

## A Chance to Save Lives: A Guide for How and Why the US Should Mandate Vaccines for Children and Limit State Exemption Laws

Lauren Zidones

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### Recommended Citation

Zidones, Lauren () "A Chance to Save Lives: A Guide for How and Why the US Should Mandate Vaccines for Children and Limit State Exemption Laws," *Akron Law Review*. Vol. 54 : Iss. 1 , Article 5. Available at: <https://ideaexchange.uakron.edu/akronlawreview/vol54/iss1/5>

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**A CHANCE TO SAVE LIVES: A GUIDE FOR HOW AND WHY THE US SHOULD MANDATE VACCINES FOR CHILDREN AND LIMIT STATE EXEMPTION LAWS**

*Lauren Zidones\*\**

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## I. INTRODUCTION

Vaccines are one of public health’s greatest achievements.<sup>1</sup> Vaccines have led to the eradication of certain diseases, prevented hundreds of deaths, improved quality of life, and saved trillions of dollars in societal costs.<sup>2</sup> Vaccines have contributed to increasing life expectancy from an average age of 40 to 80 years old.<sup>3</sup> Not only do vaccinations protect the individual who received the vaccination, but they also protect the community by reducing the spread of the disease within a population.<sup>4</sup> The Centers for Disease Control and Prevention (“CDC”) recommends vaccinations for certain age groups in order to prevent vaccine-preventable diseases from spreading in the United States. According to the World Health Organization (“WHO”), vaccines protect against 25 debilitating or life-threatening diseases such as measles, polio, tetanus,

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1. *U.S. Public Health Response to the Measles Outbreak: Testimony Before the H.R. Comm. on Energy and Commerce Subcomm. on Oversight and Investigations*, 116th Cong. (2019) (statement of Nancy Messonnier, Director, National Center for Immunization and Respiratory Diseases, Centers for Disease Control and Prevention).

2. *Id.*

3. Rino Rappuoli, Angela Santoni & Alberto Mantovani, *Vaccines: An Achievement of Civilization, a Human Right, Our Health Insurance for the Future*, 216 J. EXP. MED. 7 (Jan. 2019), [https://rupress.org/jem/article-pdf/216/1/7/1172701/jem\\_20182160.pdf](https://rupress.org/jem/article-pdf/216/1/7/1172701/jem_20182160.pdf) [https://perma.cc/F3UN-VHME].

4. Walter A. Orenstein & Rafi Ahmed, *Simply Put: Vaccination Saves Lives*, 114 PROC. OF THE NAT’L ACAD. OF SCI. OF THE UNITED STATES OF AM., 4031–33 (Apr. 10, 2017), <https://www.pnas.org/content/pnas/114/16/4031.full.pdf> [https://perma.cc/U2QW-YF99].

diphtheria, meningitis, influenza, and typhoid.<sup>5</sup> Polio, a disease that can cause lifelong paralysis, has been completely eliminated in the United States. Over time, the number of polio cases fell from more than 15,000 to fewer than 10 in the 1970s.<sup>6</sup> This was due to widespread vaccination efforts led by the United States government. Due to another effective vaccination program, measles was once declared eliminated from the United States in 2000 by the CDC.<sup>7</sup>

However, there is an apparent vaccine hesitancy facing the United States today. The WHO defines vaccine hesitancy as “the reluctance or refusal to vaccinate despite the availability of vaccines.”<sup>8</sup> It is obvious there is a reluctance to vaccinate because, by the end of 2019, over 1,000 cases of measles were confirmed in the United States. This is the greatest number of cases reported in the United States since 1992.<sup>9</sup> According to the CDC, the majority of people who got measles were unvaccinated.<sup>10</sup> With the resurgence of measles, many studies have linked this disease outbreak to the numerous exemptions from vaccination requirements.<sup>11</sup>

Franklin Delano Roosevelt said in 1932, “The success or failure of any government in the final analysis must be measured by the well-being of its citizens. Nothing can be more important to a state than its public health; the state’s paramount concern should be the health of its people.”<sup>12</sup> The federal government plays an important role in the public health system by passing laws and regulations, financing public health departments and agencies, and supporting international efforts against the spread of vaccine-preventable diseases.<sup>13</sup> The Constitution gives the

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5. *Vaccines*, WORLD HEALTH ORG., <https://www.who.int/topics/vaccines/en/> [<https://perma.cc/B8C7-TCX7>].

6. *Polio Elimination in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION: GLOBAL HEALTH (Oct. 25, 2019), <https://www.cdc.gov/polio/us/index.html> [<https://perma.cc/N7LR-R5MJ>].

7. *History of Measles*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 5, 2018), <https://www.cdc.gov/measles/about/history.html> [<https://perma.cc/XKQ7-DMTZ>].

8. *Ten threats to global health in 2019*, WORLD HEALTH ORG., <https://www.who.int/news-room/spotlight/ten-threats-to-global-health-in-2019> [<https://perma.cc/TA6W-R2PG>].

9. *Measles Cases and Outbreaks*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/measles/cases-outbreaks.html> [<https://perma.cc/Q3UQ-5JQ6>].

10. *Id.*

11. Richard Hughes IV, *Vaccine Exemptions and the Federal Government’s Role*, HEALTH AFF. BLOG (March 21, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190318.382995/full/> [<https://perma.cc/V9A8-CBNG>].

12. LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 242 (Univ. of California Press 2000).

13. Committee for the Study of the Future of Public Health, *The Future of Public Health* 165 (National Academies Press 1988), [https://www.ncbi.nlm.nih.gov/books/NBK218218/pdf/Bookshelf\\_NBK218218.pdf](https://www.ncbi.nlm.nih.gov/books/NBK218218/pdf/Bookshelf_NBK218218.pdf) [<https://perma.cc/BDX2-4MXG>].

federal government the power to regulate interstate commerce and power to tax and spend.<sup>14</sup> It is because of these two powers that the federal government is able to regulate and enforce public health initiatives.<sup>15</sup> The federal government works with state and local governments to effectively address and eliminate public health concerns. The police power of the states to protect the public health and safety of its citizens, including children under its care, and the power to intervene when there is a state public health emergency are ways in which states effectively address and eliminate public health concerns. State agencies and courts have acted upon this power in various ways, such as mandatory vaccination for school-aged children.

While no federal vaccination law exists, all 50 states require children attending public schools to be vaccinated against certain diseases.<sup>16</sup> There have been two recent attempts by Congress to pass federal vaccination laws, but these attempts have been unsuccessful. In May 2015, the Vaccinate All Children Act of 2015 was introduced to the House of Representatives by Representative Frederica Wilson (D-Fla.).<sup>17</sup> This bill did not pass, but it would have only permitted states to recognize medical exemptions for public school students whose health would be endangered by the vaccination per a physician's medical opinion.<sup>18</sup> The bill would not allow states to recognize any other exemption.<sup>19</sup> Opponents of this bill argued it was a violation of their constitutional rights and infringed upon the right to the free exercise of religion because the bill did not allow states to permit a religious exemption to any state's mandatory vaccination law.<sup>20</sup> The Vaccinate All Children Act of 2015 died in Congress, so in May 2019, Representative Frederica Wilson tried again. The Vaccinate All Children Act of 2019 was introduced at the 116th Congress and similarly would only allow states to offer an exemption for students whose health would be endangered by the vaccination per a physician's medical

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14. U.S. CONST. art. I § 8, cl. 3.

15. Committee for the Study of the Future of Public Health, *supra* note 13.

16. *State Vaccination Exemptions for Children Entering Public Schools*, PROCON.ORG (March 3, 2020), <https://vaccines.procon.org/state-vaccination-exemptions-for-children-entering-public-schools/> [<https://perma.cc/EG5M-Q49Y>].

17. H.R. 2232, 114th Cong. (2015).

18. *Id.*; *See also* H.R. 2232 (114th): *Vaccinate All Children Act of 2015*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/hr2232> [<https://perma.cc/J7MY-QA3A>].

19. H.R. 2232; *See also* GOVTRACK, *supra* note 18.

20. *Kill the Bill H.R. 2232 (114th Congress) "Vaccinate All Children Act of 2015"*, CHANGE.ORG, <https://www.change.org/p/u-s-senate-kill-the-bill-h-r-2232-114th-congress-vaccinate-all-children-act-of-2015> [<https://perma.cc/6VDU-TPNW>] (listing numerous reasons the petitioner's oppose the bill).

opinion.<sup>21</sup> This bill would impose a condition on the receipt of federal funds for preventative health services on the establishment of a state requirement in public elementary and secondary schools for children to be vaccinated.<sup>22</sup> This bill may not pass as the prior attempt was largely unsuccessful and the 2019 bill has also received a great deal of opposition.<sup>23</sup> According to Skopos Labs, H.R. 2527 only has a 3% chance of being enacted.<sup>24</sup> The factors Skopos Labs considered in this determination are: the bill's primary sponsor is a Democrat, the bill is assigned to the House Energy and Commerce Committee, and the bill's primary subject is health.<sup>25</sup> Based on these factors, Skopos Labs determined the overall chance of the bill being enacted and determined it was very improbable.

Each state allows for certain exemptions for the mandatory vaccination laws for school-aged children attending public school within its borders. Most states recognize a medical and religious exemption, while only some recognize a philosophical exemption in addition to the other exemptions.<sup>26</sup> Recently, the Superior Court of New Jersey, Appellate Division, affirmed a lower court's decision to grant permission to the Division of Child Protection and Permanency to vaccinate two children under its care who were not school-aged.<sup>27</sup> In *New Jersey Division of Child Protection and Permanency v. J.B.*, the court held that the Division of Child Protection and Permanency has the duty to provide children age-appropriate vaccinations even when the parents object for religious reasons and are not covered by the state vaccine exemption laws.<sup>28</sup> This recent 2019 decision reaffirmed that parental rights are not absolute and that the state may intervene to protect the welfare of a child and its citizens.<sup>29</sup>

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21. Vaccinate All Children Act, H.R. 2527, 116th Cong. (2019).

