevent

¹⁷³ Paul A. Offit, *End Religious Exemption*, Philly.com (May 10, 2013), http://articles.philly.com/2013-05-10/news/39144680_1_child-abuse-neglect-first-century-gospel..

¹⁷⁴ *Id.* Dr. Offit was talking about religious exemptions more broadly than vaccination.

¹⁷⁵ For comparisons of the risks of diseases to the risks of vaccines, see *Comparison of the Effects of Diseases and the Side Effects of Vaccines*, [http://www.health.gov.au/internet/immunise/publishing.nsf/Content/D35CD18A3985212ECA2574E2000F9A4F/\\$File/quick_sideeffects.pdf](http://www.health.gov.au/internet/immunise/publishing.nsf/Content/D35CD18A3985212ECA2574E2000F9A4F/$File/quick_sideeffects.pdf) (Australia); *Comparison of Effects of Diseases and Vaccines- Canadian Immunization Guide*, PUBLIC HEALTH AGENCY OF CANADA, <http://www.phac-aspc.gc.ca/publicat/cig-gci/cedv-cemv-tab-eng.php> (Canada); *Diseases & the Vaccines that Prevent Them*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/vaccines/vpd-vac/fact-sheet-parents.html> (United States).

outbreaks, it is the way to prevent harms to other children who may catch the disease from the unvaccinated child.

Providing medical exemptions may minimize the number of exemptions, offering maximum protection to children and helping prevent outbreaks. It comes with costs, though. The first cost is a loss of parental control. The United States' courts has long recognized the special role of parents as guardians and trustees of their children.¹⁷⁶ This is not just an acknowledgement of the parent's authority, and not just a matter of rights. General policies are designed at the population level. A specific child might have special needs. In the normal state of things, a parent would know their child situation best and passionately advocate for that child's interest. The best way to protect the child, usually, is to give the parent the autonomy to manage the child.

Since the parent also has the responsibility of raising, educating and disciplining the child, it is even more important for the parent to have the authority and ability to make basic decisions for the child. Especially when there is more than one right way to handle the child's affairs, we want to respect the parents' choices.¹⁷⁷

On one hand, you could argue that this is not as strong an argument when applied to vaccines. As a general matter, for the vast majority of children – absent very specific medical issues – the risks of vaccinating the child are lower than the risks of not vaccinating, and the appropriate decision is to vaccinate. If rates of vaccination are high enough to offer herd immunity, that may not be true: a child may be able to hide in the herd and have very low chances of getting a disease even if unvaccinated, so the benefits

¹⁷⁶ ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* 131 (7th ed. 2014).

¹⁷⁷ *See also* *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

will be slight.¹⁷⁸ The problem is that that’s a contingent argument; it only holds if only a small number of families do not vaccinate, since as the number of unvaccinated children goes up, it can undermine the protection of herd immunity.

On the other hand, parental rights do get substantial legal protection in our system. For example, courts have, in the past, upheld parental rights to remove children from mandatory schooling at a certain age, as discussed above.¹⁷⁹ In one case related to our topic, on Court of Appeals in Arizona allowed a mother to exempt a nine months old from immunization on religious grounds even after the mother was found unfit to have custody of the infant, upholding the balance the legislature set between parental rights and the child’s and the public health (over a powerful dissent).¹⁸⁰ In the only case in which a court found that a father’s failure to vaccinate a child against measles in the midst of a measles outbreak constituted medical neglect – *Christine M.*¹⁸¹ - it was in the context of a measles outbreak, and the court declined to force vaccinate the child since by the time the case arrived before it, the outbreak has ended.¹⁸² In other words, the court required the danger to be very immediate.

That would be a hard case to make for most childhood vaccines today: thanks to the success of our vaccination program, many of the diseases we vaccinate against are rare, so the chances of contracting them are low and the harm may not seem immediate.¹⁸³ While all of the diseases we vaccinate against can kill, some kill only rarely (like chicken

¹⁷⁸ Diekema, *Choices Should Have Consequences: Failure to Vaccinate, Harm to Others, and Civil Liability*; S. van den Hof, M.A.E. Conyn-van Spaendonck, and J. E. Van Steenberg, *Measles Epidemic in the Netherlands, 1999-2000*, 186 J. INFECTIOUS DISEASES 1483, 1483-86 (2002).

¹⁷⁹ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹⁸⁰ *Diana H. v. Rubin*, 217 Ariz. 131 (Ct. App. 2007). *But compare* *Dep’t of Human Services v. S.M.* 256 Or.App. 15 (2013).

¹⁸¹ *Matter of Christine M.*, 157 Misc. 2d 4, 595 (Fam. Ct. 1992).

¹⁸² *Id.* at 22.

