

NONMEDICAL EXEMPTIONS TO PUBLIC SCHOOL VACCINATION MANDATES IN THE POST-PANDEMIC WORLD: SOLUTIONS WITHIN EXISTING STATE FRAMEWORKS

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“If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content . . . those beliefs certainly occupy in the life of that individual a place parallel to that filled by God in traditionally religious persons.”¹

“Liberty of conscience is one thing. License to endanger the lives of others by practices contrary to statutes passed for the public safety and in reliance upon modern medical knowledge is another.”²

Abstract: The article examines issues relating to nonmedical exemptions to vaccination as a condition of public-school attendance. The article contends that the public health impacts of exemptions may be mitigated through the application of existing state frameworks relating to procedural tightening, counseling and persuasion, assessments of sincerity and good faith, the application of public emergency laws, and transparency. The article identifies best practices in each of these frameworks. The article concludes that nonmedical exemptions are unlikely to be eliminated. As such, public health and educational authorities must act to prevent further erosion of the benefits associated with vaccination.

INTRODUCTION

On October 1, 2021, California Governor Gavin Newsom announced plans to add COVID-19 (“COVID”) vaccines to the list of vaccinations required to attend school in-person, contingent upon completion of the Biologics License Application approval process by the U.S. Food and Drug Administration (“FDA”).³ Governor Newsom directed the California Department of Public Health (“DPH”) to initiate the administrative process to add COVID vaccines to the existing list of ten required vaccinations and to be phased in by grade span.⁴ However, on April 14, 2022, the California Health and Human Services Agency (“HHSA”) announced a postponement of the implementation of Governor Newsom’s order until July 2023 due to the FDA’s slow pace in approving

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1. Welsh v. United States, 398 U.S. 333, 340 (1970).
2. Anderson v. State, 65 S.E.2d 848, 852 (Ga. Ct. App. 1951).
3. See Press Release, Off. of the Governor, California Becomes First State in Nation to Announce COVID-19 Vaccine Requirements for Schools (Oct. 1, 2021) (on file with author).
4. *Id.* See also CAL. HEALTH & SAFETY CODE §§ 120335(b) (1-10) (2022) (listing vaccinations against diphtheria, haemophiles influenzae type b, measles, mumps, pertussis, polio, rubella, tetanus, hepatitis b, and varicella as conditions for in-person school attendance).

COVID vaccines for children and the lack of time to implement the mandate before the start of the 2022-23 academic year.⁵ The California DPH is authorized to require vaccination for “[a]ny other disease deemed appropriate by the department, taking into consideration the recommendations of the Advisory Committee on Immunization Practices of the United States Department of Health and Human Services, the American Academy of Pediatrics, and the American Academy of Family Physicians.”⁶

California’s requirement of COVID vaccines was followed by Louisiana’s. In December 2021, Governor John Bel Edwards allowed an administrative rule proposed by the Louisiana Department of Health to take effect, which added COVID vaccines to the list of required vaccinations for school attendance and child day care.⁷ In so doing, Governor Edwards overruled the Louisiana House Committee on Health and Welfare, which rejected the proposed rule earlier in the month.⁸ As a result, vaccination for COVID was added to the list of eleven existing vaccinations required for in-person school attendance.⁹ As in California, the rule was to become effective upon completion of the Biologics License Application approval process by the FDA, which, at the time, was only applicable to the vaccine produced by Pfizer-BioNTech to those sixteen years of age and older.¹⁰

California and Louisiana’s vaccination mandates are subject to statutory provisions, allowing for students (or parents acting on their behalf) to opt out by objecting to the vaccination. Louisiana’s exemption permits students eighteen years of age and younger to opt out of vaccination through a “written dissent from [the pupil’s] parents.”¹¹ The California exemption is limited to pupils who submitted a letter or affidavit stating beliefs opposed to vaccination prior to January 1, 2016.¹² The exemption is applicable to private and public elementary

5. See Soumya Karlamangla, *California Delays K-12 Vaccine Mandate*, N.Y. TIMES (Apr. 18, 2022), <https://www.nytimes.com/2022/04/18/us/california-covid-vaccine.html> [<https://perma.cc/N3Y9-X4CE>].

6. CAL. HEALTH & SAFETY CODE §§ 120335(b) (1-10) (2022).

7. See Letter from John Bel Edwards, Governor, State of Louisiana, to Lawrence A. Bagley, Chairman, House Comm. on Health and Welfare, State of Louisiana (Dec. 14, 2021) (on file with author).

8. *Id.* at 1.

9. See LA. ADMIN. CODE tit. 51, §§ 701(A)(1)-(7), (E) (2022) (listing vaccinations against diphtheria, tetanus, pertussis, polio, measles, mumps, rubella, hepatitis A and B, varicella, and meningococcal infection as conditions for in-person school attendance).

10. See Letter from Denise M. Hinton, Chief Scientist, U.S. Food & Drug Admin., to Elisa Harkins, Global Senior Dir., Pfizer, Inc. 2 (May 10, 2021) (reconfirming authorization of the Pfizer-BioNTech vaccine for emergency use in individuals sixteen years of age or older on December 11, 2020, and authorizing use in individuals twelve to fifteen years of age).

11. LA. ADMIN. CODE tit. 51, §§ 701(C), (E) (2022) (recognizing an exemption to COVID vaccination for any individual attending any school or day care center based upon a “written dissent” submitted by the individual or his or her parent or guardian).

12. See CAL. HEALTH & SAFETY CODE § 120335(g)(1) (2022).

and secondary schools, child day care centers, day nurseries, nursery schools, family day care homes, and development centers located within the state.¹³ Individual exemptions are to remain in effect until a pupil enrolled in the next grade span as defined by statute, at which time the exemption was to expire and vaccination becomes a prerequisite to school attendance.¹⁴

Exemptions from vaccination requirements such as those provided in Louisiana and attempted by California are widespread throughout the United States. Forty-four states and the District of Columbia permit exemptions based upon religious objections to vaccination.¹⁵ Sixteen states also recognize philosophical or conscience-based objections to vaccination.¹⁶ Legislation adding conscience-based objections has been introduced in several statehouses since the beginning of the COVID pandemic.¹⁷

II. VACCINES AND VACCINATION

Vaccination is the “medical process by which an agent similar to the disease or virus being prevented is deliberately introduced into a non-exposed individual, thereby causing the body to produce antibodies against the underlying illness.”¹⁸ The term “vaccination” was coined by Edward Jenner as a result of his work with cowpox.¹⁹ Michael McDonnell and Fredrick Askari describe vaccination as an example of active immunization in which the recipient’s immune system is induced to produce antibodies against a pathogen as a result of administering an immunobiological agent in the form of a vaccine.²⁰ The development of vaccines

13. *Id.*

14. *Id.* Grade spans are defined as birth to preschool, kindergarten to grade six, and grades seven through twelve inclusive. *See* CAL. HEALTH & SAFETY CODE §§ 120335(g)(2)(A)-(C), (g)(3) (2022).

15. *See infra* notes 31-39 and accompanying text.

16. *See infra* notes 40-51 and accompanying text.

17. *See, e.g.*, H.B. 30, 2022 Reg. Sess. (Ala. 2022) (“sincerely held personal beliefs”); H.B. 238, 32nd Leg., 1st Reg. Sess. (Alaska 2022) (“philosophical grounds”); S.B. 398, 89th Leg., 2022 Reg. Sess. (Kan. 2022) (“theistic and non-theistic moral and ethical beliefs as to what is right and wrong that are sincerely-held with the strength of traditional religious views”); H.B. 1453, 137th Leg., Reg. Sess. (Miss. 2022) (“philosophical belief” and “conscientious belief”); H.B. 1665, 101st Leg., 2d Reg. Sess. (Mo. 2022) (“conscientious belief”); H.B. 1035, 167th Leg., 2d Sess. (N.H. 2022) (creating “conscientious objector” status); H.B. 4620, 85th Leg., Reg. Sess. (W. Va. 2022) (providing parents are “free to choose . . . as it relates to immunizations).

18. Steve P. Calandrillo, *Vanishing Vaccinations: Why are So Many Americans Opting Out of Vaccinating Their Children?*, 37 U. MICH. J. L. REFORM 353, 362 (2004) (citing James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L. J. 831, 837 n.19 (2002)).

19. Stefan Riedel, *Edward Jenner and the History of Smallpox and Vaccination*, 18 PROC. BAYLOR U. MED. CTR. 21, 24 (2005).

20. W. Michael McDonnell & Frederick K. Askari, *Immunization*, 278 JAMA 2000, 2000

and their widespread distribution are one of the most important medical achievements in the twentieth century.²¹ Vaccination has eradicated, prevented, or controlled numerous life-threatening and debilitating diseases, such as diphtheria, measles, meningitis, polio, rubella, and tuberculosis, and resulted in “a dramatic reduction in morbidity and mortality due to vaccine preventable illnesses.”²² Prior to the development of vaccines, there were 200,000 cases and 4,000 deaths attributable to pertussis and 20,000 cases and 1,800 deaths attributable to polio occurring in the United States on an annual basis.²³ On a global scale, the World Health Organization (“WHO”) has estimated that vaccination and resultant immunization prevent two to three million deaths annually.²⁴ Undoubtedly, vaccines are “literally lifesavers.”²⁵

The importance of vaccination extends beyond individual well-being and has a significant impact on social well-being. Vaccination protects the individual recipient and those with whom the recipient comes into contact, including persons medically unable to receive vaccinations or for whom vaccination is only partially effective.²⁶ Vaccination, and the failure to vaccinate also have enormous economic consequences. Vaccines save billions of dollars every year which

(1997).

21. See MARK NAVIN, *VALUES AND VACCINE REFUSAL: HARD QUESTIONS IN ETHICS, EPISTEMOLOGY, AND HEALTH CARE* 6 (Routledge, 2016) (describing vaccines as “a huge success”); Alexandra Minna Stern & Howard Markel, *The History of Vaccines and Immunization: Familiar Patterns, New Challenges*, 24 *HEALTH AFFS.* 611, 611 (2005) (describing vaccination as represent[ing] the single greatest promise of biomedicine: disease prevention”).

22. Alicia Novak, Comment, *The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges*, 71 *U. PA. J. CONST. L.* 1101, 1105 (2005) (citing Ross D. Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*, 12 *ANNALS HEALTH L.* 277, 281-82 (2003)).

23. Sandra W. Roush & Trudy V. Murphy, *Historical Comparisons of Morbidity and Mortality for Vaccine-Preventable Diseases in the United States*, 298 *JAMA* 2155, 2156 tbl.1 (2007). See also Hillel Y. Levin, *Why Some Religious Accommodations for Mandatory Vaccinations Violate the Establishment Clause*, 68 *HASTINGS L. J.* 1193, 1198 (2017) (discussing disease eradication and control as a result of vaccination).

24. See *10 Facts on Immunization*, WORLD HEALTH ORG., <https://www.who.int/mongolia/health-topics/vaccines/10-facts-on-immunization> [<https://perma.cc/W5XT-LCH2>] (last updated Mar. 2018). See also Megan Gibson, Note, *Competing Concerns: Can Religious Exemptions to Mandatory Childhood Vaccinations and Public Health Successfully Coexist?*, 54 *U. LOUISVILLE L. REV.* 527, 528 (2016) (describing the success of the WHO’s Smallpox Eradication Program and the Global Polio Eradication Initiative).

25. Dorit Rubinstein Reiss & Lois A. Weithorn, *Responding to the Childhood Vaccination Crisis: Legal Frameworks and Tools in the Context of Parental Vaccine Refusal*, 63 *BUFF. L. REV.* 881, 883 (2015). See also Robert I. Field, *Vaccine Declinations Present New Challenges for Public Health*, 33 *PHARMACY & THERAPEUTICS* 542, 542 (2008) (concluding that “it would be safe to say that vaccines have saved more lives than other medical technology”).

26. See Gibson, *supra* note 24, at 541-42.

would otherwise be spent treating vaccine preventable diseases.²⁷ The failure to vaccinate also bears a multi-billion price tag for the U.S. healthcare system.²⁸ These costs are in addition to the impacts upon the labor force and productivity as a result of the continuing prevalence of vaccine preventable diseases.²⁹ For example, more than thirty-thousand, otherwise avoidable deaths, occur in the United States annually as a result vaccine preventable diseases.³⁰

For all of its health and economic benefits, vaccination is not without controversy. The Society of Anti-vaccination was founded contemporaneously with Edward Jenner's development of the smallpox vaccine in 1796, based upon the belief that vaccination was "an inappropriate meddling in the work of God."³¹ More recent opposition to vaccination has asserted a wide variety of reasons including "objections based on effectiveness, transmission of other diseases, fear of harmful effects . . . religious or philosophical beliefs . . . [and] governmental interference with personal autonomy."³² This controversy has only intensified as a result of the development of COVID vaccines with pro- and anti-vaccination supporters engaging in increasingly confrontational rhetoric and tactics.³³ Novak discusses concerns regarding the introduction of foreign substances into the

27. See Martha McCarthy, *Student Vaccination Requirements: Can Nonmedical Exemptions be Justified?*, 320 EDUC. L. REP. 591, 607 (2015).

28. U.S. healthcare costs attributable to vaccine preventable diseases are estimated at ten dollars billion annually. See Calandrillo, *supra* note 18, at 427. See also Anthony Ciolli, *Religious and Philosophical Exemptions to Mandatory School Vaccinations: Who Should Bear the Costs to Society?*, 74 MO. L. REV. 287, 290 (2009).

29. See James Lobo, Note, *Vindicating the Vaccine: Injecting Strength into Mandatory School Vaccination Requirements to Safeguard the Public Health*, 57 B.C.L. REV. 261, 271 (2016).

30. Ciolli, *supra* note 28, at 290; see Roush & Murphy, *supra* note 23, at 2155 (identifying societal costs associated with vaccine preventable diseases as including missed time from school and work, doctor's visits, and hospitalizations).

31. Calandrillo, *supra* note 18, at 388.

32. Gibson, *supra* note 24, at 535. See also Calandrillo, *supra* note 18, at 390-93 (discussing medical risks associated with vaccination); Hodge & Gostin, *supra* note 18, at 844-49 (discussing anti-vaccination sentiment in general).