22. *Id.*

23. See *Vaccinate All Children Act Would Require Vaccines Nationally Except for Medical Exemptions, No Longer Leaving It Up to the States*, GOVTRACK, <https://govtrackinsider.com/vaccinate-all-children-act-would-require-vaccines-nationally-except-for-medical-exemptions-no-e3973521c2c6> [<https://perma.cc/N3XT-XFM6>]; *Should States Require Children to be Vaccinated?*, ISSUEVOTER, <https://issuevoter.org/bills/2875/hr2527-116-vaccinate-all-children-act-h-r-2527?> [<https://perma.cc/BLJ3-SC25>].

24. *H.R. 2527: Vaccinate All Children Act of 2019*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/hr2527> [<https://perma.cc/V7KL-GBHX>].

25. *Id.*

26. PROCON.ORG, *supra* note 16.

27. *N.J. Div. of Child Prot. & Permanency v. J.B.*, 212 A.3d 444 (N.J. Super. Ct. App. Div. 2019).

28. *Id.*

29. *Id.* at 450 (quoting *In re D.C.*, 4 A.3d 1004, 1018 (N.J. 2010)).

To begin, the Background section explores public health law and how the federal and state governments balance the rights of individuals and their legally protected interests with the government's duty to ensure public health and safety. Then, the Analysis section discusses the court's decision in *New Jersey Division of Child Protection and Permanency v. J.B.* ordering age-appropriate vaccines for non-school-aged children under the State of New Jersey's care and reaffirms the notion that parental rights are not absolute. The Analysis section then argues for courts and other public agencies to possess the power to order vaccinations for children under their care, considers changes to existing state and federal laws, recommends eliminating or limiting the use of vaccine exemption laws at the state level, and argues for the federal government to make strong policy changes. Finally, the Conclusion reiterates the tremendous importance of vaccines for the welfare of society.

## II. BACKGROUND

### A. *The balance between federal and state power as related to public health in the United States.*

Public health law is a field that focuses on legal practice, scholarship, and advocacy on issues involving the government's legal authorities and duties "to ensure the conditions for people to be healthy" and how to balance these authorities and duties with "individual rights to autonomy, privacy, liberty, property and other legally protected interests."<sup>30</sup>

In order to effectively care for the public health in the United States, federal, state, and local governments must work together efficiently and prospectively.

The Constitution reserves the primary power to regulate health, safety, and welfare for the common good to the states through the Tenth Amendment.<sup>31</sup> The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>32</sup> State police power is considered one of the most essential governmental powers and is subject to the least limitations.<sup>33</sup> State police power may be used to pass

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30. Kathleen Hoke & Mathew R. Swinburne, *What is Public Health Law?*, P'SHIP FOR PUB. HEALTH L., <http://www.astho.org/Public-Policy/Public-Health-Law/What-is-Fact-Sheet/2014/> [https://perma.cc/Q4CA-BAAM] (quoting GOSTIN, *supra* note 12).

31. *Id.*

32. U.S. CONST. amend. X.

33. PA. LOCAL GOV'T COMM'N, PENNSYLVANIA LEGISLATOR'S MUNICIPAL DESKBOOK 75 (5th ed. 2017).

laws in the interest of the general welfare and health of society.<sup>34</sup> Traditionally, police power has included the following: (1) the power to promote the public health, morals or safety, and the general well-being of the community; (2) the inherent power of the government to enact and enforce laws for the promotion of the general welfare; (3) the inherent power by which the state regulates private rights in the public interest; and (4) a power of government that extends to all the great public needs.<sup>35</sup> As discussed in more detail below, the Supreme Court clarified the power to promote public health and safety includes the authority to require mandatory vaccinations in *Jacobson v. Commonwealth of Massachusetts*.<sup>36</sup>

*B. A summary of mandatory vaccines at the federal level and the Supreme Court’s position on vaccines.*

In the seminal case *Jacobson v. Commonwealth of Massachusetts*, the Supreme Court “recognized the authority of a state to enact quarantine laws and ‘health laws of every description.’”<sup>37</sup> The Court heard arguments against a state law allowing a local board of health to require mandatory vaccinations for persons over the age of 21.<sup>38</sup> The Board of Health for the City of Cambridge acted pursuant to this law and required vaccinations for persons over the age of 21 against smallpox.<sup>39</sup> At the time, there was an increase in smallpox in the city and the mandatory vaccinations were implemented to combat the rise in this disease.<sup>40</sup> The petitioner refused the vaccination and argued his constitutional rights were violated.<sup>41</sup> The Supreme Court examined the state’s police power to mandate the vaccination and concluded this was an appropriate exercise of the state’s

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34. Hoke, *supra* note 30.

35. PA. LOCAL GOV’T COMM’N, *supra* note 33.

36. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905).

37. *Id.* at 25.

38. *Id.* at 13 (stating that, “The government put in evidence the above regulations adopted by the board of health, and made proof tending to show that its chairman informed the defendant that, by refusing to be vaccinated, he would incur the penalty provided by the statute, and would be prosecuted therefor; that he offered to vaccinate the defendant without expense to him; and that the offer was declined, and defendant refused to be vaccinated.”).

39. *Id.* at 12.

40. *Id.* (stating that, “Whereas, smallpox has been prevalent to some extent in the city of Cambridge, and still continues to increase; and whereas, it is necessary for the speedy extermination of the disease that all persons not protected by vaccination should be vaccinated; and whereas, in the opinion of the board, the public health and safety require the vaccination or revaccination of all the inhabitants of Cambridge . . .”).

41. *Id.* at 13–14 (arguing that the law was in “derogation of the rights secured to the defendant by the 14th Amendment of the Constitution of the United States . . .”).

police power.<sup>42</sup> The petitioner's constitutional arguments were rejected, and the Court reasoned that, "the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."<sup>43</sup>

In 1922, the Supreme Court heard *Zucht v. King* and upheld a local ordinance that prohibited children from attending school if they did not receive the smallpox vaccine because it determined that this was within the state's police power.<sup>44</sup> After *Zucht*, by 1922 many U.S. schools required children to receive the smallpox vaccine before they could attend school.<sup>45</sup> Twenty years later in *Prince v. Massachusetts*, the Supreme Court determined, "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."<sup>46</sup> This case dealt with the conviction of Sarah Prince, the custodian of her 9-year-old niece. Prince was convicted of providing the child with magazines to sell on public streets, in violation of a labor law that prohibited children from selling magazines.<sup>47</sup> Prince was a Jehovah's Witness and argued this was a violation of her religious freedom. The Court reasoned that a state may, as *parens patriae*<sup>48</sup>, guard a child's well-being.<sup>49</sup> The principle that came from this case was that religious freedom does not mean someone can expose the public to deadly diseases.

Relatedly, President Roosevelt signed the Public Health Service Act ("PHSA") in 1944 during a time of heightened awareness of vaccine-preventable diseases and growing research on the subject.<sup>50</sup> The Public

42. *Id.* at 25–26.

43. *Id.* at 25.

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

45. *Government Regulation*, C. OF PHYSICIANS OF PHILA. (Jan. 17, 2018), <https://www.historyofvaccines.org/content/articles/government-regulation> [<https://perma.cc/HLW9-HS5H>].

46. *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

47. *Id.* at 158–60.

48. *Parens patriae* is Latin for "parent of his or her country." According to the Cornell Law School online dictionary, it is "[t]he power of the state to act as guardian for those who are unable to care for themselves, such as children or disabled individuals". The Cornell Law School online dictionary also provides an example of this doctrine: "under this doctrine a judge may change custody, child support, or other rulings affecting a child's well-being, regardless of what the parents may have agreed to." See *Parens Patriae*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/parens\\_patriae](https://www.law.cornell.edu/wex/parens_patriae) [<https://perma.cc/42WP-CST5>]. *Parens patriae* is discussed more *infra* Section II.C.2 as it applies to mandatory vaccinations for those under the care and custody of the state.

49. *Prince*, 321 U.S. at 166.

50. See Franklin D. Roosevelt, *Statement of the President on Signing the Public Health Service Act*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/statement-the->

Health Service Act authorizes the federal government to make and enforce regulations as necessary to “prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States . . . or from one State or possession into any other State or possession.”<sup>51</sup> Notably, the PHSA authorizes the Department of Health and Human Services to respond to and determine public health emergencies.<sup>52</sup> There is minimal, but highly useful, federal law laying the foundation for state public health law of which states have already taken advantage.<sup>53</sup>

C. *A summary of mandatory vaccines at the State level and existing State vaccination laws.*

The advancement in medicine and immunology over the years has encouraged people of all ages to vaccinate themselves and their children.<sup>54</sup> Every state requires vaccines for school-aged children today.<sup>55</sup> There are exemptions to the mandatory vaccinations for school-aged children and most of today’s litigation in state courts relates to those exemptions. For example, a few cases have held recently that a state is not constitutionally required to provide a religious exemption, and in states where there is a religious exemption, courts scrutinize whether their religious belief is sincere to invoke the exemption.<sup>56</sup>

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president-signing-the-public-health-service-act [https://perma.cc/5PKE-5TWB]; *Timeline: History of Health Reform in the U.S.*, KAISER FAMILY FOUND., https://www.kff.org/wp-content/uploads/2011/03/5-02-13-history-of-health-reform.pdf [https://perma.cc/Z5R5-PWPV].

51. 42 U.S.C. § 264(a) (2016).

52. *Public Health Service Act, Section 319–Fact Sheet*, ASS’N OF ST. & TERRITORIAL HEALTH OFFICIALS, http://www.astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Emergency-Authority-and-Immunity-Toolkit/Public-Health-Service-Act,-Section-319-Fact-Sheet/ [https://perma.cc/P7V2-N98Y].

53. *Summary, H.R. 2527: Vaccinate All Children Act of 2019*, GOVTRACK (Apr. 8, 2019), https://www.govtrack.us/congress/bills/116/hr2527/summary [https://perma.cc/4BTW-BEY4].

54. See Ben Balding, *Mandatory Vaccination: Why We Still Got to Get Folks to Take Their Shots*, DIG. ACCESS TO SCHOLARSHIP AT HARV., http://nrs.harvard.edu/urn-3:HUL.InstRepos:8852146 [https://perma.cc/F5PX-XQWX].

