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Cover Page Footnote
Dr. Billauer holds academic appointments at the University of Porto, Portugal, where she is a Professor in the International Program on Bioethics, and the Institute of World Politics in Washington, D.C., where she is a research Professor of Scientific Statecraft. She is currently Visiting Sr. Faculty at the Academic Center for Law and Science in Hod Hasharon. Dr. Billauer has advanced degrees in law and public health and sits on the UNESCO committee currently compiling a casebook on bioethics. Her most recent book, HEALTH INEQUITY AND THE ELDERLY: THE IMPACT OF PANDEMIC-POLICY, BIOETHICS AND THE LAW has just been published. The author gratefully acknowledges the advice and comments of Professor Norman A. Bailey, and the feedback from Dean Thomas Galligan, Professors Charlotte Tschider and Chris Ogalla at the SEALs conference (2020), but bears full responsibility for the content of this Article.

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Barbara Pfeffer Billauer, JD, MA, PhD+

Following the recent decision in Roman Catholic Diocese v. Cuomo, clear guidance regarding the state’s powers to act during a pandemic is wanting. I look here to the 2018–2019 global measles epidemic, with a focus on the New York and Israeli experiences, for that guidance. Measles rates increased dramatically during the 2018–2019 season, both in the United States and globally. This phenomenon reflects a general decline in worldwide vaccination and an increase in vaccine resistance stoked by anti-vax groups. In the United States, the epidemic targeted ultra-Orthodox Jewish communities, as it did in Israel. This Article evaluates the legal response to vaccination in the two countries, and between two neighboring ultra-Orthodox localities in New York. The research demonstrates the efficacy of differing legal responses, a novel approach to empirically assessing the impact of legal intervention. In so doing, the Article demonstrates the power of the law to help quash epidemics, demonstrating its use as a public health tool. The Article also reaffirms the constitutionality of protecting public health via governmental measures that might trespass on individual rights, such as mandating vaccination. I also discuss legal challenges mounted by the anti-vax community. Finally, and critically, this Article demonstrates the importance of lawyers being knowledgeable with epidemiological terms and principles when mounting defenses to governmental initiatives.

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I. INTRODUCTION

On Thanksgiving eve, 2020, the U.S. Supreme Court rendered a decision that effectively corroded the states’ right to address public health matters, including managing epidemics. In Roman Catholic Diocese v. Cuomo, the Court ruled that the constitutional right of freedom of religion can trump the state’s police powers. The per curiam decision trampled upon the hitherto guiding light and law in public health emergency matters, Jacobson v. Massachusetts. Some experts believe that “[w]ith Jacobson apparently sidelined, the future of many public health laws, including and especially vaccine mandates, appears perilous,” and that the previously unfettered role of public health officials, governors, and legislatures in combatting epidemics is now in serious jeopardy.

1. Id.
Paradoxically, the decision came just as the world is facing what might be called the greatest microbial invasion in a half-century, portending to threaten society as we know it. As this article is being finalized, COVID-19 has overtaken health services and hospitals, and sickened and killed millions. For now, vaccination seems to be the only effective weapon. Nevertheless, initial studies indicated that only half the population would accept vaccination,4 manifesting an overall trend in vaccine resistance.5 The anti-vaccination (“anti-vax”) community is out in full force seeking to bludgeon vaccine acceptance.6 Whether circumstances will warrant compulsory vaccination to achieve herd immunity remains to be seen. Whether states will have the power to compel such vaccination—especially in light of *Roman Catholic Diocese v. Cuomo*—is also questionable. And anti-vaxxers are sure to raise the *Diocese* case to sustain religious objection to vaccination. Guidance is surely needed.

To be sure, the *Diocese* case did not concern vaccination—it addresses lockdown and quarantine—and *Jacobson*, which it certainly trampled on, does not address the First Amendment’s Free Exercise Clause. However, case law addressing this balancing conundrum does exist—even at the Supreme Court level—although it is not referenced by the *Diocese* court. Moreover, recent practical and legal experience addressing the weighing of personal liberties against the police power of the state to protect the public health exists, establishing that sometimes religious rights must temporarily be suppressed to achieve the societal benefit.7

This Article discusses how religious objections to mandatory vaccination were dealt with during the 2018–2019 New York measles epidemic, as a case-study, to provide guidance to public health officials and the legal community in the event mandatory vaccination becomes necessary, either regarding COVID-19 or some other infectious menace.8

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8. Legislation has already been introduced in New York to compel mandatory Covid vaccination. See LEGIS. ASSEMB., A11179 (N.Y. 2020).
One overarching factor governing the propriety of a state’s legislation or a health department order is the severity of the epidemic.\(^9\) The severity and the response, however, cannot be judged in purely objective terms. Justice Gorsuch, in his concurring opinion in *Diocese*, trivialized the penalty imposed on Pastor Hennings Jacobson who foreswore vaccination to smallpox in the early 1900s.\(^{10}\) Robert Kennedy, Jr. called the fine imposed no different than a “traffic ticket.”\(^{11}\) In actuality, it was almost half the weekly wages of an average factory worker.\(^{12}\) Translated to the wages of a Supreme Court justice that equals more than $1,000.\(^{13}\) The motivating factor for the *Jacobson* Court’s rather draconian punishment was a Jungian-like panic associated with the then-raging epidemic, a similar fear the anti-vax community snubs or disputes in their crusades against measles or COVID-19 or other vaccine-preventable diseases.\(^{14}\) It is this panic, in many cases well-founded, that dictates legal, public health, and community response, and it is the possibility of such danger-induced terror and loss of life that the *Diocese* court simply ignores.

The New York 2018–2019 measles experience provides us with guidance on several fronts. Firstly, contemporaneous epidemics in two neighboring counties garnering similar health department orders regarding mandatory vaccination resulted in opposite court decisions when opposed by anti-vaxxers. The difference in the ensuing trajectory of the outbreaks in the two counties alerts us to the impact of such decisions and the efficacy of health department orders. Secondly, eventually New York State enacted legislation eviscerating non-medical vaccine exemptions for pre-school vaccination. That legislation was contested. The ensuing decision on its legality, while rendered at a lower court level, reviewed at length the compelling legal issue we face here: freedom of religion versus the police power to compel vaccination. Justice Hartman’s decision provides far more pointed, practical, and relevant guidance regarding mandatory COVID-19 vaccination than the more ephemeral and idealistic *Diocese* case. And while COVID-19 is a less contagious disease than measles,\(^{15}\)

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9. See Corman v. Acting Sec’y Pa. Dep’t of Health, 266 A.3d 452 (Pa. 2021) (holding that a school mask mandate was improper absent a state of emergency declaration by the governor).
with perhaps only a 67% vaccination rate required to achieve herd immunity needed to stem spread,\textsuperscript{16} lawmakers and public health officials will still need to confront a population that is highly resistant to vaccine acceptance.\textsuperscript{17}

In addition to empirically comparing the epidemic and legal situation in two neighboring counties to evaluate the impact of vaccination and judicial sentiment, the first such study to do so, this Article compares these results and experiences against a contemporaneous outbreak in Israel, in a society with an advanced health system but an entirely different legal system. This evaluation provides yet another rubric to confirm the impact of public health law on epidemic response.

The comparison between the Israeli and American situation becomes even more compelling when considering the population similarities in all three locales: both countries generally have high vaccination rates;\textsuperscript{18} all three outbreaks besieged similar ultra-Orthodox communities—called the Hassidic community in the United States and referred to as the Haredi community in Israel\textsuperscript{19}—and in all localities, hospitalizations surged.\textsuperscript{20} Further, in both countries the disease was imported: in the United States, the index case was exposed in Israel,\textsuperscript{21} and in Israel, the index case was exposed in Ukraine.\textsuperscript{22} That the Israeli incidence was nearly three times higher and lasted twice as long as


that in the United States and included three deaths,\textsuperscript{23} supports my hypothesis that the differing legal and cultural—although not religious—responses regarding vaccination contributed to the different outcome.

This research is novel in two respects. First, it evaluates if the difference between epidemic experiences in two developed countries with virtually identical populations—i.e., Israel and the United States—can be attributed to different legal or bioethical frameworks. Second, it determines, via a case-study approach, the power of the law as a public health response in quelling local epidemics. Finally, I address legal objections raised by the anti-vax community regarding the claim of freedom of religion. Understanding the wealth of legal precedent in this area may empower states seeking to impose public health initiatives via legislation or order and avoid constitutional trespass.

Part I introduces the problem. Section A discusses the history of the once-upon-a-time eradication of measles, and section B examines the dangers of the disease. Part II details the 2018–2019 measles epidemic on a chronological basis in two neighboring New York counties, Rockland and Kings (Brooklyn), illustrating in real time the critical nature of the interface among anti-vaxxers, public health personnel, and disease incidence, and the importance of evaluating the severity of the epidemic and the response of local public health experts on the scene. Part III discusses and compares the differing responses to municipal emergency orders in each county from an epidemiological perspective. Part IV examines the variant judicial views. Finally, Part V explores state legislation, noting the tensions between First Amendment freedoms of religion, personal freedoms of choice and autonomy, and the Government’s constitutionally sanctioned role of protecting public health. This Part also provides reassurance for legislatures seeking to eliminate religious exemptions to vaccination and the constitutionality.

\textit{A. Background}

In 2000, the United States achieved World Health Organization (WHO) status for eradicated measles.\textsuperscript{24} Not twenty years later, we were on the verge of losing that designation.\textsuperscript{25} The 2018–2019 outbreak saw the United States suffering the worst measles epidemic in decades, sickening more people than any year since

\begin{itemize}
  \item \textsuperscript{23} See generally Tani Goldstein, \textit{Ill-Prepared Israeli Health System Struggles to Keep Measles at Bay}, TIMESISR. (Nov. 11, 2019, 6:39 AM), https://www.timesofisrael.com/ill-prepared-israeli-health-system-struggles-to-keep-measles-at-bay/.
  \item \textsuperscript{24} See Measles Elimination, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 5, 2020), https://www.cdc.gov/measles/elimination.html (“The World Health Organization (WHO) defines measles elimination as ‘the absence of endemic measles virus transmission in a defined geographical area (e.g. region or country) for at least 12 months . . . .’ In 2000, measles was declared eliminated from the United States.”).
  \item \textsuperscript{25} Gabriella Borter, \textit{How One County Scrambled to Keep America Measles-Free}, REUTERS (Nov. 4, 2019, 8:47 AM), https://www.reuters.com/article/us-health-measles-usa-insight/how-one-county-scrambled-to-keep-america-measles-free-idUSKBN1XE15F.
\end{itemize}
As of December 5, 2019, “1,276 illnesses were reported in [thirty-one] states.” Two outbreaks arising in neighboring New York counties, Rockland and Kings, accounted for the lion’s share—about 75% of the cases. By contrast, in 2017, 120 cases were reported for the entire country.

Globally, the same trend appeared. In the first ten months of 2019, 440,263 confirmed cases of measles were reported, a three-fold increase over the prior year. This increase was not limited to undeveloped countries. According to WHO records, Israel, an economically developed (“OECD”) country, was the


28. Debra Goldschmidt & Susan Scutti, Michigan Measles Outbreak Linked to Outbreak in New York; Rockland County Takes New Steps to Contain Virus, CNN (Apr. 16, 2019), https://www.cnn.com/2019/04/16/health/measles-outbreak-new-york-michigan-bn/index.html. See also Lena H. Sun, Washington Post Unaware He had Measles a NY Man to Michigan, Infecting 39 People, WASH. POST (Apr. 15, 2019), https://www.washingtonpost.com/health/2019/04/16/how-patient-zero-spread-measles-across-state-lines-infected-people/. While most reports attribute 75% of the American epidemic to these venues, when adding the 39 cases in Michigan that were seeded by a visitor from Rockland, and the cases in the religious communities of Lakewood and Sullivan-Ulster, which are satellites of the Rockland and Kings counties reported on here, the percentage of American cases tethered to these locales exceeds 85%.

29. Measles Foothold, supra note 27; see also Debra Goldschmidt & Susan Scutti, Michigan Measles Outbreak Linked to Outbreak in New York; Rockland County Takes New Steps to Contain Virus, CNN (Apr. 16, 2019, 1:20 PM), https://www.cnn.com/2019/04/16/health/measles-outbreak-new-york-michigan-bn/index.html (noting that two Rockland cases were imported from the United Kingdom and one from Ukraine). See also Lena H. Sun, Unaware He Had Measles, a Man Traveled from N.Y. to Michigan, Infecting 39 People, WASH. POST (Apr. 16, 2019), https://www.washingtonpost.com/health/2019/04/16/how-patient-zero-spread-measles-across-state-lines-infected-people/ (noting its import from Brooklyn, with 75% of the U.S. cases over the previous five years occurring in “various insular communities . . . [including] the ultra-Orthodox community in New York”).


sixth-most measles-stricken country in the WHO’s European Region. The 2018–2019 epidemic was the worst that country had seen. Over 4,300 people became ill, compared to thirty the year before.

Another 200 cases were reported in Jerusalem in November and December. Over the course of the epidemic, three died. One was a forty-three year old stewardess exposed on a fight from the United States to Israel. A ten year old boy currently lies in a coma with permanent brain damage.

It took five years after the measles vaccine was developed in 1963 for the vaccine to gain traction in the United States. Widespread vaccination at the effective level of two doses was not achieved until some three decades later.


37. Exposure to Measles on Flight to Georgia, ARUTZ SHEVA, ISR. NAT’L NEWS (Dec. 17, 2019) [hereinafter Exposure to Measles].


39. Exposure to Measles, supra note 37.


By 2000, the United States had achieved WHO status of eradicating a disease, which throughout the middle of the 20th century claimed some 400–500 lives a year, hospitalized another 48,000, and sickened a reported 500,000, including 4,000 cases of encephalitis. These figures represent a gross improvement in case-fatality compared to the turn of the 20th century, when an average of 5,300–6,000 succumbed to measles-related deaths yearly.

In the last decade, however, vaccination resistance rooted and spread, and cases of measles have been creeping up before exploding of late. The descent in public health metrics surrounding vaccination has been attributed to the rising potency of the anti-vax movement, populated by actors, politicians, and even physicians. Their motives—and their funding sources—remain obscure and—at least facially—above reproach. Upon examination, however, it appears

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43. See Reported Cases and Deaths from Vaccine Preventable Diseases, United States, CTRS. FOR DISEASE CONTROL & PREVENTION (May 2019) (on file with author).
45. See Calandrillo, supra note 40, at 372, n.122; see also Never Too Old—Measles is Often Spread by Adults—Vaccinating Children Only is No Longer Enough, ECONOMIST, May 25, 2019.
46. Orenstein et al., supra note 44; see also Information Sheet—Observed Rate of Vaccine Reactions—Measles, Mumps, and Rubella Vaccines, WORLD HEALTH ORG. (May 2014), https://www.who.int/vaccine_safety/initiative/tools/MMR_vaccine_rates_information_sheet.pdf.
47. See Measles History, supra note 40.
48. Jacqueline K. Olive et al., The State of the Antivaccine Movement in the United States: A Focused Examination of Nonmedical Exemptions in States and Counties, 15 PLOS MED. (2018); see also Ben Sales, Here’s What We Know About Orthodox Vaccination Rates, JEWISH TELEGRAPHIC AGENCY (June 7, 2019).
49. See Measles Cases and Outbreaks, supra note 30.
50. EJ Dickson, A Guide to 17 Anti-Vaccination Celebrities, ROLLING STONE (June 14, 2019, 1:52 PM), https://www.rollingstone.com/culture/culture-features/celebrities-anti-vaxxers-jessica-biel-847779/ (discussing a list of anti-vaxxers including Robert de Niro and Jenny McCarthy); see also Paumgarten, supra note 22.
52. See, e.g., Paumgarten, supra note 22 (noting that pediatrician Lawrence Palevsky is an anti-vaxxer).
that at least some of them are making lots of money from these socially harmful activities.\footnote{See \textit{FEAR Speech}, supra note 34, at 45–46. \textit{See, e.g., Cedillo v. Sec'y of Health & Hum. Servs.}, 617 F.3d 1328, 1335–36 (Fed. Cir. 2010) (some doctors and “researchers” have become expert witnesses in vaccine litigation and earn significant sums from testifying); \textit{Dr. Mark Geier Severely Criticized}, \textit{QUACKWATCH} (July 11, 2012), https://quackwatch.org/cases/civil/geier/. \textit{See also Weiss v. Sec'y of Dept. of Health & Hum. Servs.}, No. 03-190V, 2003 U.S. Claims LEXIS 359, at *2 (Fed. Cl. Oct. 9, 2003) (quoting Haim v. Sec'y of Health & Hum. Servs., No. 90-1031V, 1993 U.S. Claims LEXIS 145, at *46 (Fed. Cl. Aug. 27, 1993)) (holding by a magistrate that “Geier’s testimony is not reliable, or grounded in scientific methodology and procedure. His testimony is merely subjective belief and unsupported speculation.”); \textit{Weiss}, No. 03-190V, 2003 U.S. Claims LEXIS 359, at *2 (quoting Ormechea v. Sec’y of Health & Hum. Servs., No. 90-1683V, 1992 U.S. Cl. Ct. LEXIS 264, at *20 (Fed. Cl. June 10, 1992)) (“Because Dr. Geier has made a profession of testifying in matters to which his professional background (obstetrics, genetics) is unrelated, his testimony is of limited value to the court.”).}