33. See, e.g., *Bridges v. Houston Methodist Hosp.*, No. H-21-1774, 2021 WL 2399994, at *1-2 (S.D. Tex. June 12, 2021) (dismissing claims challenging Houston Methodist Hospital's COVID vaccine mandate and describing as "reprehensible" the claim that the policy constitutes medical experimentation in violation of the Nuremberg Code); Complaint, *Cal. Educators for Med. Freedom v. L.A. Unified Sch. Dist.*, No. 21-cv-2388 (C.D. Cal. Mar. 17, 2021) (claiming that policies requiring vaccination constitute nonconsensual medical experimentation and clinical research); Richard Pan, *Anti-Vaccine Extremism is Akin to Domestic Terrorism*, WASH. POST (Feb. 28, 2021), https://www.washingtonpost.com/opinions/anti-vaccine-extremism-is-akin-to-domestic-terrorism/2021/02/26/736aee22-787e-11eb-8115-9ad5e9c02117_story.html [<https://perma.cc/8UXV-7D4N>] (contending that anti-COVID vaccination campaigns are propaganda in an effort to market "alternative remedies and magical supplements" which could result in unnecessary deaths and are thus akin to domestic terrorism).

human body, the absence of vaccine preventable disease in the community, distrust of public health officials, personal autonomy, and religious objections.³⁴ Reiss discusses safety concerns such as vaccine toxicity and damage to the immune system and belief in the superiority of “natural immunity.”³⁵ Tomsick attributes anti-vaccination sentiment to beliefs that the government and regulatory agencies have concealed information regarding medical risk and that pharmaceutical companies are motivated by profit rather than safety.³⁶

III. VACCINATION, RELIGION, CONSCIENCE, AND STATE LAW

A. Vaccination and State Law

Every state requires vaccination against certain communicable diseases as a condition for school attendance.³⁷ The vast majority of school vaccination laws apply to both public and private schools.³⁸ These policies are not entirely uniform but nevertheless nearly unanimous with respect to several diseases.³⁹ For

34. Novak, *supra* note 22, at 1106-07.

35. Dorit Rubinstein Reiss, *Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements*, 65 HASTINGS L.J. 1551, 1553 (2014).

36. Emma Tomsick, Note, *The Public Health Exemptions Demand for Revoking Non-Medical to Compulsory Vaccination Statutes*, 34 J. L. & HEALTH 130, 153 (2020) (citing Anna Kata, *A Postmodern Pandora's Box: Anti-Vaccination Misinformation on the Internet*, 28 VACCINE 1709, 1713 (2010)).

37. See *State School Immunization Requirements and Vaccine Exemption Laws*, U.S. DEP'T OF HEALTH & HUMAN SERVS. CTRS. FOR DISEASE CONTROL & PREVENTION 7-9, app. A (2017), <https://www.cdc.gov/phlp/docs/school-vaccinations.pdf> [<https://perma.cc/ZK4B-SG3C>]. For a comprehensive overview of state vaccination requirements as a condition for attendance at public and private educational institutions, see generally Hodge & Gostin, *supra* note 18.

38. See *id.* (noting that forty-six state school vaccination laws are applicable to public and private educational institutions). All fifty state school vaccination laws are applicable to day care facilities. *Id.*

39. See *Hepatitis B Vaccine Mandates for Child Care and K-12*, IMMUNIZATION ACTION COAL. 1-2 (2019), <https://www.cdc.gov/hepatitis/hbv/vaccchildren.htm> [<https://perma.cc/CMS9-4K3N>]. Every state requires the polio vaccine for those students attending childcare centers and elementary schools and the DTaP vaccine for diphtheria, tetanus, and pertussis for those students attending childcare centers and elementary and secondary schools. See *Polio Vaccine Mandates for Child Care and Elementary Schools*, IMMUNIZATION ACTION COAL. 1-2 (2020), <https://www.cdc.gov/vaccines/parents/diseases/polio.html> [<https://perma.cc/4CGX-Q7LK>]; *DTaP Vaccine Mandates for Elementary and Secondary Schools*, IMMUNIZATION ACTION COAL. 1-2 (2020), <https://www.cdc.gov/vaccines/hcp/vis/vis-statements/dtap.html> [<https://perma.cc/FFE6-NHX5>]. Vaccination for haemophiles influenza is required in every state for children attending daycare centers. See *Hib Vaccine Mandates for Childcare*, IMMUNIZATION ACTION COAL. 1-2 (2019), <https://www.cdc.gov/vaccines/parents/diseases/hib.html> [<https://perma.cc/FE3X-Q87W>]. Other vaccines are subject to fewer requirements.

example, forty-eight states require vaccination for hepatitis B for child care centers, elementary, and secondary schools.⁴⁰ The MMR vaccine for measles, mumps, and rubella is required in every state for attendance at elementary and secondary schools and child care centers.⁴¹ Elementary and secondary schools and child-care centers are subject to mandatory varicella vaccination in all states with the exception of South Dakota.⁴² These requirements are paramount due to the absence of federal vaccination requirements as a condition of admission to public schools.

B. Religious Exemptions to Vaccination

Forty-four states and the District of Columbia grant exemptions to students based upon religious objections to vaccination.⁴³ The language creating these exemptions varies by state ranging from belief to active practice of religious principles to membership in a recognized congregation. The significance of these differences is uncertain given the sparsity of interpretive case law.

Specifically, in *Workman v. Mingo City Board of Education*, the Court of Appeals for the Fourth Circuit concluded that the termination of religious exemptions in West Virginia did not impermissibly interfere with the free exercise of religion.⁴⁴ In *Whitlow v. California*, the U.S. District Court for the Southern District of California concluded that the U.S. Constitution does not require religious exemptions, and that the right to practice religion freely does not give individuals the liberty to expose the community to communicable disease or children to the risk of ill health and death.⁴⁵ In *Love v. State Department of Education*, the California Court of Appeals held that repeal of the state's religious

40. *DTaP Vaccine Mandates for Child Care and Elementary Schools*, IMMUNIZATION ACTION COAL. 1-2 (2019), <https://www.cdc.gov/vaccines/schedules/hcp/imz/child-adolescent.html> [<https://perma.cc/6KZF-HL8E>].

41. *MMR Vaccine Mandates for Child Care and K-12*, IMMUNIZATION ACTION COAL. 1-2 (2019), <https://www.cdc.gov/vaccines/vpd/mmr/public/index.html> [<https://perma.cc/P5YG-3GK7>].

42. *Varicella Vaccine Mandates for Child Care and K-12*, IMMUNIZATION ACTION COAL. 1-2 (2020), <https://www.cdc.gov/vaccines/vpd/varicella/hcp/recommendations.html> [<https://perma.cc/2SDY-6G5L>].

43. Religious exemptions are not recognized or are chronologically limited in California, Connecticut, Maine, Mississippi, New York, and West Virginia. *See* CAL. HEALTH & SAFETY CODE § 120335(g)(1) (2022) (eliminating exemptions unless filed before January 1, 2016, and subject to termination upon enrollment in an advanced grade span); CONN. GEN. STAT. §§ 10-204a(b)(1)-(7) (2022) (eliminating exemptions unless filed before April 28, 2021); 2019 Me. Leg. Serv., Ch. 154 (H.P. 586) (L.D. 798 (2019)) (eliminating exemptions effective September 1, 2021); MISS. CODE ANN. § 41-23-47 (2022); 2019 N.Y. Sess. Laws, Ch. 35 (A2371-A) (2022) (eliminating exemptions effective immediately); W. VA. CODE § 16-3-4(h) (2022) (limiting exemptions to medical reasons).

44. *Workman v. Mingo Cty. Bd. of Educ.*, 419 F.App'x 348, 353-54 (4th Cir. 2011).

45. *Whitlow v. California*, 203 F. Supp. 3d 1079, 1084, 1086 (S.D. Cal. 2016).

exemption did not transgress the free exercise of religion.⁴⁶ In *Brown v. Smith*, the California Court of Appeals upheld the elimination of religious exemptions on the grounds of the state's interest in public health and safety, and the potential for significant social burdens associated with the absence of widespread vaccination.⁴⁷

The largest number of exemptions are based upon religious beliefs or convictions. Twenty-three states and the District of Columbia exempt public school students from vaccination on these grounds.⁴⁸ These exemptions are broader than those requiring active practice of religious principles and membership in a religious congregation in at least four states Arkansas, Maryland, Massachusetts, and Ohio.

In Arkansas, the court found that religious exemption limited to members of a "recognized church or religious denomination" was too narrow and required school administrators and courts to make impermissible distinctions between sincere religious beliefs.⁴⁹ In Maryland, the Supreme Court struck down an exemption limited to "adherents of a recognized church or religious denomination" as a violation of the Establishment Clause of the U.S. Constitution.⁵⁰ In Massachusetts, the Supreme Court struck down an exemption limited to objectors who subscribe to "tenets and practice of a recognized church or religious denomination" as a violation of the Establishment Clause of the U.S. Constitution.⁵¹ The Ohio Court of Appeals denied custody to a mother due to failure to immunize her child based upon her inability to identify a religious denomination to which she belonged or teachings that dictated her refusal to vaccinate.⁵²

Closely related to belief and convictions are exemptions based upon

46. *Love v. State Dep't of Educ.*, 240 Cal. Rptr. 3d 861, 873 (Cal. Ct. App. 2018).

47. *Brown v. Smith*, 235 Cal. Rptr. 3d 218, 225 (Cal. Ct. App. 2018).

48. For states granting exemptions on the basis of religious beliefs, see ARK. CODE ANN. § 6-18-702(d)(4)(A) (2022); DEL. CODE ANN. § 131(6) (2022); D.C. CODE § 38-506(1) (2022); GA CODE ANN. § 20-2-771(c) (2022); IND. CODE §§ 20-34-3-2(a)(1)-(3) (2022); MD. CODE EDUC. § 7-403(b)(1) (2022); MASS. GEN. LAWS ch.76 § 15 (2022); MINN. STAT. § 121A-15(3)(d) (2022); MO. REV. STAT. § 167.181(3) (2022); MONT. CODE ANN. §§ 20-5-403(1)(d), (2)(a)(ii), 20-5-405(1)(a)-(d) (2022); NEV. REV. STAT. § 392.437 (2022); N.H. REV. STAT. ANN. § 141-C.20-c(II) (2022); N.M. STAT. ANN. § 24-5-3(A)(3) (2022); N.C. GEN. STAT. § 130A-157 (2022); N.D. CENT. CODE § 23-07-17.1(3) (2022); OR. REV. STAT. § 433.267(1)(c)(A) (2022); R.I. GEN. LAWS § 16-38-2(a) (2022); TEX. EDUC. CODE ANN. § 38.001(c)(1)(B) (2022); UTAH CODE ANN. § 53G-9-303(3) (2022); VT. STAT. ANN. tit.18, § 1122(a)(3)(A) (2022); WASH. REV. CODE § 28A.210.090(1)(b) (2022); S.C. CODE ANN. REGS. § 61-8(II)(A)(2) (2022). For states granting exemptions on the basis of religious convictions, see MICH. COMP. LAWS § 333.9215(2) (2022); OHIO REV. CODE ANN. § 3313.671(B)(4) (2022).

49. *Boone v. Bozeman*, 217 F. Supp. 2d 938, 947 (E.D. Ark. 2002).

50. *Davis v. State*, 451 A.2d 107, 113-14 (Md. 1982).

51. *Dalli v. Bd. of Educ.*, 267 N.E.2d 219, 223 (Mass. 1971).

52. *In re I.W.*, No. C-180095, 2019 WL 1781486, at *2 (Ohio Ct. App. Apr. 24, 2019).

“religious grounds” and “personal beliefs.”⁵³ These exemptions are undefined by statute or case law but may be broader given the absence of reference to an underlying religious belief or conviction. New Jersey’s exemption may also be broad given its focus on free exercise rights of objectors.⁵⁴ Exemptions granted by three states based upon dissent and objections are broader.⁵⁵

Three categories of exemptions require active engagement by religious objectors. Three states require objectors to demonstrate that they are adherents to a religious belief.⁵⁶ This category seems to imply that objectors follow specific religious teachings in their daily lives. Similarly, five states require objectors to adhere to religious practices, once again implying active participation rather than mere belief.⁵⁷ This conclusion may be drawn with greater certainty in the three states which require active membership in a religious congregation in order to qualify for an exemption.⁵⁸

C. Conscience-Based Exemptions to Vaccination

Conscience-based objections may be divided into two categories. The first, and most common, exemption requires some kind of belief. Twelve states require belief, although they differ in their descriptions. Three states grant exemptions based upon philosophical beliefs.⁵⁹ Washington’s statute is broader as it also

53. See ARIZ. REV. STAT. ANN. § 15-873(A)(1) (2022) (personal belief); IDAHO CODE § 39-4802(2) (2022) (religious grounds); ILL. COMP. STAT. § 5/27-8.1(8) (2022) (religious grounds); KY. REV. STAT. ANN. § 214.036 (2022) (religious grounds); 24 PA. CONS. STAT. § 13-1303a(d) (2022) (religious grounds); WIS. STAT. § 252.04(3) (2022) (religion).

54. See N.J. STAT. ANN. § 26:1A-9.1 (2022) (“free exercise of the pupil’s religious rights”).

55. See LA. STAT. ANN. § 17:170(E) (2022) (dissent); OKLA. STAT. tit. 70, § 1210.192(2) (2022) (objection); WYO. STAT. ANN. § 21-4-309(a) (2022) (religious objection).

56. See COLO. REV. STAT. § 25-4-903(2)(b)(I) (2022) (“adherent to a religious belief whose teachings are opposed to immunizations”); KAN. STAT. ANN. § 72-6262(b)(2) (2022) (“adherent of a religious denomination whose religious teachings are opposed to . . . inoculations”); S.D. CODIFIED LAWS § 13-28-7.1(2) (2022) (“adherent to a religious doctrine whose teachings are opposed to such immunization”).

57. See ALA. CODE § 16-30-3(1) (2022); FLA. STAT. § 1003.22(5)(a) (2022); HAW. REV. STAT. § 302A-1156(2) (2022); TENN. CODE ANN. § 49-6-5001(b)(2) (2022); VA. CODE ANN. §§ 22.1-271.2(C)(i), 2(E), 32.1(D)(1) (2022).

58. See IOWA CODE § 139A.8(4)(a) (2) (2022) (“tenets and practices of a recognized religious denomination of which the applicant is an adherent or member”); NEB. REV. STAT. § 79-221(2) (2022) (“tenets and practices of a recognized religious denomination of which the student is an adherent or member”); ALASKA ADMIN. CODE tit. 4, § 06.055(b)(3) (2022) (“tenets and practices of the church or religious denomination of which the applicant is a member”). The exemption in Nebraska is broader than those in Alaska and Iowa as the statute also grants exemptions to students based upon their “personal and sincerely followed religious beliefs.” NEB. REV. STAT. § 79-221(2) (2022).