55. *States With Religious and Philosophical Exemptions From School Immunization Requirements*, NAT’L CONF. OF STATE LEGIS. (June 26, 2020), http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx [https://perma.cc/ZW35-K6EZ].

56. WEN W. SHEN, CONG. RES. SERV., LSB10300, AN OVERVIEW OF STATE AND FEDERAL AUTHORITY TO IMPOSE VACCINATION REQUIREMENTS 2 (May 22, 2019), https://crsreports.congress.gov/product/pdf/LSB/LSB10300 [https://perma.cc/PG8C-HK6T].

### 1. State vaccine exemption laws for school-aged children.

The three major types of exemptions are medical, religious, and philosophical exemptions. A medical exemption is allowed when a child has a medical condition that prevents him or her from receiving a vaccine.<sup>57</sup> The religious exemption is invoked when a parent states that vaccinating their child contradicts their religion.<sup>58</sup> The philosophical or personal exemption allows a parent to object on other grounds such as moral or philosophical reasons.<sup>59</sup> Typically, a philosophical exemption “indicates that the statutory language does not restrict the exemption to purely religious or spiritual beliefs.”<sup>60</sup>

As of 2019, 45 states allow religious exemptions, while 15 states allow philosophical exemptions.<sup>61</sup> Because of the resurgence of diseases that were once eliminated in the United States by vaccines, there has been an increase in legislation to repeal the philosophical and/or personal belief exemption by numerous states.<sup>62</sup> An example of a disease that once was eliminated is measles, which is an extremely contagious disease.<sup>63</sup> Measles was declared eliminated in the United States in 2000.<sup>64</sup> However, thousands of cases have been reported in recent years, including a large outbreak at Disneyland which resulted in 300 cases in the United States and Canada.<sup>65</sup>

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57. *What is an exemption?* CTRS. FOR DISEASE CONTROL & PREVENTION: SCHOOL VAX VIEW (Oct. 12, 2017), <https://www.cdc.gov/vaccines/imz-managers/coverage/schoolvaxview/requirements/exemption.html> [<https://perma.cc/DN7H-R2NK>].

58. *States With Religious and Philosophical Exemptions From School Immunization Requirements*, *supra* note 55 (noting that “[r]eligious exemption indicates that there is a provision in the statute that allows parents to exempt their children from vaccination if it contradicts their sincere religious beliefs.”); Christal Cammock and Jennifer Baum, *Vaccination Law 101: A Guide for Children’s Lawyers*, AM. BAR ASS’N (July 2, 2019), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2019/summer2019-vaccination-law-101-a-guide-for-childrens-lawyers/> [<https://perma.cc/LA5W-MDGU>].

59. *States With Religious and Philosophical Exemptions From School Immunization Requirements*, *supra* note 55.

60. *Id.*

61. PROCON.ORG, *supra* note 16.

62. *Measles Resurgence Makes for Busy Year in Vaccination Policy*, ASS’N OF ST. & TERRITORIAL HEALTH OFFICIALS (Aug. 22, 2019), <https://www.astho.org/StatePublicHealth/Measles-Resurgence-Makes-for-Busy-Year-in-Vaccination-Policy/08-22-19/> [<https://perma.cc/4XC3-UAN7>].

63. Robyn Correll, MPH, *Re-Emerging Diseases: Why Some Are Making A Comeback*, VERY WELL HEALTH (June 29, 2020), <https://www.verywellhealth.com/why-some-diseases-are-re-emerging-4151072> [<https://perma.cc/4NJ5-PUZR>].

64. *History of Measles*, *supra* note 7.

65. Robyn Correll, MPH, *Re-Emerging Diseases: Why Some Are Making A Comeback*, VERY WELL HEALTH (Nov. 17, 2019), <https://www.verywellhealth.com/why-some-diseases-are-re-emerging-4151072> [<https://perma.cc/4NJ5-PUZR>]. *See also History of Measles*, *supra* note 7 (listing

“Due to the extremely high number of measles outbreaks in 2019, states paid significant attention to legislation limiting vaccine exemptions.”<sup>66</sup> Many states have been working towards repealing nonmedical exemptions to improve vaccination rates.<sup>67</sup> For example, in 2015 there was a multi-state measles outbreak of 147 cases that originated from Disneyland in Orange County, California.<sup>68</sup> According to the CDC, the outbreak likely started from an infected traveler who visited Disneyland.<sup>69</sup> One of the first cases from this outbreak was an 11-year-old unvaccinated child.<sup>70</sup> Soon after this outbreak, California eliminated the personal belief and religious belief exemptions by passing S.B. 277.<sup>71</sup> When Governor Jerry Brown signed S.B. 277 into law, he stated, “The science is clear that vaccines dramatically protect children against a number of infectious and dangerous diseases.”<sup>72</sup> Additionally, he noted, “While it’s true that no medical intervention is without risk, the evidence shows that immunization powerfully benefits and protects the community.”

Another measles outbreak occurred in Washington State in 2019.<sup>73</sup> The Clark County Public Health Department confirmed 71 cases of measles between January and April 2019, which included one child who

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the number of measles cases from 2010 until 2020. There were 1,282 individual cases of measles in 2019 in 31 states. A large outbreak in New York occurred resulting in the increase of cases. The majority of cases were among people who were not vaccinated against measles.).

66. *States Maintain and Increase Vaccine Coverage Through Legislative Action*, ASS’N OF ST. & TERRITORIAL HEALTH OFFICIALS (Nov. 07, 2019), <https://www.astho.org/StatePublicHealth/States-Maintain-and-Increase-Vaccine-Coverage-Through-Legislative-Action/11-07-19/> [<https://perma.cc/95GD-2JEL>].

67. *Measles Resurgence Makes for Busy Year in Vaccination Policy*, ASS’N OF ST. & TERRITORIAL HEALTH OFFICIALS (Aug. 22, 2019), <https://www.astho.org/StatePublicHealth/Measles-Resurgence-Makes-for-Busy-Year-in-Vaccination-Policy/08-22-19/> [<https://perma.cc/4ZA7-MLXL>] “Bills in several states have sought to do away with non-medical exemptions for school vaccination requirements and allow only medical-based exemptions . . . [T]he number of states allowing exemptions is beginning to shrink.”

68. *Measles Outbreaks 2015*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/measles/cases-outbreaks.html> [<https://perma.cc/TKL8-KZCS>].

69. *Id.*

70. *Morbidity and Mortality Weekly Report, Measles Outbreak – California, December 2014-February 2015*, CTRS. FOR DISEASE CONTROL & PREVENTION (February 20, 2015), [https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6406a5.htm?s\\_cid=mm6406a5\\_w](https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6406a5.htm?s_cid=mm6406a5_w) [<https://perma.cc/X3EL-FMVG>].

71. S.B. 277 (Cal. 2015). This bill was signed by the Governor Jerry Brown on June 30, 2015, but it did not become effective until July 1, 2016.

72. Jon Brooks, *California Ends Personal Belief Exemption for Vaccines*, KQED (June 29, 2015), <https://www.kqed.org/stateofhealth/41751/bill-ending-vaccine-exemptions-passes-california-senate-moves-to-governors-desk> [<https://perma.cc/9ES9-X8AN>].

73. *Measles Investigation*, CLARK COUNTY, WASH.: PUB. HEALTH (Apr. 29, 2019), <https://www.clark.wa.gov/public-health/measles-investigation> [<https://perma.cc/WHX6-2MLQ>].

traveled from Ukraine to Clark County. Of the 71 cases confirmed, 93% of the infected parties were 1 to 18 years old and were not vaccinated.<sup>74</sup> In total, 61 of those sickened were unimmunized.<sup>75</sup> During the investigation of the outbreak, an estimated 4,100 people were exposed to measles.<sup>76</sup> The Clark County Public Health Department identified various exposure sites which included health care facilities, schools, child care centers, and other public places like grocery stores and churches.<sup>77</sup> As a result, the State of Washington removed the personal belief exemption from vaccinations for measles, mumps, and rubella in 2019.<sup>78</sup> Similarly, New York's governor signed a bill in June 2019 that ended vaccination exemptions based on religious beliefs in response to a large measles outbreak and now only allows medical exemptions.<sup>79</sup> Likewise, Maine eliminated the religious and philosophical exemptions, to take effect in September 2021.<sup>80</sup>

By repealing these exemptions, it is obvious states are concerned with the public health and safety of their citizens. States are also attempting to counteract the anti-vaccination movement. The anti-vaccination movement has been attributed to the spread of misinformation on social media, lack of access to regular healthcare for low-income families, and concerns over individual freedom and liberty.<sup>81</sup> This movement has aided in the vulnerability of Americans contracting vaccine-preventable diseases. Between the years 1991 and 2004, there was an increase in skepticism and the number of vaccine exemptions. Dr. Andrew Wakefield released his paper titled, *The Lancet*, which falsely reported an implied link between the MMR vaccine and autism.<sup>82</sup> This paper was published in 1998; however, the author did not withdraw his

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74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Laurel Wamsley, *Washington State Senate Passes Bill Removing Exemption For Measles Vaccine*, NPR (Apr. 18, 2019), <https://www.npr.org/2019/04/18/714713364/washington-state-senate-passes-bill-removing-exemption-for-measles-vaccine> [https://perma.cc/XLM5-N5CC].

79. Bobby Allyn, *New York Ends Religious Exemptions For Required Vaccines*, NPR (June 13, 2019), <https://www.npr.org/2019/06/13/732501865/new-york-advances-bill-ending-religious-exemptions-for-vaccines-amid-health-cris> [https://perma.cc/DK76-X7HD].

80. H.P. 0586, 2019 Leg., 129th Sess. (Me. 2019).

81. Olivia Benecke & Sarah E. DeYoung, *Anti-Vaccine Decision-Making and Measles Resurgence in the United States*, 6 GLOB. PEDIATRIC HEALTH (July 24, 2019), [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6657116/pdf/10.1177\\_2333794X19862949.pdf](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6657116/pdf/10.1177_2333794X19862949.pdf) [https://perma.cc/457C-8M48].