Vaccine resistance is not limited to the United States.\footnote{See Denis Campbell, \textit{Sharp Rise in Measles in England Amid Fears Over ‘Anti-Vaxxers’}, \textit{THE GUARDIAN} (Aug. 30, 2019, 11:12 AM); \textit{see also Goldstein, supra note 23.}} Globally we see the same reasons for lowered vaccination rates and high disease incidence: anti-vaxxers spreading false information claiming the measles vaccine is dangerous and the disease is not.\footnote{\textit{Calandrillo, supra note 40.}} Various countries have taken aggressive initiatives to deal with the problem, and in some cases are compelling vaccinations by imposing fines to deal with the rising outbreaks.\footnote{\textit{Allison M. Maiuri, German Lawmakers Approve Compulsory Measles Vaccine Plan}, \textit{MED. XPRESS} (Nov. 14, 2019), https://medicalxpress.com/news/2019-11-german-lawmakers-compulsory-measles-vaccine.html.}

In the United States, all states have mandatory vaccination requirements.\footnote{\textit{Calandrillo, supra note 40, at 356; \textit{see States With Religious and Philosophical Exemptions from School Immunization Requirements}, NAT’L CONF. OF STATE LEGS. (Apr. 30, 2021), https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx; \textit{cf. James G. Hodge, Jr. & Lawrence O. Gostin, School Vaccination Requirements: Historical, Social, and Legal Perspectives}, 90 Ky. L.J. 831, 833 & n.9 (2002) (noting that in the early part of the 20th century, prominent parents preferred jail and fines to vaccinating their children); \textit{State Vaccination Requirements}, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/vaccines/imz-managers/laws/state-reqs.html (Nov. 15, 2016).} However, in some circumstances parents who oppose vaccination can opt out,\footnote{\textit{Sharon Otterman, Get Vaccinated or Leave School: 26,000 N.Y. Children Face a Choice}, \textit{N.Y. TIMES} (Sept. 6, 2019), https://www.nytimes.com/2019/09/03/nyregion/measles-vaccine-exemptions-ny.html (noting only a few states which do not allow non-medical exemptions); Mariam Siddiqui et al., \textit{Epidemiology of Vaccine Hesitancy in the United States}, \textit{9 HUM. VACCINES & IMMUNOTHERAPEUTICS} 2643 (2013).} by relying on religious exemptions, which require attestation that the religion
prohibits vaccines\textsuperscript{60} or philosophical exemptions,\textsuperscript{61} which are easier to obtain.\textsuperscript{62} Alternatively, they institute their own delayed vaccine schedule,\textsuperscript{63} or simply home school them, a response that may have its own negative ramifications.\textsuperscript{64} Legal efforts to compel vaccination or prevent nonvaccinated children from attending school receive mixed reception—from both the medical community and the courts.\textsuperscript{65} The virulent anti-vax movement stokes these sentiments,\textsuperscript{66} contributing to the raging global epidemic.\textsuperscript{67}

With the vaccine resistance trend escalating, some means must be found to increase vaccine coverage—as a preventive measure, as well as a response to a

\textsuperscript{60} There are very few established religions that oppose vaccination, most notably Christian Scientists. Some parents claim religious objections when it is their own personal belief. \textit{See NM v. Hebrew Acad. Long Beach}, 155 F. Supp. 3d 247 (E.D.N.Y 2016) (ruling against a parent’s religious objection when the objection is based on the parent’s own belief). Hence, philosophical objections that only require a personal statement of belief are easier to obtain. \textit{See Davis v. State}, 451 A.2d 107 (Md. 1982).

\textsuperscript{61} Gordana Pelčić et al., \textit{Religious Exception for Vaccination or Religious Excuses for Avoiding Vaccination}, 57 CROAT. MED. J. 516 (2016); \textit{New York State to Students: Get vaccinated—or Leave School}, ARUTZ SHEVA, ISR. NAT’L NEWS (Sept. 4, 2019), https://www.israelnationalnews.com/News/News.aspx/268390 (noting that in NY “[s]ome 26,000 public school students” had claimed religious exemptions prior to their being eliminated); \textit{see also} Paumgarten, \textit{supra} note 22 (noting that “[i]n California, after the removal of the religious exemption, the rate of vaccination rose, from ninety per cent to ninety-six per cent”); Calandrillo, \textit{supra} note 40, at 360.

\textsuperscript{62} Kyle Reding, \textit{Do We Need Religious and Philosophical Exemptions to Vaccination?}, 10 J. OF BIO SECURITY, BIOSAFETY, AND BIODEFENSE L. 20190006 (2019); Davis v. State, 451 A.2d 107 (Md. 1982); \textit{see also} Douglas S. Diekema, \textit{Personal Belief Exemptions From School Vaccination Requirements}, 35 ANN. R. OF PUB. HEALTH 275 (2014) (“Whether these exemptions were restrictive (allowing only exemption for recognized or established religions) or liberal (allowing exemption for personal beliefs) varied by state.”); Kay Lazar, \textit{A Murky Battle Over Religious Beliefs and COVID-19 Vaccinations Continues}, THE BOS. GLOBE (Sep. 18, 2021), https://www.bostonglobe.com/2021/09/18/metro/murky-battle-over-sincerely-held-religious-beliefs-covid-19-vaccination/.


raging epidemic. But, forcibly compelling vaccination carries notions of violations of autonomy, which are considered heinous to a large segment of society, whether they agree with the importance of vaccination or not. Nevertheless, during a raging epidemic, there may be no other choice available other than some form of mandated vaccination or restricting access to public spaces for those choosing not to vaccinate.

Restricting religious exemptions is another vehicle to increase vaccination, but this, too, invites pushback. A state-backed information program might be another method of countering anti-vax misinformation. But this initiative has problems as well. In Minnesota, for example, the program appears counterproductive, as the state’s government is populated by those espousing anti-vax sentiment. Furthermore, at the end of the day, parents will gravitate to educational programs more aligned with their cognitive preferences.

Ultimately, the best solution might be to empower state or local health department authorities to intervene—at least during the midst of an epidemic. This was the mechanism attempted by the two neighboring counties in the midst of the 2018–2019 measles epidemic, the subject of this work.


70. Julie D. Cantor, Mandatory Measles Vaccination in New York City – Reflections on a Bold Experiment, 381 NEW ENG. J. MED. 101, 101–03 (2019) (opining that New York City’s decision to fine residents who do not vaccinate may have backfired).

71. Id. at 101–02.


75. See, e.g., Ass’n of Jewish Camp Operators v. Cuomo, 470 F. Supp. 3d. 197, 229 (N.D.N.Y. 2020).
B. The Targeted Epidemics for Investigation:

The two major American outbreaks in New York’s Rockland County and Brooklyn—and to a lesser extent Lakewood, New Jersey—76 and the Israeli outbreaks, disproportionately affected ultra-Orthodox Jewish areas.77 Because New York and Israel ordinarily have high vaccination rates,78 these localized outbreaks signify pockets of vaccination resistance. The issue of why these communities resist vaccines, while significant, is outside the scope of this paper and addressed elsewhere.79 Here, I focus only on the impact of anti-vax groups targeting them, comparing government response, community pushback, and the consequential trajectory of the epidemics.

C. How Dangerous is Measles Anyway?

“[M]easles is the most contagious disease on earth.”80 It “is so contagious that if one person has it, 90% of . . . [those in] close [proximity] . . . who are not immune will also become infected.”81 During the 1989–1992 United States measles epidemic, 57,859 cases and 127 deaths—two per every thousand

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78. Chen Stein-Zamir et al., The National Childhood Immunization Registry in Israel, 4 PROCEEDIA IN VACCINOLOGY 9, 11 (2011) (recounting that overall, Israel boasted a 97% vaccination rate for MMR—measles, mumps and rubella vaccine—in 2007); see Stein-Zamir et al., supra note 77 (noting Israel’s vaccination rate decreased to 90% by 2020, and to 78% in the Haredi neighborhoods).

79. See Policy Initiative, supra note 34.


cases—were reported. In some developing countries, the case-fatality is closer to one in a hundred, although before widespread use of antibiotics to address the sequelae, it was as high as one to five in one hundred, even in the United States. Additionally, risks to immunocompromised children or very young infants—for whom vaccination is contraindicated—must be considered.

“Globally, measles remains a leading cause of childhood deaths and an estimated 160,000 children die each year from complications of the disease.”

Death, however, is not the only serious risk. Other risks include encephalitis—a life-threatening swelling of the brain—and hospitalization—with a rate ranging from one in five to one in ten for those unvaccinated, mostly owing to pneumonia. In 2011, in the United States 40% of patients were hospitalized. The Center for Disease Control (“CDC”) reports that currently, 20% of the unvaccinated end up in the hospital.

About one in one thousand children who contract measles develops encephalitis, which “can lead to convulsions and leave the child deaf or with
intellectual disability." In rare cases, a delayed, but fatal, form of encephalitis, called subacute sclerosing panencephalitis ("SSPE"), may develop seven to ten years after a child contracts measles. Further, measles may have a suppressive effect on the immune system for up to two years. Recent studies determined that roughly 16% of children suffering from measles acquire a severe case of "immune amnesia," where measles "strip[s] away the immune protections" these children had built to diseases and germs over years of exposure; "those children had lost at least some immunity to more than 40% of the microbes that cause common childhood diseases."

Not only does measles result in serious consequences or sequelae, but treatment modalities are limited. Because measles is a viral disease, antibiotics are only effective against measles-related bacterial pneumonia, not the disease itself. Hence, the best "treatment" is prevention. Two mechanisms are available: vaccination, and, where vaccination is unavailable due to medical contraindications, reliance on non-exposure by others, called "herd immunity." Herd immunity can only be achieved by reaching a disease-specific level of immunity—for measles, this level is 93–95%—either from vaccination or prior infection, such that the likelihood of coming into contact with an infected individual reaches close to zero. In essence, the concept of herd immunity relies on vaccination, not so much to protect the vaccinated individual, but rather to

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91. Complications of Measles, supra note 87.
92. Complications of Measles, supra note 87; Maggie Fox, Fatal Measles Complication Killed Patients Years Later, NBC NEWS (Oct. 28, 2016), https://www.nbcnews.com/health/health-news/fatal-measles-complication-killed-patients-years-later-n674706. This complication killed at least 16 people following an outbreak in California. Id. The complication occurs when the measles virus remains in the brain, undetected, activating years later as subacute sclerosing panencephalitis ("SSPE") once the child has recovered. Id. In the California cases, “1 in 1,400 [children] under 5 who [contracted] measles developed SSPE.” Id. See also Complications of Measles, supra note 87.
96. Adam Felman, What to Know About Measles, MED. NEWS TODAY (June 29, 2020).
assure that that individual does not become a carrier and infect otherwise susceptible individuals. In other words, one gets vaccinated because one is a good citizen who wants to protect others, not merely because one wants to protect oneself.

II. THE 2018–2019 AMERICAN MEASLES PANDEMIC

A. The Rockland County Outbreak

The Rockland County outbreak began in an ultra-Orthodox synagogue on October 1, 2018. During the Succot holiday service, a fourteen-year-old teenager visiting from Israel fell sick, exposing seven thousand congregants. The house of worship served as the perfect epicenter of spread, and the county—with its unvaccinated population—provided a perfect breeding ground, especially for the youngsters.

100. See id.

101. McDonald et al., supra note 77 at 444; Stein-Zamir et al., supra note 77. The official date is recorded as October 1, but Patient Zero, in observance of Simchat Torah, attended services at the synagogue for the fifth time in four days on October 1. See Paumgarten, supra note 22.

102. Paumgarten, supra note 22; McDonald et al., supra note 77, at 444. The incubation period of measles, from exposure to prodrome, averages 10–12 days. Selina SP Chen et al., What is the Incubation Period for Measles?, MEDSCAPE (June 6, 2019), https://www.medscape.com/answers/966220-87114/what-is-the-incubation-period-for-measles. The teenager was diagnosed on or about October 1, meaning he likely contracted the disease around September 20. “The New York State Department of Health last week said the measles cases in Rockland were linked to travelers who returned from Israel” Measles Cases in New York Linked to Travel to Israel, THE TIMES OF ISR. (Oct. 23, 2018), https://www.timesofisrael.com/measles-cases-in-new-york-linked-to-travel-to-israel. See also Robert Carlson, Israel Visitors Brought Measles to New York in 2018, PRECISION VACCINATIONS (Mar. 27, 2019), https://www.precisionvaccinations.com/ny-reported-336-cases-nyc-and-rockland-counties-during-measles-outbreak; See also Robert MacDonald, et. al, Notes From the Field: Measles Outbreaks From Imported Cases in Orthodox Jewish Communities—New York and New Jersey, 2018-2019, CTRS. FOR DISEASE CONTROL (May 17, 2019), https://www.cdc.gov/mmwr/volumes/68/wr/mm6819a4.htm; Rene F. Najera, Measles Update-November 2018, THE HIST. OF VACCINES (Nov. 19, 2018), https://www.historyofvaccines.org/content/blog/measles-update-november-2018 (“Most of the cases in Rockland County are in an Orthodox Jewish community. In turn, it is believed that the index case (the first confirmed case) brought measles to the New York area via Israel. In Israel, the legislature is voting on a bill that would prevent unvaccinated/non-immune children from attending public school when an outbreak was declared”). Nevertheless, it is unlikely that the child arrived after September 23, the beginning of Succot—when travel is prohibited by Jewish law—and further he likely was in the synagogue every day from September 23 to October 1, the Succot holiday, probably three times a day as is customary holiday worship. Driving on Sukkos, DINONLINE (Sep. 15, 2013), https://dinsonline.org/2013/09/15/can-you-drive-on-sukkot/ (“It is not permitted to drive on Sukkot”). See also Menachem Posner, What is Sukkot? A Guide to the Jewish Holiday of Sukkot, The Feast of Tabernacles, and the Meanings Behind it, Chabad.org, https://www.chabad.org/library/article_cdo/aid/4784/jewish/What-Is-Sukkot.htm.

103. See Paumgarten, supra note 22. “The shul is more than twenty-two thousand square feet and holds seven thousand people.” Id.
Indeed, at the time in question, “‘Rockland County . . . ha[d] the second lowest measles vaccination rate in [New York State.]’” 2018 data shows “children ages one to three have only a 59.4% vaccination rate, and children ages [four] to [eighteen] have only a 53.8% vaccination rate.” “According to county data on . . . school-age children, some Jewish schools in the county had measles vaccination rates below 70% in 2018, compared to 99% statewide.” The county was a sitting duck.

“On October 9th, a second case [was reported] in New Square,” an all-Hassidic enclave in Rockland County, from “a fifty-six-year-old man returning from a trip to Israel.” With these cases, New Square becomes the focus of where the two New York outbreaks intersect.

New Square in Rockland is home of the Squarer (Skverer) Hassidim, a sect that originated in the Ukraine. Its founders eventually migrated from Williamsburg, in Brooklyn where some New Square residents still send their...
children to school, and where presumably relatives in both locales intermixed during the Succot holiday. In total, three cases imported from Israel to New Square seeded the Rockland epidemic.112 From there, one person travelled to Michigan, and infected thirty-nine others.113 These index cases birthed an epidemic, which would sicken 312 people in Rockland County alone before the outbreak was declared over.114 In the first seven months, October 2018 to April 2019, more than one hundred fifty became ill.115 Fifty-six patients, mostly children, were hospitalized representing an 18% hospitalization rate; “[f]ifteen . . . were so sick that they ended up in . . . intensive care.”

In the first month of the epidemic, more than forty cases were reported.117 By November 18, 2018, seventy-five cases had been diagnosed.118 The Rockland

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113. See Paumgarten, supra note 22; see generally Ruppert, supra note 112; C.F. v. New York City Dep’t of Health & Mental Hygiene, No. 508356/19, 2019 NY Misc. LEXIS 1914, at *3 n.1 (N.Y. Sup. Ct. Apr. 18, 2019).


County Health Department then created a measles information section on itssite, and in December health officials barred unvaccinated students from attending school.119 Similarly, the New York Health Commissioner, Dr. Oxiris Barbot, also issued an emergency order in December, barring unvaccinated students from attending school in certain neighborhoods.120 Like the New York City Health Commissioner’s emergency order, the Rockland County directive did not seem to have much of an effect. By January 23, 2019, Rockland County


[i]n December, the city issued exclusion orders, barring unvaccinated students from attending school in certain neighborhoods. The city issued violations to 23 yeshivas and day care centers for breaking that order. But, last month, the city said it would no longer issue violations; rather, it would immediately close yeshivas. . . . ‘Our attempts at education and persuasion have failed to stop the spread of measles,’ [said] Nick Paolucci, a spokesman for the city’s Law Department.