59. See ARK. CODE ANN. § 6-18-702(d)(4)(A) (2022); OR. REV. STAT. § 433.267(1)(c)(A)

permits exemptions based upon personal objections but is narrower to the extent that exemptions regardless of their basis are inapplicable to vaccination for measles, mumps, and rubella.⁶⁰ North Dakota's statute similarly mentions philosophical beliefs but, unlike Arkansas, Oregon, and Washington, expressly requires such beliefs be "sincerely held" and not a "pretense for avoiding legal requirements."⁶¹ Pennsylvania describes belief as "a strong moral or ethical conviction similar to a religious belief" thereby injecting an undefined degree of sincerity and fervor into the exemption determination.⁶²

An additional four states delink belief from philosophy by simply granting exemptions based upon personal belief.⁶³ However, Arizona requires an explicit statement of the personal belief underlying the exemption request.⁶⁴ The statutes in three other states similarly delink belief from philosophy but require that beliefs be "conscientiously held."⁶⁵ Applicable case law in Minnesota declares that personal convictions should be treated equally with similarly situated religious beliefs.⁶⁶

The second type of exemption requires no particular belief objecting to vaccination. Statutes in Oklahoma and Michigan require only objection to vaccination.⁶⁷ However, a 2007 opinion by the Michigan Attorney General's office provides objections must be "actual," and local health departments are empowered to require explanations and determine if an exemption has been properly claimed.⁶⁸ Idaho's statute grants exemptions based upon "religious or other grounds."⁶⁹ Louisiana's exemption is arguably the most liberal of all by merely requiring a "written dissent" to vaccination.⁷⁰ Whether these distinctions represent true differences in the nature of the protected beliefs and exemptions is

(2022); WASH. REV. CODE § 28A.210.090(1)(c) (2022).

60. See WASH. REV. CODE § 28A.210.090(1)(c) (2022).

61. N.D. ADMIN. CODE § 33-06-05-01(c) (2022). See also N.D. CENT. CODE § 23-07-17.1(3) (2022).

62. 28 PA. CODE § 23.84(b) (2022). See also 24 PA. CONS. STAT. § 13-1303a(d) (2022).

63. See ARIZ. REV. STAT. ANN. § 15-873(A)(1) (2022); COLO. REV. STAT. § 25-4-903(2)(b)(I) (2022); UTAH CODE ANN. § 53G-9-303(3) (2022); WIS. STAT. § 252.04(3) (2022).

64. See ARIZ. ADMIN. CODE § R9-6-706(A)(5) (2022). But see COLO. REV. STAT. § 25-4-903(2.3)(b)(V) (2022) (prohibiting the state from requiring explanation of the religious or personal beliefs serving as the basis for an exemption request).

65. MINN. STAT. § 121A-15(3)(d) (2022); OHIO REV. CODE ANN. § 3313.671(B)(4) (2022); TEX. EDUC. CODE ANN. § 38.001(c)(1)(B) (2022). See MINN. STAT. § 121A.15(3)(d) (2022) (exemption limited to diphtheria, hepatitis B, pertussis, polio, and tetanus); TEX. EDUC. CODE ANN. § 38.001(a) (2022) (exemption limited to diphtheria, mumps, polio, rubeola, rubella, and tetanus).

66. See *In the Matter of the Welfare of X* (Sibley Cty. Ct., Family Div. Dec. 29, 1977), cited in Off. of the Att'y Gen., 1980 WL 119579, at *4 (Minn. July 23, 1980).

67. See MICH. COMP. LAWS § 333.9215(2) (2022); OKLA. STAT. tit. 70, § 1210.192(2) (2022).

68. Off. of the Mich. Att'y Gen., 2007 WL 2734012, at *5 (Sept. 14, 2007).

69. IDAHO CODE § 39-4802(2) (2022).

70. LA. STAT. ANN. § 17:170(E) (2022). See also LA. ADMIN. CODE tit. 28, §§ 303(E), 1101(E) (2022).

uncertain as there is an absence of interpretive case law.⁷¹

IV. NONMEDICAL EXEMPTIONS TO VACCINATION AND PUBLIC HEALTH

Nonmedical exemptions to vaccination may have significant impacts on public health. Widespread and broadly drawn exemptions may damage the success of vaccination programs.⁷² Supporters of exemptions are not necessarily unconcerned about public health and the common well-being.⁷³ Instead, exemption supporters and public health advocates reach different conclusions about how to achieve these goals due to competing and often conflicting assumptions. On one side of the conflict are religious teachings about right and wrong and strongly held moral and ethical considerations regarding individual autonomy.⁷⁴ These beliefs are confronted by social concerns and epidemiological data on the other side of the issue.⁷⁵

Conscience-based objections to vaccination are more susceptible to criticism due to their perceived lack of connection to widely accepted religious doctrines and teachings. This lack of connection and the vagueness of such exemptions in state statutes may lead to more conscience claims as compared to religious claims

71. The language utilized in the recognized bases for exemption from school vaccination requirements closely tracks language in recent state legislation prohibiting COVID vaccination mandates in the employment, education, and public accommodations contexts. *See, e.g.*, H.B. 2001, § 1(d)(8), 2021 Spec. Sess. (Kan. 2021) (“theistic and non-theistic moral and ethical beliefs as to what is right and wrong that are sincerely-held with the strength of traditional religious views”); N.D. CENT. CODE § 34-03-10(2)(c)(2) (2022) (“philosophical or moral beliefs opposed to . . . immunization”); TENN. CODE ANN. § 14-2-102(a) (2022) (prohibiting private businesses, governmental entities, schools or local educational agencies from compelling or taking “an adverse action against a person to compel the person to provide proof of vaccination if the person objects to receiving a COVID-19 vaccine for any reason”); UTAH CODE ANN. § 26-68-201(2)(c) (2022) (prohibiting public and private employers from requiring vaccination for COVID if receiving such a vaccination conflicts with an employee or prospective employee’s “sincerely held personal belief”); EXEC. ORDER GA. 40 § 1 (Tex. 2021) (prohibiting public and private employers and public accommodations from requiring vaccination or proof thereof based upon “personal conscience”).

72. *See, e.g.*, Timothy J. Aspinwall, *Religious Exemptions to Childhood Immunization Statutes: Reaching for a More Optimal Balance between Religious Freedom and Public Health*, 29 LOY. U. CHI. L. J. 109, 114 (1997) (concluding that broad religious exemptions are inconsistent with public health objectives); Allan Jacobs, *Do Belief Exemptions to Compulsory Vaccination Programs Violate the Fourteenth Amendment?*, 42 U. MEM. L. REV. 73, 76 (2011) (contending that widespread religious and philosophical exemptions endanger existing vaccination programs and public health as a result of their “expanding and unlimited scope”).

73. *See* Aspinwall, *supra* note 72, at 111 (arguing that religious teachings often share concerns about public health and the common well-being with public health advocates).

74. *Id.*

75. *Id.*

and the consequent spread of disease and harm to non-claimants.⁷⁶ The result may be a proliferation of “exemptions of convenience” given the absence of required documentation of sincere beliefs opposed to vaccination.⁷⁷ Proliferation may pose a risk to public health and safety especially during an epidemic of vaccine preventable disease.⁷⁸ These risks include decreases in vaccination rates necessary to establish and maintain so-called herd immunity and overtaxing of resources to process exemption requests at the expense of vaccine distribution.⁷⁹ “Herd immunity” and the “herd effect” occur when a critical mass of vaccination rates within a population is reached, thereby conferring protection upon, and reducing the risk of infection to, persons who remain unvaccinated by reason of choice or medical necessity.⁸⁰

According to Gonzalez, states offering conscience-based and religious exemptions have higher overall exemption rates which poses a threat to herd immunity for vaccine preventable diseases.⁸¹ Increases in the number of conscience-based exemptions nationwide and linking such increases with the ease of obtaining exemptions and resultant enhanced risk of the spread of vaccine preventable diseases.⁸² Moreover, Horowitz argues that conscience-based exemptions “could lead to wholesale ineffectiveness of the vaccination program [in times of a health emergency] and create under-inclusiveness issues”.⁸³ Thompson concluded that nonmedical exemptions threaten herd immunity for

76. See Sara Mahmoud-Davis, *Balancing Public Health and Individual Choice: A Proposal for a Federal Emergency Vaccination Law*, 20 HEALTH MATRIX 219, 245 (2020).

77. See Calandrillo, *supra* note 18, at 432 (contending that conscience-based exemptions “pose a risk to societal welfare because they allow parents to decline to vaccinate their children even where there is no documentation of a sincere belief opposed to immunization”). However, the same criticism is equally applicable to religious objectors. See Lobo, *supra* note 29, at 273-74 (concluding that the absence of prohibitions upon vaccination in the most widely practiced religions in the United States indicates that most religious objectors “are actually using religion as a proxy for a non-religious motive”).

78. See, e.g., Mahmoud-Davis, *supra* note 76, at 244 (contending that “[t]he number of individuals who might claim vaccination exemptions on philosophical grounds could pose significant risks to the public health and safety” in a multi-state emergency).

79. *Id.* at 244. Saad B. Omer et al., *Nonmedical Exemptions to School Immunization Requirements: Secular Trends and Association of State Policies with Pertussis Incidence*, 296 J. AM. MED. ASS’N 1757, 1761 (2006) (contending that states offering conscience-based and religious exemptions have higher overall exemption rates).

80. See Gibson, *supra* note 24, at 528-29.

81. Victor Diego Gonzalez, *Religion in the Time of Measles: Prescriptions for Minimizing the Public Health Threats Associated with Religious Exemptions from Mandatory Vaccinations*, 15 CARDOZO PUB. L. POL’Y & ETHICS J. 413, 434 (2017).

82. McCarthy, *supra* note 27, at 608.

83. Ben Horowitz, *A Shot in the Arm: What a Modern Approach to Jacobson v. Massachusetts Means to Mandatory Vaccination During a Public Health Emergency*, 60 AM. U. L. REV. 1715, 1743 (2011).

vaccine preventable diseases.⁸⁴

V. SHOULD CONSCIENCE-BASED EXEMPTIONS BE ELIMINATED?

Critics of conscience-based exemptions have raised several grounds in support of their elimination. Most of these grounds relate to individual and collective concerns. Unlike other types of medical decision-making, vaccinations, and their absence, are unique in their ability to impact individual and collective health and well-being.⁸⁵ Individual well-being is not limited to objectors but also includes those whom they may infect and, in particular, society's most vulnerable members - children, the immunocompromised, and those medically unable to be vaccinated.⁸⁶

Collective interests most commonly cited by critics include public health, achievement and preservation of herd immunity, and overall well-being associated with control of the spread of communicable diseases.⁸⁷ These collective interests are subject to protection through invocation of the communal self-defense principle.⁸⁸ The Supreme Court stated that the communal self-defense principle in the context of vaccination provides that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members" which epidemic is considered to be an event of "paramount necessity."⁸⁹ The Court concluded that creation of a minority privilege to defy mandatory vaccination for smallpox presents "the spectacle . . . of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population" and refusing to "hold it to be an element in the liberty secured by the Constitution of the United States that . . . a minority of persons . . . should have the power thus to dominate the

84. Joseph W. Thompson et al., *Impact of Addition of Philosophical Exemptions on Childhood Immunization Rates*, 32 AM. J. PREVENTATIVE MED. 194, 199 (2007).

85. See Gibson, *supra* note 24, at 541-42.

86. *Id.* see also Jacobs, *supra* note 72, at 101 (criticizing belief exemptions as creating "an unnecessary risk of children acquiring communicable diseases in a school environment . . . [and violating] the right of children to enjoy the safest possible school environment").

87. See, e.g., Gibson, *supra* note 24, at 544 (concluding that the balance between individual liberty and collective welfare must weigh in favor of public health thereby requiring the elimination of nonmedical exemptions); Novak, *supra* note 22, at 1125 (arguing for the abolition of nonmedical exemptions on public health grounds); Tomsick, *supra* note 36, at 142 (arguing for the abolition of nonmedical exemptions in order to achieve and maintain herd immunity); Michael Lederman et al., *Defeat COVID-19 by Requiring Vaccination for All. It's Not Un-American. It's Patriotic*, USA TODAY (Aug. 6, 2020), <https://www.usatoday.com/story/opinion/2020/08/06/stop-coronavirus-compulsory-universal-vaccination-column/3289948001/> [<https://perma.cc/6SKP-DGDS>] (contending nonmedical exemptions violate the social contract). See also *supra* notes 59-60 and accompanying text.

88. See Novak, *supra* note 22, at 1123.

89. *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905).

majority when supported in their action by the authority of the State”.⁹⁰ These interests may be further described as compelling thereby permitting states to eliminate all nonmedical exemptions, religious or otherwise, without impermissibly intruding upon the rights of objectors.⁹¹

These concerns, while undoubtedly significant, must be balanced against individual interests such as voluntariness, consent, and the primary right and responsibility of parents, to make determinations regarding the perceived well-being of their children.⁹² These rights and responsibilities include the authorization of medical treatment for their minor children.⁹³ This authorization requires consent beyond “cursory agreement to vaccinations based on provider recommendations and legal mandates.”⁹⁴ Rather, consent requires “disclosure, comprehension [and] voluntariness” on behalf of the party charged with decision-making.⁹⁵ This is not to argue that parental interests are sufficient in and of themselves to overturn vaccination mandates for children. Rather, it is to argue that elimination of nonmedical exemptions, including those based upon conscience, negates voluntariness and consent and treats recipients as a collective manner rather than individuals worthy of particularized assessment.⁹⁶

It is also important to not overestimate the effect of nonmedical exemptions on disease control. The elimination of nonmedical exemptions will not prevent all future outbreaks of vaccine preventable disease.⁹⁷ Instead, future outbreaks will result from a combination of failure or inability to vaccinate and vaccine

90. *Id.* at 37-38.

91. *See, e.g.,* Sherr v. Northport-E. Northport Union Free Sch. Dist., 672 F. Supp. 81, 88 (E.D.N.Y. 1987) (holding that “[i]t has been settled law for many years that claims of religious freedom must give way [to] the competing interest of society in fighting . . . contagious diseases through mandatory inoculation programs”). *See also* Gibson, *supra* note 24, at 543-44 (concluding that the elimination of nonmedical exemptions would be sustained through application of the compelling interest test).

92. *See* Katherine Drabiak, *Disentangling Dicta: Prince v. Massachusetts, Police Powers, and Childhood Vaccine Policy*, 29 ANNALS OF HEALTH L. & LIFE SCI. 173, 184-85 (2020).