82. Hughes IV, *supra* note 11.

claims until 2012.<sup>83</sup> During this period of time, people became hesitant about vaccines, feared potential side effects, and failed to appreciate the significant health benefits that came with vaccinations.<sup>84</sup> Additionally, a recent study found that vaccine-refusing parents increasingly believe that immunizations are simply unnecessary.<sup>85</sup>

Today, there remains a battle between parents who refuse to vaccinate their children and the power of states to order age-appropriate vaccinations using their police power. This battle has affected parents of school-aged children, parents of non-school-aged children, and parents who have lost custody of their child to the state. However, the state's interest in protecting public health and safety is very strong in each of the scenarios. This note will specifically consider vaccinations for non-school-aged children, an area that has not been considered in depth before.

## 2. Non-school-aged children and the lack of mandatory vaccination laws.

When a state makes a change to its mandatory vaccination laws, a wave of lawsuits is filed by parents who refuse to vaccinate their child.<sup>86</sup> Most issues today revolve around parents of school-aged children who are faced with deciding to comply with the mandatory vaccination laws or not. Parents have the option of opting out if they meet an exemption recognized by the state they live in. In a factually unique case, a mother attempted to shield her children from vaccines, arguing that she met a state vaccine exemption.<sup>87</sup> The case is distinctive from typical suits brought involving vaccines because the mother and father lost custody of their two non-school-aged children to the Division of Child Protection and Permanency. The Division requested court approval to vaccinate the children because the Division has a duty to provide adequate and

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83. Laura Eggertson, *Lancet retracts 12-year-old article linking autism to MMR vaccines*, 182 CANADIAN MED. ASS'N J. (Mar. 9, 2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2831678/pdf/182e199.pdf> [<https://perma.cc/SJL9-QVLC>].

84. Walter A. Orenstein & Rafi Ahmed, *Simply put: Vaccination saves lives*, 114 PROC. NAT'L ACAD. SCI. USA (Apr. 10, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5402432/pdf/pnas.201704507.pdf> [<https://perma.cc/PKE6-K6DM>].

85. Catherine Hough-Telford, MD, David W. Kimberlin, MD, Inmaculada Aban, MS, PhD, William P. Hitchcock, MD, Jon Almquist, MD, Richard Kratz, MD, & Karen G. O'Connor, BS, *Vaccine Delays, Refusals, and Patient Dismissals: A Survey of Pediatricians*, 138 PEDIATRICS (Sept. 2016), <https://pediatrics.aappublications.org/content/pediatrics/early/2016/08/25/peds.2016-2127.full.pdf> [<https://perma.cc/GSB8-S5QX>].

86. *See 55 families sue NYS for vaccine mandate*, WBFO (July 10, 2019), <https://news.wbfo.org/post/55-families-sue-nys-vaccine-mandate> [<https://perma.cc/59VP-5Y8A>].

87. *N.J. Div. of Child Prot. & Permanency v. J.B.*, 212 A.3d 444 (N.J. Super. Ct. App. Div. 2019).

appropriate medical care.<sup>88</sup> Before this case, a court had not decided whether permission could be granted to the Division to compel vaccinations for children under its care, despite the parents' religious objection.

The relevant facts of the case are as follows. In September 2017, the Division of Child Protection and Permanency received a referral reporting the poor living conditions of a mother, father, and their two children. The children were not of school age and were both under the age of three at the time. The family lived in a single motel room and the children slept in the mother's bed with her, despite being told this was dangerous for the children.<sup>89</sup> The report also stated the mother received no prenatal care while pregnant with the son and the family did not believe in immunizations.<sup>90</sup> When the mother was in the hospital with her newborn son, she refused all vaccinations.

The Division observed the family and confirmed there was only one bed in the room and saw the father alone with the daughter. The father, a Megan's Law offender, is not allowed to have unsupervised contact with any minor. These two observations led the Division to file a complaint for the custody of the son and daughter. The complaint alleged the children had not been immunized and the parents failed to provide any regular medical and dental care for the children. The Division was granted the care, custody, and supervision of the children. The Division then sought a court order requesting vaccinations for the children. The lower court granted permission to vaccinate the children pending consultation with the children's allergist. The children's pediatrician testified that the children should receive age-appropriate vaccinations. The mother testified she has not vaccinated her children citing her religious beliefs and the First Amendment. The court stated they are aware the children are not students attending school but argued they are in the custody of the Division and living in an area experiencing a measles outbreak.<sup>91</sup>

The lower court found it necessary to compel the vaccination of these children to safeguard their health and life in accordance with the pediatrician's recommendations. Furthermore, the court established that the Division was authorized to proceed with the vaccinations because the children were under its care, custody, and supervision.<sup>92</sup>

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88. See N.J. STAT. ANN. § 9:6B-4(o) (West 2020).

89. *J.B.*, 212 A.3d at 447.

90. *Id.* at 447.

91. *Id.* at 449.

92. *Id.* at 450.

The mother appealed the decision and argued that the trial court erred in determining the Division has the authority to vaccinate their children. She argued that the law and public policy of New Jersey allows for a religious exemption from vaccinations. The appellate court agreed with the lower court with its finding that the Division is authorized to compel vaccinations for children under its care. However, the appellate court argued that a measles outbreak is not controlling on its determination to compel the vaccination. Regardless of an outbreak nearby or nationwide, children should be given age-appropriate vaccinations due to the highly contagious nature of measles and other vaccine-preventable diseases. Furthermore, the appellate court agreed with the lower court that this is not a matter regarding the children at school but rather ensuring the health and safety of the children under the care of the Division.<sup>93</sup>

The mother argued that her children should be exempt from vaccinations under New Jersey Statute section 26:1A-9.1. However, this statute permits a religious exemption for school-aged children.<sup>94</sup> This section does not apply because the children are not school-aged. Instead, the Child Placement Bill of Rights Act applies, and it provides for specific rights separate from, and independent of, a child's parents or legal guardian for every child placed outside of his or her home by the Division.<sup>95</sup> These rights are "designed to maintain and advance the child's mental and physical well-being."<sup>96</sup> This includes providing adequate and appropriate medical care.<sup>97</sup> The Division is authorized to "pursue any legal remedies, including the initiation of legal proceedings in a court of competent jurisdiction, as may be necessary to . . . provide medical care or treatment for a child when such care or treatment is necessary to prevent or remedy serious harm to the child."<sup>98</sup> Furthermore, resource parents have responsibilities that incorporate providing appropriate health care and medical treatment to children who have been placed in their homes. New Jersey calls relatives and non-relatives who provide foster care to children "resource families" or "resource parents."<sup>99</sup> Their responsibilities

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93. *Id.* at 451

94. *Id.*

95. N.J. STAT. ANN. 9:6B-1 to 9:6B-6 (West 2020).

96. N.J. STAT. ANN. 9:6B-4(k) (West 2020).

97. N.J. STAT. ANN. 9:6B-4(o) (West 2020).

98. N.J. STAT. ANN. 9:6-8.86(b) (West 2020).

99. See *New Jersey Department of Children and Families Policy Manual*, N.J. DEP'T OF CHILD. & FAMILIES (February 2013), [https://www.nj.gov/dcf/policy\\_manuals/CP-IV-B-6-300\\_issuance.shtml](https://www.nj.gov/dcf/policy_manuals/CP-IV-B-6-300_issuance.shtml) [<https://perma.cc/3EBL-BVFW>]; *A Basic Guide to the New Jersey Court Process for Resource Families*, ADVOCS. FOR CHILD. OF N.J. (June 2014), [https://acnj.org/downloads/2014\\_06\\_01\\_resource\\_parent\\_guide.pdf](https://acnj.org/downloads/2014_06_01_resource_parent_guide.pdf) [<https://perma.cc/C7LA-395M>].

are listed in New Jersey Code 3A:51-7.1(a) and include working with the Division caseworker to ensure all medical, dental, mental/behavioral health, and other health care needs are adequately and promptly met. The resource parent must “ensure that each child living in the home, including the children in placement . . . and all other children in the resource family, receive all age-appropriate immunizations as recommended by the child’s physician.”<sup>100</sup> The responsibilities given to the Division and the resource parents demonstrate a serious concern for a child’s health and well-being.

The court also discussed the state’s *parens patriae* responsibility of protecting the welfare of children. *Parens patriae* means “parent of the country” and is the fundamental principle guiding state courts in promoting a child’s welfare and best interests.<sup>101</sup> The state has an obligation under this doctrine to intervene when it is necessary to prevent harm to a child.<sup>102</sup> For example, the Supreme Court has allowed the state, as *parens patriae*, to restrict a parent’s control by requiring school attendance and by regulating or disallowing a child to perform labor.<sup>103</sup> There is precedent showing that New Jersey courts have “overridden the desires of parents who refused to consent to medical treatment and ordered such treatment to save a child’s life” using this authority.<sup>104</sup> In *Muhlenberg Hospital v. Patterson*, the Superior Court of New Jersey ordered a child to receive a blood transfusion over the parent’s objections using their *parens patriae* authority. The parents were devout Jehovah’s Witnesses and refused the transfusion on religious grounds.<sup>105</sup> As demonstrated, a court may override a parent’s refusal of age-appropriate vaccines if it’s in the child’s best interest. Therefore, parental rights are not absolute.<sup>106</sup>

### III. STATEMENT OF THE ISSUE

Figuring out how to appropriately address the increase in vaccine-preventable diseases requires consideration of the separation of state and federal powers, parental rights, and the protection of public health and

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100. N.J. ADMIN. CODE §§ 3A:51-7.1(a)(2) (2020).

101. *Hoefers v. Jones*, 672 A.2d 1299, 1308 (N.J. Super. Ct. Ch. Div. 1994), *aff’d*, 672 A.2d 1177 (N.J. Super. Ct. App. Div. 1996) (citing *In re Adoption of Child*, 277 A.2d 566 (N.J. Super. Ct. App. Div. 1971)).

102. *In re D.C.*, 4 A.3d 1004, 1018 (N.J. 2010) (citing *Fawzy v. Fawzy*, 973 A.2d 347, 358–59 (N.J. 2009)).

103. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

104. *In re D.C.*, 4 A.3d at 1018.

105. *Muhlenberg Hosp. v. Patterson*, 320 A.2d 518 (N.J. Super. Ct. Law. Div. 1974).