Id. See also Elisha Fieldstadt, One New York City Student with Measles Sickened 21 People Amid Outbreak, NBC NEWS (Mar. 8, 2019, 1:59 PM), https://www.nbcnews.com/storyline/measles-outbreak/one-new-york-city-student-measles-sickened-21-peopl-100006 (“In December, the health department issued a mandatory directive that schools in selected zip codes in Borough Park and Williamsburg exclude students who had not received the measles, mumps and rubella (MMR) vaccines.”). The enforcement of this directive, however, seems lax. Id.; Lanning Taliaferro, Parents Fight Measles Outbreak Rules In Rockland, Brooklyn, PATCH (Mar. 16, 2019, 12:39 PM), https://patch.com/new-york/newcity/parents-fight-measles-outbreak-rules-rockland-brooklyn (“The penalty is $2,000-per-day for every unvaccinated child allowed to attend school during the outbreak, a city Health Department spokesperson said.”); Oxiris Barbot, ALERT # 38: Measles Outbreak in New York City in the Orthodox Jewish Community, N.Y.C. DEP’T OF HEALTH & MENTAL HYGIENE, https://ww1.nyc.gov/assets/doh/downloads/pdf/han/alert/2018/alert38-measles-outbreak.pdf.
registered 118 cases; by February, the total had increased to 135. All the while, Rockland health department officials scrambled to vaccinate.

Midway through the epidemic came the first anti-vax pushback. In March 2019, parents of some forty students at the non-Jewish Green Meadow Waldorf school, a school with a 56% vaccination rate, challenged the health department’s order barring school attendance without vaccination. Their claim? That their perfectly healthy children were prevented from pursuing daily activities. Judge Vincent Briccetti of the United States District Court for the Southern District of New York was not convinced. On March 12, 2019, with 145 cases reported, Judge Briccetti allowed the health department order to stand, holding that, “[t]he plaintiffs have not demonstrated that public interest weighs in favor of granting an injunction.” It should have been a victory for the county.

But the cases continued to mount. By March 26, 2019, the county reported 153 cases. The county executive declared a state of emergency: no unvaccinated person under eighteen years of age would be allowed in public places, including venues of public transport.

121. Kramer, supra note 118. Further:

Rockland County Attorney Thomas Humbach said: . . . ‘While no one enjoys the fact that these kids are out of school these orders have worked; they have helped prevent the measles outbreak from spreading to this school population. We will continue to press forward to protect the public health as that is the primary objective of the government.’

Id.


123. See Gold, supra note 119.

124. Gold, supra note 119.; Gabriel Rom, Judge Denies Request to let Unvaccinated Students Return to Class, LOHUD (Mar. 12, 2019, 5:15 PM), https://www.lohud.com/story/news/local/rockland/2019/03/12/judge-denies-request-let-unvaccinated-students-return-class/3140386002/ (“[T]he county’s Law Department said the school’s vaccination rate was about 33 percent when the Dec. 5 order was imposed.”).

125. Rom, supra note 124.


128. Rom, supra note 124.

129. Kramer, supra note 118.

130. Kramer, supra note 118. Further:

Health officials in Rockland County, New York have declared a state of emergency amid an ongoing measles outbreak. The county is prohibiting unvaccinated children under the
The anti-vaxxers began a major offensive—this time with a rally on March 28, 2019, organized by a group called Pro-Informed Consent which asked their followers to post anti-vax comments at The Jewish Federation of Rockland County social media pages. The exchange made for an ugly interchange. With the epidemic still raging and restrictions on their children’s liberty chafing, the anti-vaxxers stepped up their attack. The Green Meadow Waldorf School parents went to state court to challenge the Health Department order.

On April 5, 2019, with 166 cases now reported, acting New York State Supreme Court Judge Rolf Thorsen quashed the Rockland County Health Department order. His opinion relied on a faulty understanding of age of 18 from going out in public spaces for 30 days. The ban begins at midnight tonight and is in effect for 30 days. Public places include shopping centers, businesses, restaurants, schools, and places of worship. Anyone under 18 who hasn’t been vaccinated will be banned from such places for 30 days or until the individual gets vaccinated. People who are medically unable to get vaccinated are exempt. Parents of unvaccinated children ‘will be held accountable’ if they are found to be in violation and could face a class B misdemeanor charge.

Welch, supra note 119.


132. Taliaferro, supra note 120 (noting “the group called it ’unvaccinated civil disobedience’”).

133. See [Jewish Federation & Foundation of Rockland County, FACEBOOK (Mar. 27, 2019), https://www.facebook.com/JewishFederationRC/](https://www.facebook.com/JewishFederationRC/); see also Rachel Leah Goldblatt (@ReporterRox), *TWEET* (Mar. 28, 2019, 10:31 AM), https://twitter.com/ReporterRox/status/111127467843293696?ref_src=twsrc%5Etfw%7Ctwcamp%5Ewtsdarpp%7Ctwpdrtt%7Ctwcon%7Cstatel%7Ctwadp%7Ctwsrc%7Ctwtweet%7Ctwgep%7Ctwchc%7Ctwtbr%7Ctw12%7Ctwv%7Ctwfr%7Ctw0%7Ctwvttm&ref_url=https%3A%2F%2Fpatch.com%2Fnew-york%2Fnewcity%2Fanti-vaxxers-staging-protest-mall-rockland-county.


135. *Judge Lifts Ban on Unvaccinated Children, but Not Because Outbreak Ended*, supra note 126; W.D. v. Cnty. of Rockland, 110 N.Y.S.3d 820, 822–23 (N.Y Sup. Ct. 2019) (noting plaintiffs filed a petition for a preliminary injunction under CPLR Article 78, opposing this emergency order, and stating that this action was “arbitrary and capricious and contrary to law.”) Judge Thorsen granted the plaintiffs’ petition for a preliminary injunction on April 5, 2019, Rockland County appealed and lost. *Id.*; see Robert Brum, *Measles: Rockland Issues New ‘Exclusion Order’ for Public Spaces*, LOHUD (Apr. 16, 2019) (“Communicable Disease and Exposure Exclusion Order” that mandates anyone with measles to stay home, and those exposed stay out of public spaces throughout the county. Those who do not comply face a $2,000-a-day fine.”). In the New York Judicial System trial court judges are called “Justices.”
“epidemic,” admitted undefined in the statute—and an abject ignorance of the purpose of vaccination. Justice Thorsen based his opinion on the absolute number of cases—166, which he did not think particularly troubling—as opposed to the epidemiologic definition—the number of cases compared to baseline. Given that there were 120 cases in the entire United States in 2017 and eighty-six cases in 2016, epidemiologically, Rockland County presented a classic, textbook epidemic. But with Justice Thorsen’s decision, legal efforts in Rockland County to stem the six-month-old epidemic ceased, leaving the way clear and unfettered for anti-vax activists.

In the six-month time period before the order was issued, the Rockland health department had vaccinated 16,958 people in total, averaging 2,880 a month or ninety-six people a day. In the weeks following the Pro-Informed Consent’s rally and the court decision, the number dropped to an average of seventy-three per day. In total, less than 4,700 more would be vaccinated in the next nine weeks. Following the striking down of the emergency order, other less stringent health department directives were implemented and aggressive


137. Cf. People v. Aleynikov, 104 N.E. 687, 695 (N.Y. 2018) (noting when a word is not defined by the relevant statute, the court must look to its ordinary meaning and “dictionary definitions serve as useful guideposts” in determining the word’s “‘ordinary’ and ‘commonly understood’” meaning); see Epidemic, supra note 136 (“[E]pidemic” is dictionary-defined as “an outbreak of disease that spreads quickly and affects many individuals at the same time.”); but see Manfred S. Green et al., When is an Epidemic an Epidemic?, 4 ISR. MED. ASS’N. J. 3, 3 (2002) (“An epidemic is the occurrence in a community or region of cases of an illness, specified health behavior, or other health-related events clearly in excess of normal expectancy; the community or region, and the time period in which cases occur, are specified precisely.”).

138. See LEON GORDIS, EPIDEMIOLOGY 23 (5th ed. 2014) (defining epidemic “the occurrence in a community or region of a group of illnesses of similar nature, clearly in excess of normal expectancy, and derived from a common or from a propagated source.”) or [baseline or background level] . . .

139. The 166 cases at the time were far above the usual background level for the entire United States. See Measles Cases and Outbreaks, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/measles/cases-outbreaks.html (last visited Aug. 30, 2020).


141. See generally Rom, supra note 124.

142. Cantor, supra note 70, at 102.

143. Cantor, supra note 70, at 102.

144. Cantor, supra note 70, at 102.
counter-anti-vax initiatives were initiated. But the epidemic soldiered on. By the time the Rockland County epidemic was declared over six months later by the Department of Health, another 146 people would sicken.146

During the ensuing months following Justice Thorsen’s decision, the Rockland County Health Department continued aggressive vaccination efforts147 and the County Executive renewed the State of Emergency.148 But their efforts were hampered by the virulent anti-vax movement149 “sway[ing] parents in New York to refuse immunizations for their kids.”150 On May 13, 2019, the anti-vaxxers hosted a second rally; this one attracted close to a thousand people,151 Advance notice for the event was less than twenty-four hours;152 the anti-vaxxers were out in full-force rounding up attendees, some of whom were bussed in from Brooklyn and Lakewood,153 and the delayed

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146. See Rogers, supra note 114 (noting a total of 312 confirmed cases); Brum, supra note 135 (noting the county had 166 cases reported between the beginning of the epidemic and the issuing of Justice Thorsen’s order).

147. See County Executive Announcement, supra note 145; Paumgarten, supra note 22; Measles Information, supra note 107; Rochel Leah Goldblatt, Measles Outbreak: Q&A With Rockland County Health Commissioner, LOHUD (Oct. 26, 2018).


149. Comment to Why Del Bigtree Wore A Yellow Star of David, THE HIGH WIRE WITH DEL BIGTREE (Apr. 1, 2019), https://www.youtube.com/watch?v=sI8jq3JAB-g. (“Incredible speech full of priceless information! We are eternally grateful for all you are doing to speak up for those whose voices have fallen on deaf ears!”).


[a]pproximately 1,000 men and women turned out on Tuesday night at the Atrium Plaza in Monsey for what had been billed as a ‘highly informative night of science and discussion addressing your concerns, fears and doubts.’ The flyer for the event was released just 24 hours in advance and appeared to be deliberately vague, listing no date for the symposium and listing the sponsor as the United Jewish Community Council, a seemingly unknown entity.

Id.

153. David Israel, Monsey Jewish Families Rally Against Measles Vaccinations ‘Conspiracy’, JEWISH PRESS (May 15, 2019). The concerted effort to troll for attendees is clear. Lakewood is home to a few prominent Rabbis who support the anti-vax movement. See Gedolim Letters; see
notification suggested that the organizers feared being shut down by City authorities.

“As measles cases topped 250 . . . a [hitherto unknown] group called the United Jewish Community Council ([UJCC]) hosted a symposium five miles from the health department . . . .”154 “[U]ltra-Orthodox Jews packed a ballroom for a ‘vaccine symposium’ with leaders of the anti-vaccination movement.”155 Speakers at the event included Rabbi Hillel Handler; the anti-vax “prophet,” Andrew Wakefield,156 via a video conference; and anti-vax “celebrity” Del Bigtree,”157 all of whom make repeated appearances in other recent epidemics.158

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The sponsoring group, the UJCC, might have been unknown, but it attracted the heavy hitters in the anti-vax movement, notably Wakefield and Bigtree. One of Bigtree and ICAN’s recurring arguments is the debunked autism–thimerosal connection, now expanded to include an alleged autism–aluminum connection. The fact that the measles vaccine contains neither thimerosal, nor aluminum, does not seem to be of concern either to Bigtree, or his supporters.

The Rockland County Health Department fired back against the UJCC-Bigtrees production with literature of its own, as did the Jewish community. These initiatives did not seem to have much of an effect. As a result, the


160. Sun & Brittain, supra note 53. In June of 2019, Mr. Bigtree “headlined [numerous] forums in the ultra-Orthodox Jewish communities in Brooklyn and Rockland County.” Id. He was quoted as saying “[t]hey should be allowed to have the measles if they want the measles. . . . It’s crazy there’s this level of intensity around a trivial childhood illness.” Id. See also Amy Britain, The Multi-Millionaire Anti-Vax Couple Bankrolling Groups Scaremongering About Immunisation, INDEPENDENT (June 23, 2019, 4:52 PM), https://www.independent.co.uk/news/world/americas/anti-vax-donation-new-york-couple-vaccine-a8970921.html (describing how Bigtree has no expertise in health or science but artfully stokes fear and hysteria at anti-vax conferences). David Gorski, Deception by Omission: Del Bigtree’s ICAN Calls the Studies Licensing MMR into Question, SCI. BASED MED. (May 6, 2019), https://sciencebasedmedicine.org/deception-by-omission-del-bigtrees-ican-calls-the-studies-licensing-mmr-into-question/.


163. Cohen et al., supra note 116 (noting “New York state countered these booklets with posters in Yiddish—but botched the translation so badly that parts of it are incomprehensible”); see also McDonald et al., supra note 77 (noting that “culturally appropriate and detailed vaccine education book was distributed to 15,000 Rockland County and 10,000 Orange County homes and medical providers”).

164. Rom & Goldblatt, supra note 157.

165. This is perhaps because the Yiddish versions were improperly translated. See Rogers, supra note 114 (noting “the Yiddish was mangled”); see also Lost in Translation: Rockland Measles Doorhangers Include Botched Yiddish Text, NEWS 12 WESTCHESTER (May 28, 2019, 5:10 PM), https://westchester.news12.com/lost-in-translation-rockland-measles-doorhangers-include-botched-yiddish-text-40545979. Yossi Gestetner of the Orthodox Jewish Public Affairs Council described the translation effort as, “a butcher job,” and noted that the Yiddish words just don’t make sense. Id. He explained, “[i]t seems to be speak with your health worry food person.” Id.
health department became increasingly concerned that the anti-vaxxers were disseminating literature specially targeted to the ultra-orthodox community.166

According to Rockland County spokesperson John Lyon, “[f]rankly,” false information regarding vaccines that is circulated in ultra-orthodox Jewish communities “is dangerous and of great concern to our Department of Health.” The sentiment was echoed by others: “[W]hen the anti-vaxxers targeted the ultra-Orthodox Jewish community, they knew exactly what they were doing. To help plant fear directly into mothers’ hearts, their publications contained religious references and include illustrations of mothers and children wearing clothes typical of religious Jews.”167

By June 2019, though, local counter-anti-vax activists had organized and were out in full force.168 Led by well-regarded health organizations catering to the ultra-Orthodox community, including Chai Lifeline,169 and facilitated by local counter-anti-vax activist Shoshana Bernstein, an informational seminar for women was held in Monsey on June 3, 2019.170 This time the efforts seem to have had some effect.171 Three months later, on September 25, 2019, the

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166. Tyler Pager, ‘Monkey, Rat and Pig DNA’: How Misinformation is Driving the Measles Outbreak Among Ultra-Orthodox Jews, N.Y. TIMES (Apr. 9, 2019), https://www.nytimes.com/2019/04/09/nyregion/jews-measles-vaccination.html; see also Rogers, supra note 114 (noting that “anti-vaxxers … specifically targeted the Orthodox Jewish community, spreading claims that vaccines caused conditions such as autism and sudden infant death syndrome”).


169. Rom & Goldblatt, supra note 157.

170. See Marcy Oster, Fewer Than 150 Attend Vaccine Education Program in NY Ultra-Orthodox Community, TIMES ISRAEL (June 4, 2019, 11:42 PM), https://www.timesofisrael.com/fewer-than-150-attend-vaccine-education-program-in-ny-ultra-orthodox-community/ (noting that though smaller than the earlier event in Monsey, this was a women-only event, and it may have attracted an audience most likely to be impacted by the message, in contrast with the huge rally-type event that might have been designed as a media event, just to make a splash).

epidemic was declared over,172 missing just by a hair’s breadth losing the WHO designation of “epidemic-free.”173

Figure 1. Two photographs showing attendance at the meeting to oppose measles vaccinations in Monsey, Rockland County, New York (Photo Credit: Gwynne Hogan/New York Public Radio).174

172. Jane Zucker et al., Consequences of Undervaccination—Measles Outbreak, New York City, 2018–2019, 382 NEW ENG. J. MED. 1009, 1011 (2020) (noting that on “September 3, 2019, when the outbreak was declared to be over [it was] two incubation periods [42 days] after the infectious period of the last case ended”).

Compare Rogers, supra note 114, with Measles Information, supra note 107 (noting that on October 7, another case was reported, which technically means the United States should have lost eradication status).


174. de Freytas-Tamura, supra note 155.
Controlling the epidemic did not come cheap. According to preliminary reports, the direct cost of the Rockland County response was between 2.4 and 6.5 million dollars. And while no one died, by the time the epidemic was over, 312 would sicken, “[8%] were diagnosed with pneumonia and [7%] were hospitalized.” (This is to be compared with the U.S. total of 119 individuals requiring hospitalization and sixty developing pneumonia). One patient suffered encephalitis, a life-threatening swelling of the brain.