93. *See, e.g.,* Macklin v. Ark. Dep’t of Human Servs., 624 S.W.3d 869, 874 (Ark. 2021) (holding the state’s interest in promoting the health and safety of its children must yield to the rights of parents to make fundamental decisions regarding the lives of their children and the balancing of these interests was a matter of legislatively-determined public policy in which the court could not interfere); *In re* LePage, 18 P.3d 1177, 1181 (Wyo. 2001) (holding that the state department of health had no statutory authority to inquire into the sincerity of parents’ religious beliefs regarding the vaccination of their children); Off. of the Att’y Gen., 1991 WL 634929, at *1 (Mont. Feb. 27, 1991) (instructing school districts to refrain from challenging affidavits stating parents’ religious beliefs regarding vaccination of their children).

94. Drabiak, *supra* note 92, at 185 (citing Kristine Severyn, *Jacobson v. Massachusetts: Impact on Informed Consent and Vaccine Policy*, 5 J. PHARMACY & L. 249, 252-53 (1995)).

95. Drabiak, *supra* note 92, at 185.

96. *Id.*

97. *Id.* at 204 (contending that “[p]resenting the removal of [nonmedical exemptions] as a sufficient solution misleadingly simplifies vital facts behind why outbreaks occur”).

failure.⁹⁸ Some vaccine recipients will fail to develop antibodies that confer immunity, some recipients may develop disease despite vaccination, and immunity will inevitably wane over time.⁹⁹ The existence of nonmedical exemptions has little, if any involvement, with these issues.

Enforcement difficulties have also been cited as an argument for elimination of nonmedical exemptions.¹⁰⁰ These difficulties arise primarily from the creation and application of appropriate tests for determining who may qualify for an exemption.¹⁰¹ Leaving aside the argument that difficulty in applying vague language in statutes should not serve as an excuse for the wholesale gutting of legislatively created rights, it is without dispute that abuses of exemptions may occur. Abuses are much more likely to occur in states where there is minimal oversight of exemption processes.¹⁰² This lack of oversight and accompanying deference to claims may result in “exemptions of convenience” in certain circumstances.¹⁰³ Some critics have concluded that anyone who wants an exemption will receive it.¹⁰⁴

There are few legal obstacles to elimination of conscience-based exemptions. The United States Supreme Court has not directly ruled on whether an individual has a right to object to vaccination of his or her children on the basis of conscience.¹⁰⁵ In dicta, the Court has stated that parents “cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds.”¹⁰⁶ According to the Court, the free exercise of religion “does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”¹⁰⁷ Giving these statements greater weight than they are due as dicta and recognizing that they address religious issues relating to vaccination, it is fair to conclude conscience-based exemptions would equally fail.

98. See Gregory A. Poland & Robert M. Jacobson, *The Re-Emergence of Measles in Developed Countries: Time to Develop the Next-Generation Measles Vaccination?*, 30 *VACCINE* 103, 103 (2012). “Vaccine failure” is defined as either primary wherein a percentage of recipients fail to develop antibodies resulting in immunization or waning in which effectiveness of the vaccine decreases over time.

99. See Drabiak, *supra* note 92, at 204-05.

100. See Novak, *supra* note 22, at 1124.

101. *Id.*

102. *Id.*

103. See § 39-4802(2), *supra* note 58.

104. See Novak, *supra* note 22, at 1124.

105. See *Zucht v. King*, 260 U.S. 174, 176 (1922) (holding that school admission may be conditioned upon vaccination but did not address a conscience-based objection to such requirement). For a detailed discussion of U.S. Supreme Court jurisprudence regarding vaccination, see *McCarthy*, *supra* note 27, at 599-600.

106. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (relating to the application of labor laws to the distribution of Jehovah’s Witness’ pamphlets by a minor).

107. *Id.* at 166-67.

This conclusion is consistent with holdings in federal and state courts determining that the recognition of conscience-based objections is not constitutionally required.¹⁰⁸ This conclusion is also consistent with administrative rules and regulations, judicial opinions, and opinions of attorneys general in states with otherwise robust protection of religious objections to vaccination. Specifically, in *Kleid v. Board of Education*, the court concluded that the failure to include conscience-based objections in Kentucky's religious exemption statute is not a violation of the Establishment Clause.¹⁰⁹ In *Syska v. Montgomery City Board of Education*, the court held that the failure to include conscience-based objections in Maryland's religious exemption statute was constitutional.¹¹⁰ The Office of Attorney General in Iowa concluded that Iowa's religious exemption was inapplicable to "ethical or moral beliefs outside of a recognized religion."¹¹¹ The Office of Attorney General in Kansas concluded that the failure to include conscience-based objections in Kansas' religious exemption statute was not a violation of the Establishment Clause.¹¹² The law is clear, states need not grant exemptions other than those deemed medically necessary.¹¹³

All of the above objections duly noted, the elimination of nonmedical exemptions, including those that are conscience-based, is unrealistic.¹¹⁴ Conscience-based exemptions are too well-established under existing state law to be easily uprooted.¹¹⁵ Furthermore, many states have not back-tracked despite the COVID pandemic, but instead have sought to expand existing statutory exemptions with at least one state going as far as to determine that COVID is not a public health emergency negating the application of nonmedical objections.¹¹⁶

An added obstacle is the understandable reluctance of courts to delve into religious and personal beliefs in a quest to separate sincere beliefs from claims

108. See, e.g., *Phillips v. City of New York*, 27 F. Supp. 3d 310, 313 (E.D.N.Y. 2014), *aff'd*, 775 F.3d 538 (2d Cir. 2015) (holding that religious exemptions to vaccination are not constitutionally required).

109. See *Kleid v. Bd. of Educ.*, 406 F. Supp. 902, 907 (W.D. Ky. 1976); 10A N.C. ADMIN. CODE § 41A.0403 (2022) (providing that North Carolina's religious exemption is inapplicable to personal belief or philosophy not founded upon a religious belief).

110. *Syska v. Montgomery Cty. Bd. of Educ.*, 415 A.2d 301, 304 (Md. Ct. Spec. App. 1980).

111. Off. of the Att'y Gen., 1977 WL 18943, at *2-3 (Iowa July 14, 1977).

112. Off. of the Att'y Gen., 2012 WL 3782384, at *3-4 (Kan. Aug. 28, 2012).

113. See, e.g., Calandrillo, *supra* note 18, at 429-30 (concluding that religious exemptions are "probably not required" and conscience-based exemptions are "certainly not required"); Lobo, *supra* note 29, at 279 (stating that "no court has ever required a state to include anything other than a medical exemption to compulsory vaccination laws, despite the fact that most states have religious exemptions"); Reiss, *supra* note 35, at 1563 (describing the judicial history of exemptions as "enabling, not mandating" nonmedical exemptions).

114. See, e.g., Ciolli, *supra* note 28, at 290-93 (contending that the elimination of nonmedical exemptions is unrealistic given the current state of statutory and case law).

115. See *supra* notes 32-52 and accompanying text.

116. See Off. of the Att'y Gen., 2021 WL 6275030, at * 1 (Va. Dec. 30, 2021). See also *supra* note 15 and accompanying text.

asserted in bad faith or without adequate justification, however those terms may be defined.¹¹⁷ Such quests require “high levels of entanglement” with individual beliefs, inquiries about which local school administrators, health department officials, and federal and state judges may be ill-equipped.¹¹⁸ Authority to make these determinations may be misused and abused “especially if the decision-maker does not share the values of the exemption-seeking parent, which is almost always the case.”¹¹⁹ The delegation of such authority also assumes a degree of sophistication about issues of religion and conscience which may be lacking or absent, especially if claimed exemptions are based upon beliefs and practices unfamiliar to decisionmakers. In this regard, compliance with legal standards is only part of the equation. Empathy with individual claimants, open-mindedness regarding their beliefs, and even-handedness in the application of standards are also required. These traits are unlikely to be present in all cases.

Critics of nonmedical exemptions have alternatively argued in favor of retaining religious objections and abolishing conscience-based objections.¹²⁰ Leaving the unrealistic nature of such proposals aside for the reasons previously discussed, these arguments also fail to recognize the fine and often indistinguishable line between religion and conscience.¹²¹ The hallmarks of religion are threefold.¹²² The first component is belief, which consists of faith in “the mission of a certain individual or group - prophet, incarnate god or church - or assent to a particular interpretation of existence,” the desire to belong to a spiritual society which shares the same world-view, and release from daily life.¹²³

117. *See, e.g.*, Reiss, *supra* note 35, at 1569 (stating that “[f]reedom of conscience and religion means that the state may not tell me if my beliefs are legitimate . . . [and] 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”).

118. *Id.* at 1589.

119. *Id.* at 1590.

120. *See, e.g.*, Gonzalez, *supra* note 68, at 418 (advocating the tightening of requirements for religious objections and the abolition of conscience-based objections); Lobo, *supra* note 29, at 263-64 (arguing for the creation of a uniform vaccination mandate to be adopted by the states in which religious objections are limited and conscience-based objections are eliminated); Rials, *supra* note 68, at 238 (contending that conscience-based exemptions should be eliminated as they encourage “illegitimate objections” having no basis in science and interfere with the creation and maintenance of herd immunity).

121. *See* *United States v. Seeger*, 380 U.S. 163, 174 (1965) (Clark, J., concurring) (describing the distinction between conscience and religious belief as difficult due to the fact that “in no field of human endeavor has the tool of language proved so inadequate”). *See also* Reiss & Weithorn, *supra* note 25, at 918 (noting that distinguishing between religious and conscience-based objections can be “quite challenging and can lead to substantial debate”).

122. *See* Lucien J. Dhooge, *The Equivalence of Religion and Conscience*, 31 NOTRE DAME J. L., ETHICS & PUB. POL’Y 253, 255-56 (2017) (defining religion as consisting of belief, action, and purpose).

123. John O. Hayward, *Religious Pretenders in the Courts: Unmasking the Imposters*, 20 TRINITY L. REV. 24, 28 (2014).

Belief is manifested through “categorical demands on action” that require satisfaction regardless of individual desire or societal incentives and disincentives.¹²⁴ These actions are intended to serve a “higher good or ultimate end” beyond ordinary human existence.¹²⁵

In a similar manner, conscience consists of belief and response.¹²⁶ Belief refers to identification of moral principles and assessment of context, which in turn, influence decision-making and judgments.¹²⁷ Decisions and judgments based upon such evaluations create a moral consciousness for each individual and provide him or her with a sense of self.¹²⁸ Response is a necessary element as a claim of conscience is “about what one must do, no matter what.”¹²⁹ Conscience often draws upon the same spiritual and transcendental beliefs that motivate religious actors.¹³⁰ Likewise, religious beliefs share characteristics with conscience-based thought.¹³¹ These belief systems do not operate independently

124. BRIAN LEITER, *WHY TOLERATE RELIGION?*, 34 (Princeton Uni. Press, 2013).

125. Hayward, *supra* note 103, at 30. *See also* RUSSELL BLACKFORD, *FREEDOM OF RELIGION AND THE SECULAR STATE* 6 (2012).

126. *See* Dhooge, *supra* note 95, at 266–67 (defining conscience as consisting of belief and response). *See also* Steven D. Smith, *What Does Religion Have to Do with Freedom of Conscience?*, 76 *UNIV. COLO. L. REV.* 911, 923 (2005) (contending that conscience “involves more than mere belief: it entails acting - living - in accordance with central convictions”).

127. *See* Darlene Fozard Weaver, *Conscience: Rightly Formed and Otherwise*, 132 *Commonwealth* 10, 11 (Sept. 18, 2005), <https://www.commonwealmagazine.org/conscience> [<https://perma.cc/9J6S-6EUM>] (referring to conscience as “human knowledge of right and wrong . . . our moral consciousness, process of moral decision-making, and settled moral judgments or decisions”). *See also* Elizabeth Sepper, *Taking Conscience Seriously*, 98 *VA. L. REV.* 1501, 1526-27 (2012) (discussing the impact of perceptions of right and wrong upon moral decision-making).

128. *See* Sepper, *supra* note 127, at 1526-27. *See also* MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY*, 79 (2008) (describing conscience as the “core of [an individual’s] humanity”); Dan W. Brock, *Conscientious Refusal by Physicians and Pharmacists: Who is Obligated to Do What, and Why?*, 29 *THEORETICAL MED. & BIOETHICS* 187, 189 (2008) (contending that conscience-based judgments “define who, at least morally speaking, the individual is, what she stands for, what is the central moral core of her character”).

129. LEITER, *supra* note 124, at 95. Leiter further describes conscience-based responses as “a kind of moral imperative central to one’s integrity as a person.” *Id.* *see also* JOHN RAWLS, *A THEORY OF JUSTICE*, 207 (Belknap Press Rev. Ed., 1999) (1971) (describing claims of conscience as “binding absolutely” and non-negotiable).

130. *See, e.g.*, *Welsh v. United States*, 398 U.S. 333, 340, 343-44 (1970) (plurality opinion) (granting an exemption from compulsory military service on the basis of deeply and sincerely held beliefs deriving from purely moral and ethical sources); *United States v. Seeger*, 380 U.S. 163, 165-66 (1965) (holding that an agnostic belief system in which the existence of a supreme being remained an open question and the adherent’s words and deeds were motivated by a devotion to goodness and virtue for their own sake was sufficient to qualify for an exemption from military service as long as such belief system was sincere and meaningful).

131. *See* Levin, *supra* note 23, at 1207.

but parallel to one another with frequent overlaps.¹³² Furthermore, conscience may occupy a place in the believer's life, similar to those of religious adherents.¹³³

Conscience and religion share sufficient "critical core characteristics" as to be moral equivalents and, thus, subject to equivalent treatment under the law.¹³⁴ Courts and scholars have struggled with these issues in opinions dating back decades.¹³⁵ Local school boards and administrators, and health department officials are unlikely to possess any greater competence to resolve these issues,

132. *Id.*

133. *See, e.g., Welsh*, 398 U.S. at 340 (concluding that the beliefs at issue occupied "a place parallel to that filled by God" in religious persons); *Seeger*, 380 U.S. at 166 (holding that the belief system at issue occupied a place in the life of the possessor parallel to that occupied by belief in God in the life of a religious adherent).

134. Levin, *supra* note 23, at 1207. *See also* MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 208-09 (2000) (equating religious freedom and liberty of conscience and contending that fairness requires equal accommodation of both); MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 65-71 (Belknap Press, 1998) (contending that conscience-based exemptions should be treated in a manner similar to those available for religious beliefs); Dhooge, *supra* note 94, at 277-91 (arguing that religion and conscience are moral and legal equivalents); Rodney K. Smith, *Converting the Religious Equality Amendment into a Statute with a Little "Conscience,"* 1996 BYU. L. REV. 645, 662-74 (1996) (supporting the treatment of conscience-based exemptions in a manner similar to those available to religious beliefs). *But see* JOHN GARVEY, *WHAT ARE FREEDOMS FOR?*, 54-55 (Harv. Univ. Press, 2000) (supporting exemptions from civil obligations solely for religious beliefs and practices); Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 LEGAL THEORY 214, 234-36 (2009) (supporting a broad definition of religion and accompanying protection with weaker protections for claims of conscience); Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1499-1500 (1990) (supporting exemptions from civil obligations solely for religious beliefs and practices); Steven D. Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325, 357 (2005) (supporting a broad definition of religion and accompanying protection with weaker protections for claims of conscience).