106. *N.J. Div. of Child Prot. & Permanency v. J.B.*, 212 A.3d 444, 450 (N.J. Super. Ct. App. Div. 2019) (citing *In re Guardianship of K.H.O.*, 736 A.2d 1246, 1251 (N.J. 1999)).

welfare of our society. These three considerations profoundly intersect and controversy arises when rights or powers are infringed upon. However, deference must be given to any solution that protects and promotes public health in order for a strong democracy to withstand a disease outbreak. Outbreaks can be costly, cause life-threatening complications, and expend numerous resources.<sup>107</sup> Therefore, it is advantageous to focus in the coming years on strengthening federal and state vaccine laws and allow the courts to mandate vaccinations when appropriate.

The Tenth Amendment states, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>108</sup> The Tenth Amendment reserves certain powers to the states. These powers are referred to as police power and allow states to pass laws to regulate the health, safety, and welfare of society.<sup>109</sup> Exercise of police power will be upheld by the courts unless there is a complete disregard for individual rights.<sup>110</sup> Anti-vaccination parents argue their individual rights are violated when compelled to vaccinate their child. However, it has been long held that “the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”<sup>111</sup> A parent’s objection may be overridden to protect the public health and safety.

When it comes to raising children, parents want full autonomy over important decisions affecting the care and well-being of their children.<sup>112</sup> Parental rights vary by state but generally include the right to the physical care and custody of the child, the right to decide where and with whom

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107. Carolina Andrada, *Cost of Outbreak Response*, OUTBREAK OBSERVATORY (July 12, 2018), <https://www.outbreakobservatory.org/outbreakthursday-1/7/12/2018/cost-of-outbreak-response> [<https://perma.cc/34K6-LC88>].

108. U.S. CONST. amend. X.

109. Hoke, *supra* note 30.

110. Jorge Galva, Christopher Atchison, & Samuel Levey, *Public Health Strategy and the Police Powers of the State*, 120 PUB. HEALTH RPTS. 20 (2005), <https://journals.sagepub.com/doi/10.1177/00333549051200S106> [<https://perma.cc/52PZ-RAW5>].

111. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

112. “In most cases, a child’s parents are the persons who care the most about their child and know the most about him or her. As a result, parents are better situated than most others to understand the unique needs of their child and to make decisions that are in the child’s interests. Furthermore, since many medical decisions will also affect the child’s family, parents can factor family issues and values into medical decisions about their children.” Douglas S. Diekema, M.D., M.P.H., *Parental Decision Making*, U. OF WASH. MED., DEP’T OF BIOETHICS AND HUMAN., <https://depts.washington.edu/bhdept/ethics-medicine/bioethics-topics/detail/72> [<https://perma.cc/7QYL-RM2G>].

the child lives, the right to make decisions about medical care, the right to determine the child's religious affiliation, and the right to make decisions about their education.<sup>113</sup> However, parental rights are not absolute.<sup>114</sup> Parental rights can be severely limited or terminated under state law. For example, when a parent loses its child to a state child protection agency, their rights are typically terminated if there is a showing of abuse or neglect.<sup>115</sup>

Furthermore, a parent generally has the ability to make the decision whether to vaccinate their child or not.<sup>116</sup> However, parents of children that have been placed under the care, custody, and supervision of a state as a result of abuse and neglect are situated differently than parents who retain full legal and physical custody of their children.<sup>117</sup> A parent's objection to vaccinating their child in this situation can be overridden by the courts. This is one way the state can prevent potential harm to the child under its care and ensure the protection of the community from the spread of vaccine-preventable diseases.

An additional way to ensure the health of the community is to eliminate or extremely limit mandatory vaccine exemption laws pertaining to religious and philosophical reasoning nationwide. By repealing these laws, more school-aged children will be vaccinated, and this should have a positive impact on the rise of vaccine-preventable diseases in America. At the federal level, a more rigorous approach to

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113. See *Protecting Parental Rights at the State Level*, PROTECTING CHILDREN BY EMPOWERING PARENTS, <https://parentalrights.org/states/> [https://perma.cc/25E9-NC5C]; *Barrett v. Steubenville City Sch.*, 388 F.3d 967, 972 (6th Cir. 2004) (stating that parents have a fundamental right to direct the education of their children); *Santosky v. Kramer*, 455 U.S. 745, 745 (1982) (stating that the Fourteenth Amendment protects a parent's interest in the care, custody, and management of their child).

114. *N.J. Div. of Child Prot. & Permanency v. J.B.*, 212 A.3d 444, 450 (N.J. Super. Ct. App. Div. 2019) (citing *In re Guardianship of K.H.O.*, 736 A.2d 1246, 1251 (N.J. 1999)).

115. For example, New Jersey law states that evidence that one or more of the following is sufficient grounds for terminating parent rights: the parent has abandoned the child, the parent has subjected the child to aggravated circumstances of abuse, neglect, cruelty, or abandonment, or the parent has been convicted of abuse, abandonment, neglect of, or cruelty to his or her child. N.J. REV. STAT. § 30:4C-15 (2013).

116. See, Diekema, M.D., M.P.H., *supra* note 112 ("Parents have the responsibility and authority to make medical decisions on behalf of their children. This includes the right to refuse or discontinue treatments, even those that may be life-sustaining. However, parental decision-making should be guided by the best interests of the child."). See also, Tim Dare, *Parental rights and medical decisions*, PAEDIATRIC ANAESTHESIA (July 24, 2009), <https://pubmed.ncbi.nlm.nih.gov/19650841/> [https://perma.cc/5WM9-626K] ("Most countries grant parents rebuttable legal rights to make treatment decisions on behalf of their young children, creating a presumption in favor of parental rights.").

117. *J.B.*, 212 A.3d at 453.

public health and vaccines would be highly influential; it would also combat the rise of vaccine-preventable diseases.

#### IV. ANALYSIS

- A. *New Jersey court reaffirms parental rights are not absolute and orders age-appropriate vaccines for children under its care and custody through its parens patriae power.*

The New Jersey court in *J.B.* appropriately set aside a parent's objection to medical care in order to prevent harm to the children and to public health and safety. Given the widespread emergence of once eliminated diseases in the United States, this decision reinforces the importance of vaccinations in the United States currently. Therefore, courts and other public agencies must have the power to order vaccinations for children under its care even when a parent objects in order to protect public health and safety.

In *J.B.*, the court considered the parents' strong interest in the sole care of their children with the states' *parens patriae* power. While the court recognized the fundamental right of a parent to raise their biological children, the court reaffirmed that parental rights are not absolute.<sup>118</sup> This is especially true when a child's well-being is jeopardized at home.<sup>119</sup> This limitation on parental rights is well established but had not been applied to the context of requiring vaccinations for a child before the *J.B.* case. By requiring vaccinations for children under its care, the state is preventing any potential harm to the child. Arguably, this power is intrusive on parental rights and invades their privacy. However, children are vulnerable and need protection. If a parent puts them in harm's way, the state has the power to help a child in need through its *parens patriae* power. Without the ability of the state to intervene, a child is not fully protected in situations where they need it the most.

As explained in *New Jersey Division of Child Protection and Permanency v. J.B.*, the Division is charged with the duty to provide appropriate medical care and treatment of these children.<sup>120</sup> This duty includes providing age-appropriate vaccinations despite a parent's objection.<sup>121</sup> This may seem intrusive on parental rights; however, New

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118. *Id.* at 450.

119. *N.J. Div. of Youth & Family Services v. C.S.*, 842 A.2d 215, 237 (N.J. Super. Ct. App. Div. 2004).

120. *Id.*

121. *Id.*

Jersey courts recognize the very fundamental nature of parental rights and the importance of family integrity.<sup>122</sup> The New Jersey Legislature stated, “the preservation and strengthening of family life is a matter of public concern as being in the interests of the general welfare, but the health and safety of the child shall be the State’s paramount concern when making a decision on whether or not it is in the child’s best interest to preserve the family unit.”<sup>123</sup> In *New Jersey Division of Child Protection & Permanency v. Y.N.*, the court emphasized that “New Jersey’s child-welfare laws balance a parent’s right to raise a child against the State’s *parens patriae* responsibility to protect the welfare of children.”<sup>124</sup> This balancing test allows for the court to consider the parent’s autonomy and the state’s responsibility to protect children under its care and the greater population. States have a strong interest in promoting public health and safety, and their interest in doing so increases when protecting a child under their care and custody.

*B. Courts are uniquely situated and should have the power to order vaccinations per recommendations from agencies tasked with protecting children under the state’s care.*

Courts are tasked with interpreting and applying federal or state laws.<sup>125</sup> Typically, family law matters are left to the states to handle rather than the federal government.<sup>126</sup> Agencies are established in states, such as the Division of Child Protection and Permanency in New Jersey, to ensure the safety of children living in the state’s borders.<sup>127</sup> Agencies work with

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122. *In re Guardianship of K.H.O.*, 736 A.2d 1246, 1251 (N.J. 1999).

123. N.J. STAT. ANN. § 30:4C-1(a) (West 2016).

124. N.J. Div. of Child Prot. & Permanency v. Y.N., 104 A.3d 244, 252 (N.J. 2014).

125. See *Erie Doctrine and Choice of Law – History of the Erie Doctrine*, NAT’L PARALEGAL C., <https://lawshelf.com/coursewarecontentview/erie-doctrine-and-choice-of-law-history-of-the-erie-doctrine> [<https://perma.cc/5V36-6B89>] (The Erie Doctrine states that federal courts, “when confronted with the issue of whether to apply federal or state law in a lawsuit, must apply state law on issues of substantive law.” If the legal question is based on procedural issue, the federal courts should apply federal law).

126. See *United States v. Lopez*, 514 U.S. 549, 565 (1995) (noting that some subjects “such as family law and direct regulation of education” are matters for state rather than federal law); *United States v. Windsor*, 570 U.S. 744, 767 (2013) (citing *In re Burrus*, 136 U.S. 586, 593–94 (1890) “The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”).