B. The Brooklyn Outbreak

Two and a half million people live in Brooklyn—one of the five boroughs of New York City—more than eight times the number living in Rockland, about forty miles away. Compared to the 8,500 who live in New Square...
neighborhood, along with the 23,000 in Monsey and 32,300 in Spring Valley, the Rockland areas primarily affected, approximately 150,000 Brooklynites live in the Williamsburg section and 100,000 live in nearby Borough Park. These two locales, populated predominantly by ultra-Orthodox groups, contributed most of the over 600 confirmed measles cases to the New York tally. The larger of the two outbreaks occurred in Williamsburg, where 473 people became ill. In Borough Park, 121 cases were reported. Fifty-five cases were reported in outlying neighborhoods. This is not the first outbreak to befall the ultra-Orthodox in these New York City areas. A similar outbreak happened in 2013, although it was far less severe.

The measles epidemic in Brooklyn began a day earlier than Rockland, on September 30, 2018, although it ended some three months earlier, with no new cases reported beginning early July 2019. Similar to Rockland County, the New York City epidemic was also traced to Israel; the index case, also a child, was a native New Yorker who contracted the disease while visiting Israel.


183. See Spring Valley/Population, GOOGLE (last visited Feb. 14, 2022), https://www.google.com/search?q=population+spring+valley+%26rlz=1C1GGRV_enIL757IL762&es_sm=117&ei=PjZyYbabP7Jh6tXRh7_gBg&ved=0ahUKEwi2oqesDLd4AhWYII0KHaQGDhACU&uact=5&q=population+spring+valley&gws_rd=ssl.


185. Howard, supra note 115.


187. Id.

188. Id. Scott Enman, These Are All The Brooklyn Neighborhoods With Measles, BROOKLYN DAILY EAGLE (July 16, 2019), https://brooklyneagle.com/articles/2019/07/16/these-are-all-the-brooklyn-neighborhoods-with-measles/.


190. See Rosen, supra note 189.

191. Patel et al., supra note 179.

192. Howard, supra note 115.

193. Fieldstadt, supra note 120; see also 51% Of Early Cases In NY Measles Outbreak Attributed To Unvaccinated Adults, HEALIO NEWS (Oct. 7, 2019), https://www.healio.com/news/infectious-disease/20191007/51-of-early-cases-in-ny-measles-outbreak-attributed-to-unvaccinated-adults (noting eleven cases were internationally imported); ALERT # 38: Measles
in Israel. Six people diagnosed were children; one eventually was hospitalized with pneumonia.

According to the New York City Department of Health, the epidemic started slowly. The first thirteen cases were reported in October 2018, twenty-eight more were reported in November 2018, and fourteen more in December 2018. That was when “the health department issued a mandatory directive that schools in selected zip codes in Borough Park and Williamsburg exclude students who had not received the measles, mumps and rubella (MMR) vaccine.” One school did not comply, admitting a single student who was not vaccinated. The student proceeded to infect twenty-one others. In January 2019, thirty-seven more people were infected. By February 2019, the number of new cases in New York City had almost doubled—at seventy-one cases. By March 2019, that number had more than doubled again to 169.

Ratcheting up vaccine resistance was an anti-vax pamphlet called, “The Vaccine Safety Handbook: An Informed Parent’s Guide,” produced by an anti-vax group called Parents Educating and Advocating for Children’s Health (“PEACH”). The pamphlet became ubiquitous in Hasidic enclaves, including

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"Outbreak in New York City in the Orthodox Jewish Community, N.Y.C. DEP’T OF HEALTH & MENTAL HYGIENE (Oct. 18, 2018) [hereinafter ALERT #38], https://www1.nyc.gov/assets/doh/downloads/pdf/han/alert/2018/alert38-measles-outbreak.pdf (noting that “six individuals with measles were confirmed in October in the Orthodox Jewish community of Williamsburg, Brooklyn” and that initial individuals were unvaccinated traveling in Israel)."


195. ALERT #38, supra note 193.


197. Id.

198. Fieldstadt, supra note 120.

199. Fieldstadt, supra note 120.

200. Fieldstadt, supra note 120. In Williamsburg, Yeshiva Kehilath Yakov “‘went out of compliance’ and allowed an unvaccinated student with measles to attend school.” 21 of the resultant 87 cases were traced to that one student—and the high rates of non-vaccination in the school.

201. Measles, supra note 186.

202. Measles, supra note 186.

203. Measles, supra note 186.


Brooklyn and Rockland County.” “[D]irectly aimed at the Orthodox community,” the pamphlet is “partly written in Hebrew and filled with snippets from the Torah, or Old Testament,” although the assertions misrepresent Jewish law. The pamphlet also plays on unique fears within the ultra-Orthodox communities, such as that vaccines might contain traces of monkey, kidneys, rabbit brains, pork products, and aborted fetuses.

According to Shevi Rosner, president of the Orthodox Jewish Nurses association:

[from front cover to back cover, the booklet is full of misinformation . . . . It’s so well-produced and written that it looks professional and factual, . . . . [b]ut it’s filled with cherry-picked snippets of articles that appear to prove that vaccines are dangerous, yet when you look at the article, it’s saying the exact opposite."


208. Koerner & Reinstein, supra note 167; see Gwynne Hogan, How Orthodox Jewish Nurses Are Fighting ‘Anti-Vaccination Propaganda’ Targeting Their Community, GOTHAMIST (Mar. 26, 2019, 9:00 AM) (discussing the counter-anti-vax efforts of the Orthodox Jewish Nurses Association and Blima Marcus at vaccinetaskforce@gmail.com and their counter-speech book, PIE); EMES INITIATIVE, A SLICE OF PIE: PARENTS INFORMED & EDUCATED (2019), https://www1.nyc.gov/assets/doh/downloads/pdf/a-slice-of-pie; Scott Enman, Measles Outbreak: Brooklyn Judge Dismisses Anti-Vaxxer Lawsuit Against the City, BROOKLYN DAILY EAGLE (Apr. 19, 2019), https://brooklyneagle.com/articles/2019/04/19/measles-outbreak-brooklyn-judge-dismisses-anti-vaxxer-lawsuit-against-the-city/; see also LaMotte, supra note 207 (“Yet local Orthodox Jewish leadership has made it clear that there is nothing in Jewish law that prohibits vaccinations. In fact, it’s the opposite.”)

209. PEACH, ALL YOUR VACCINE QUESTIONS ANSWERED 2, https://www.dropbox.com/s/uu9b5dk1rccms/PEACH%20anti-vaxxing.pdf?dl=0; see Koerner & Reinstein, supra note 167; see also Jessica Bursztynsky, Jewish Nurses Debunk Anti-Vaxxer Misinformation as Measles Spreads in NYC Ultra-Orthodox Community, CNBC (Apr. 21, 2019, 10:30 AM), https://www.cnbc.com/2019/04/18/jewish-nurses-debunk-anti-vaxxer-misinformation-as-measles-spreads.html. The PEACH booklet:

[takes original, anti-vaccination beliefs and applies them to passages of the Bible. . . . [M]embers of the Orthodox Jewish Nurses’ Vaccine Task Force [] are frantically working on their own handbook called Pie [sic], short for Parents Informed and Educated. They’re going page-by-page against Peach, seeking to refute . . . false claims in the Peach handbook, notably one that says the MMR vaccine violates kosher dietary law.

Id.

210. LaMotte, supra note 207.
But it is effective. The PEACH group also sponsors “a vaccine conference hotline that frequently invites guests who have written about the dangers of vaccines to speak to the assembled listeners.” With anti-vax groups stoking vaccine-fears targeted to the ultra-Orthodox community, cases mounted up and New York City Deputy Health Commissioner, Demetre Daskalakis blamed the local yeshiva where the outbreak began. He said:

One school failed to exclude people in Williamsburg. . . . We had one measles case in that school, and subsequently every unvaccinated child who was not excluded came down with the measles, creating really the spark that ignited Williamsburg and created a true fire of measles in that neighborhood.

Other than blaming the school and requiring vaccination prior to school admittance—and apparently not monitoring compliance, nothing seems to have been done until April, six months after the epidemic began. On April 8, 2019, with 193 cases reported, the city “ordered yeshivas in Brooklyn to exclude . . . all students who are not vaccinated against measles” or face closure. On April 9, 2019, the City declared a state of emergency when the total cases reached 285. It promulgated an order requiring all individuals to be vaccinated—or provide evidence of immunity or a medical exemption—or

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211. The group publishes two pamphlets: THE VACCINE SAFETY HANDBOOK, supra note 204 and ALL YOUR VACCINE QUESTIONS ANSWERED, supra note 209, prominently featuring the Hebrew acronym for “With the help of the Blessed Almighty.”

212. LaMotte, supra note 207; see also Belluz, supra note 150.

213. Koerner & Reinstein, supra note 167 (“[C]alls are led by Chany Silber, a Jewish mother in Brooklyn.”); see also Gwynne Hogan, Misinformation Hotline Stokes Fear Of Vaccines in Ultra-Orthodox Community, GOTHAMIST (Mar. 12, 2019, 11:37 PM), https://gothamist.com/news/misinformation-hotline-stokes-fear-of-vaccines-in-ultra-orthodox-community (“the Akeres Habayis Hotline . . . in Yiddish mean[ing] ‘mainstay of the home’” “has taken on a different meaning and a different purpose, serving as a telephonic hub for ultra-Orthodox mothers who are resistant to vaccinating their children.”)


216. See Fieldstadt, supra note 120.


218. Janelle Griffith, New York City Declares Health Emergency Over Measles Outbreak in Brooklyn, NBC NEWS (Apr. 9, 2019, 3:08 PM), https://www.nbcnews.com/news/us-news/new-york-city-declares-health-emergency-over-measles-brooklyn-n992466 (stating the mayor suddenly noticed the urgency of the situation claiming: “This . . . outbreak that is very, very troubling and must be dealt with immediately.”)

face a $1,000 fine.\textsuperscript{220} Those who could not furnish proof of immunity or medical exemption would be prohibited from attending school or daycare.\textsuperscript{221} It appears that compliance monitoring then began in earnest.\textsuperscript{222} In April, the City announced school closures for non-compliance with the April 9 order, shuttering two schools for failing to release immunization and attendance records.\textsuperscript{223} By June, ten schools had been closed, nine of the ten were in Williamsburg;\textsuperscript{224} the tenth was in Queens.\textsuperscript{225} An additional five yeshivas were closed temporarily, and three individuals were fined within the first two weeks of the April 9 order for failing to vaccinate.\textsuperscript{226}

As the number of cases grew, five families sued the city for restricting their liberty.\textsuperscript{227} As in Rockland County, parents of unvaccinated children went to court to have the health department order struck down, accompanied by a heavy-hitter team of lawyers, including Robert F. Kennedy Jr., chairman of Children’s Health Defense, the anti-vaccination group.\textsuperscript{228} Claiming the health department order violated their children’s autonomy, religious practices,\textsuperscript{229} and the law of informed consent, they demanded a temporary restraining order.\textsuperscript{230} The arguments in both counties were similar. Lawyer Kennedy argued that “[r]eligious rights are fundamental. It is unconstitutional for the state to deprive people of such important rights when religious animus has played a key role.”\textsuperscript{231}

\begin{footnotes}
\textsuperscript{220} Cantor, supra note 70, at 101.
\textsuperscript{221} Joseph Aron & Shlomo Greenwald, New York Declares Public Health Emergency as Cases Approach 300, JEWISH PRESS, Apr. 10, 2019, at 12.
\textsuperscript{222} Pager & Mays, supra note 120.
\textsuperscript{223} Short, supra note 206.
\textsuperscript{225} Sales, supra note 224.
\textsuperscript{227} Short, supra note 206; see also C.F. v. New York City Dep’t of Health & Mental Hygiene, 2019 N.Y. Misc. LEXIS 1914, at *2 (N.Y. Sup. Ct. Apr. 18, 2019).
\textsuperscript{230} Id.
\textsuperscript{231} Lawsuit Filed to Stop Repeal of Religious Exemptions to Vaccines, WGRZ (July 10, 2019, 5:19 PM), https://www.wgrz.com/article/news/lawsuit-seeks-to-stop-repeal-of-religious-exemptions-to-vaccines/71-7af6a0e9f-3b7d-4b86-8b4d-7e205f8ec7 (a sentiment he re-echoed when
On April 18, 2019, Judge Lawrence Knipel of Kings County Supreme Court denied their request and upheld the April 9 order, ruling that “[t]he unvarnished truth is that these diagnoses represent the most significant spike in incidences of measles in the United States in many years and that the Williamsburg section of Brooklyn is at its epicenter.” With 285 cases in Brooklyn, compared to eighty-five diagnoses nationwide during the entirety of 2016, “this court can only conclude that there presently exists an emergent measles epidemic . . . in or bordering the Williamsburg neighborhood of Brooklyn, sufficient to warrant the declaration of a public health emergency.” Judge Knipel clearly “got it,” understanding what constitutes an epidemic in the public health context.

The court’s ruling could not have come soon enough. By the end of April 2019, the number of new cases spiked to 193. The impact of the ruling was dramatic; by the end of May, the city had issued 123 citations for noncompliance with its order, and new case reports dropped dramatically—ninety-seven cases for May, and twenty for June.

The anti-vaxxers seemed desperate. On June 4, 2019, Rabbi Handler surfaced again, this time holding a rally at a wedding hall on the boundary of the Borough Park and Flatbush neighborhoods, where a meeting was orchestrated by the UJCC. Again, Del Bigtree was prominently featured, again brandishing his yellow Star of David, and again declaiming the thoroughly debunked theory opposing state legislation seeking to eliminate religious exemptions to mandatory vaccination; see Debra Cassens Weiss, Robert F. Kennedy Jr. Among Lawyers Filing Suit to Block Vaccination Order, ABA J. (Apr. 16, 2019, 12:51 PM), https://www.abajournal.com/news/article/robert-f-kennedy-jr-is-among-the-lawyers-filing-suit-to-block-vaccination-order.


233. Id. at 2–3.

234. Id. at 3–4.


236. NYC HEALTH, supra note 218.


238. NYC HEALTH, supra note 218.


241. Sally Goldenberg & Amanda Eisenberg, Amid Measles Outbreak, Debate Over Vaccines Rages in Orthodox Brooklyn Neighborhood, POLITICO (June 5, 2019), https://www.politico.com/states/new-york/albany/story/2019/06/05/amid-measles-outbreak-debate-over-vaccines-rages-in-orthodox-brooklyn-neighborhood-1042065; Beth Mole, Measles Cases Hit 1,001 as Anti-vaxxers Hold Another Rally of Disinformation, ARSTECHNICA (June 6,
that vaccines cause a rise in autoimmune diseases and neurological disorders.\textsuperscript{242} Bigtree went further, linking vaccines to the Holocaust and to child sacrifice.\textsuperscript{243} In the words of one witness: “[h]e compared them to Nazi experimentation on unwilling Jewish medical subjects, then to the intentional ritual murder of children, in an effort to debunk the scientific consensus that a critical mass of vaccinated people, or herd immunity” will protect those who cannot be vaccinated for genuine medical reasons.\textsuperscript{244}

And again, attendees were bussed in from other neighborhoods.\textsuperscript{245} But this time, the local communities of Borough Park and neighboring Flatbush were in an uproar.\textsuperscript{246} As in Rockland County, the meeting was well-publicized, although

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\textsuperscript{242} Hogan, supra note 239.
\textsuperscript{244} Sales, supra note 240.
\textsuperscript{246} Anti-Vaccination Event in Midwood Draws Ire From Residents, Officials, NEWS 12 BROOKLYN (June 5, 2019, 7:45 PM), https://brooklynnews12.com/antivaccination-event-in-midwood-draws-ire-from-residents-officials-40593621; see also Hogan, supra note 239. “Word about Tuesday’s event had spread through WhatsApp groups, word of mouth, flyers stuck to telephone poles and through recorded messages blasted from car speakers around Borough Park.” Id.
\end{flushright}
notice of the exact date and place were not revealed until twenty-four hours prior to the event.\textsuperscript{247} Again, it appears the conference organizers might have been afraid of being shut down.

This time the audience was far smaller; some reports said only fifty people attended, and the message seemed to have fallen on deaf ears.\textsuperscript{248} In July, only six cases were reported in Brooklyn.\textsuperscript{249} By August,\textsuperscript{250} the epidemic died out for Brooklynites.\textsuperscript{251}

To be sure, the city also reached out to the ultra-Orthodox community and distributed a thirty-page pamphlet prepared by a rabbinical organization explaining the benefits of vaccination, how vaccines are made and tested, and other details.\textsuperscript{252} “Satmar Hasidic leaders, including United Jewish Organizations executive director Rabbi David Niederman, supported the mayor’s measles order, proclaiming ‘take the shot.’”\textsuperscript{253} “The Der Yid Newspaper (affiliated with the Satmar community of Williamsburg) printed a strong editorial against anti-vaxxers [and] . . . also took the rare step of printing it in English.”\textsuperscript{254} It is difficult to assess the contribution of the Williamsburg

\textsuperscript{247} See Eller, supra note 152; see also Ben Guarino & Lena H. Sun, \textit{New York Anti-Vaccine Event Attracts Pro-Vaccine Protests Amid Measles Outbreak}, WASH. POST (June 5, 2019), https://www.washingtonpost.com/health/2019/06/05/brooklyn-anti-vaccine-event-attracts-pro-vaccine-protests-amid-measles-outbreak/ (describing how the conferences organizers misled the wedding hall owners into believing they were renting their site for an anti-pornography conference); \textit{Muzzling Anti-Vaxxer}, supra note 6; \textit{Total Blowout}, supra note 245.