135. *See, e.g., Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981) (stating that defining religious belief and practice are "more often than not a difficult and delicate task"); *see also Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 92 (E.D.N.Y. 1987) (describing the determination of which denominations may qualify for an exemption as an "inherently tricky proposition"). *Compare Davis v. Beason*, 133 U.S. 333, 342 (1890) (holding that religion "has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will"), *and United States v. MacIntosh*, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting) (stating that "the essence of religion is belief in a relation to God involving duties superior to those arising from any human relation"), *with Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (finding Buddhism, Taoism, Ethical Culture and Secular Humanism to qualify as religions despite the absence of a belief in God).

especially on behalf of multiple students in any given academic year.

There are risks associated with fluid definitions and blurred boundaries. Fluidity and blurring may lead to the creation of exemptions from otherwise binding legal obligations, which are especially acute when they impose costs and burdens upon others such as in the area of public health.¹³⁶ Misuse of exemptions by undeserving claimants is a further risk exacerbated by judicial limitations upon consideration of the truth or falsity of the contested beliefs.¹³⁷ Risks aside, however, fluidity is necessary in order to account for “the diversity of human experience with what people take to be the divine, transcendence, or mystery.”¹³⁸ New and different viewpoints regarding imponderable questions should generally be welcomed rather than cast aside out of fear of misuse and concerns relating to potential overbreadth.

VI. MITIGATING THE IMPACT OF NONMEDICAL EXEMPTIONS ON PUBLIC HEALTH: SOLUTIONS WITHIN EXISTING STATE FRAMEWORKS

Given the likelihood that nonmedical exemptions, including those that are conscience-based, will remain part of the legal landscape and may in fact increase in number, it is important to strike a balance between exemptions and public health. The underlying fundamental principle in achieving balance is recognition that neither interest has absolute priority.¹³⁹ In practice, this means there will be occasions when the beliefs of objectors and the exemptions they seek must yield to the greater good in maintaining public health.¹⁴⁰ It also means that objectors and their interests must be accommodated to the extent they do not cause significant harm to societal interests in disease control.¹⁴¹

136. See, e.g., Lucien J. Dhooge, *Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?*, 21 WM. & MARY J. WOMEN & L. 319, 356-58 (2015) (discussing the unworkability of religiously based exemptions for vital services).

137. See *United States v. Ballard*, 322 U.S. 78, 85-86 (1944) (requiring that sincerity of religious beliefs be determined “without a view as to [their] truth or falsity”). See also WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* 3 (2005) (questioning the competence and ability of courts to define religion without establishing “a legal hierarchy of religious orthodoxy”).

138. Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1477 (2013).

139. See Aspinwall, *supra* note 72, at 134.

140. *Id.*

141. *Id.* see also Drabiak, *supra* note 92, at 207 (contending that “[p]ublic health ethics requires maximizing noncompulsory strategies and permitting conscientious objections, which do not necessarily impede health officials’ desired outcomes”); Douglas Diekema, *Personal Belief Exemptions from School Vaccination Requirements*, 35 ANN. REV. PUBLIC HEALTH 275, 275-92 (2014); Alvin Nelson El Amin et al., *Ethical Issues Concerning Vaccination Requirements*, 34 PUB. HEALTH REV. 1, 5-6 (2012); Douglas Opel & Douglas Diekema, *Finding the Proper Balance Between Freedom and Justice: Why We Should Not Eliminate Personal Belief Exemptions to*

States may achieve balance through reexamination of the administrative processes by which nonmedical exemptions in general, and conscience-based exemptions in particular, are granted. Optimal processes “encourage deliberative thought and [verification] of sincerity of beliefs.”¹⁴² Fortunately, many states already have elements of such processes in their existing vaccination laws. What is missing is uniformity and consistency across state laws.

This section of the article examines elements within existing state laws and identifies best practices with respect to the granting and maintenance of nonmedical exemptions. These proposals are described under the headings of procedural tightening, counseling and persuasion, sincerity and good faith, the continuation of exemptions in times of medical emergencies such as epidemics and outbreaks, and transparency.

A. Procedural Tightening

Procedural tightening strategies focus on enhancing rigor with respect to processes by which individuals seek exemptions from vaccination.¹⁴³ The goal of these strategies is to increase vaccination rates by creating more complex and rigorous processes which in turn deter objectors from seeking exemptions.¹⁴⁴ Some objectors may simply choose to accept vaccination rather than undertake a rigorous administrative process.¹⁴⁵ There is a direct correlation between procedural complexity and the number of exemptions sought and ultimately granted.¹⁴⁶ There is considerable support for such a correlation in research relating to religious exemptions to school vaccination requirements.¹⁴⁷ This correlation is also supported in administrative law literature examining “the role of procedural mechanisms and institutional design in controlling and managing behavior.”¹⁴⁸

Vaccine Mandates, 37 J. HEALTH POL., POL’Y & L. 141, 141-57 (2012).

142. Calandrillo, *supra* note 18, at 434.

143. See Reiss & Weithorn, *supra* note 25, at 974-79.

144. See Ciolli, *supra* note 28, at 295-96. See also Gonzalez, *supra* note 81, at 437.

145. See Levin, *supra* note 23, at 1240.

146. See Rials, *supra* note 60, at 218 (concluding that “the higher the rate of complexity in the process of applying for exemptions, the lower the rate of actual exemptions, and the lower the rate of complexity, the higher the rate of exemptions”).

147. For summaries of research correlating procedural complexity with lower numbers of exemptions in the context of school vaccination requirements, see, e.g., Calandrillo, *supra* note 18, at 434-35; Nili Karako-Eyal, *Beyond the Ethical Boundaries of Solidarity: Increasing Vaccination Rates through Mandatory Education to Solidarity*, 6 TEX. A&M L. REV. 345, 362-63 (2019); Reiss & Weithorn, *supra* note 25, at 964.

148. Reiss & Weithorn, *supra* note 25, at 961 n.307. See also Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243, 243 (1987); William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 67-68 (2004).

Procedural tightening must begin with the documentation necessary to obtain a nonmedical exemption. Every state recognizing nonmedical exemptions requires a written statement from a parent, guardian, or student if he or she is over the age of eighteen years. However, the required form of these statements varies with some state statutes lacking explicit reference to any document other a writing of some type.¹⁴⁹ Jurisdictions requiring nothing more than a writing have tipped the balance too far in favor of exemptions. These policies lack the sufficient degree of rigor necessary to establish a bona fide exception to important public health requirements. Exemptions may flourish in such an environment.

Signed statements with some informational requirements is a step in the right direction but also does not rectify the imbalance between individual and collective interests.¹⁵⁰ The requirement of a notarized affidavit affirming the applicant's beliefs and identifying their conflict with vaccination is a sounder approach.¹⁵¹ Tennessee's statute explicitly provides that affidavits are submitted under penalty of perjury, which is unnecessary duplicative given the affiant's oath, but may have some effect on bad faith applicants and discourage "exemptions of convenience."¹⁵²

The utilization of required state forms is a preferable approach given that they

149. See ALA. CODE § 16-30-3(1) (2022) (writing); D.C. CODE § 38-506(1) (2022) (writing submitted in good faith); FLA. STAT. § 1003.22(5)(a) (2022) (writing); HAW. REV. STAT. § 302A-1156(2) (2022) (writing); IDAHO CODE § 39-4802(2) (2022) (writing); IND. CODE § 20-34-3-2(a)(1) (2022) (signed writing delivered to teacher or official who may order vaccination); KAN. STAT. ANN. § 72-6262(b)(2) (2022) (signed writing); LA. STAT. ANN. § 17:170(E) (2022) ("written dissent"); MASS. GEN. LAWS Ch. 76, § 15 (2022) (writing); N.J. STAT. ANN. § 26:1A-9.1 (2022) (written statement); N.C. GEN. STAT. § 130A-157 (2022) (written statement); 24 PA. CONS. STAT. § 13-1303a(d) (2022) (writing); VT. STAT. ANN. tit. 18, § 1122(a)(3) (2022) (signed written document); WIS. STAT. § 252.04(3) (2022) (written statement provided to school); WYO. STAT. ANN. § 21-4-309(a) (2022) ("written evidence"); LA. ADMIN. CODE tit. 28, §§ 303(E), 1101(E) (2022) ("written dissent").

150. See N.M. STAT. ANN. § 24-5-3(A)(2) (2022) (affidavit or written affirmation that religious beliefs do not permit administration of a vaccine or other immunizing agent); WASH. REV. CODE § 28A.210.090(1)(b) (2022) (signed written certification of beliefs); ARIZ. ADMIN. CODE §§ R9-6-706(A)(1)-(6) (2022) (signed statement disclosing names of parents, names and dates of birth of children for whom an exemption is sought, disclosure of the vaccine that is the subject matter of the request, statement of personal belief opposed to vaccination, and parents' dated signature).

151. See ARK. CODE ANN. § 6-18-702(d)(4)(B) (2022) (signed affidavit affirming beliefs); GA. CODE ANN. § 20-2-771(e) (2022) (signed affidavit affirming conflict); IOWA CODE § 139A.8(4)(a)(2) (2022) (signed affidavit affirming tenets and practices); KY. REV. STAT. ANN. § 214.036 (2022) (signed affidavit affirming beliefs); NEB. REV. STAT. § 79-221(2) (2022) (signed affidavit affirming tenets and practices); N.H. REV. STAT. ANN. § 141-C:-20-(c)(II) (2022) (notarized form affirming beliefs); TENN. CODE ANN. § 49-6-5001(b)(2) (2022) (signed written statement affirming tenets and practices); ALASKA ADMIN. CODE tit. 4, § 06.055(b)(3) (2022) (signed affidavit affirming conflict); 14 DEL. ADMIN. CODE § 804(7.1.2) (2022) (signed affidavit affirming beliefs).

152. See TENN. CODE ANN. § 49-6-5001(b)(2) (2022).

promote uniformity throughout the jurisdiction. Courts have held that the required use of state-generated forms is not a violation of free exercise rights nor compels speech by potential objectors.¹⁵³ However, the utility of such forms is dependent on the information which the objector is required to disclose and affirm.¹⁵⁴

The most complete approaches utilizing a state forms approach may be found in existing statutes and administrative rules in Illinois and Texas, and the former approach in Connecticut prior to its elimination of nonmedical exemptions in 2019. Forms required by these states are note-worthy, as they impose burdens on objectors which are not undue but nevertheless cumbersome. For example, the required form in Texas may only be obtained through a written request to the state, must be notarized, and must be submitted to the admitting official of a school within ninety days of notarization.¹⁵⁵ The required form in Illinois must contain a detailed description of the objection including identification of the belief that is in conflict with a specific vaccination requirement.¹⁵⁶ The form must also be signed by a health care provider describing information provided to the objecting party.¹⁵⁷ The previous exemption provided by Connecticut law required a description of the conflict between the vaccination requirement and the objector's religious beliefs.¹⁵⁸ The Connecticut statute also required an extensive acknowledgement process involving judges, notary publics, and members of the state bar.¹⁵⁹ These forms strike an appropriate balance between the rigor to protect

153. *See* W.B. by and through Baker v. Crossroads Academy-Central Street, 2019 WL 6257963 (W.D. Mo., 2019) (upholding the rejection of a handwritten objection to vaccination). *See also* B.W.C. v. Williams, 990 F.3d 614, 618-22 (8th Cir. 2021) (concluding that the required use of a state-generated form in order to obtain an exemption is not compelled speech in violation of the U.S. Constitution).

154. *See* COLO. REV. STAT. §§ 25-4-903(2)(b)(II)(B), 25-4-903(2.3)(b)(II)-(V) (2022); N.D. CENT. CODE § 23-07-17.1(3) (2022); OR. REV. STAT. § 433.267(1)(c)(A) (2022); R.I. GEN. LAWS § 16-38-2(a) (2022); MD. CODE REGS. § 10.06.04.05(A) (2022); MINN. R. 4604.0400 (2022); MO. CODE REGS. ANN. 19 § 20-28.010(1)(C)(2) (2022); MONT. ADMIN. R. 37.114.716(1) (2022); NEV. ADMIN. CODE 46-20 § (2)(2) (2022); S.C. CODE ANN. REGS. § 61-8(II)(A)(2) (2022); S.D. ADMIN. R. 44:81:06:01 (2022); UTAH ADMIN. CODE § 396-100-5(1) (2022); 12 VA. ADMIN. CODE § 5-110-80(A)(1) (2022); Off. of the Att'y Gen., 2021 WL 6275030, at *5 (Mich. Sept. 14, 2007) (providing that local health departments may require utilization of exemption forms and require explanation of "other objection to immunization").

155. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 161.0041(a)-(c) (2022) (requiring utilization of a form provided by the state, notarization, and receipt of the form through written request to the state). *See also* TEX. EDUC. CODE ANN. § 38.001(c)(1) (2022) (requiring utilization of a state-provided form submitted to an "admitting official" within ninety days of notarization).

156. *See* ILL. COMP. STAT. § 5/27-8.1(8) (2022).

157. *Id.*

158. *See* CONN. GEN. STAT. §§ 10-204a(b)(1)-(7) (2022).

159. *Id.* (requiring acknowledgement by a judge of a court of record, a family support magistrate, a clerk or a deputy clerk of a court having a seal, a town clerk, a notary public, a justice of the peace, an attorney admitted to the Connecticut state bar, or a school nurse).

public health and the accommodation of individual belief.