127. See *State Child Welfare Agency Websites*, CHILD WELFARE INFO. GATEWAY, [https://www.childwelfare.gov/organizations/?CWIGFunctionsaction=rols:main.dspList&rolType=Custom&RS\\_ID=16](https://www.childwelfare.gov/organizations/?CWIGFunctionsaction=rols:main.dspList&rolType=Custom&RS_ID=16) [<https://perma.cc/7KV2-RXKF>]; *What is Child Protective Services?*, STOP IT NOW, <https://www.stopitnow.org/ohc-content/what-is-child-protective-services> [<https://perma.cc/99BP-4MHA>] (explaining that Child Protective Services is a “branch of your state’s social services department that is responsible for the assessment, investigation and intervention

both the state legislature and judiciary to protect children and families from abuse and neglect. The mission of the Division in New Jersey is to “ensure the safety, permanency, and well-being of children and support families.”<sup>128</sup> Their services include counseling, in-home services, and foster care and residential placement of children in New Jersey. Because the agency has an expertise in ensuring the well-being of children under its care, it works closely with the court system to protect children that are at risk for abuse and neglect in various ways. The court monitors the Division’s actions when it removes a child from a home and makes specific judicial determinations and requires certain hearings throughout an investigation and removal of a child.<sup>129</sup>

Also, the Division of Child Protection and Permanency must adhere to specific processes and procedures laid out by the legislature when looking into reports of abuse, neglect, or other incidences against a child’s welfare.<sup>130</sup> As discussed above, resource parents must provide appropriate health care and medical treatment for the children removed from their parents.<sup>131</sup> Resource parents are trained and licensed by the State of New Jersey and are obligated to provide support and stability to the child until they are placed.<sup>132</sup> The resource parents are given responsibilities from statutes as well, which the Division and the court ensure they adhere to. Therefore, the relationship between the court and the Division or any other child protection agency is an important and close one.

In the *J.B.* case, the Division received a referral about the parents of the two children and their living conditions. The Division conducted an investigation and found substantiated and admitted abuse and neglect of the children. Because of the Division’s advocacy and relationship with the court system, they were able to place the children in a safe environment and receive appropriate care. The children did not previously receive regular medical or dental care and were at risk for contracting serious preventable illnesses. The Division fought for age-appropriate vaccines

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regarding cases of child abuse and neglect, including sexual abuse. . . . Some examples of names used in other states for child protective services are Department of Family Services, Department of Social Services, and Department of Youth and Family Services.”).

128. *Child Protection and Permanency*, STATE OF NEW JERSEY DEPARTMENT OF CHILDREN AND FAMILIES., <http://state.nj.us/dcf/about/divisions/dcpp/> [<https://perma.cc/48S7-EB7V>].

129. Superior Court of New Jersey Family Division, *Children in Court Operations Manual*, NEW JERSEY COURTS, <https://www.njcourts.gov/courts/assets/family/cicmanual.pdf?c=yZH> [<https://perma.cc/7FYK-VZG9>].

130. *Id.*

131. *See supra* Section II.C.2.

132. *A Basic Guide to the New Jersey Court Process for Resource Families*, ADVOC. FOR CHILD. OF N.J. (June 2014), [https://acnj.org/downloads/2014\\_06\\_01\\_resource\\_parent\\_guide.pdf](https://acnj.org/downloads/2014_06_01_resource_parent_guide.pdf) [<https://perma.cc/C7LA-395M>].

for both children and the court agreed with the Division over the mother's religious objections. The court stated to "rule otherwise would needlessly jeopardize the health and safety of children in placement and undermine the discharge of the Division's duty to provide care, particularly when a known risk of exposure to a disease preventable by vaccination is present."<sup>133</sup>

If this court were to rule against immunizing the children, it would be going against the recommendations by their pediatrician, the CDC, and the Division. From the mother's perspective in *J.B.*, vaccines contain a "foreign protein" which is "not healthy."<sup>134</sup> As the court specifically pointed out, the mother is not a doctor, nor does she have any training in vaccines or virology.<sup>135</sup> However, when a pediatrician, the CDC, and the Division all recommend specific medical care for one's child, any argument against their recommendations would be difficult to make.

Courts are uniquely situated and can balance the interests of a child protection agency with the competing interests of the parents. Because of the role the courts play in these proceedings and their role as interpreter of the law, the court should have the power to order vaccinations per recommendations from agencies tasked with protecting children as the Superior Court of New Jersey did in *J.B.* A court hears all relevant facts and applies them to the law and is able to make important determinations about a child's health and safety. Underlying the recommendations of pediatricians, the CDC, and child protection agencies is the goal of promoting public health nationwide. Therefore, the court should have the power to order vaccinations.

A balancing test should be used when a court is determining whether to order vaccinations over objections from a parent when a child has been placed in the care and custody of the state. A parent's interest should be weighed against the court's interest in protecting the child and public health. A recommendation should be given by a pediatrician and the state child protection agency caring for the child. If the pediatrician finds the child should not receive the vaccine for medical reasons, the court must decide against the vaccinations. If the parent cites philosophical ideals, the court may inquire into this and take it into consideration but balance this with public health interests.

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133. N.J. Div. of Child Prot. & Permanency v. J.B., 212 A.3d 444, 453 (N.J. Super. Ct. App. Div. 2019).

134. *Id.* at 448.

135. *Id.* at 449.

C. *Recommended changes to vaccine laws at the federal and state level.*

In order to address concerns about the outbreak of diseases in the United States, state governments should implement strong policy changes. For example, the states should only allow medical exemptions for school-aged children. States should repeal any other exemption they currently allow. If there are other nonmedical exemptions, the states should make it more difficult to qualify for one, and the party must request permission for the exemption every year before school starts.

A federal vaccination law would benefit the public health immediately and for generations to come. While attempts at passing a federal vaccination law have been largely unsuccessful in the past, lawmakers could propose a more tailored law for non-school-aged children in the United States. This would have a positive impact on herd immunity as well.<sup>136</sup>

Additionally, at the federal level, lawmakers should consider passing a law that protects Americans when an outbreak occurs. The law could require that anyone within a certain area of the outbreak must be checked for vaccinations. Diseases like measles have spread rapidly in America because of intercontinental travel. The federal government, through the CDC, could set up periodic examinations of passengers coming back from high-risk countries in an attempt to stop the spread of vaccine-preventable diseases. Screening of airplane and cruise ship passengers could prevent the spread of a disease at an earlier stage.

1. State nonmedical exemptions must be limited or eliminated completely.

While the court in the *J.B.* case determined an exemption to the New Jersey mandatory vaccine statute was inapplicable, it is crucial to analyze exemptions and their impact on public health. As previously discussed,<sup>137</sup> in the United States, children must receive certain vaccines before attending public or private schools.<sup>138</sup> States recognize certain exemptions from the mandatory vaccine statutes, but this depends on each state. Every state has a medical exemption for children who have a medical condition that prevents them from getting a vaccine. Some of these exemptions may be dangerous to public health, however. When a state permits additional

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136. See *infra* Section C.1 for a discussion on herd immunity.

137. See *supra* Section II.C.1.

138. James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 Ky. L.J. 831, 833 (2002).

exemptions beyond the medical exemption, they are allowing more children in the community to be without age-appropriate vaccines. This negatively affects the concept of herd immunity. Herd immunity or community immunity is:

A situation in which a sufficient proportion of a population is immune to an infectious disease (through vaccination and/or prior illness) to make its spread from person to person unlikely. Even individuals not vaccinated (such as newborns and those with chronic illnesses) are offered some protection because the disease has little opportunity to spread within the community. Also known as herd immunity. For herd immunity to be effective, there must be at least 95% of the population immunized.<sup>139</sup>

If herd immunity is working properly and a large percentage of the population is vaccinated, it will protect those who cannot be vaccinated for medical reasons. The more people who are vaccinated, the more herd immunity protects this class of people. The inverse of this can be very damaging to public health and the welfare of society as a whole. If only a small percentage of the population is vaccinated, there is a much higher risk of an outbreak, and the class of people who are ineligible to receive vaccines will not be indirectly protected.<sup>140</sup> For example, in order for measles to be effectively prevented in a community, 92–95% of the population needs to be immune to it.<sup>141</sup> The remaining population benefits from the herd immunity and will be protected against the disease.

However, new research shows that where nonmedical exemptions are allowed, herd immunity is not as effective.<sup>142</sup> The research looked at states with only the medical exemption and states that had nonmedical exemptions as well. The research showed that the most effective way to increase immunization rates is to take away nonmedical exemptions. Strong policy changes can facilitate this increase in the states that still have philosophical and religious exemptions. Policy changes will also

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139. Centers for Disease Control and Prevention, *Vaccines & Immunizations, Glossary*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/terms/glossary.html#commimmunity> [<https://perma.cc/566Y-G3PT>].

140. The College of Physicians of Philadelphia, *Herd Immunity*, THE HIST. OF VACCINES, <https://www.historyofvaccines.org/content/herd-immunity-0> [<https://perma.cc/6WQ7-V4VU>].

141. Aimee Cunningham, *How holes in herd immunity led to a 25-year high in U.S. measles cases*, SCIENCE NEWS (Apr. 29, 2019), <https://www.sciencenews.org/article/holes-herd-immunity-led-25-year-high-us-measles-cases> [<https://perma.cc/6VDT-5Q25>].

142. Katherine Bortz, *Removing nonmedical vaccine exemptions improves herd immunity*, HEALIO (Apr. 5, 2019), <https://www.healio.com/pediatrics/vaccine-preventable-diseases/news/online/%7B9118fa29-9949-4c1a-966e-c718bb2ba75a%7D/removing-nonmedical-vaccine-exemptions-improves-herd-immunity> [<https://perma.cc/TZ9A-Z7JU>].

maintain and protect herd immunity.<sup>143</sup> The erosion of herd immunity puts everyone at risk for contracting a vaccine-preventable disease. Under this concept, a vaccination not only protects the individual who receives the shot, but also their family, coworkers, friends, and neighbors. It is important to public health to maintain and protect herd immunity and repealing nonmedical exemptions will improve the success of herd immunity nationwide.