\textsuperscript{248} \textit{Total Blowout}, supra note 245. At the Flatbush anti-vaccination event, “[a]s of 9:30PM ET, a whopping 50 anti-vaxxers have shown up at the anti-vaccination symposium at Ateres Chynka Hall in Flatbush. The event was called for 8:00PM, with ‘buses leaving Williamsburg every 10 minutes.’” A statement from the Flatbush Jewish Community Coalition said the organization, “expresses [its] grave disappointment and dismay with the organizers and hosts of tonight’s anti-vaccination event. The Flatbush community does vaccinate. The religious and lay leaders of our community are unanimous in encouraging vaccination. We resent that participants are being bussed in from other neighborhoods. Our community will not participate.” \textit{Id.}; Catherine Kim, \textit{Anti-Vaccination Rallies Are Drawing Crowds—Even During the Measles Epidemic}, VOX (May 15, 2019, 2:10 PM), https://www.vox.com/science-and-health/2019/5/15/18624715/antivax-vaccines-measles-new-york-orthodox-jews-rallies (“Hundreds of people attended an anti-vaccination event in New York, where the outbreak has hit hardest . . . [Hillel Handler] also criticized New York Mayor Bill de Blasio, calling him a ‘German’ and ‘very sneaky fellow,’ for actions he said singled out Jews during the epidemic.”).

\textsuperscript{249} \textit{Measles}, supra note 218.

\textsuperscript{250} \textit{Measles}, supra note 218.


\textsuperscript{252} Frost, supra note 194; see also \textit{Total Blowout}, supra note 245.

\textsuperscript{253} Short, supra note 206.

\textsuperscript{254} \textit{Historic: Satmar Paper “Der Yid” Publishes Editorial in English Blasting Anti-Vaxxers}, YESHIVA WORLD (Apr. 11, 2019, 8:15 PM), https://www.theyeshivaworld.com/news/headlines-
community although these efforts clearly had no effect on anti-vax proselyzer, Handler, a member of the sect.255

As of September 3, New York City saw fifty-two patients hospitalized—8% of the 654—sixteen in intensive care,256 and “[sixty-five] reported complications, including pneumonia and encephalitis.”257 “Of the 17 hospitalized children, five (29%) were admitted to the intensive care unit.”258

By the time the epidemic was over, the city had spent over $6 million and deployed more than 500 staff to effectuate the mandatory vaccination order.259 Almost 15,550 doses of the MMR vaccine were administered after the April 9 emergency order, a nearly 41% increase compared to the same time period the previous year.260 This is to be compared to approximately 4,600 doses administered in Rockland after its emergency order was vacated.261

While not as dramatic from a public health standpoint, the Lakewood, New Jersey and Fallsburg, New York, measles experiences are noteworthy.262 Together, the two locales contributed another forty cases: thirty-three for Lakewood and seven for Fallsburg,263 which reacted by imposing vaccine requirements for campers.264 Including the thirty-nine cases imported to


257. Frost, supra note 194 (noting seventy-eight percent of Brooklyn cases were unvaccinated because of parental refusal or intentional delay, and twenty-one percent were too young for routine measles vaccination); Stephanie Soucheray, US Measles Cases hit 1,234 as Brooklyn Outbreak Called Over, CIDRAP (Sep. 3, 2019), https://www.cidrap.umn.edu/news-perspective/2019/09/us-measles-cases-hit-1234-brooklyn-outbreak-called-over.

258. Fleming, supra note 178.

259. Guarino & Sun, supra note 247.


261. Cantor, supra note 70; Measles Information, supra note 107.


Michigan from Williamsburg,265 these numbers raise the contribution of the ultra-Orthodox community to 86% of the 2018–2019 American measles-epidemic load.266 The Lakewood experience is especially interesting because it brokered intense intra-community strife.267 Here, too, the organized anti-vax movement helped foster vaccine resistance, in large measure via the Gedolim Letters manifesto written by a local anti-vaxxers apparently with the help of anti-vax activists—but targeted to the local Orthodox community.268

C. The Israeli Experience

While New York quelled its epidemic in less than a year with less than 1,000 cases, Israel, with its own large ultra-Orthodox population, did not fare as well.269 Between July 2018 and July 2019, the Israeli Health Ministry pegged the number of cases at more than 4,300.270 Thereafter, another two hundred cases were reported, bumping the number to over 4,500 cases as the epidemic dragged on for almost two years.271 Most believe that the Israeli-Ukraine pilgrimages imported the epidemic to Israel,272 also around the time of High Holidays273 when thousands flock to visit the grave of Rabbi Nachman of Breslov.274 In October, following the pilgrimage, “measles cases exploded in Israel, to 949.”275 Since Ukraine hosted the most serious of the European outbreaks—with 72,000 cases—276 and had a poor vaccination record—57% of

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266. While the official tallies indicate that 75% of US cases came from Rockland and Brooklyn, adding the thirty-nine Michigan cases seeded from Rockland and the forty cases from New Jersey and Sullivan Counties, raises the tally to 86%. See also Public Health Advisory #2, supra note 63; Barchenger, supra note 263.
269. Stein-Zamir et al., supra note 77.
270. Avery, supra note 18 (note discrepancies both in dates and numbers with Stein-Zamir et al., supra note 77).
272. Stein-Zamir et al., supra note 77 (noting outbreak followed international importations credited, “mainly to the Ukraine”).
273. REUTERS, supra note 109.
276. Julia Belluz, 2019 is a Very Bad Year for Measles, Vox (May 31, 2019, 10:38 AM), https://www.vox.com/2019/4/15/18311377/measles-outbreak-2019; but see Goldstein, supra note 24 (noting 54,000 cases for Ukraine); see also Measles – European Region: Disease Outbreak
III. EVALUATING THE RESPONSE

A. Israel

Vaccination law in Israel differs from the United States and other countries. “There is no law compelling vaccination, no law barring unvaccinated children from attending schools, no disciplinary action against anti-vaxxers, and no educational effort targeting the parents.”

As an overall policy in Israel, coercive vaccination measures are not countenanced, even to the point of not requiring vaccination as a precondition to schooling. In fact, until 2018–2019, laws imposing mandatory vaccination

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277. Goldstein, supra note 23; Jaffe-Hoffman, supra note 109 (“In the past, approximately 30,000 [Israelis] would travel to the Ukrainian city every Rosh Hashanah.”).

278. Goldstein, supra note 23 (“In Ukraine, it seems the disdain and mistrust of scientific knowledge have spread not only among the general public but within the health care system itself, as doctors increasingly recommend that parents opt not to vaccinate children, and about 30% of medical publications penned by physicians do the same.”). The steep increase in Ukrainian cases is attributed to both a vaccine shortage and massive anti-vaccine propaganda.


Heath Ministry Director General Moshe Bar Siman Tov . . . contacted all the chief district physicians and asked them not to hesitate to use their authority to keep unvaccinated children out of schools and preschools if there are signs of a potential outbreak of the type that reached its peak last September and October.

Id. Since the outbreak had peaked by that time, no such authority vested in the district physicians, and the directive was not implemented except in isolated areas. See Ido Efrati, Israel Bars 11 Children Not Vaccinated for Measles from Preschools, HAARETZ (Jan. 15, 2019), https://www.haaretz.com/israel-news/.premium-israel-bars-11-children-not-vaccinated-for-measles-from-preschools-1.6846463.

280. Kamin-Friedman, supra note 279, at 3 (“Israel’s Advisory Committee on Infectious Diseases and Immunization . . . discussed the possibility of requiring children’s vaccination prior to their admission to the education system in 2008. The committee . . . stated that a mandatory vaccination requirement would not be effective due to enforcement difficulties . . . .”).

281. Kamin-Friedman, supra note 279, at 3–4. However, recent international work on the coronavirus epidemic seems to indicate Israeli support for mandatory vaccination to coronavirus.
have only passed in Israeli history on two occasions, “once in 1949, when Israel faced a smallpox outbreak, and once in 1994 when a [localized] measles outbreak occurred . . . .”282 Nevertheless, Israeli law does allow closing schools in case of a measles outbreak,283 but, the government only applied this law to two schools in the last four months of 2018—in Jerusalem and a town near Haifa—when 900 new cases were reported in these areas.284 And judicial intervention has, thus far, been limited to individual cases.285 Proposed legislation to charge parents with responsibility for vaccination and ban unvaccinated children from schools has stalled.286

Indeed, the lack of mandatory pre-school requirements, a reflection of the Israeli veneration for autonomy, 287 may well explain the three-fold higher incidence and longer duration of the 2018–2019 Israeli measles outbreak, considering the affected populations were virtually identical in lifestyle and demographics.

See Jonathan Davies, Legal and Ethical Ramifications of COVID-19 in Israel, 39 MED. & L. 225, 235–37 (2020) (discussing autonomy and noting “[i]t is assumed that public health interests will prevail over the right to autonomy in Israel and worldwide,” predicting that vaccination will become mandatory even in Israel).

282. Kamin-Friedman, supra note 279, at 4. Kamin-Friedman further recognizes: [t]he Public Health Ordinance enacted in 1940, is currently the only reference in Israeli law to public health interventions. According to §19 of the Ordinance . . . ‘In any town, village or area where an infectious disease assumes or is likely to assume an epidemic character or where there exists in the neighborhood infectious disease such as in the opinion of the Director constitutes a danger to the public health of . . . [the] area, the Director or Medical Officer may proceed to take such measures to protect the inhabitants thereof from infection . . . .

Kamin-Friedman, supra note 279, at 4.

283. Goldstein, supra note 23.

284. Goldstein, supra note 23; see also Court Blocks Teachers’ Strike Over Canceled Quarantine for Kids, Classes to go Ahead, THE TIMES OF ISR. (Jan. 27, 2022), https://www.timesofisrael.com/court-blocks-teachers-strike-over-cancelled-kids-quarantine-classes-to-go-ahead/ (Israeli policy during the COVID outbreak differs a bit with schools being required to hold classes by Zoom during the earlier waves. The most recent policy—addressed to Omicron—is to open schools and relax quarantine rules—to the point of engendering a teacher’s strike—the legality of which was rejected).

285. See, e.g, Tel Aviv Court Orders Mother to Vaccinate Her Children, TIMES ISRAEL (Nov. 4, 2019, 7:09PM), https://www.timesofisrael.com/tel-aviv-court-orders-mother-to-vaccinate-her-children/ (“Father sue[d] after unmarried couple agreed to have kids, but [the] woman refused to have them immunized, claiming—but not proving—they are sensitive to the vaccines.” The court directed vaccination.).

286. Goldstein, supra note 23.

B. The American Response

Both Rockland County and Kings, NYC, were criticized for poor public health response. Rockland’s Health Department came under fire for initially allowing children to attend school if not vaccinated and for botched pro-vaccination messaging.\(^{288}\) New York City came under attack for not calling in the CDC during the 2018–2019 epidemic,\(^{289}\) although with 400 people assigned from its own health department,\(^{290}\) it is not clear what the CDC could have contributed.

In terms of legal responses and the subsequent trajectory of the epidemic, however, comparison between the Rockland and Brooklyn episodes vastly differ. These differing legal resolutions and consequent public health measures and outcomes provide us with some objective evidence of the efficacy of public health law and emergency orders in combating epidemics. The fortuitous similarities in population characteristics in both American epidemics and the Israeli outbreak also preclude typical objections of the ecologic fallacy.

To recount, both American epidemics began about the same time; both were imported from Israel.\(^{291}\) Both began with teenagers.\(^{292}\) Both communities were composed of ultra-Orthodox Jews with identical lifestyles.\(^{293}\) Both epidemics were festered by the same groups of anti-vaxxers, PEACH, and ICAN,\(^{294}\) promulgated by written literature and oral symposia in both counties.\(^{295}\) Both communities cooperated in counter-anti-vax efforts,\(^{296}\) but these initiatives primarily took place after the epidemic was well underway. In April 2019, both counties sought court orders imposing vaccination.\(^{297}\) And there the similarity ends.

Initially, it appears the Rockland County Health Department did a better job of responding, declaring a state of emergency as early as March 2019.\(^{298}\) By contrast, initially New York City seemed to allow the epidemic to get the best of them. Aggressive efforts by the city did not begin until April 2019.\(^{299}\)


\(^{289}\) Cohen et al., supra note 116.

\(^{290}\) Cohen et al., supra note 116.

\(^{291}\) McDonald et al., supra note 77, at 444; see also Patel et al., supra note 179.

\(^{292}\) McDonald et al., supra note 77; see also Patel et al., supra note 179.

\(^{293}\) McDonald et al., supra note 77; see also Patel et al., supra note 179.

\(^{294}\) Policy Initiative, supra note 34, at 23–24.

\(^{295}\) Policy Initiative, supra note 34, at 23–24.

\(^{296}\) Policy Initiative, supra note 34, at 23–24.

\(^{297}\) Pager & Mays, supra note 120.

\(^{298}\) See generally Cantor, supra note 70, at 102.

\(^{299}\) See generally Cantor, supra note 70, at 101. Although rules were implemented requiring schools to ascertain student vaccination prior to admittance back in December, these were flagrantly disregarded with lackluster enforcement by the City as is apparent from the increased number of cases.
In April, Rockland County had reported thirteen new cases, compared to 193 in New York City, with totals for the six months—October to the date of the court orders—of 166 for Rockland and 256 for Kings County.300

Figure 3. Bi-monthly Epidemic Curve (new cases) during October through April, the first half of the 2018-2019 measles epidemic, for Rockland County and Kings County (NYC).301 Rockland in orange, Kings in blue.

Prior to the respective court decisions, Rockland registered thirty-one cases for March and April, down by 50% from January and February, while NYC registered 362 cases for the two months—up more than three times compared to the prior two months.302 At that time, Rockland was vaccinating almost 100 persons a day.303 But following the April 5, 2019 court decision repealing the Rockland state of emergency and denying compulsory vaccination, measles cases dramatically increased in the county, and vaccinations dramatically decreased.304

After the Rockland court quashed the local order, Rockland County reported eighty-four new measles cases, a six and a half-fold increase.305 The uptick in

300. See court decisions, infra.
303. Cantor, supra note 70, at 102.
304. See Cantor, supra note 70.
305. Rochel Leah Goldblatt, Rockland Measles: Emergency Order Renewed for 4th Time, Cases Rise to 275, LOHUD (June 24, 2019, 3:06 PM),
Rockland cases continued throughout May 2019, rising from thirteen in April to eighty-four in May, culminating with the impressive anti-vax symposium held on May 13.\(^{306}\) Not until June, contemporaneous with a vigorous community counter-anti-vax effort—and imposition of the state law—do we begin to see a decrease in Rockland cases.

The increase—and in fact, acceleration—of cases following the court’s revocation of the Rockland health department order resulted in an epidemic that outlasted the New York City epidemic by approximately three months, and risked the United States losing its WHO measles-free status.\(^{308}\) In comparison after its court intervention, and now armed with an order requiring vaccination, New York City would soon boast a decline of new cases by 50%—from 193 to 97—in one month. Six cases were reported in July and none were reported in August.\(^{309}\)

\(^{306}\) See de Freytas-Tamura, supra note 155.

\(^{307}\) Graph created by author.


\(^{309}\) Measles, supra note 218; Paul Frangipane, Measles Outbreak Continues to Slow, With No New Cases in August, BROOKLYN DAILY EAGLE (Aug. 23, 2019) (noting 654 cases were reported in New York City as of August).
One physician, however, derided this tactic. In an article published in the *New England Journal of Medicine*, Dr. Julie Cantor first questioned the Rockland County’s reported statistics, then suggested that laws coercing vaccination are so unpalatable as to be counterproductive.\(^{310}\) She also claimed, without evidence, that New York City’s decision to fine residents who do not vaccinate may have backfired.\(^{311}\) “Furthermore,” she asserts, “emergency edicts may not increase vaccination rates . . . . If New York City excludes confounding variables, perhaps its data, which are not publicly available, will be more compelling.\(^{312}\) Regardless, the precedent’s dangers remain.”\(^{313}\)

Yet, on its face, the efficacy of allowing New York City’s order to stand seems quite compelling, strongly suggesting that the legal intervention escalated vaccination and hence decreased spread and truncated the epidemic’s progression.\(^{314}\) The question to be examined, given the similarity of facts at the time of the respective orders, is what caused the legal outcome to differ?