Additional procedural tightening occurs in the small number of states requiring parties to identify the specific vaccinations to which they object or requiring objections to all vaccinations as a condition for exemption.¹⁶⁰ These approaches may reduce the number of applications especially given the accompanying requirement that individuals describe the specific nature of their objection to each and every vaccination for which an exemption is sought. Hawaii's absolute prohibition upon a la carte exemptions may be the most effective approach to reducing the number of applications.¹⁶¹ However, the impact of this prohibition may be reduced to the extent that Hawaii's statute does not expressly require a detailed explanation of the applicant's reason for seeking an exemption from all required vaccinations.¹⁶² Illinois' required identification of vaccinations, when combined with its previously-discussed detailed state form, may prove to be more effective.¹⁶³

Administrative regulations implementing Wisconsin's statutory exemption for religious beliefs and personal convictions may provide an additional means by which to discourage exemption applications. The signed statement of "religious or personal conviction grounds" submitted to the Wisconsin Department of Health requires written evidence of prior receipt of required vaccinations.¹⁶⁴ Although the regulation does not explicitly provide as such nor is there governing case law, it may be implied that past receipt of a vaccination which is the subject matter of a current request disqualifies the applicant from an exemption.¹⁶⁵ At the very least, past receipt of a vaccination should require an explanation of the changed circumstances underlying the new-found objection. Resolution of this issue also may be useful in the determination of the applicant's sincerity and good faith in seeking the exemption.¹⁶⁶ Although outright disqualification may be too harsh of a penalty and may fail to take into account changes in the applicant's personal beliefs, prior receipt of the vaccination which is the subject matter of a current exemption request should require a detailed

160. See COLO. REV. STAT. § 25-4-903(2.3)(b)(II)(A) (2022) (requiring identification of the vaccination from which an exemption is sought). See also ARIZ. ADMIN. CODE §§ R9-6-706(A)(4)-(5) (2022) (requiring identification of the vaccination from which an exemption is sought and statement of personal belief with respect to such vaccination); N.D. ADMIN. CODE § 33-06-05-04 (2022) (providing that, while exemptions are available for all required vaccinations, objectors must identify specific vaccinations in their applications).

161. See HAW. CODE § 11-157-5(b) (2022). See also Novak, *supra* note 22, at 1109 (contending that individuals must be required to object to all vaccines in order to receive a conscience-based exemption).

162. See *supra* note 121 and accompanying text.

163. See ILL. COMP. STAT. § 5/27-8.1(8) (2022).

164. WIS. ADMIN. CODE, DEP'T OF HEALTH SERV'S § 144.05 (2022).

165. *But see* Grzyb v. Grzyb, 2009 WL 7388854 (Va. Cir. Ct. 2009) (concluding that a parent's prior receipt of vaccines does not mean that the parent has no bona fide religious objection to the vaccination of his or her child).

166. See *infra* notes 161-93 and accompanying text.

explanation of the circumstances, necessitating the change and a more probing inquiry into the applicant's sincerity and good faith.

A final example of procedural tightening may be found in the five exemption statutes, which require periodic renewal. These statutes recognize that objections and resultant exemptions are not static but may change over time. Three states expressly require annual renewal of exemption requests.¹⁶⁷ Texas' and Utah's statutes provide that exemptions are effective for two years which, while preferable to no chronological limitations whatsoever, provides convenience to parents at the expense of school administrators and public health authorities.¹⁶⁸ New Mexico's statute requires renewal every nine months.¹⁶⁹ This period of time, not only adheres to the traditional school year for elementary and secondary students, but also requires parents to apply in advance of each new academic year. However, annual renewals more accurately reflect modern school attendance patterns as some portion of student populations may be expected to attend school for at least part of the summer. In any event, regardless of the form it takes, the placement of another obstacle in the path of objectors may reduce exemption applications which is the objective of procedural tightening.

B. Counseling and Persuasion

The second element of a balanced approach to the granting of nonmedical exemptions is counseling and persuasion. Counseling consists of a review of educational materials provided by the federal or state government, an acknowledgement that the failure to be vaccinated increases the risk of personal infection as well as infection of others including classmates and family members, and that such infections may prove to be life-altering or life-threatening.¹⁷⁰

Counseling could be informal through providing parents with information or more intensive including the requirement that it be provided by medical personnel.¹⁷¹ More stringent counseling requirements such as the use of quizzes to verify informed consent could also be utilized.¹⁷² Regardless of form,

167. See ARK. CODE ANN. § 6-18-702(d)(4)(B) (2022) (requiring an annual application process); VT. STAT. ANN. tit. 18, § 1122(a)(3) (2022) (requirement of annual signed statement). See also NEV. ADMIN. CODE 46-20 § (2)(1) (2022) (requiring annual submission of exemption requests).

168. See 25 TEX. ADMIN. CODE ANN. § 97.62(2) (2022) (providing that the signed exemption form is effective for two years from the date of notarization); UTAH CODE ANN. § 53G-9-303(4)(e) (2022).

169. See N.M. STAT. ANN. § 24-5-3(B) (2022) (providing exemptions are for a period of nine months and must be renewed in order to remain effective).

170. See Gonzalez, *supra* note 81, at 441.

171. See Silverman, *supra* note 22, at 285 (advocating mandatory consultation with medical personnel as a condition of granting exemptions to school vaccination requirements). See also McCarthy, *supra* note 27, at 598.

172. See Reiss, *supra* note 35, at 1596 (stating that “[a] somewhat rigorous educational requirement seems appropriate, potentially with a short quiz at the end” in order to obtain an

compliance with counseling requirements should be memorialized in signed statements.¹⁷³

Counseling requirements are not excessive given the risks associated with unvaccinated status and do not impose “insurmountable barriers” for those seeking exemptions.¹⁷⁴ Most individuals seeking exemptions could overcome these obstacles. Even if they fail as a deterrent, these obstacles enhance the accuracy of the exemption process by requiring documentation and bolstering informed decision-making.¹⁷⁵ Additionally, less committed parents may decide to have their children vaccinated in order to avoid the time and effort associated with undergoing counseling.¹⁷⁶

A crucial element of counseling is persuasion through education. Persuasion and educational efforts emphasize “interventions that strive to change attitudes and minds” through “information, logic, and reason to empower an individual to make his or her own wise choices.”¹⁷⁷

Persuasive efforts should focus on the benefits of vaccination, the remoteness of risks associated with vaccination, and the avoidable risks that unvaccinated persons impose on themselves and those with whom they interact.¹⁷⁸ More intensive educational programs may include information regarding the approval process for vaccines and safety profiles for specific vaccines.¹⁷⁹ However the program as structured, should focus on the personal consequences associated with non-vaccination and avoid giving additional publicity to vaccine misinformation.¹⁸⁰

exemption).

173. See Devin W. Quackenbush, *Religion’s Hepatitis B Shot: The Arkansas General Assembly Established an Overly Broad Religious Exemption to Mandatory Immunization After the District Court Invalidated the Original Religious Exemption - McCarthy v. Ozark School District*, 42 CREIGHTON L. REV. 777, 819 (2009) (arguing in favor of signed statements in the form of affidavits).

174. Reiss & Weithorn, *supra* note 25, at 975.

175. *Id.*

176. *Id.* Counseling and persuasion may be useful in convincing “vaccine hesitant” parents who have general and unarticulated anxiety about vaccines to immunize their children. *Id.* at 929. Weithorn and Reiss further contend that counseling and persuasion will have little or no impact on so-called “vaccine rejectors” and “vaccine resistant” parents. *Id.*

177. *Id.* at 965.

178. See Gonzalez, *supra* note 81, at 438 (advocating educational content that “increase[s] public knowledge about the life-saving benefits of vaccinations, about the remote risks posed by [. . .] vaccinations, and about the avoidable risks that non-vaccinations impose”). See also Silverman, *supra* note 22, at 293.

179. See Priya Shetty, *Experts Concerned About Vaccination Backlash*, 375 LANCET 970, 971 (2010) (quoting Dr. Paul Offit of the Children’s Hospital of Philadelphia as advocating “educational classes that teach the public what the safety profiles of different vaccines are, before they are allowed to opt out of vaccination”).

180. See Tomsick, *supra* note 36, at 154 (concluding that “educational efforts that are not focused on vaccine misinformation, but rather focus on the personal consequences of not

Counseling and persuasion are part of the requirements for nonmedical exemptions in several states. The majority of these states require the completion of an educational module regarding the benefits associated with vaccination and the risks of non-vaccination.¹⁸¹ The content of these modules is not specified by statute, although Vermont lists the information that must be disclosed in its educational materials including the requirement that such information be “evidence-based.”¹⁸² One state specifically allows for completion of the required education module in an online format.¹⁸³ Required education modules and the provision of vaccine information have been held not to violate the free exercise rights of potential objectors.¹⁸⁴

While these statutes are preferable to no educational requirements whatsoever, they do not go far enough in ensuring adequate understanding of the magnitude of the decision to avoid vaccination and imposing a more formidable obstacle in the path of potential objectors. The addition of two requirements present in a small number of existing state statutes would address these shortcomings. Initially, state educational modules should include a required review and signature by an independent individual as is the case in Florida, Illinois, Oregon, and Washington. Each of these states require exemption applications to be reviewed and signed by medical personnel.¹⁸⁵ A second

vaccinating [. . .] have been more successful”).

181. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-873(A)(1) (2022); ARK. CODE ANN. §§ 6-18-702(d)(4)(C)(ii)-(iii) (2022) (requiring completion of an educational component and signed informed consent form by parents seeking exemption for their children); COLO. REV. STAT. § 25-4-903(2)(b)(1) (2022) (requiring completion of an educational module or certificate as a condition of receipt of a nonmedical exemption); TEX. HEALTH & SAFETY CODE ANN. § 161.0041(d) (2022); 14 DEL. ADMIN. CODE § 804(7.1.2) (2022); MINN. R. 4604.0400 (2022) (providing that schools may send “other information . . . related to immunization” to parents in addition to that required by state law); Mich. Att’y Gen. Op. No., 7205 at 1,5 (Sept. 14, 2007) (permitting local health departments to provide information regarding vaccination to parents). *See also supra* note 150 and accompanying text.

182. VT. STAT. ANN. tit. 18, §§ 1122(a)(3)(B)(i)-(iii) (2022) (requiring review of educational materials relating to the risks of adverse reactions to vaccination, the increased risk to the child and others of contracting or carrying vaccine preventable diseases, and the heightened risk to those who cannot be vaccinated or who have higher risk of contracting disease and for whom this risk could be life-threatening).

183. *See* UTAH CODE ANN. §§ 53G-9-304(3)(a)(i)-(ii), (3)(b)(i) (2022) (permitting completion of an online educational module unless the parent has an in-person consultation with a health official at a local health department).

184. *See, e.g.*, *Nikolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017) (holding the provision of information regarding the benefits of vaccination and risks associated with non-vaccination by a local health department in Michigan did not intrude upon the free exercise of religion).

185. *See* ILL. COMP. STAT. § 5/27-8.1(8) (2022) (requiring certificate of religious exemption to be signed by a health care provider and describing the efforts to educate parents on the benefits of vaccination and risks of non-vaccination to the child and the community); OR. REV. STAT. §

requirement is administrative review of compliance with exemption processes by school administrators and local health departments.¹⁸⁶

These additional hurdles have the advantages of improving parental understanding, enhancing the accuracy of the exemption process, combatting vaccine misinformation, and transforming the educational requirement into something more than a check-the-box exercise.¹⁸⁷ These hurdles may discourage less committed parents and persuade undecided parents to permit vaccination of their children.¹⁸⁸ Although such instances may be rare, every such occurrence is a victory for public health by eliminating a potential vector for disease in the community and securing individual well-being. The infrequency of such occurrences aside, each such victory is well worth a more rigorous educational requirement.

C. Sincerity and Good Faith

Nonmedical objections to vaccination should require sincerity of belief.¹⁸⁹ State statutes provide a starting point for the assessment of sincerity. Unfortunately, these statutes utilize different terms to describe their sincerity requirements. These differences make comparisons across states difficult.

A small group of states granting either religious exemptions or religious and conscience-based exemptions utilize the term “sincerity of belief.”¹⁹⁰ An equally small group require that the beliefs be “bona fide.”¹⁹¹ Perhaps closely related are requirements that the beliefs be actual or held in good faith.¹⁹² The mere presence

433.267(1)(c)(B)(i) (2021) (requiring the certification to receive an exemption be signed by a health care practitioner and describing the efforts to educate parents on the benefits of vaccination and risks of non-vaccination); WASH. REV. CODE § 28A.210.090(2)(a) (2022) (requiring the certification to receive an exemption be signed by a health care practitioner and describing the efforts to educate parents on the benefits of vaccination and risks of non-vaccination).

186. See OR. REV. STAT. §§ 433.267(4), (7) (2021) (requiring review of exemptions for compliance with state law by school administrators and local health departments); 2007 Mich. Op. Att’y Gen. No. 7205, 2007 WL 2734012, at *1, 5 (Sept. 14, 2007) (authorizing local health departments to determine if an exemption has been properly claimed pursuant to state law).

187. See *infra* text accompanying notes 146-48.

188. *Id.*

189. *But see* Dep’t of Health v. Curry, 722 So.2d 874, 878 (Fla. Dist. Ct. App. 1998) (prohibiting inquiry into the sincerity of a religious belief serving as grounds for an exemption from vaccination). See *infra* text accompanying note 64.

190. See, e.g., MASS. GEN. LAWS ch. 76, § 15 (2022); N.D. ADMIN. CODE § 33-06-05-01(1)(c) (2022).

191. See, e.g., HAW. REV. STAT. § 302A-1156(2) (2022) (bona fide religious tenets and practices); MD. CODE ANN. EDUC. § 7-403(b)(1) (2022) (bona religious beliefs and practices); N.C. GEN. STAT. § 130A-157 (2022) (bona fide religious beliefs).

192. See, e.g., D.C. CODE § 38-506(1) (2022) (objections filed in good faith); 2007 Mich. Op. Att’y Gen. No. 7205, 2007 WL 2734012, at *1, 5 (Sept. 14, 2007) (requiring objection to be “actual”).

of such beliefs is inadequate in Pennsylvania, which requires that they be strongly held.¹⁹³ Other states assume the presence of sincerity as objectors is required to submit affidavits in support of exemption requests.¹⁹⁴ Detailed descriptions of the objector's beliefs such as are required in Illinois may also be viewed as an attempt to verify sincerity.¹⁹⁵

Assessments of sincerity are more difficult in the area of conscience than religion, as people may be unable to articulate the depth of a particular conviction and its importance in their lives or in comparison to other beliefs.¹⁹⁶ As a result, there is no guarantee that examination of one's behavior will provide clear resolutions with respect to personal motivations of the actor, sincerity, and establishment of a hierarchy of convictions.¹⁹⁷

This difficulty is exacerbated by the likelihood that conscientious objectors are not affiliated with a religious congregation or ascribe to tenets, beliefs, and practices associated with a specific faith tradition. However, the absence of membership in a religious congregation may not be necessary for a valid religious objection.¹⁹⁸ Acceptance of vaccination by the objector's religion also is not conclusive.¹⁹⁹ The absence of required membership in a congregation, ascription to specific religious tenets and beliefs, and doctrinal conformity blurs the line

193. *See, e.g.*, 28 PA. CODE § 23.84(b) (2022) (requiring objections to be supported by “religious grounds or on the basis of a strong moral or ethical conviction similar to a religious belief”).

194. *See infra* text accompanying notes 123, 126. *But see infra* text accompanying note 64.