Communities are concerned with the rise of vaccine-preventable diseases and state legislatures have felt the pressure to address the growing concerns and control the outbreaks. I recommend states repeal the philosophical and religious exemptions for mandatory exemptions for children. California, Mississippi, New York, West Virginia, and Maine only recognize the medical exemption.<sup>144</sup> Numerous states are already in the process of passing legislation to repeal these exemptions but there are still states that recognize them.<sup>145</sup> Specifically, as of June 2019, 17 states recognize both the religious and philosophical exemptions in addition to the medical exemption.<sup>146</sup> Repealing the nonmedical exemptions for mandatory vaccines is one immediate way to address the emergence of vaccine-preventable diseases and increase the success rate of herd immunity in the United States.

2. State courts should set forth clear vaccination guidelines for non-school-aged children under the state's care.

The court in *J.B.* had to decide whether non-school-aged children under the Division's care and custody should be vaccinated over the parent's objections. The State of New Jersey did not have a statute to rely on in this unique situation. Instead, the court relied on the responsibilities given to the resource parent as a basis for their order to vaccinate. Under New Jersey Code 3A:51-7.1(a), the resource parent must protect children in the care and custody of the Division from vaccine-preventable diseases.<sup>147</sup> As previously discussed,<sup>148</sup> this statute requires the resource

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143. *Id.*

144. *State Law & Vaccine Requirements*, NAT'L VACCINE INFO. CTR., <https://www.nvic.org/Vaccine-Laws/state-vaccine-requirements.aspx> [https://perma.cc/A39Q-7LFK].

145. *See supra* Section IV.C.1.

146. *State Law & Vaccine Requirements*, *supra* note 145.

147. *N.J. Div. of Child Prot. & Permanency v. J.B.*, 212 A.3d 444, 452 (N.J. Super. Ct. App. Div. 2019).

148. *See supra* Section IV.C.1.

parent to look after the child's medical, dental, and mental/behavioral health.

State law should also set forth clear vaccination requirements for non-school-aged children and for children under the care and supervision of a state child protection agency. This would resolve the issue before the New Jersey court in *J.B.* The vaccine guidelines would provide courts with guidance for when a parent objects to immunizing their child but has lost temporary or permanent care and custody of their child to the state. This would benefit the parent, the child, the state child protection agency, and the court system. Potential benefits for the court and agency include court efficiency and less litigation. The child will benefit from a quick and efficient hearing on the matter because the sooner the issue is resolved, the sooner the child can be protected against vaccine-preventable diseases like measles. A pediatrician should be used in all proceedings to determine whether the child is fit for a vaccination or if they meet a medical exemption. If the pediatrician finds that the child will have a severe allergic reaction or has another medical condition that will cause harm to the child if vaccinated, the court must rule against the vaccine. If a court determines a vaccine should be given, it should be given in a timely manner after the court's decision. For example, if a parent objects to a vaccine and the court, agency, and a pediatrician all agree that it should be given, the vaccine must be given within 60 days of the ruling. State laws should be revised to include children under the care and supervision of the state to adequately ensure their protection against vaccine-preventable diseases.

3. Federal public health law should be strengthened and there should be increased access to accurate health information.

A more aggressive approach to ensuring the eradication of vaccine-preventable diseases in the United States is to enact a federal law setting forth vaccination requirements. The federal government traditionally leaves public health law to the states, but it does have power through the Public Health Service Act of 1944 to isolate and quarantine individuals when needed.<sup>149</sup> The Public Health Service Act recognized the federal government's authority to quarantine and take measures to prevent the entry and spread of communicable diseases from foreign countries in the

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149. Public Health Service Act of 1944, Pub. L. No. 78-410, 58 Stat. 682.

United States.<sup>150</sup> Section 311 of the Public Health Services Act requires the Department of Health and Human Services to “assist States and their political subdivisions in the prevention and suppression of communicable diseases and with respect to other public health matters, shall cooperate with and aid State and local authorities in the enforcement of their quarantine and other health regulations, . . . and shall advise the several States on matters relating to the preservation and improvement of the public health.”<sup>151</sup> This imposes a significant requirement on the federal government to assist the states in combatting communicable diseases.

As discussed in the Introduction, a significant piece of legislation was introduced in May of 2019. The Vaccinate All Children Act of 2019 proposes that states can only recognize a medical exemption for mandatory vaccinations for children.<sup>152</sup> Supporters believe this is one of the best ways to safeguard against deadly viruses and it provides a solution to the outbreak of once-eradicated diseases in the United States.<sup>153</sup> Those against the bill believe the federal government is overstepping and this mandate would be an infringement on personal liberty.<sup>154</sup> While the likelihood of this bill passing is low, there has been an increase in discussions around a federal vaccination law.<sup>155</sup> A federal vaccination law would have a strong impact on the eradication of vaccine-preventable diseases, would ensure that children are adequately protected, and would have a significant impact on herd immunity nationwide. People may become more aware of the dangers of not vaccinating their children if the federal government takes a stronger stance on the matter. A federal law

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150. *Legal Authorities for Isolation and Quarantine*, CTRES. FOR DISEASE CONTROL & PREVENTION (Feb. 24, 2020), <https://www.cdc.gov/quarantine/aboutlawsregulationsquarantine/isolation.html> [<https://perma.cc/97HU-4KZW>]

151. Public Health Service Act of 1944, Pub. L. No. 78-410, § 311, 58 Stat. 682, 693.

152. Vaccinate All Children Act, H.R. 2527, 116th Cong. (2019).

153. GOVTRACK, *supra* note 18.

154. *Id.*

155. See Wendy E. Parmet, *Gottlieb’s threat of federal vaccine mandates: questionable legality, poor policy*, STAT (Feb. 28, 2019), <https://www.statnews.com/2019/02/28/gottlieb-federal-action-vaccine-mandates/> [<https://perma.cc/YW2S-AY47>]; Marilyn Haigh, *FDA head says federal government may take action if states don’t adjust lax vaccine exemption laws*, CNBC (Feb. 21, 2019), <https://www.cnbc.com/2019/02/21/fda-head-says-federal-government-may-take-action-if-states-dont-adjust-lax-vaccine-exemption-laws.html> [<https://perma.cc/39AU-B9V6>]; Scott C. Ratzan, Barry R. Bloom, Lawrence O. Gostin, & Jonathan Fielding, *States are failing on vaccinations. The federal government must lead.*, THE WASH. POST (Mar. 7, 2019), [https://www.washingtonpost.com/opinions/states-are-failing-on-vaccinations-the-federal-government-must-lead/2019/03/07/1e90ece8-40f5-11e9-922c-64d6b7840b82\\_story.html](https://www.washingtonpost.com/opinions/states-are-failing-on-vaccinations-the-federal-government-must-lead/2019/03/07/1e90ece8-40f5-11e9-922c-64d6b7840b82_story.html) [<https://perma.cc/G9K9-CK8V>].

could enhance vaccine confidence among Americans and educate those who are unaware of the effectiveness and safety of vaccines.<sup>156</sup>

As suggested by academics and professors in the global health field, four straightforward steps should be taken by the federal government in response to the vaccine hesitancy in America.<sup>157</sup> First, the federal government should initiate a comprehensive communication plan to deliver information about the benefits of vaccines to Americans in understandable language from sources the public trusts.<sup>158</sup> They suggest health advocates should be used instead of celebrities and athletes so the message is clear and effective.<sup>159</sup> Second, the federal government should work towards eliminating all vaccine exemptions for school-aged children except for the medical exemption.<sup>160</sup> Third, the academics and professors argue for the federal government to “condition certain Medicaid or public-health funding on states eliminating nonmedical exemptions” such as the religious and philosophical exemptions.<sup>161</sup> This would increase compliance with federal law and therefore, ensure greater health in the United States. Lastly, global health experts emphasize screening out false anti-vaccine messages across all social media platforms, similar to the way the government screens for sexually explicit, violent, and threatening messages.<sup>162</sup> By doing so, only facts and the truth will reach the public about vaccinations. It will also make the public more aware of the actual potential side effects of the common vaccines children and adults receive. For example, per the CDC, most side effects are minor and include a sore arm or low-grade fever that do not last more than a couple of days.<sup>163</sup>

Additionally, Dr. Sanjay Gupta, a practicing neurosurgeon, published an essay in 2015 in an attempt to demolish some of the common misconceptions about adverse reactions to vaccines. In his essay, he states that someone is 100 times more likely to be struck by lightning than to have a serious adverse reaction to a vaccine that protects you from

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156. *Vaccines Prevent Infectious Disease Outbreaks and Protect Communities*, TR. FOR AM. HEALTH (Aug. 2019), <https://www.tfah.org/story/vaccines-prevent-infectious-disease-outbreaks-and-protect-communities/> [<https://perma.cc/2QZU-5FK7>].

157. Ratzan et al., *supra* note 157.

158. *Id.*

159. *Id.*

160. See *supra* Section II.C.1 for a discussion the elimination of certain state vaccine exemption statutes.

161. Ratzan et al., *supra* note 157.

162. *Id.*

163. *Vaccines & Immunizations, Possible Side effects from Vaccines*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 8, 2020), <https://www.cdc.gov/vaccines/vac-gen/side-effects.htm> [<https://perma.cc/3RJ6-9BEZ>].

measles.<sup>164</sup> He goes on to point out that “the benefit of vaccines is not a matter of opinion. It is a matter of fact.”<sup>165</sup> Creating better access to the facts and eliminating false anti-vaccination messages on social media will benefit society immensely.

It is useful to also know what other countries have done to promote public health and vaccinations globally. The federal government could confer with successful health advocates in other countries in an effort to plan a successful campaign to educate the public. For example, the World Health Organization’s Regional Office for Europe created a very informative, user-friendly datasheet explaining in simple terms what the possible side effects of a vaccine are, what the possible complications of the disease are, and what the common unwanted side effects of the treatment of the disease are.<sup>166</sup>

Additionally, in March 2019, Russia expanded its measles vaccination law to address a recent increase in measles cases within its borders.<sup>167</sup> Russia broadened its immunization efforts during this time and its campaign targeted individuals with no prior vaccination record, migrant workers, and those who refused vaccines in the past.<sup>168</sup> In June 2019, China passed the PRC Law on Vaccine Administration which sets out “regulatory requirements for researching, producing, distributing, and using vaccines.”<sup>169</sup> The new law contains strict vaccine management policies and stringent penalties for violating them. “The Law mandates the launching of a national vaccine electronic tracking platform that integrates tracking information throughout the whole process of vaccine production, distribution, and use to ensure all vaccine products can be tracked and verified.”<sup>170</sup> This tracking requirement safeguards against any misconduct in the use and management of immunizations. A system like

164. Dr. Sanjay Gupta is the multiple Emmy-award winning chief medical correspondent for CNN. Sanjay Gupta, *Benefits of vaccines are a matter of fact*, CNN (Jan. 10, 2017), <https://www.cnn.com/2017/01/10/health/vaccines-sanjay-gupta/index.html> [https://perma.cc/T9WV-9TZJ].