¹⁸³ *Notifiable Diseases and Mortality Tables*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Jan. 3, 2014), http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6252md.htm?s_cid=mm6252md_e.

pox). This reality is part of the reason the Diana H. court declined to order the immunization of the child in question over the objection of the mother, even though the mother was found unfit – the court said that there is no evidence that leaving the child unimmunized was an “imminent” danger to her health.¹⁸⁴

Similarly, while Novak suggests some religious exemptions may violate equal protection, that position has not been upheld so far – and even Novak acknowledges that at least form exemptions would not fail the *Lemon* test.¹⁸⁵ An argument can be made under the *Lemon* test that a religious exemption has no secular purpose. But I see at least one such purpose: allowing children to attend schools even if their parents object to immunizations.

My conclusion is that it is possible¹⁸⁶ but unlikely that courts will strike down religious and philosophical exemptions and only leave medical.

The legislature, however, may. The question is whether legislatures will want to go that way. Legislators may hesitate to step on parental rights. They may also hesitate to infringe on religious freedoms, whether from a mistaken belief that such interference would be unconstitutional or from genuine respect for such beliefs. And they may fear the political battle that abolishing exemptions would inevitably lead to.

But even legislators sympathetic to the rights of religious minorities may reconsider if the exemption is broadly abused. Especially if the number of outbreaks increases.

4.c. Personal Belief Exemption Only

¹⁸⁴ 177 P.3d at 139.

¹⁸⁵ Novak, *The Religious and Philosophical Exemption to State-Compelled Vaccination: Constitutional and Other Challenges* at 1115.

¹⁸⁶ It was done in Mississippi, but it has been a while. *Brown v. Stone*, 378 So.2d 218, 221-23 (Miss. 1979).

Another alternative is to remove the religious exemption and only have a “personal choice” exemption. At least 17 states currently offer a philosophical exemption, or a personal belief exemption.¹⁸⁷ I admit that I do not like the terminology. Philosophical seems wrong, and while there is an element of belief in choosing not to get a vaccine – usually belief in misinformation or conspiracy theories – personal belief seems to suggest something quasi-religious. I would prefer the language of a “personal choice” exemption. A personal choice exemption has the benefit of openly admitting that the state is allowing people to opt out of immunization requirement for whatever reason they choose, be it religious, be it their fears, be it just not wanting to be bothered to take the child to the doctor’s office. In other words, people don’t have to lie about their reasons: they do not have to give such reasons.

One concern when you adopt a personal choice exemption is that people will use those exemptions for convenience only.¹⁸⁸ Getting a child vaccinated requires some effort – at the very least, the patient needs to go to a doctor’s office, potentially missing work or at least spending time that could be used elsewhere. And watching a child injected with a vaccine – something most children do not appreciate – is not fun. In some jurisdictions, all a personal belief exemption requires is signing a form or writing a letter:¹⁸⁹ much easier than going to a doctor. A similar concern is that parents will decide not to

¹⁸⁷ Lu, *Giving Families their Best Shot: A Law-Medicine Perspective on the Right to Religious Exemptions from Mandatory Vaccination*, Appendix.

¹⁸⁸ Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*; Jennifer S. Rota, et al., *Processes for obtaining nonmedical exemptions to state immunization laws*, 91 AM. J. OF PUB. HEALTH 645 (2001); Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?* at 360.

¹⁸⁹ Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?* at 357; Arizona § 15-873, *Exemptions; nonattendance during outbreak*, available at <http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/15/00873.htm&Title=15&DocType=ARS>; Maine § 6355, *Enrollment in school*, available at <http://www.mainelegislature.org/legis/statutes/20-A/title20-Asec6355.html>.

vaccinate because of concerns raised by friends or because it is the norm in their social circle,¹⁹⁰ without giving the matter sufficient thought and considering the risks. At least one commentator pointed out that the choice not to vaccinate should require at least as much effort as the choice to vaccinate, to avoid such problems.¹⁹¹

There are good reasons to prefer the option of a personal choice exemption over a religious one, and possibly even over a situation of a medical exemption only. There are people who sincerely see vaccines as toxic.¹⁹² Faced with a medical exemption only, people who hold such belief may face the choice between homeschooling, falsifying medical documents or lying in some other way, or vaccinating their children with what they believe is toxins. It seems problematic to adopt a policy that may encourage people to lie, in terms of falsifying records. The counter to this, of course, is that altering the law to fit irrational beliefs, unsupported by the evidence, is also problematic. But in my view, forcing people to do something that they think will poison their children – however irrationally – is almost bound to be counter productive and lead to other problems.