### IV. THE LEGAL RESPONSE: EMERGENCY ORDERS AND THE POWERS OF THE MUNICIPALITY

#### A. Arbitrary and Capricious in Rockland

The Rockland County order, which barred children who had not been vaccinated from public spaces, was stricken in *W.D. v. County of Rockland*.\(^{315}\) The New York City order, which fined anyone who had not been vaccinated and accessed public spaces, was upheld in *C.F. v. Department of Health and Mental Hygiene*.\(^{316}\) Both actions were brought as Article 78 proceedings, challenging the local laws as “arbitrary and capricious.”\(^{317}\) The main differences between the orders was that Rockland’s targeted those under the age of eighteen and saddled responsibility on the parents for vaccinating their children. By comparison, New York City imposed a $1,000 fine for non-compliance and applied to everyone, adult and child alike, if the person appeared in public and could not show proof of vaccination or immunity or medical exemption. Yet,

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\(^{310}\) See Cantor, *supra* note 70, at 102.

\(^{311}\) Cantor, *supra* note 70, at 101.


\(^{313}\) Cantor, *supra* note 70, at 102 (emphasis added); see also Drew, *supra* note 65.


\(^{316}\) C.F. v. N.Y.C. Dep’t of Health & Mental Hygiene, 139 N.Y.S.3d 273 (App. Div. 2020); see also Brief of Petitioner at 1–2, 8–9, C.F. v. N.Y.C. Dep’t of Health & Mental Hygiene, 139 N.Y.S.3d 273, 273 (App. Div. 2020) (No. 19-4455) (stating that with the exception of exemption for medical contraindications “all persons . . . shall be vaccinated against measles” and anyone not able to show proof of vaccination or immunity would be considered a “nuisance”).

\(^{317}\) *W.D.*, 101 N.Y.S. 3d at 822; *C.F.*, 139 N.Y.S.3d at 273.
notwithstanding the similarity of underlying facts, within the span of two weeks two entirely different decisions were rendered.

While the Rockland County order did not actually include a vaccination requirement, it effectively did so by barring unvaccinated children from public places from March 27 through April 25 of 2019.318 Although not expressly using the terms liberty or autonomy, the petitioners claimed that their children could not attend the school of their choice. They sought to have the order voided on the grounds that it was arbitrary and capricious.319 They also claimed that the religious exemption they enjoyed—to be stricken some three months later by New York State—afforded them protection from the local order.320 This claim was essentially ignored by the Court, which focused on the facts and the definition of “epidemic” found in the enabling legislation.321 Although noting that the County Executive had emergency power, the court found this was limited to disasters.322 While “epidemic” is covered under the disaster provision, its meaning was undefined in the enabling statute.323 This omission allowed the court to forage around the general vernacular, consult the dictionary,324 select the definition of its choice, and accept the petitioners’ characterization of the outbreak as one not severe enough to justify emergency orders by the executive.325

To do so, the Court turned to a Merriam-Webster dictionary to provide the desired definition.326 That dictionary provides two definitions: the first defines epidemic as “an outbreak of disease that spreads quickly and affects many individuals at the same time,” and was implicitly rejected by the court.327 Instead, the court chose a second definition, one that defines the word as “affecting . . . disproportionately . . . large numbers of individuals within a population.”328 Holding that “[i]n a population of roughly 330,000 people, 166 cases [of measles] . . . does not appear . . . to rise to the level of an ‘epidemic’ as included in the definition of ‘disaster’ under Executive Law § 24[,]” the court

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319. Id.
322. Id. at 823–24.
323. Id. at 824.
324. Id. (“When a word used in a statute is not defined in the statute, dictionary definitions serve as ‘useful guideposts’ in determining the word’s ‘ordinary’ and ‘commonly understood’ meaning.”).
325. Id.
327. W.D., 101 N.Y.S. 3d at 824.
328. Id.
ruled that the order was indeed arbitrary and capricious and constituted an abuse of executive discretion.329

Several problems surface with the courts’ outcome determinative methodology.330 First is that “epidemic” is a term of art in public health practice, meaning an excess of cases over a background level or normal expectancy.331 Given that the prevalence of disease in Rockland was 40% higher than experienced by the entire U.S. over the preceding year, and double that of 2016, the situation certainly constituted an epidemic in public health terms.332 Moreover, given that the disease increased from one case to 166 cases over a six-month period, was spreading rapidly, and had the potential to spread astronomically, it could be said to constitute an epidemic even under the first Merriam-Webster definition. Thirdly, the epidemic definition relied on by the court, which appears to be a secondary definition, was not even a proper definition of the term when used as a noun—as opposed to an adjective—at least according to one dictionary published in 1981 by Merriam-Webster.333

The decision is plainly wrong from a public health point of view,334 and perhaps from a legal view as well,335 although it was upheld on appeal.336 As illustrated above, the impact of this decision delayed resolution of the

329. Id.
331. GORDIS, supra note 138, at 23.
332. Measles Cases and Outbreaks, supra note 30.
335. See Garcia v. N.Y.C. Dep’t of Health & Mental Hygiene, 106 N.E.3d 1187, 1202 (N.Y. 2018) (holding that “the Board [of Health] permissibly adopted . . . vaccine rules pursuant to its legislatively-delegated and long-exercised authority to regulate vaccinations”).
epidemic. The arguments made by the Rockland County Attorney, which focused on the police power of the state and relied on Jacobson, were clearly not effective nor persuasive regarding the issues raised in the local order.

B. Not Arbitrary and Capricious in Brooklyn

One day before the Appellate Division ruled on the Rockland case, the Brooklyn case was filed. Here the petitioners, also a group of parents, brought claims far more sophisticated than their Rockland neighbors. In addition to the same arbitrary and capricious claim that prevailed in Rockland, the petitioners also alleged violations of autonomy, informed consent, religious freedoms, and claimed that the order was “disproportionate to the provable factual circumstances” and “fail[ed] to use the least restrictive means that would likely control measles yet balance the rights to individual autonomy.”

The petitioner’s papers also contained additional claims, which were given little receptivity by the court, including the “scepter of unjustifiable forced vaccination.” Rather than focusing on strict constitutional—religious freedom—issues, the plaintiffs raised human rights and bioethical mandates, such as “the Nuremberg Code, the Helsinki Declaration, and the UN Declaration on Human Rights and Bioethics,” which support the right of “the fundamental principle of informed consent.” Petitioners also raised issues of safety and efficacy of the vaccine, but without persuasive evidence—save an unsupported doctor’s affidavit, which was quickly rejected by the court. Finally, they claimed that the city had “no legal authority or precedent for finding an unvaccinated person in any context to be a nuisance.”

341. Id.
342. Id. at 4. Interestingly, the Israeli position also relies heavily on the Helsinki Declaration, although its prime focus is on ethical human research. See Davies, supra note 281, at 227–28 (adopting “the Geneva Declaration of the World Medical Association, which governed the relationships between doctor and patient.”)
345. Verified Petition, supra note 340, at 14, 16; see generally Garcia v. N.Y.C. Dep’t of Health & Mental Hygiene, 106 N.E.3d 1187, 1196 (N.Y. 2018). The Garcia court ruled that: [t]o be sure, the . . . vaccine rules necessarily impinge upon personal choice to some degree. This will almost always be true with health-related regulations . . . [But because] the rules challenged here . . . seek to ensure increased public safety and health for the
Similar to the Rockland court, the Brooklyn decision first addressed the city’s power to act:

The pivotal questions posed for this court’s determination is whether Respondent Commissioner has a rational, non-pretextual basis for declaring a public health emergency and issuing the attendant orders challenged herein. The evidence in this regard is largely uncontroverted. The unvarnished truth is that these diagnoses represent the most significant spike in incidences of measles in the United States in many years and that the Williamsburg section of Brooklyn is at its epicenter.346

At the time of the decision, 285 cases had been reported in the Brooklyn epicenters of Williamsburg and Borough Park, which together claimed a population of about 150,000, which seemingly would make the Rockland epidemic—which focused mainly on New Square, Monsey and Spring Valley (the ultra-Orthodox areas) far worse. Regardless, Brooklyn’s Judge Knipel recognized the severity of the epidemic and took serious issue with Judge Thorsen.347 Pointedly, he noted “[t]he appropriate measure is rather the sudden percentage rise in infection experienced by the subject population. If one were to wait till a significant percentage of overall population were infected, disaster would inevitably ensue.”348

Finding the city Health Department order well-founded, Judge Knipel proceeded to address the city’s response and determine if there was a less restrictive, “demonstrably better, safer, or more efficient,” alternative available. He concluded not, noting that petitioners had not even supplied or suggested one.349 Interestingly, dehors the record, one commentator suggested quarantine of affected or exposed persons as an acceptable alternative.350 But that was before the days of the coronavirus, when we are finding that quarantine poses its own hazards, such as serious deficits to mental health, including risk of post-traumatic stress disorder and suicide.351 Further, quarantine is only an adjuvant in terms of controlling a current epidemic. Should another epidemic roll out in short order, as was seen in the smallpox epidemics, ravaging disaster follows.352

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347. C.F., 2019 N.Y. Mis. LEXIS 1914, at *4 n.3.
348. Id. (emphasis added).
349. Id. at *4.
350. Cantor, supra note 70, at 102.
352. See generally WILLRICH, supra note 12.
Judge Knipel also rejected objections of informed consent, noting a fireman does not ask consent to put out a fire in a burning building, and that “religious objections,” would apply only to pre-school certifications of vaccination.\[353\] Finding that the personal opinions of the affiants are of no value, he noted they are “unsupported by an affidavit of a religious official . . . or other doctrinal documentation.”\[354\] The judge further addressed “scientific objections” raised by the petitioners, which included three typical anti-vax tropes: vaccine danger, ineffectiveness, and that it causes the disease,\[355\] and swiftly rejected these as speculation.\[356\]

While the dicta clearly and adamantly rejected these “scientific” claims, the anti-vax community continues to spout them—attempting to secure more converts to their cause.\[357\] These efforts go unobstructed.\[358\] Sadly, next time an epidemic happens upon us, the anti-vax message likely will have infected a host of new susceptibles, and we can expect to find ourselves back in court again as local—and state—emergency orders are again contested.\[359\]

C. Balancing Rights and Interests

Another argument brushed off by the Brooklyn court pertains to petitioner’s claim to “balance the rights to individual autonomy, informed consent and free exercise of religion.”\[360\] Certainly, all legislative measures are subject to balancing the rights and needs of the parties,\[361\] but the important variable to be calibrated is balanced against what?

The Gedolim Letters brochure, referenced above, sheds light on common misconceptions of parental rights.\[362\] Indeed, it goes beyond claims of parental rights to make medical or health-related decisions for their children,\[363\] which can be abrogated under certain circumstances.\[364\] Rather, the brochure asserts


\[355\] Id. at *4–5.

\[356\] Id. at *5.


\[358\] Id.


\[360\] C.F., 2019 N.Y. Misc. LEXIS 1914, at *1.


\[362\] Gedolim Letters, supra note 268, at 2–3, 14, 19, 23.

\[363\] See Ass’n of Jewish Camp Operators v. Cuomo, 470 F. Supp. 3d 197, 206 (N.D.N.Y 2020) (raising the claim of parental rights in the context of a pandemic).

\[364\] Id. at 213–14.
that “[r]eligious freedom is an absolute constitutional right—and to remove it we would need absolute scientific proof that there is indeed a compelling health threat that we must avert. That proof has never been given.” Such misstatements of both legal and scientific fact fan the flames of resistance. This false information of an absolute right of parents to determine health care choices for their children energizes anti-vax parents to oppose legislation removing nonmedical exemptions or otherwise require vaccination.

The balancing of parental rights may turn on the characterization of the threat as perceived under the cultural mores of the country involved. In Israel, other countervailing rights are considered including autonomy, dignity, and education. In the United States, such individual rights, when exercise thereof threatens the public health, had been relegated as inferior, at least under Jacobson. These cultural differences may be of little interest when an

365. GEDOLIM LETTERS, supra note 268, at 10; see Jacobson, 197 U.S. at 26 (ruling that “the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint”); see also Barbara Pfeffer Billauer, More on Measles: De-Mystifying the Myths: #1 Autism, Thimerosal and the Vaccine, TIMES ISRAEL (Dec. 19, 2019, 4:45 PM), https://blogs.timesofisrael.com/more-on-measles-de-mystifying-the-myths-1-autism-thimerosal-and-the-vaccine/.

366. Billauer, supra note 351; see also ALL YOUR VACCINE QUESTIONS ANSWERED, supra note 201.


368. Kamin-Friedman, supra note 279, at 10 (noting that “[s]anctions applied against those who refuse vaccination (depriving the right to education) in the US resulted in increased immunization rates”).

369. Kamin-Friedman, supra note 279, at 5. Kamin-Friedman further notes that:

[the] constitutional right to dignity includes . . . , the right to autonomy. One aspect of the right to autonomy is parental autonomy, which refers to parents’ right and obligation to take care of their minor children . . . . The right to autonomy in the medical context is implemented through the requirement of ‘informed consent’ prior to medical interventions.

Kamin-Friedman, supra note 279.

370. Kamin-Friedman, supra note 279, at 3–4 (noting that, “[t]he government . . . possesses the sole authority to empower, regulate, or carry out activities designed for the protection or promotion of the general health, safety, and welfare of the population”); see also HCJ 7245/10 Adalla Legal Ctr. v. The Israeli Ministry of Social Affairs & Social Servs., 49–50 (2013) (Isr.); see also Limor Malul, The Role of the Israeli Courts in Formulating the Physician–Patient Relationship, 33 INT’L J. OF MED. & L., 61 (2014).

371. See Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944); In re Abbott, 954 F.3d 772, 778, 785–86 (5th Cir. 2020) (“The right to practice religion freely does not include liberty to expose the community . . . to communicable disease.”) (quoting Prince, 321 U.S. 166–67); see also Crowley v. Christensen, 137 U.S. 86, 89–90 (1890) (“Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one’s own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others.”); Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905) (“The possession and enjoyment of all rights are subject to
epidemic is self-contained. However, when infective agents result in pandemic, international cultural clashes must be addressed.

V. A LEGAL RESPONSE: CLASH OF IDEALS AND THE ROLE OF THE FIRST AMENDMENT

A. Mandatory Vaccination Laws in the United States

Mandatory vaccination is not a novel concept in the United States. Every state requires that all pre-school children must be vaccinated against a prescribed list of childhood diseases prior to attendance.\(^{372}\) There are, however, certain exemptions, which vary in extent and proof of qualification on a state-by-state basis. But these exemptions are generally easy to obtain and the enforcement of documentation is lax.\(^{373}\)

All states allow exemptions for medical reasons. Fifteen states allow philosophical exemptions.\(^{374}\) Until very recently forty-eight states legislatively provided for religious exemptions from mandated vaccinations.\(^{375}\) Now, the number is down to 44.\(^{376}\)

In 2015, following the measles outbreak in Disneyland, the California Legislature enacted Senate Bill 277.\(^{377}\) This "law gave California parents a choice: they could vaccinate a child against ten diseases, obtain a medical exemption stating that the child had a medical condition that prevents vaccinating, or keep the child at home and provide education through such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community."

372. Calandrillo, supra note 40, at 356.
374. States with Religious and Philosophical Exemptions from School Immunization Requirements, NAT’L CONF. OF STATE LEGIS. (Apr. 30, 2021), https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx (philosophical exemptions include objections because of “personal, moral or other beliefs . . . [t]he existing statute in Minnesota and Louisiana does not explicitly recognize religion as a reason for claiming an exemption, however, as a practical matter, the non-medical exemption may encompass religious beliefs.”).
376. See Sandstrom, supra note 375 (California, New York, Maine, Mississippi, and West Virginia bring the total to five).
homeschooling or an independent study.”378 At the time, three other states had eliminated non-medical exemptions—Maine, West Virginia,379 and Mississippi.380 The California legislation, like those of the three other states that had already enacted similar laws, withstood judicial scrutiny on constitutional issues.381

In June of 2019, shortly before the epidemics in both Rockland County and New York City subsided (and after the Health Department orders were decided), New York State became the fifth state to eliminate all non-medical exemptions to pre-school vaccination.382 On June 13th, Governor Andrew Cuomo signed legislation (S.2994A/A.2371).383 Unvaccinated students now have fourteen days from the start of school to prove they received the first dose of each immunization.384 Recently, New Jersey attempted to enact similar legislation,


380. Gingold, supra note 27 (noting “[o]ther states are also considering bills to eliminate non-medical exemptions to school vaccination requirements, including Arizona (HB 2162), Iowa (HF 206), [and] Minnesota (SF 1520).”); see also Susan Haigh, supra note 367 (noting Connecticut is also considering such legislation).

381. Reiss & Diamond, infra note 394.

382. To be sure, New York’s legislative efforts have been criticized as too slow. In comparison to California’s swift legislative response, which similarly eliminated non-medical exemptions, New York’s bill languished for months—legislators introduced it in January 2019, but it did not pass until June. After California’s legislature eliminated religious and “personal belief” exemptions the vaccination rate rose from ninety percent to ninety-six percent. “But so did the incidence of doctors selling bogus medical exemptions.” See Paumgarten, supra note 22.


but failed,\textsuperscript{386} at least in part due to organized anti-vax efforts,\textsuperscript{387} generating the cheers of throngs on its failure, many of whom were anti-vax interlopers bussed in from Brooklyn.\textsuperscript{388} Colorado\textsuperscript{389} and Oregon\textsuperscript{390} suffered similar experiences.