195. *See infra* text accompanying notes 128-29.

196. *See* Chapman, *supra* note 138, at 1478 (noting that “[s]ome people are remarkably ‘inarticulate’ about their motivation for acts of moral courage”). *See also* Andrew Koppelman, *How Shall I Praise Thee? Brian Leiter on Respect for Religion*, 47 SAN DIEGO L. REV. 961, 978 n.79 (2010) (discussing the inability of some people to clearly articulate the motivations for their behavior).

197. *See* Kent Greenawalt, *The Significance of Conscience*, 47 SAN DIEGO L. REV. 901, 906 (2010) (questioning the reliability of even “a fairly intense examination” in distinguishing “genuine claims of conscience from lesser moral objections”).

198. *See, e.g.*, *Maier v. Besser*, 341 N.Y.S.2d 411, 413 (N.Y. Sup. Ct. 1972) (granting an exemption from a required certificate of vaccination to a child of a parent who subscribed to Christian Scientist beliefs despite the absence of membership in the church).

199. *See, e.g.*, *Berg v. Glen Cove City Sch. Dist.*, 853 F. Supp. 651, 655 (E.D.N.Y. 1994) (granting an exemption from vaccination to the child of a Jewish parent based upon her sincere and genuine interpretation of Hebrew scripture, despite the fact that the branch of Judaism to which she subscribed did not oppose vaccination). For examples of acceptance of vaccination by specific faith traditions, *see, e.g.*, NAT'L CATHOLIC BIOETHICS CTR., NEW CHARTER FOR HEALTH CARE WORKERS, arts. 69-70 (2017); Geoffrey S. Nelson, *Mormons and Compulsory Vaccination*, MORMON PRESS (Mar. 30, 2015), https://www.mormonpress.com/mormon_vaccination [<https://perma.cc/TQY5-K5WE>]. For a general discussion of acceptance of vaccination by various religions, *see* Reiss, *supra* note 35, at 1574-84 (discussing the acceptance of vaccination by Christianity, Judaism, and Islam and the views of Christian Scientists and Jehovah's Witnesses).

between religious objections and conscience-based objections which also lack such attributes.²⁰⁰

Current case law does not provide adequate guidance regarding the question of sincerity of belief with respect to conscience-based objections. Opinions addressing exemptions in the context of public-school attendance primarily concern the issue of whether beliefs qualify as religious.²⁰¹ Another group of cases address purely religious questions from constitutional perspectives.²⁰²

Courts are, in any event, institutionally ill-suited to make determinations regarding sincerity of beliefs.²⁰³ Courts struggle with defining religion and conscience, let alone rejecting accommodations for lack of sincerity.²⁰⁴ Distinguishing between sincere and insincere beliefs is a difficult task, as such determinations tend to be fact-specific and subjective.²⁰⁵ As noted by Levin, “if religious beliefs can be personal and idiosyncratic, who can say that any particular person seeking a religious accommodation is lying or insincere, and on what basis?”²⁰⁶ The ubiquity of the Internet and its proliferation of sources of information and misinformation regarding religion and vaccines further complicates any judicial inquiry into the issue of sincerity.²⁰⁷

200. Critics have contended that the absence of these factors encourages individuals to cloak their philosophical objections to vaccination under the guise of religion. *See, e.g.,* Lobo, *supra* note 29, at 273-74 (concluding that “many objectors who claim ‘religious’ reasons are actually using religion as a proxy for a non-religious motive”); Reiss, *supra* note 35, at 1586-87 (discussing so-called “fake religions”); Tomsick, *supra* note 36, at 137 (noting that only Dutch Reformed Congregations and faith-healing denominations such as Christian Scientists object to vaccination leaving one to wonder “who is actually pursuing religious exemptions to compulsory vaccination statutes”).

201. *See, e.g.,* Watkins-El v. Dep’t of Educ., WL 5867048, at *3 (E.D.N.Y. Oct. 7, 2016) (concluding that an objection to vaccination was genuine and sincere but did not stem from the objector’s Islamic faith); Caviezel v. Great Neck Pub. Sch., 701 F. Supp. 2d 414, 418 (E.D.N.Y. 2010) (concluding that objector’s belief in pantheism was genuine and sincere but not religious in nature); Farina v. Bd. of Educ., 116 F. Supp. 2d 503, 508 (S.D.N.Y. 2000) (concluding that the objectors’ beliefs were not the product of their Roman Catholic faith but were “borrowed from outside sources” including information available on the Internet).

202. *See infra* text accompanying notes 31, 33, 84, 125, 156. *See also* Maricopa Cty. Health Dep’t v. Harmon, 750 P.2d 1364, 1370 (Ariz. Ct. App. 1987) (concluding that the denial of a requested exemption from vaccination for measles on the basis of religious belief was not a denial of religious freedom pursuant to the Arizona Constitution).

203. *See* Levin, *supra* note 23, at 1222 (contending that determinations of sincerity of belief “call on judges to make assessments that they are not institutionally well-suited to make”). *See also infra* text accompanying notes 89-91.

204. *See* Levin, *supra* note 23, at 1208.

205. *Id. see also* Flynn v. Estevez, 221 So.3d 1241, 1247-52 (Fla. Dist. Ct. App. 2017) (refusing to adjudicate a dispute between a member of the Catholic Church and church teachings regarding vaccination based upon the ecclesiastical abstention doctrine).

206. Levin, *supra* note 23, at 1208.

207. *See* Mahmoud-Davis, *supra* note 76, at 241 (concluding that “the accessibility of the

The same conclusion holds true for conscience-based beliefs to the extent that they parallel religion by drawing upon similar ideas, motivating similar behaviors and lifestyle choices, and serving as the basis for personal identity.²⁰⁸ Levin also correctly concludes that the necessary case-by-case approach to assess sincerity would be cost prohibitive, not only for school administrators and health departments, but also for courts which would inevitably be required to review any finding of insincerity.²⁰⁹ Conflicting outcomes would invariably result from such inquiries.

This is not to contend that consideration of sincerity should be beyond administrative or judicial inquiry. The burden of proof regarding belief and sincerity remains with the individual seeking an exemption by a preponderance of the evidence.²¹⁰ This inquiry may be narrower than in the case of religion, given the absence of indicia of belief, such as church membership, formal services, rituals, ceremonies, accepted texts, recognized clergy, holidays, and efforts at propagation.²¹¹ But such inquiry must nevertheless proceed.²¹²

There are several factors which are relevant to the sincerity inquiry. Lines of inquiry relating to the belief may include its sources, the level of detail, and its connection to the vaccination from which an exemption is sought.²¹³ Non-specific beliefs and standalone principles, bearing only a tangential relationship to vaccination, may be indicative of factors beyond the bounds of conscience such as mistrust of government, fear, and reliance upon misinformation.²¹⁴ While maintaining some degree of rigor, administrators and courts should exercise caution in their assessments of the validity of individual beliefs.²¹⁵

Of equal importance are the objector's words and actions.²¹⁶ The impact of the belief upon daily routine, as manifested through health care decisions, diet, and other aspects of the objector's lifestyle, may provide a window into

Internet and the proliferation of information about religion and vaccines makes the task of distinguishing between legitimate and fraudulent opt-out requests even harder").

208. See Levin, *supra* note 23, at 1207.

209. *Id.*

210. See, e.g., *Farina v. Bd. of Educ.*, 116 F. Supp. 2d 503, 508 (S.D.N.Y. 2000); *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 94 (E.D.N.Y. 1987).

211. See *Malnak v. Yogi*, 592 F.2d 197, 209 (3d Cir. 1979) (Adams, J., concurring) (recognizing the existence of a religion by external signs such as "formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with traditional religions").

212. *But see infra* text accompanying note 161.

213. See *Mahmoud-Davis*, *supra* note 76, at 243.

214. See *Farina*, 116 F. Supp.2d at 513 (discussing the necessity of distinguishing between genuine beliefs and personal fears of vaccination).

215. See *Int'l Soc'y of Krishna Consciousness v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981).

216. See *Farina*, 116 F. Supp. 2d at 508 (providing that government officials "may draw inferences from an [individual's] words and actions in determining whether they hold genuine and sincere . . . beliefs against inoculations").

individual sincerity.²¹⁷ Inconsistent words and deeds, including consent to the administration of other vaccinations and medical interventions, may indicate a lack of sincerity.²¹⁸ Chronological considerations may also be critical to the determination of sincerity, specifically, the length of time that the individual has held the belief and whether such belief has changed over time.²¹⁹ A final indication of non-sincerity is whether the objector began pursuit of a conscience-based exemption after the rejection of a medical or religious exemption. Such behavior may be indicative of “exemption shopping.”

Evidence of sincerity may also exist when an individual suffers a negative consequence as a result of his or her belief, such as an adverse health condition or heightened risk thereof to him or herself or affected children, public condemnation, and exclusion from school. The willingness to voluntarily suffer such consequences demonstrates a degree of individual sincerity indicative of a conscience-based response and serves to distinguish it from instances in which an individual objects to a particular set of circumstances, but “lacks the moral strength to adhere to that conviction.”²²⁰ Unwillingness to suffer “significant adverse consequences” casts doubt upon the honesty and depth of an individual’s convictions.²²¹

D. Exemptions in Times of Epidemics and Outbreaks

State statutes granting conscience-based exemptions identify two instances in which existing exemptions may be disregarded. These instances relate to epidemics and outbreaks of vaccine preventable disease.²²² The most common exception is the occurrence of an outbreak of disease.²²³ The existence of an

217. See Mahmoud-Davis, *supra* note 76, at 243.

218. *But see Farina*, 116 F. Supp. 2d at 508; *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 91 (E.D.N.Y. 1987) (recognizing inconsistency of beliefs with established dogma or orthodoxy of religion). See also *infra* text accompanying note 137.

219. See Mahmoud-Davis, *supra* note 76, at 243 (discussing the relevance of the objector’s past and current beliefs to the question of sincerity).

220. Greenawalt, *supra* note 197, at 905-06.

221. *Id.*

222. An “epidemic” is defined as “an increase, often sudden, in the number of cases of a disease above what is normally expected in that population in that area.” U.S. DEP’T OF HEALTH & HUM. SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, INTRODUCTION TO EPIDEMIOLOGY, EPIDEMIC DISEASE OCCURRENCE 1 (2011). An outbreak “carries the same definition of epidemic but is often used for a more limited geographic area.” *Id.*

223. See ARIZ. REV. STAT. ANN. § 15-873(C) (2022) (outbreaks of communicable vaccine preventable diseases as determined by state or local health authorities); ARK. CODE ANN. §§ 6-18-702(d)(4)(C)(iv)(a)-(b) (2022) (outbreak); LA. STAT. ANN. § 17:170(F) (2022) (outbreak); UTAH CODE ANN. § 53G-9-304(1)(a)(iv) (2022) (outbreak); WIS. STAT. § 252.04(7) (2022) (“substantial outbreak” at schools or municipality of diphtheria, measles, mumps, pertussis, polio, rubella, tetanus, and other diseases specified by the state health department).

epidemic or threat thereof is required in a smaller number of states.²²⁴ Three states specifically limit exemptions to a list of vaccine preventable diseases.²²⁵ These exceptions closely track those applicable to religious exemptions.²²⁶

Differences between statutes permitting states to disregard exemptions are substantial. Epidemics and outbreaks have different definitions in medical parlance. These definitions may also be too narrow in the event of an immunological emergency. State and local officials may find their power unduly constrained to undertake measures to protect students and the public. Affected populations may include those outside of the locality or state in question, given the ubiquity of modern travel and the obvious fact that contagions do not recognize county lines or state borders. There are also a number of states that have no explicit statutory provisions relating to the non-recognition of exemptions during outbreaks, epidemics, or emergencies.²²⁷ Furthermore, the

224. See COLO. REV. STAT. § 25-4-908 (2022) (“danger of an epidemic”); N.D. CENT. CODE § 23-07-17.1(6) (2022) (“danger of an epidemic” existing with respect to chickenpox, diphtheria, hepatitis A and B, meningococcal disease, mumps, polio, pertussis, rotavirus, rubella, and rubeola); TEX. EDUC. CODE ANN. § 38.001(f) (2022) (“in times of emergency or epidemic” as declared by the commissioner of public health). See also *Rhea v. Bd. of Educ.*, 171 N.W. 103, 105-06 (N.D. 1919) (prohibiting vaccination mandate for smallpox in the absence of an imminent or existing epidemic). But see *Booth v. Bd. of Educ.*, 70 S.W.2d 350, 352-53 (Tex. App. 1934) (upholding the denial of admission to public school of children unvaccinated for smallpox despite the absence of an imminent or actual epidemic). Ohio provides for an exception to exemptions in the case of an epidemic, but the exception is limited to varicella epidemics declared by the director of the state department of health. See OHIO REV. CODE § 3313.671(C) (2022).

225. See *infra* text accompanying notes 41, 46.

226. For state statutes and regulations permitting disregard of religious exemptions in times of an outbreak; see, e.g., ILL. COMP. STAT. § 5/27-8.1(8) (2022) (outbreaks or exposure to disease); MONT. CODE ANN. § 20-5-405(4) (2022) (students may be excluded if there is a risk of exposure or transmission); WYO. STAT. ANN. § 21-4-309(a) (2022) (outbreak as determined by state or county health authority); DEL. ADMIN. CODE § 804(7.1.3) (2022) (exclusion from school if the Division of Public Health declares an outbreak or a student has had or is at risk of exposure). See, e.g., ALA. CODE § 16-30-3(1) (2022) (epidemic or immediate threat thereof); KY. REV. STAT. ANN. § 214.036 (2022) (epidemic in a given area which may, by emergency regulation issued by the Cabinet for Health and Human Services, require vaccination). But see HAW. CODE § 11-157-5(c) (2022) (“danger or presence of an outbreak or epidemic”). For state statutes and regulations permitting disregard of religious exemptions in times of a public health emergency; see, e.g., IOWA CODE § 139A.8(4)(b) (2022) (emergency or epidemic as determined by the state board of health and declared by the director of public health); MD. CODE ANN. EDUC. § 7-403(b)(1) (2022) (emergency or epidemic declared by Secretary of Health); MASS. GEN. LAWS Ch. 76, § 15 (2022) (emergency or epidemic declared by department of public health).