In addition, coercion can generate resistance.¹⁹³ A system of school immunization requirements with no safety valve can be politically unappealing and hard to put in place – as well as vulnerable to political attack – even among those who are not antivaccine.

¹⁹⁰ For some research highlighting the importance of social network to the decision to vaccinate, see Emily K. Brunson, *The Impact of Social Networks on Parents' Vaccination Decisions*, PEDIATRICS (April 15, 2013), <http://pediatrics.aappublications.org/content/early/2013/04/10/peds.2012-2452>.

¹⁹¹ Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*.

¹⁹² *This Study Reveals Children are Being Vaccinated With Toxic Levels of Aluminium Causing Neurological Damage and Autism*, VACTRUTH, <http://vactruth.com/2014/01/28/toxic-levels-of-aluminum/>; Dan Olmsted & Mark Blaxill, *The Age of Polio: How an Old Virus and New Toxins Triggered a Man-Made Epidemic -- Part I, The Wrong Narrative*, AGE OF AUTISM, <http://www.ageofautism.com/2011/09/the-age-of-polio-how-an-old-virus-and-new-toxins-triggered-a-man-made-epidemic.html>; Jake Crosby, *Discovering I Was Toxic*, AGE OF AUTISM, <http://www.ageofautism.com/2009/01/discovering-i-was-toxic.html>.

¹⁹³ Frank P. Grad, PUBLIC HEALTH LAW MANUAL, 72-73; Jason L. Schwartz, *Unintended Consequences: The Primacy of Public Trust in Vaccination*, 107 FIRST IMPRESSIONS: AN ONLINE COMPANION TO MICH. L. REV. 100 (2009).

Having a way to exit from the requirement can help mitigate that resistance: yes, it is still an obligation, but those who truly want to have choices.

Finally, homeschooling may present its own challenges. Homeschooling means a child's education is dependent on the parent's ability to educate that child. This may be unequal, and forcing parents to do so may be a disservice to the child, harming that child's education. The fact that a parent chose not to protect the child against preventable diseases is not a good reason to also deprive that child from state-sponsored public education.

Allowing an exemption, even a hard to get one, also respects parental autonomy: parents have a choice to exempt their children from vaccines, even if they have to meet certain criteria to do so.

The risk, of course, is that allowing parents to take an open exemption – for any reason – can increase the rates of exemptions (which have been rising)¹⁹⁴ and lead to more outbreak. Some parents may take the exemption because of antivaccine views, others because of convenience, as discussed. If the process of getting an exemption is easier than immunization, we have a problem.¹⁹⁵

Several proposals have been raised to try and make personal choice exemptions harder to get while still living them intact. One currently in place in several states –

¹⁹⁴ Blank, et al., *Exempting Schoolchildren From Immunizations: States With Few Barriers Had Highest Rates Of Nonmedical Exemptions*.

¹⁹⁵ Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*.

including Washington¹⁹⁶ and California¹⁹⁷ - was suggested by Ross Silverman in 2003, referred to by him as a process of “informed refusal”.¹⁹⁸ Under this process,

Prior to receiving an exemption, applicants would meet with a health professional ... to discuss the relative risks and benefits of immunization and exemption. This interaction would need to be memorialized on a standardized form.¹⁹⁹

This was adopted in California and Washington as well as Oregon²⁰⁰. Again, the requirement in all three states is pretty minimal: a signature by a health provider that the exemptor had the benefits and risks of vaccines explained to her (In Washington, the exemptor can instead watch a video). And still, the antivaccine organizations fought these statutes tooth and nail.²⁰¹

Dr. Offit suggested a somewhat more intense educational requirement – “attending educational classes that teach the public what the safety profiles of different vaccines are, before they are allowed to opt out of vaccination.”²⁰² A somewhat rigorous educational requirement seems appropriate, potentially with a short quiz at the end. Such quizzes are used for verifying informed consent in some clinical trials, and may be useful here, to assure internalization of the facts.

¹⁹⁶ Wash. Rev. Code Ann. § 28A.210.080, 90.

¹⁹⁷ Cal. Health & Safety Code § 120325 et seq.

¹⁹⁸ Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection* at 285.

¹⁹⁹ *Id.*

²⁰⁰ **See:** Cal. Health & Safety Code § 120325 et seq. Or. Rev. Stat. § 433.267.

Wash. Rev. Code Ann. § 28A.210.080, 90. See also Omer et al, *supra* note #.

²⁰¹ As mentioned above, Governor Jerry Brown, from California, instructed the California Health Department to add an exemption from this educational requirement for religious reasons. See <http://www.uchastings.edu/news/articles/2013/10/reiss-viewpoint-lawsigning.php>.

²⁰² Priya Shetty, *Experts concerned about vaccination backlash*, THE LANCET (March 20, 2010), [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(10\)60421-7/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(10)60421-7/fulltext).