\textsuperscript{387} New Jersey 101.5, New Jersey Vaccines Law Defeated (for now) – Parents Cheer, YOUTUBE (Jan. 13, 2020), https://www.youtube.com/watch?v=yVlPoTTjnyw&t=49s (“Opponents to a bill that would have ended religious exemptions to mandatory vaccinations for New Jersey public school students cheer after state Senate President Steve Sweeney announces the exemption will remain in place”); Mordechai Sones, New Jersey Vaccines Law Defeated (for now) as Parents Cheer, ISR. NAT’L NEWS (Jan. 14, 2020, 8:01 PM), https://www.israelnationalnews.com/News/News.aspx/274550 (“Months of organizing a national movement culminated in protesters flooding the chamber and cheering when the Senate session ended without a vote . . . Orthodox Jewish voices were prominent at New Jersey’s protest, with bill opponents arriving by bus from Brooklyn, Monsey, Lakewood, Pennsylvania, and Maryland.”); see also GEDOLIM LETTERS, supra note 268, at 3 (“[Gedolim] rule that vaccination is a parental choice, and that parents may not be coerced into vaccination.”). The authors included a letter sent to the legislator making their views on vaccination known. Email from Gedolim Letters Staff to Barbara Pfeffer-Billauer, Research Professor, Inst. of World Politics (Feb. 5, 2020) (on file with author). There is no indication who prepared the Gedolim Letters, who produced it, or who funded it. The author’s attempts by email to ascertain this information were rebuffed, with the signatory to her emails listed only as “Gedolim Letters Staff” and who expressly declined to identify himself/themselves fearing retaliation.

\textsuperscript{388} Sones, supra note 387 (noting that on site was the ubiquitous anti-vaxxer Del Bigtree of ICAN, who travelled to Trenton, New Jersey, to cheer the failure to pass the legislation); Vaccine Wars, Del Bigtree up close in Trenton Jan. 13 2020, YOUTUBE (Jan. 13, 2020), https://www.youtube.com/watch?time_continue=1017&v=QFST07QG14E&feature=emb_logo.

\textsuperscript{389} Jennifer Brown, Colorado Lawmakers Failed to Pass a Bill to Improve Immunization Rates in 2019. Here’s What’s New this Year, COLORADO SUN (Feb 20, 2020, 3:00 AM), https://coloradosun.com/2020/02/20/immunization-rates-legislation/.

with Colorado generating the personal appearance of noted anti-vaxxers, including Robert Kennedy Jr.391

In the absence of the ability to pass such a statute due to widespread community opposition fueled by false claims that of autism would result, Oregon mandated that parents either watch an educational video or discuss vaccination with their doctor.392 Minnesota, too, provides for education,393 but its vehicles are championed by a decidedly anti-vax government.394 Maine “pared back a bill that would have eliminated all nonmedical exemptions[,]” revoking philosophical exemptions but retaining religious exemptions.395 But Connecticut has enacted legislation that eviscerates new religious exemptions although grandfathers in ones obtained prior to April 28, 2021.396 On the other hand, “[twenty] states have introduced legislation to expand non-medical

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395. VanderHart, supra note 390; see also Jeffrey Schools, Religious Exemptions Restored in Vaccine Bill Passed by Maine Senate, NEWS CENTER MAINE (May 2, 2019, 6:54 PM), https://www.newscentermaine.com/article/news/health/religious-exemptions-restored-in-vaccine-bill-passed-by-maine-senate/97-a93e80f5-52e8-44b8-a5f0-00946c575dcb; Stevenson, supra note 394. Whether in light of the recent case of Does v Mills, eschewing religious exemptions for COVID-19 in Maine, that the state will continue to allow religious exemptions for childhood vaccines remains to be seen.

exemptions for vaccines[,] or to require doctors to provide patients with more information on the risks of vaccines.397

B. Attacking State Legislation on Constitutional Grounds

In July 2019, a lawsuit challenged the newly enacted New York legislation.398 This lawsuit, filed by fifty-five families, claimed the law is unconstitutional and violates religious freedom.399 Related actions were brought by Robert Kennedy Jr.’s anti-vax Children’s Health Defense organization.400 Similar to the California law, the New York State legislation does not compel vaccination, nor does it ban the non-vaccinated from visiting public spaces, nor does it impose a fine on those choosing not to vaccinate.401 The law does allow parents to homeschool or move to another state, should their religious beliefs so motivate them.402

While the lawsuits attacking the local orders focused primarily on the reasonableness of the court-ordered behavior, cases attacking the state’s desire to remove non-medical exemptions focus on the constitutional right of freedom of religion,403 with the main issue revolving around balancing freedom of religion with the state’s police power to protect the public’s right to health and safety.404 As of now, five jurisdictions have grappled with that issue, all ruling that no constitutional trespass had occurred.405


399. Id. at 858.


401. N.Y. PUB. HEALTH L. § 2164 (McKinney 2019).


403. The matter first rose over 125 years ago. “In 1890, the California Supreme Court rejected a constitutional challenge to a ‘vaccination act’ that required schools to exclude any child who had not been vaccinated against small-pox.” Brown v. Smith, 235 Cal. Rptr. 3d 218, 220, 224–25 (Ct. App. 2018). “Where the issue pertains to medical or surgical treatment, the nature, effect, and result of which are the subjects of common knowledge, such matters are within the rule of judicial knowledge. As for instance, the court will take judicial notice of the nature, purpose, and effects of vaccination.” Id. at 223 (quoting S. Cal. Edison Co. v. Indus. Accident Co., 243 P. 455 (1925)).

404. Brown, 235 Cal. Rptr. 3d at 225 (citing Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944)).

In California, general anti-vax tropes about the dangers and efficacy of the vaccine were also raised (and rejected) with the court taking judicial notice of vaccine safety. These same issues were raised in the case attacking the Brooklyn order, denied on April 18, 2019. Perhaps for that reason they were not raised in the action challenging the New York state statute. Other claims were raised in the New York case but given short shrift by the court, which devoted most of its attention to the constitutional questions. These additional issues include the right of parents to make educational decisions pertaining to their children, a so-called “hybrid” claim, and an inchoate claim of compelled speech. The compelled speech claim ostensibly related to an alleged effect of the law forcing home-schooling on parents refusing to vaccinate their children.  

1. The State’s Police Power vs. the Individual’s Freedom of Religion

The conflict between the free exercise of religion and the state’s police power to protect public health is fully explored in F.F. v. New York, which addressed the constitutionality of New York’s statute. The action charged Justice Denise Hartman with balancing the freedom of religion of individuals against health risks to the community. The court noted that four other states, California,

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406. Brown, 235 Cal. Rptr. 3d at 224–25 (quoting the complaint “dispute[s] the central hypothesis that drives vaccine theory,” which allegedly “has never been proven . . . it”; that “[v]accines kill and maim children”; and that Senate Bill No. 277 “is a totalitarian mandate that expects parents to merrily sacrifice their children for the greater good.”).


408. N.Y. PUB. HEALTH L. § 2164 (McKinney 2019).


411. Id. at 777.

412. The New York court held the claims were not well-developed. The California court rejected an analogous claim of a right to attend school. See Brown v. Smith, 235 Cal. Rptr. 3d 218, 226 (Ct. App. 2018).


Maine, West Virginia, and Mississippi—which similarly removed non-medical exemptions—also faced similar constitutional challenges, and all withstood scrutiny as the reviewing courts rejected a Free Exercise Clause challenge.

In rendering her seventeen-page decision, Justice Hartman considered both the applicability of the strict scrutiny doctrine—finding it inapplicable—as well as the legitimacy of the plaintiff’s religious claims. Ultimately, she ruled that protecting the public health trumps individual religious freedoms, and that health risks to individuals outweighed the plaintiffs’ First Amendment claims:

'The court is hard-pressed to conclude that plaintiffs have shown that the balance of equities tips decidedly in their favor. Just as the court cannot overstate the potential harm to plaintiffs . . . the court cannot overstate the potential harm to unvaccinated individuals if the injunction is granted.' In disallowing the parents’ claim, the New York court first considered the importance of freedom of religion in light of the state’s police function to protect the public safety. The court acknowledged that “freedom of religious expression is a founding tenet of this nation,” supported by longstanding precedent. However, the court also ruled that this liberty “does not include the right to endanger the health of the community, one’s children, or the children of others,” relying on several cases, including *Jacobson v. Massachusetts*.

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418. *Id.*
419. *McCarthy v Boozman*, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002) (“The constitutional right to freely practice one’s religion does not provide an exemption for parents seeking to avoid compulsory immunization for their school-aged children”).
420. As the ultimate purpose of the legislation is the protection of public health, courts have routinely concluded that compulsory vaccination laws without religious exemptions are constitutional, regardless of whether rational basis or strict scrutiny applies. *F.F.*, 108 N.Y.S.3d at 774–75.
421. *Id.* at 775.
422. *Id.* at 777.
425. *Id.* at 863–64.
426. *Id.* at 864. The court noted that “the Supreme Court upheld Massachusetts’ compulsory vaccination laws as a valid exercise of the states’ police power, rejecting the plaintiff’s claim that a law requiring children to be vaccinated as a condition to attending public or private schools violated the guarantee of individual liberty under the United States Constitution.” *Id.* at 861.
427. *Id.* at 860–61; *Jacobson v. Massachusetts*, 197 U.S. 11, 28–29, 38 (1905) (identifying the ongoing smallpox epidemic as a danger to the general public, allowing the court to hold that individual rights and liberty were subordinate to the state’s obligation to eradicate the disease).
Therein, the U.S. Supreme Court held that mandatory vaccination laws are within the state’s police power and do not violate guarantees of individual liberty, and that individual freedom is truncated when the common welfare is at stake.\footnote{428} In other words, an individual’s liberty is subordinated to the police power of the state, as “the state may be justified in restricting individual liberty ‘under the pressure of great dangers’ to ‘the safety of the general public.”\footnote{429}

Citing \textit{Zucht v. King}, where the Supreme Court addressed the mandatory vaccination requirement prior to school admittance in upholding a Texas law,\footnote{430} the New York court further noted that government officials are endowed with broad discretion in matters affecting public health.\footnote{431} A similar holding emerged in \textit{Viemeister v. White}.\footnote{432} These decisions articulated the standard that the common welfare must subordinate the religious freedom of the individual, and is subject to the police power of the state.\footnote{433} That court’s decision was clear—the state’s police power trumps First Amendment freedom of religion rights. The maxim was well-stated by an Arkansas court:

> It has long been settled that individual rights must be subordinated to the compelling state interest of protecting society against the spread of disease . . . . The constitutional right to freely practice one’s religion does not provide an exemption for parents seeking to avoid compulsory immunization for their school-aged children.\footnote{434}

In explaining her ruling, New York’s Judge Hartman cited to \textit{Brown v. Smith}, a California case, which noted that “compulsory immunization has long been recognized as the gold standard for preventing the spread of contagious diseases.”\footnote{435} She then noted the legislative history, which references studies that found that “when belief exemptions to vaccination guidelines are permitted, vaccination rates decrease’ and community immunity wanes if large numbers of children do not receive required vaccinations.”\footnote{436} Finally, Judge Hartman ruled that “protecting public health, and children’s health in particular, through attainment of threshold inoculation levels for community immunity from

\footnote{428} \textit{Jacobson}, 197 U.S. at 37–38; see also Zechariah Chafee, \textit{Freedom of Speech in War Time}, 32 Harv. L. Rev. 932, 957 (1919) (noting memorably that the freedom to swing one’s arms “ends just where the other man’s nose begins”).


\footnote{431} \textit{F.F.}, 108 N.Y.S.3d at 776; see also New York v. Van de Carr, 199 U.S. 552, 562–63 (1905) (stating the municipality may vest in its official’s broad discretion in matters affecting the application and enforcement of a health law).

\footnote{432} \textit{Viemeister v. White}, 72 N.E. 97, 97 (N.Y. 1904).

\footnote{433} \textit{F.F.}, 108 N.Y.S.3d at 774.


\footnote{436} \textit{Brown}, 235 Cal. Rptr. 3d at 221; see \textit{F.F.}, 108 N.Y.S.3d at 772 (citing \textit{Brown}, 235 Cal. Rptr. 3d at 221); see also Reiss & Diamond, supra note 394.
communicable diseases is unquestionably a compelling state interest, and can be regulated under the police power vested in the state under the state’s power to control, regulate, or prohibit non-criminal behavior which furthers the public health.

The uncontrollable nature of epidemic diseases moved the Supreme Court to uphold such extreme measures on the basis of the defense of the common good. The communitarian philosophy was carried into later judicial holdings, further consolidating states’ exercise of public health police power.

The legal principles underlying the state public health police power are basic: *sic utere tuo, ut alienum non laedas*—“use that which is yours so as not to injure others”—and *salus populi supreme lex*—“public well-being is the supreme law.” The former doctrine describes “the power of the state to prevent or prohibit ‘the use of private property or the commission of private acts in a manner harmful to others.’” The principle of *salus publica*, on the other hand, recognizes a more extensive police power to ‘prevent or avoid public harm even if the action has not harmed others.’

A state action “allowable under this aegis was, generally speaking, under the discretion of the state legislature.”

Judge Hartman relied on a litany of cases upholding the superiority of protecting public health, even at the expense of trespassing on First Amendment rights and even while recognizing the inherent dangers of vaccination. Thus, relying on a California case, the New York court ruled that, “[w]hile vaccination may not be the best and safest preventive possible, experience and observation . . . dating from the year 1796 . . . have proved it to be the best method known to medical science to lessen the liability to infection with the disease.” Similarly, in *Love v. State Department of Education*, the California Court of Appeals echoed the *Abeel* court’s views, noting that vaccination was the best method


438. *Id.; Brown*, 235 Cal. Rptr. 3d at 224; see also Jorge E. Galva et al., *Public Health Strategy and the Police Powers of the State*, 120 PUB. HEALTH REPS. (2005 SUPP. 1) 20, 20–21 (2005) (citing Smith v. Turner, 48 U.S. 283, 340–41 (1849)) (“State police power was validated for the first time a few years after the end of the Revolutionary War, when Philadelphia was isolated to control the threat of yellow fever.”).


442. Galva et al., supra note 438, at 21.

443. *Id.* (citing Berman v. Parker, 348 U.S. 26, 32 (1954)).


446. *Abeel*, 24 P. at 384.
“to lessen the liability to infection with the disease.” Going further, the New York F.F. court cited Brown v. Smith, which rejected the parents’ claim that because vaccines are unavoidably unsafe, they could not be regulated.

2. The Limits of the Police Power

To be sure, in recent years curbs have been placed on the exercise of this power, even in the face of an epidemic. However, as far as relevant here, those limits require only the least restrictive use of power. Nevertheless, other questions surface regarding its implementation, the most pressing being under what conditions may courts protect this police power: i.e., must an emergency be present? The answer is a resounding no. Courts have routinely held that states need not wait for vaccination rates to fall below the community immunity threshold or for outbreaks to occur before mandatory inoculations are required for children to attend school. In order to maintain community immunity and prevent future outbreaks, courts have upheld proactive, compulsory vaccination requirements for school-aged children, even where there was no recent outbreak. Numerous courts have ruled that even where an emergency or imminent situation is not present, individuals cannot use the religious exemption to trump the state’s interest in protecting public health by requiring vaccination.

447. Love, 240 Cal. Rptr. 3d at 864.
449. Reiss, & Diamond supra note 394.
451. Galva et al., supra note 438, at 22. The authors note that: (1) the exercise of police power could be limited by express or implied rights; (2) the rule of reason supporting public health actions would be replaced by strict analysis; and (3) the states should show a compelling interest to allow exercise of police power limiting an individual right, id., none of these considerations being applicable here.
452. But see Jacobson v. Massachusetts, 197 U.S. 11, 27–28 (1905) (finding police powers apply only to epidemics “in process” as opposed to those vaccination measures mandated as a prophylactic measure to prevent an future epidemic from occurring).
454. See id.
455. See, e.g., Workman v. Mingo Cnty. Bd. of Educ., 419 Fed. App’x 348, 353–54, 356 (4th Cir. 2011) (noting the Supreme Court has consistently recognized that a state may constitutionally require school children to be immunized, even when no recognized outbreak was in progress); Brown v. Smith, 235 Cal. Rptr. 3d 218, 224–25 (Ct. App. 2018) (dismissing plaintiffs’ challenge to California law that eliminated the previously existing “personal beliefs” exemption from mandatory immunization); Whitlow v. California Dep’t of Educ., 203 F. Supp. 3d 1079, 1083 (S.D. Cal. 2016) (citing Jacobson, 197 U.S. at 27) (upholding the constitutionality of SB 277 noting that,
The case of *Davis v. State* is noteworthy. The opinion begins by reminding us that the vaccination program need not be triggered by the existence of an epidemic, although the presence of an epidemic will, indeed, evicerate exemptions. Furthermore, courts have upheld decisions to implement vaccination requirements based on historical experience and without the need for legislative fact-finding hearings.