227. States lacking explicit statutory provisions relating to the non-recognition of exemptions during outbreaks, epidemics, or emergencies are Florida, Indiana, Kansas, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, and South Dakota. But see *infra* text accompanying notes 205-06 (discussing the adoption

ability of authorities to respond to outbreaks and epidemics is under attack in some states.²²⁸

Public emergency laws provide a unified approach to addressing exemptions during an epidemic or outbreak of disease. The Model State Emergency Health Powers Act (“MSEHPA”) serves as a model for uniformization.²²⁹ Drafted in the wake of the attacks of September 11, 2001, and amplified concerns about bioterrorism, MSEHPA is designed to be implemented during a public health emergency which was defined, in part, as “an occurrence or imminent threat of an illness or health condition that is believed to be caused by . . . the appearance of a novel or previously controlled or eradicated infectious agent.”²³⁰ This occurrence or imminent threat must present a “high probability” of a large number of deaths, serious or long-term disabilities, or widespread exposure posing a significant risk of substantial future harm.²³¹

MSEHPA authorizes public health authorities to vaccinate persons against infectious disease during a public health emergency and quarantine persons who are unable or unwilling to undergo vaccination for medical, religious, or philosophical reasons.²³² The laws in numerous states either duplicate²³³ or closely

of the Model State Emergency Health Powers Act by Florida, New Mexico, Oklahoma, Oregon, South Carolina, and South Dakota).

228. *See, e.g.*, H.B. 30, 2022 Reg. Sess. (Ala. 2022) (eliminating the exception to exemptions in the event of an epidemic); H.B. 266, 32nd Leg., First Sess. (Alaska 2022) (providing that the governing body of school districts may, rather than shall, order vaccination of students if the commissioner of health and social services deems it necessary for the welfare of individual students or the general public); H.B. 2281, 55th Leg., Second Reg. Sess. (Ariz. 2022) (providing that students may be excluded from public schools only if there is an active case of vaccine preventable disease within the school and the department of health services or local health department declares an outbreak in the area including the school). *See also infra* text accompanying note 88. *But see Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 177-82 (9th Cir. 2021) (concluding that an individual’s belief that COVID-19 vaccines were derived from fetal stem cells was insufficient to avoid vaccination mandate); *Masseth v. Jones*, 2021 WL 6752317, at *13 (C.D. Cal. Nov. 9, 2021) (concluding that administration of the pertussis vaccine was rationally related to the protection of student health and an incidental burden on religion); S.B. 153, 2021-22 Leg. Sess. (Vt. 2022) (eliminating religious exemptions to vaccination in public schools).

229. LAWRENCE O. GOSTIN, PROPOSED DRAFT: THE MODEL STATE EMERGENCY HEALTH POWERS ACT (hereinafter “MSEHPA”), CTR. FOR LAW & PUB’S HEALTH GEORGETOWN & JOHNS HOPKINS UNIVS. (Oct. 23, 2001), <https://biotech.law.lsu.edu/blaw/bt/MSEHPA.pdf> [<https://perma.cc/MLN2-6WCB>].

230. MSEHPA, § 104(m)(1)(ii). For a discussion of the factors motivating the drafting of MSEHPA, see Horowitz, *supra* note 83, at 1728.

231. MSEHPA, §§ 104(m)(2)(i)-(iii).

232. *Id.* §§ 603(a)(1)-(3).

233. *See, e.g.*, ALA. CODE § 31-9-3(4) (2022); DEL. CODE ANN. tit. 20, §§ 3132(11) (a)-(b) (2022); GA. CODE ANN. § 31-12-1.1(2) (2022); IOWA CODE § 135.140(6) (2022) (referring to a “public health disaster”); LA. STAT. ANN. § 29:762(12) (2022); N.J. STAT. ANN. § 26:13-2 (2022); OKLA. STAT. tit. 63, §§ 6104(2)(a)-(b) (2022); OR. REV. STAT. §§ 433.442(4)(a)-(b) (2022); WIS.

track MSEPHA's public health emergency language.²³⁴ A smaller number of states endorse MSEPHA's vaccination provision.²³⁵

Adopting MSEPHA's provisions into state laws granting exemptions has several advantages. MSEPHA is non-controversial, as demonstrated by its wide acceptance by numerous states recognizing nonmedical exemptions, including seven states which currently recognize conscience-based exemptions.²³⁶ Utilization of MSEPHA's emergency standard is broader than the epidemic and outbreak standards currently in use in many states. This breadth empowers state and local health departments and officials to act prior to the occurrence of an outbreak or epidemic, by which time efforts to contain disease may be too late.²³⁷

MSEPHA's emergency standard narrows exemptions during times of exigency. This narrowing recognizes that exemptions are intended to be the exception to universal school vaccination and not the rule. To allow objectors to dictate the terms of state and local responses to outbreaks and epidemics is inconsistent with public and school health considerations. States are under no legal obligation to grant nonmedical exemptions and, in so doing, are free to set

STAT. §§ 323.02(16)(a)-(b) (2022); WYO. STAT. ANN. § 35-1-115(a)(1) (2022) (referencing "a substantial risk of a significant number of human fatalities or incidents of permanent or long-term disability").

234. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-787(A) (2022) (defining a state of emergency as "an occurrence or imminent threat of an illness or health condition that is caused by . . . an epidemic or pandemic disease . . . that poses a substantial risk of a significant number of human fatalities or incidents of permanent or long-term disability"); FLA. STAT. § 381.003315(1)(c) (2022) (defining a public health emergency to include any occurrence or threat "which results or may result in substantial injury or harm to the public health from infectious disease"); 20 ILL. COMP. STAT. § 3305/4 (2022) (defining a "disaster" to include "an occurrence or threat of widespread or severe damage, injury or loss of life . . . resulting from . . . [an] epidemic"); IND. CODE § 10-14-3-1(b)(22) (2022) (defining a "disaster" to include "an occurrence or imminent threat of widespread or severe damage, injury or loss of life . . . resulting from . . . [an] epidemic").

235. *See, e.g.*, FLA. STAT. § 381.003315(1)(d)(4) (2022) (empowering the state health officer to order vaccinations for "communicable diseases that have significant morbidity or mortality and present a severe danger to public health"); GA. CODE ANN. § 31-12-3(a) (2022) (authorizing the Georgia Department of Public Health and county boards of health to mandate vaccination against "contagious or infectious disease where the particular disease may occur, whether or not the disease may be an active threat"); 20 ILL. COMP. STAT. § 3305/4 (2022) (authorizing the state department of public health to order the administration of vaccines "as necessary to prevent the probable spread of a dangerously contagious or infectious disease"); IOWA CODE § 135.144(6) (2022) (empowering the Iowa Department of Public Health to order vaccination against "an infectious disease and to prevent the spread of communicable or potentially communicable disease").

236. *See infra* text accompanying notes 205-07.

237. *See* Aspinwall, *supra* note 72, at 136 (contending that vaccination mandates in the event of an epidemic are of "limited utility because the disease already has spread by the time symptoms appear"). *See also* Tomsick, *supra* note 36, at 137 (noting that "vaccinations are preventative health measures; once an outbreak exists, is it not too late to vaccinate?").

the terms by which they are granted.²³⁸ The non-recognition of exemptions in times of emergency is a reasonable limitation upon a privilege which states are not constitutionally compelled to grant.

E. Transparency

A final strategy for addressing nonmedical exemptions is transparency. Transparency serves as “a tool increasingly used in modern administrative states to achieve goals.”²³⁹ In the context of school vaccination, transparency “focuses on publicizing information regarding non-vaccination [sic], identifying children who are unvaccinated, and perhaps also publishing rates of vaccination of individual schools or other facilities, and localities.”²⁴⁰

Transparency serves two important goals. First, publication of information regarding vaccination rates and the number of unvaccinated children allows parents to make informed decisions about where their children can safely attend school.²⁴¹ Informed decisions promote not only children’s health, but also benefits society, as the impact of unvaccinated individuals in the community may have a negative impact on public health.²⁴²

Second, transparency provides valuable information to non-governmental organizations and health care providers, which may prove useful to their efforts to increase vaccine uptake in the communities they serve.²⁴³ An added benefit is the potential stigmatizing impact of such information, and resultant social pressure to conform individual behavior to accepted social norms.²⁴⁴ However, care needs to be exercised in order to avoid a backlash among vaccine resistant and hesitant parents, and maintain confidentiality of medical and educational records.²⁴⁵

States have taken different approaches to transparency. Some states expressly require schools, officials, or districts to retain documents relating to exemptions.²⁴⁶ Although the aggregation of information is undoubtedly important

238. *See infra* text accompanying notes 80-85.

239. Reiss & Weithorn, *supra* note 25, at 973.

240. *Id.* at 963.

241. *See* Tomsick, *supra* note 36, at 136 (citing Caitlin Cardenas-Comfort & Mary Majumder, *Laws About Transparent School Vaccination Reporting: Public Health Context & Ethics*, 109 AM. J. PUB. HEALTH 1687, 1688 (2019)).

242. *See* Tomsick, *supra* note 36, at 136.

243. *Id.*

244. *See* Reiss & Weithorn, *supra* note 25, at 963 (contending that such stigmatization may “exert influence on the conduct of some who might otherwise avoid vaccination”). *See also infra* text accompanying note 148.

245. *See* Reiss & Weithorn, *supra* note 25, at 973 (discussing and rejecting the “extreme” approach of publicizing the names of all unvaccinated children attending school and their parents which would alert others of the risk of contact with such individuals and allow them to undertake self-protective measures).

246. *See, e.g.*, GA. CODE ANN. § 20-2-771(e) (2022) (requiring filing of documents relating to

to schools, school districts, and state health and educational agencies, it is of far less use to individuals and health care providers, to the extent it cannot be shared due to privacy considerations. This approach also requires parties to be proactive in seeking out information shared with the public. Individuals need to be knowledgeable about the sources of information and how to access it. Procedures for obtaining information may prove cumbersome and confusing for inexperienced individuals. The same criticisms hold true for states requiring the filing of annual reports with administrative bodies.²⁴⁷

The preferable approach to transparency is one in which school districts and officials actively engage interested parties. Such an approach is found in Colorado's procedures governing the granting of exemptions. Colorado's certificate seeking an exemption requires the gathering of significant amounts of information, including the identities of the parents and students, the names and locations of the schools that the students are attending, and the vaccines for which an exemption is sought.²⁴⁸ The state is specifically prohibited from requiring identification of the religious faith or reason for seeking a conscience-based exemption.²⁴⁹ The state is also prohibited from storing any such information.²⁵⁰

However, school districts are required to annually disclose to all parents the exemption rates for measles, mumps, rubella, and any other required vaccinations in the school's discretion.²⁵¹ Exemption information thus reaches even the most passive of parents, does not require active searches, maintains the privacy of persons seeking exemptions, and protects them from stigmatization. In this manner, parents may make informed choices about school attendance for their children, and non-governmental organizations and health care providers may target communities lagging in vaccine uptake to the detriment of public health and well-being.

VII. CONCLUSION

The COVID-19 pandemic has brought renewed attention to issues

religious exemptions with the "responsible official of the school or facility"); IND. CODE § 20-34-3-2(a)(3) (2022) (requiring delivery of documents seeking a religious exemption to a teacher or other person who may order vaccination); NEV. REV. STAT. § 392.437 (2022) (providing for filing of a written statement seeking a religious exemption with the board of trustees of the local school district); R.I. GEN. LAWS § 16-38-2(a) (2022) (requiring retention of documents seeking religious exemptions by the administrative head of the school).

247. *See, e.g.*, MINN. STAT. § 121A.15(3)(d) (2022) (requiring school administrators to forward exemption requests to the commissioner of the state department of health); MD. CODE REGS. § 10.06.04.05(C)-(D) (2022) (requiring schools to maintain a list of exempted students and annually report the number of exemptions to the Secretary of Health).

248. *See* COLO. REV. STAT. §§ 25-4-903(2.3)(b)(II)(A), (b)(III) (2022).

249. *Id.* § 25-4-903(2.3)(b)(V).

250. *Id.*

251. *See* 6 COLO. CODE REGS. §§ 1009-2-XIV(C)(1)-(2) (2022).

surrounding vaccination, which have smoldered for decades. Skepticism regarding the efficacy of vaccination requirements has thrived among a small but vocal portion of the population. Controversy swirls around questions of individual autonomy versus contributing to the collective good and the political weaponization of vaccination in an increasingly divided nation.²⁵² In such a highly polarized society, vaccination has become an additional log on the cultural fires that have consumed the country in recent years.

Successful public health policies rely heavily on a substantial degree of voluntary cooperation.²⁵³ The underlying assumption in a cooperative approach is that policies are consistent with social attitudes and values.²⁵⁴ While there is strong support for required vaccination as a condition of public school attendance, the consistency of such support with social norms may depend upon factors beyond health considerations.²⁵⁵ Every state has compelled cooperation through mandates, but these coercive policies have promoted work-arounds in the form of nonmedical exemptions.²⁵⁶

Despite the criticism of nonmedical exemptions as a surrender of public health to the control of a minority who refuse vaccination, and the conclusion that they are not legally required, the elimination of nonmedical exemptions is unrealistic.²⁵⁷ The recognition of this reality by public health authorities and school administrators, sooner than later, is the preferable course. This recognition does not mean that those responsible for the health and safety of students and the general public must surrender their authority to those who oppose vaccination for whatever reason. Instead, state and local officials must act to discourage, if not actively impede, exemptions through enhanced procedural rigor, counseling and persuasion, assessment of good faith and sincerity, and the exercise of emergency powers in appropriate circumstances.²⁵⁸ Greater transparency empowers parents to make appropriate choices for their children in often uncertain circumstances.²⁵⁹

This article proposes methods by which to achieve these goals utilizing existing state law. For better or worse, nonmedical exemptions are a fixture of current health and education law. But the vast majority of those who support

252. *See infra* text accompanying notes 26-27, 67-71.

253. *See* Reiss & Weithorn, *supra* note 25, at 955 (contending that “[p]ublic health policy success typically depends on a substantial degree of voluntary cooperation”). *See also* Lawrence O. Gostin et al., *The Law and the Public’s Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 120 (1999).

254. Reiss & Weithorn, *supra* note 25, at 955.

255. *See, e.g.*, Grace Sparks et al., *KFF COVID-19 Vaccine Monitor: Profile of the Unvaccinated*, KAISER FAMILY FOUND. (June 11, 2021), <https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-profile-of-the-unvaccinated/> [<https://perma.cc/568T-6V5Q>] (finding significant differences in vaccination rates and willingness to be vaccinated depending upon race, gender, age, education, income, geographic location, and political affiliation).

256. *See infra* text accompanying notes 32-52.

257. *See infra* text accompanying notes 65, 80-88.

258. *See infra* text accompanying notes 115-210.

259. *See infra* text accompanying notes 211-23.

universal vaccination of children as a condition of public-school attendance are not powerless. Rather, it is best to accept what cannot be changed, act to limit that which already exists, and prevent further erosion of the benefits associated with vaccination. In so doing, the interests of current public-school students and future generations may best be protected.