In both cases, the hope is that this would eliminate exemptions of convenient and make sure parents have the full information about the risk they are taking before choosing not to vaccinate a child.

Silverman also suggests that the exemption should be renewed – maybe not annually, but occasionally.²⁰³ An annual requirement is not unheard of, though it's not common: Arkansas requires parents using a religious exemption to go through the application process annually. Arkansas' process requires a notarized statement requesting the religious/philosophical exemption; completion of an educational component; an informed consent that includes a signed statement of refusal to vaccinate, and a signed statement of understanding that the department may remove the child from school during outbreaks.²⁰⁴

Making the exemption process demanding will involve a political battle; but then, so would eliminating all but non-medical exemptions. It seems to me the better way to go.

Conclusion

In 2008, after many years of low numbers of measles, the United States saw 140 cases of measles.²⁰⁵ Of the 131 cases reported until July, 91% were unvaccinated or had an unknown vaccination status.²⁰⁶ In 2011, the United States saw 222 cases of measles.

²⁰³ Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection* at 286.

²⁰⁴ Ark. Code Ann. § 6-60-504(b)

²⁰⁵ *Measles — United States, January 1–August 24, 2013*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6236a2.htm>.

²⁰⁶ *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>.

86% of those sick were unvaccinated or had an unknown vaccination status.²⁰⁷ Between January 1-August 24 2013, the United States saw 159 cases of measles; 82% were in unvaccinated or people of unknown vaccination status.²⁰⁸ This is in spite of the fact that MMR coverage stands at over 94%.²⁰⁹ While a far cry from the many case a year pre-vaccine,²¹⁰ it is a change, and not for the better.

As immunization rates drop, diseases may come back. Measles is an extremely contagious disease – it comes back among the first, and targets first and foremost the unvaccinated. Whooping cough has also made a reappearance. While its return is at least in part because of a vaccine that is less effective than scientists expected, outbreaks of whooping cough are more prevalent in communities with low vaccination rates.²¹¹ HiB outbreaks were also seen, again, primarily in the unvaccinated.²¹²

As outbreaks reappear, states may seek to increase vaccination rates. School immunization mandates are an extremely effective tool to achieve that goal,²¹³ and it is natural for states to reconsider their exemptions policies if those policies lead to outbreaks. This may explain the recent study by Omer et al, which examined bills related to exemptions proposed in all states between 2009 and 2012. The study found that while

²⁰⁷ *Measles- United States, 2011*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6115a1.htm>.

²⁰⁸ *Measles — United States, January 1–August 24, 2013*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6236a2.htm>.

²⁰⁹ *Vaccination Coverage Among Children in Kindergarten— United States, 2011–12 School Year*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6133a2.htm>.

²¹⁰ S.W. Roush & T.V. Murphy, *Historical comparisons of morbidity and mortality for vaccine-preventable diseases in the United States*.

²¹¹ Blank, et al., *Exempting Schoolchildren From Immunizations: States With Few Barriers Had Highest Rates Of Nonmedical Exemptions*; Misegades Lk, et al., *Association of childhood pertussis with receipt of 5 doses of pertussis vaccine by time since last vaccine dose, California, 2010*, 308 JAMA: J. AM. MED. ASS'N 2126; Omer, et al., *Geographic Clustering of Nonmedical Exemptions to School Immunization Requirements and Associations With Geographic Clustering of Pertussis*.

²¹² OFFIT, *DEADLY CHOICES: HOW THE ANTIVACCINE MOVEMENT THREATENS US ALL* at xi-xii.

²¹³ Walter A. Orenstein & Alan R. Hinman, *The Immunization System in the United States - The Role of School Immunization Laws*.

most bills (31 out of 36) aimed to expand exemptions and only five aimed to restrict them, none of the bills proposing to expand exemptions passed, while three out of five proposing restrictions were enacted into law.²¹⁴ This suggests that states may already be moving in the direction of limiting the ability of parents to opt out of vaccinating their children.

The religious exemption, as it currently stands, is easily and often abused. It does not sufficiently protect children against their parents' decision not to vaccinate them, and it does not sufficiently protect communities against outbreaks. Reconsidering its existence is an appropriate step for states seeking to improve immunization rates to take. Replacing it with an appropriately narrow personal choice exemption is one option; leaving only medical exemptions is another, though more problematic one.

Abolishing the religious exemption won't be easy. It will involve a political battle. But leaving things as they are carries substantial risks. Many states, seeing an increase in diseases we can prevent, with their attendant suffering, harms, deaths and costs, may wish to take that step.

²¹⁴ Omer et al, supra note ##, at 621.