3. Establishing a Freedom of Religion Claim

While Justice Hartman acknowledged that the cases validating the superiority of the police power did not expressly address claims that compulsory vaccination violated the Free Exercise Clause, she cited to *Phillips v. City of New York* and *Prince v. Massachusetts*, and noted that “persuasive” dicta of the Second Circuit stated that “mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause.” Again, these courts also ruled that “[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.” The New York court also held that strict scrutiny is not the right approach to evaluate constitutionally-based claims for religious exemptions where the language is content-neutral.

“[f]or more than 100 years, the United States Supreme Court has upheld the right of the States to enact and enforce laws requiring citizens to be vaccinated”).


462. *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (“The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”).


464. *Id.* (citing *Prince*, 321 U.S. at 166–67).

465. *Id.* at 772 (quoting Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 464, 466-67, (N.Y. 2006)) (“A ‘neutral’ law, the Supreme Court has explained, is one that does not
4. Sincerity or Subterfuge

Exemptions sought on religious grounds highlight their improper use, when employed not to actualize a religious objection, but as antipathy to prevailing science. This can be seen by comparing the surge in religious exemptions and decline in those professing religion.\footnote{466} Thus, in 2010–2011, the number of children with religious exemptions from school vaccine requirements was 14,059.\footnote{467} In the 2017–18 school year, more than 26,000 students had religious exemptions—compared to only 4,571 who had medical exemptions.\footnote{468} Interestingly, religious adherence declined during those intervening years,\footnote{469} as atheism and agnosticism became more popular. The number of “Americans who are religiously unaffiliated—describing themselves as atheist, agnostic or ‘nothing in particular’—jumped more than six points, from 16.1% to 22.8%” between 2007 and 2014.\footnote{470} Thus, the increase in religious exemptions for vaccination is not due to a vast constituency who “suddenly found religion.”\footnote{471} Rather, this roughly fifty-fold increase in “religiosity” manifested by the surge in religious exemptions—although not tracked by sect affiliation—indicates the practice of hijacking the exemption for personal use, and provided the perfect breeding ground for the 2018–2019 national epidemic.\footnote{472}

In this regard, the F.F. court did not seem impressed by the integrity or sincerity\footnote{473} of many of the claims\footnote{474} or claimants.\footnote{475} This requirement—of

\footnote{466} Compare Ginsgold, supra note 27, at n.44, and Andrews, supra note 224, with America’s Changing Religious Landscape, PEW RSCH. CTR. (May 12, 2015) [hereinafter Changing Religious Landscape], https://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

\footnote{467} Ginsold, supra note 27, at n.44.

\footnote{468} Ginsold, supra note 27, at n.44; Andrews, supra note 224.

\footnote{469} Changing Religious Landscape, supra note 466.

\footnote{470} Changing Religious Landscape, supra note 466.

\footnote{471} See Changing Religious Landscape, supra note 466.


\footnote{473} F.F. v. New York, 108 N.Y.S.3d 761, 766 (N.Y. Sup. Ct. 2019) (finding the standard for establishing a religious exemption in New York are “[g]enuine and sincere religious beliefs”); see also Garcia v. N.Y.C. Dep’t of Health & Mental Hygiene, 106 N.E.3d 1187, 1191, 1197 (N.Y. 2018) (holding that the N.Y.C. Department of Health has been vested with the authority to enact vaccine regulation to protect the public health since 1866).

\footnote{474} F.F., 108 N.Y.S.3d at 767; see also McCarthy v. Boozman, 212 F. Supp. 2d 945, 947 (W.D. Ark. 2002) (finding “the statute requiring immunization of school age children is constitutional, but that the religious exemption provision of the statute is unconstitutional”). The paradoxical situation was later addressed by the legislature enacting new, but narrower laws allowing exemptions on philosophical grounds. See ARK. CODE ANN. § 6-18-702(d)(4)(A) (2019).

\footnote{475} See also Sherr v. Northport-East Northport Union Free Sch. Dist., 672 F. Supp. 81, 94–97 (E.D.N.Y. 1987).
sincere beliefs—was discussed at length under *Davis v. State*.\(^476\) a fulsome decision which bears note here. That court noted that:

while many do hold genuine and sincere religious beliefs, it cannot be denied that there are individuals who have attempted to assert religious exemptions when they, in actuality, disagree with the prevailing scientific and medical consensus that vaccines are safe for their children and are a highly effective way to protect public health[.\(^477\]

To this end, the New York court cited *Caviezel v. Great Neck Public Schools*,\(^478\) holding that personal affidavits were insufficient to constitute a religious exemption.\(^479\) Of particular note is the courts’ disentangling legitimate religious views from a general notion that they call “religious” supposedly supporting some amorphous freedom to choose,\(^480\) violation of liberty, or right of informed consent.\(^481\) The case of *N.M. v. Hebrew Academy Long Beach*,\(^482\) is a noteworthy example. Therein, the court pointedly rejected the plaintiffs’ claim that Jewish (Halachic) law created a basis for opposing vaccination and ruled that it was a subterfuge for health concerns.\(^483\) The *N.M.* court hence denied the parents’ request for an injunction, which, had it been granted, would have allowed their child to remain in school,\(^484\) even pointing out hypocrisy in the plaintiffs’ behaviors.

\(^{476}\) *Davis v. State*, 451 A.2d 107, 111 (Md. 1982) (citing Maier v. Besser, 341 N.Y.S.2d 411, 414 (N.Y. Sup. Ct. 1972)) (as manifested by “membership in or adherence to a recognized church”). *But c.f. N.M.*, 155 F. Supp. 3d at 258–59 (ruling N.Y. requires the proponent of the exemption request to establish that their religion supports their claim.)


\(^{478}\) *Caviezel*, 701 F. Supp. 2d 414.

\(^{479}\) *F.F.*, 108 N.Y.S.3d at 775

\(^{480}\) *Id.* at 775.

\(^{481}\) See *id.* at 771.

\(^{482}\) *N.M.* v. Hebrew Acad. Long Beach, 155 F. Supp. 3d 247, 258–59 (E.D.N.Y. 2016) (rejecting the parents’ sincere, but disingenuous, effort to couch their objections as religious; it is unknown whether the parents had the child vaccinated or removed the child from the school).

\(^{483}\) *Id.* at 258–59.

\(^{484}\) *Id.* at 249–59. A more insidious argument was raised in a pamphlet entitled *GEDOLIM LETTERS*, *supra* note 268, produced by an anonymous individual or group who claim to be students of three Lakewood Rabbis. The pamphlet spends much of its fifty-four pages distinguishing and differentiating the Halachic opinions of hundreds of major Rabbinic authorities mandating vaccination. *Id.* Claiming the issue is one of debate, the author(s) notes the Lakewood Rabbis opine the issue is a religious one. *Id.* at 23. Disentangling the issue, the dispute is not whether under Jewish Law vaccination is permissible; the dispute is whether it is mandatory. *Id.* at 1.
Judicial antipathy towards amorphous religious exemptions is amply demonstrated. For example, in the aforementioned case of *Davis v. State*485 “[t]he record [revealed] that the Department of Health and Mental Hygiene . . . recognized only two religious groups . . . qualifying for the [applicable] exemption: the Worldwide Church of God and the Church of Christ Scientist.”486 The plaintiff, who adhered to neither, claimed the exemption provision was unconstitutional.487 The court agreed.488 But in a pyrrhic victory the court eliminated all exemptions, holding the portion of the statute unconstitutional regarding religious exemptions but upholding the remainder including the plaintiff’s criminal conviction for failing to vaccinate his son.489

The subterfuge for using religion to mask scientific disagreement is patently demonstrated by the brochures designed to foster vaccine-independence. Thus, for example, the *Gedolim Letters* brochure, discussed above, illustrates the corrupted attempt to misuse Jewish law to sustain a claim for religious objections to vaccination.490 Attempting to sustain a position that there is a bone fide controversy in Jewish law regarding vaccination, the (anonymous) author gathers a list of prevailing major rabbinic positions, admitting that with the exception of a handful of rabbinic authorities,491 hundreds of others opine that vaccination is not only permitted, but mandatory.492 The opposers claim only that vaccination is permissible, rather than mandatory.493 No Rabbinic authority has gone on record opposing vaccination on the basis of Jewish Law, thus removing the issue from a religious tenet eligible for an exemption.494

485. *Davis v. State*, 451 A.2d 107, 108–09, 113 (Md. 1982) (addressing the meaning of “conflicts with the tenets and practice of a recognized church or religious denomination of which he is an adherent or member” and holding it unconstitutional as not being universal in application).

486. *Id.* at 109.

487. *Id.* at 110.

488. *Id.* at 113–14.

489. *Id.* at 115.

490. See generally *GEDOLIM LETTERS*, supra note 268 (compiled ostensibly to defuse the polarization of the community on the issues, with the clear but underlying message of attempting to validate the author’s fear of vaccination and refusal to vaccinate his children).

491. *Id.* at 1. It is not clear whether the author is relying on three or five rabbis who support his position against the scores he notes that do not. It appears that three of the rabbis are venerated in the U.S. The other two are in Israel, including one Chaim Kanievsky, who initially admonished his flock to remain in synagogue and Yeshiva in violation of Israeli directives at the inception of the coronavirus, before he subsequently backtracked. See David M. Halbfinger, *Virus Soars Among Ultra-Orthodox Jews as Many Flout Israel’s Rules*, N.Y. TIMES (May 7, 2020). See also Aaron Rabinowitz & Josh Breiner, *Tens of Thousands of Haredi Students Went to School Sunday, Violating Coronavirus Closure*, HAARETZ (Mar. 16, 2020), (noting “[t]ens of thousands of ultra-Orthodox (Haredi) students went to school Sunday as usual, following the directive of Rabbi Chaim Kanievsky, leader of the non-Hasidic Haredi community, who ordered Talmud Torah schools to remain open despite the Health Ministry order to close”).

492. See generally *GEDOLIM LETTERS*, supra note 268.

493. See *GEDOLIM LETTERS*, supra note 268, at 1.

494. Indeed, even the most impressive of those Rabbis, whom the Gedolim Letters author cites in support of his position, Rabbi Chaim Kanievsky, has gone on record re the COVID vaccine as
Nevertheless, the brochure’s (anonymous) author cobbles together an unsubstantiated claim that Jewish Law requires free choice, as a religious imperative, and then goes further by bootstrapping his argument on the unsubstantiated claim “that one opposes vaccination on religious grounds has a firm basis in the Torah.”

Given that hundreds of religious experts—which he, himself, cites—opine that vaccination is not a choice, but a requirement, he clearly is crossing himself. In summary, the brochure artificially turns the rare Rabbinitic political demurrer on the Jewish requirement to vaccinate into a religious issue. First, it claims that vaccination is a religious decision, “because the Rabbis say it is,” although what these very few Rabbis really say is that it is a matter of personal choice, and then because, these few Rabbis say it is a personal choice, it suddenly becomes a religious issue.

VI. CONCLUSION

Although measles is, theoretically, far more contagious than COVID-19, the present pandemic makes measles look tame. This has not stopped five Supreme Court justices from misunderstanding the severity of the situation—erroneously saying it is necessary to be vaccinated. Sam Sokol, Defying Death Threats, Top Haredi Rabbi Doubles Down on Support for Child Vaccines, HAARETZ (Dec. 21, 2021), https://www.haaretz.com/israel-news/.premium-defying-death-threats-top-haredi-rabbi-doubles-down-support-for-child-vaccines-1.10483142 (“After receiving death threats, Rabbi Chaim Kanievsky reiterates his belief that vaccination campaigns in ultra-Orthodox educational institutions are necessary”).

This publication has been prepared on behalf of the talmidim of Moreinu Harav Shmuel Kamenetzky, shlit"a, Moreinu Harav Elya Ber Wachtalogel, shlit"a, and Moreinu Harav Malkiel Kotler, shlit"a. Parents who choose not to vaccinate should be viewed as parents exercising a right and making a justifiable decision, not as agitators recklessly endangering the public welfare.

GEDOLIM LETTERS, supra note 268, at 2 (“In 2008, a Lakewood beis din [community court] was convened . . . [This can] be identified as the beginning of the Orthodox Jewish community’s vaccination controversy.”); GEDOLIM LETTERS, supra note 268, at 10 (“P]recious little has been devoted to scientific discussion of the nature of the threat that the unvaccinated pose. No study demonstrating clearly that unvaccinated children pose a health threat to those around them has been presented in any of our legislatures ruling on the issue.”). Notwithstanding the parallel claim that they don’t oppose vaccination, the pamphlet is replete with false information insinuating grave dangers of vaccination.

comparing sources of contagion and venerating religious worship *uber alles*—under the rubric that Constitutional Rights reigns supreme.\(^{500}\) Indeed, consideration of constitutional guarantees in the face of danger to health has been undertaken by numerous courts, as this Article demonstrates. Sadly, the Supreme Court did not take cognizance of those cases when deciding the *Diocese* case.\(^{501}\)

We can only anticipate a further challenge as states begin to invoke legislation compelling COVID-19 vaccination.\(^{502}\) The impact of escalating vaccine resistance, fostered by a virulent anti-vax movement and now targeted to the Black population, will further complicate matters.

Attempts to counter the dangerous actions of this movement have taken various forms, including legislation removing non-medical vaccine exemptions and emergency municipal orders compelling vaccination during the pendency of an epidemic.\(^{503}\) Studies also illustrate the impact of mandatory vaccination on pre-school admittance.\(^{504}\) Nevertheless, orders advocating vaccination prior to school attendance—with the onus on the parents, and the targets on children—did not seem as effective as imposing fines for anyone failing to submit to immediate vaccination,\(^{505}\) such as provided in the stunningly effective laws enacted by New York City via its April 9, 2019 order.\(^{506}\)

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501. Of course, the requirement of using the least restrictive alternative is always paramount, rendering Cuomo’s lockdown response arguably ill-advised. Nevertheless, the customary deference once given to legislatures and health officials seems to have been decimated by the *Diocese* case.


504. Robbins et al., *supra* note 337, at 273 (noting “school immunization laws were more comprehensive [and better enforced] in low incidence areas,” with high levels of schools excluding noncompliant students.) “In contrast, school immunization laws [were not widely applied nor enforced] in the high incidence group . . . The evidence indicates a strong association between comprehensive, vigorously enforced school immunization laws and a low incidence of measles.” Id.


Although effective, these methods have been criticized as violating constitutional rights—including personal liberty, religious freedom, or, as couched on some anti-vax websites, as violating a right of informed consent.\footnote{Barbara Cáceres, Vaccine Mandates: Ignoring Human Rights and Informed Consent, VACCINE REACTION (Mar. 7, 2019), https://thevaccinereaction.org/2019/03/vaccine-mandates-ignoring-human-rights-and-informed-consent/} These arguments have been deftly rejected by the courts.\footnote{C.F. v. New York City Dep’t of Health & Mental Hygiene, No. 508356/19, 2019 N.Y. Misc. LEXIS 1914, *1, *2–3 (Sup. Ct. Apr. 18, 2019).} To requote one juridical opinion addressing the informed consent issue, “a fireman does not ask for permission to enter a burning building.”\footnote{Id. at 5. The analogy is not quite apt; entering a burning building is not as invasive as, nor should it carry the same degree of protections, as an invasion of the body. Nevertheless, a more apt analogy can be constructed by conjuring the doctor who does not ask for consent before performing an emergency procedure if the patient is not competent to provide it.} Voiding religiously-based vaccine exemptions has also survived constitutional challenge. However, at the time of writing this Article, only six states have such laws.\footnote{States with Religious and Philosophical Exemptions from School Immunization Requirements, NAT’L CONF. OF STATE LEGIS. (Apr. 30, 2021), https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx.} While other states are trying or considering this option, the organized anti-vax movement is strengthening their opposition to such laws,\footnote{E-mail from hisunim–educated-choice.com@responder.co.il, to omniscience@starpower.net (Aug. 25, 2020) (on file with author).} and thus far, they have been successful.

As new epidemics overtake us and vaccine resistance grows, we should not overlook municipal ordinances as an effective public health measure. Great care must be afforded to defending these orders. Not only must lawyers be schooled in epidemiology, but dicta empowering judges to take judicial notice of the efficacy of vaccination must be recalled and weaponized. Finally, in terms of assessing how much weight will be afforded to the legislature’s judgment, the New York Court of Appeals had once made this clear: “[w]e now hold that substantial deference is due the Legislature.”\footnote{Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 466 (N.Y. 2006).} Courts once resoundingly held that First Amendment protections of religious freedom (and the Free Exercise Clause) are not absolute.\footnote{Sherbert v. Verner, 374 U.S. 398, 402–03 (1963).} There is, however, under the \textit{Diocese} case, an assault on these judicial sentiments, of which we must be wary.

The sad result suggests that both judges and lawyers need basic epidemiology training to properly understand and deploy available legal interventions, as unpopular as they may be, since in the midst of an epidemic, this may be the only resort.

VII. APPENDIX

Figure 5. Epidemic Curve Depicting New Cases Per Day.514

514. Daskalakis, supra note 215.