165. *Id.*

166. World Health Organization Regional Office for Europe, *Risk scales: Fear the diseases, not the vaccines*, WORLD HEALTH ORG., [http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0006/281526/Risk-Scales.pdf?ua=1](http://www.euro.who.int/__data/assets/pdf_file/0006/281526/Risk-Scales.pdf?ua=1) [https://perma.cc/N2SR-F33T].

167. Astghik Grigoryan, *Russia: Government Expanding Vaccination for Measles Amid Outbreak in Neighboring Countries*, LIBR. OF CONGRESS (May 9, 2019), <https://www.loc.gov/law/foreign-news/article/russia-government-expanding-vaccination-for-measles-amid-outbreak-in-neighboring-countries/> [https://perma.cc/8YW9-6CFQ].

168. *Id.*

169. Laney Zhang, *China: Vaccine Law Passed*, LIBR. OF CONGRESS (Aug. 27, 2019), <https://www.loc.gov/law/foreign-news/article/china-vaccine-law-passed/> [https://perma.cc/R5KU-JWPK].

170. *Id.*

this could be implemented in the United States to combat any apprehensiveness regarding the management and distribution of vaccines in America.

Furthermore, through China's Expanded Programme on Immunization, China provides vaccines for eligible children at no cost.<sup>171</sup> Under this program, children receive protection against 12 vaccine-preventable diseases.<sup>172</sup> While the United States and private insurance companies offer vaccines at a low cost to most children, the United States could create a similar program to China's where eligible children under a specified age will receive vaccines at no cost. Under the Vaccines for Children Program, the CDC provides vaccines to children under the age of 19 who are either Medicaid-eligible, uninsured, underinsured, or American Indian or Alaska Native. The federal government should expand this program by requiring private insurers to provide vaccines to all children for a fixed low rate or eliminate the cost altogether. Eliminating cost barriers would immediately increase the number of children vaccinated in America.

4. State and local governments should be proactive instead of reactive when an outbreak occurs in the United States.

State police power includes the power to promote the public health, morals or safety, and the general well-being of the community.<sup>173</sup> The police power of the state can be used to effectively address and eliminate public health concerns. State and local governments could use their inherent police power to require vaccinations for specific individuals during an outbreak of a communicable disease.<sup>174</sup> Instead of waiting for an outbreak to occur to mandate vaccinations within a community, the state should be proactive and enact strong policies now. By enhancing vaccination laws, more people will be vaccinated, which will lead to the prevention of disease outbreaks.<sup>175</sup> Recent outbreaks in the United States

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171. See *Vaccines in China*, WORLD HEALTH ORG., <https://www.who.int/china/health-topics/vaccines> [<https://perma.cc/YDL8-2AZ2>]; *National Immunization Programme*, UNICEF 70, <https://www.unicef.cn/sites/unicef.org.china/files/2019-06/04EN-NIP%20Atlas%202018.pdf> [<https://perma.cc/UWD8-F9ED>].

172. *Id.*

173. See *supra* Section IV.A.1.

174. MATTHEW B. BARRY & JARED P. COLE, CONG. RES. SERV., R43899, THE MEASLES: BACKGROUND AND FEDERAL ROLE IN VACCINE POLICY (Feb. 9, 2015), <https://fas.org/sgp/crs/misc/R43899.pdf> [<https://perma.cc/3L24-CBZM>].

175. *Vaccines Prevent Disease Outbreaks*, VACCINATE YOUR FAM., <https://www.vaccinateyourfamily.org/why-vaccinate/vaccine-benefits/to-prevent-outbreaks/> [<https://perma.cc/NPD3-L82H>].

include the following diseases: mumps, measles, and pertussis.<sup>176</sup> The CDC estimates 100,000 children have not received any of the recommended 14 vaccines.<sup>177</sup> The number of unvaccinated children has attributed to the recent outbreaks.<sup>178</sup> If a state or local government passed stronger policies now, there would be less of a threat of an outbreak in the future. Outbreaks can be costly, cause life-threatening complications, and expend numerous resources.<sup>179</sup> Therefore, any action that would lessen the threat of a disease outbreak should be taken. The simplest way to address this is to get vaccinated.

## V. CONCLUSION

As this note demonstrates, vaccines are critical for a healthy society. Vaccines have helped increase the life expectancy for humans in the 20th century and have reduced the number of deaths associated with infectious diseases.<sup>180</sup> Despite efforts by the CDC, state and local governments, and other public health agencies, infectious diseases are still a “major cause of illness, disability, and death.”<sup>181</sup> Steps must be taken to address the continued rise of vaccine-preventable diseases in America.

Eliminating or limiting state exemptions for mandatory vaccinations for school-aged children is the simplest way to address this growing issue. However, a population of parents argue for absolute parental rights and are against any vaccine exemption reform so they can have total decision-making power relating to their child’s medical care. But, “[p]arental rights are not absolute. . .[b]alanced against the constitutional protection of family rights is the state’s *parens patriae* responsibility to protect the welfare of children.”<sup>182</sup> The state has an obligation under this doctrine to

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176. Liz Meszaros, *Deadly disease resurgence: Outbreaks Linked to Waning Vaccine Protection*, MDLinx (Oct. 23, 2018), <https://www.mdlinx.com/internal-medicine/article/2851> [https://perma.cc/L3GP-L3VR].

177. *Id.*

178. *Vaccines Prevent Disease Outbreaks*, VACCINATE YOUR FAM., <https://www.vaccinateyourfamily.org/why-vaccinate/vaccine-benefits/to-prevent-outbreaks/> [https://perma.cc/NPD3-L82H].

179. Carolina Andrada, *Cost of Outbreak Response*, OUTBREAK OBSERVATORY (July 12, 2018), <https://www.outbreakobservatory.org/outbreakthursday-1/7/12/2018/cost-of-outbreak-response> [https://perma.cc/34K6-LC88].

180. *Immunizations and Infectious Diseases*, OFF. OF DISEASE PREVENTION AND HEALTH PROMOTION, <https://www.healthypeople.gov/2020/topics-objectives/topic/immunization-and-infectious-diseases> [https://perma.cc/PW9F-PGHK].

181. *Id.*

182. N.J. Div. of Child Prot. & Permanency v. J.B., 212 A.3d 444, 450 (N.J. App. Div. 2019).

intervene when it is necessary to prevent harm to a child.<sup>183</sup> Using the *parens patriae* doctrine, state courts should intervene, as it did in *New Jersey Division of Child Protection and Permanency v. J.B.*, and compel vaccinations for children under the states' care. By requiring vaccinations for children under its care, the state is preventing any potential harm to the child and protecting the health of the community. Without the ability of the state to intervene, a child is not fully protected in situations where they need it the most.

The New Jersey court in *J.B.* reaffirmed parental rights are not absolute and that the state may intervene to protect the welfare of a child and its citizens.<sup>184</sup> This case, as noted above, is unique because the court-mandated vaccines for non-school-aged children who did not fall within New Jersey's vaccine exemption laws. Even with unique facts, the court appropriately set aside a parent's objection to medical care in order to prevent harm to the children under the state's care and to protect public health and safety. Given the widespread emergence of once-eliminated diseases in the United States, this decision reinforces the importance of vaccinations in the United States.

Changes should be made to federal and state public health programs and laws. States should extensively limit or completely eliminate nonmedical exemptions for school-aged children. It is obvious from the number of states who have recently removed the nonmedical exemptions from their public-school immunization requirements that they are also concerned with the rise of vaccine-preventable diseases and the anti-vaccination population.<sup>185</sup> And for children that are under the care and custody of the state, clear vaccination guidelines must be set forth for the courts to follow for non-school-aged children.

Additionally, state and local governments should be proactive instead of reactive when an outbreak occurs in the United States and continue to work with the federal government to quickly and efficiently address infectious disease outbreaks. Federal public health law must be strengthened. The federal government should also provide better access to the truth about vaccines so the public can make an informed decision. Educating the public on the importance and benefits of vaccines is

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183. *In re D.C.*, 4 A.3d 1004, 1018 (N.J. 2010) (citing *Fawzy v. Fawzy*, 973 A.2d 347, 358–59 (N.J. 2009)).

184. *J.B.*, 212 A.3d at 450 (quoting *In re D.C.*, 4 A.3d 1004, 1018 (N.J. 2010)).

185. *States With Religious and Philosophical Exemptions From School Immunization Requirements*, NAT'L CONF. OF STATE LEGIS. (June 26, 2020), <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> [<https://perma.cc/ZW35-K6EZ>].

powerful and would ensure compliance with vaccination laws and guidelines. As described in the Principles of the Ethical Practice of Public Health, “[k]nowledge is important and powerful” and the “effectiveness of institutions depends heavily on the public’s trust.”<sup>186</sup> This includes being transparent, communicating the facts, and reliability.<sup>187</sup> These principles should be followed to gain the public’s trust, eliminate false anti-vaccine messages on social media, and to educate the public about the benefits of vaccines.

As noted earlier, deference must be given to any solution that protects and promotes public health in order for a strong democracy to withstand a disease outbreak. While vaccines remain a controversial topic in today’s society, strong policy changes will benefit the greater good. Therefore, it is advantageous to focus on strengthening federal and state vaccine laws and allow the courts to mandate vaccinations when appropriate.

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186. *Principles of the Ethical Practice of Public Health*, PUB. HEALTH LEADERSHIP SOC’Y (2002), [https://www.apha.org/-/media/files/pdf/membergroups/ethics/ethics\\_brochure.ashx](https://www.apha.org/-/media/files/pdf/membergroups/ethics/ethics_brochure.ashx) [<https://perma.cc/J6QC-XHT7>].

187. *Id.*