



BY DENNIS F. HERNANDEZ

# HEALTH FIRST

In *Whitlow v. California Department of Education*, parents opposed the enforcement of SB 277 as a violation of their children's rights to due process, equal protection, and education

**AMERICANS** value their personal freedom, and most Americans are skeptical when government attempts to legislate in the realm of personal freedom. When the government passed a law to require cyclists to wear a helmet, for instance, some Americans objected to the government's authority to pass such a law. This tension between personal freedom and governmental authority plays out at the beginning of every school year when parents are told their children must be immunized before they can enroll in school. There are few decisions more personal than a parent's decisions relating to his or her children.

Until recently, California parents could exempt their school-age children from mandatory immunizations for philosophical reasons or based on their personal belief that vaccinations may be harmful to their children. However, because of the increasing number of parents refusing to immunize their school-age children, the legislature passed SB 277 in 2016 to eliminate the personal belief exemption (PBE) for mandatory childhood vaccination. In response to this legislation, a very vocal and well-organized group of parents opposed to mandatory vaccination filed *Whitlow v. California Department of Education*,<sup>1</sup> an action seeking to enjoin the enforcement of SB 277 on the grounds that eliminating the PBE violates the parents' rights to equal protection and due process, as well as various other claims.

## Background

According to the Centers for Disease Control and Prevention (CDC), vaccination is one of the "Ten Great Public Health Achievements in the 20th Century" due to its sig-

Dennis F. Hernandez is of counsel to the Los Angeles firm of Alvarado Smith. He also serves as a member of the Editorial Board of *Los Angeles Lawyer* magazine.



nificant impact on morbidity and mortality in the United States.<sup>2</sup> Vaccination is one of the means of protecting the public's health through disease prevention and one of the goals of public health is community immunity. Community or "herd" immunity occurs when a significant proportion of the population is vaccinated, which provides greater protection for unprotected individuals.<sup>3</sup> The larger the number of people who are vaccinated in a population, the lower the likelihood that a susceptible (unvaccinated) person will come into contact with the infection. Disease is thereby less likely to spread between individuals if large numbers of people are already immune.

All 50 states require children to receive certain vaccinations before attending public school, and some states extend these requirements to day care and private schools.<sup>4</sup> Generally, there are three types of exemptions to the requirement that children be vaccinated before entering school: medical, religious, and philosophical or personal belief. The medical exemption, which is recognized in all 50 states, requires a written statement by a licensed physician to the effect that the condition of the child or the medical circumstances of the child are such that immunization is not considered safe.<sup>5</sup>

Religious exemptions allow parents to exempt their children from vaccination if it contradicts their sincere religious beliefs. In order to qualify for these exemptions, families have to demonstrate that vaccinations violate the teachings of a recognized religion to which they belong. In some cases, state health boards ask parents to get notes from a clergyman. In California, there was not a separately recognized exemption based on religious beliefs; the religious exemption was included in the personal belief exemption. Most states grant exemptions for persons who have bona fide religious beliefs against immunization.<sup>6</sup>

The legal basis for mandatory vaccination is well established. For more than 100 years, the U.S. Supreme Court has upheld the right of the states to enforce laws requiring citizens to be vaccinated. An outbreak of small pox and the state's mandatory vaccination response caused the Supreme Court to consider the competing interests of the individual's liberty interest and the public's need for safety. In *Jacobson v. Commonwealth of Massachusetts*,<sup>7</sup> the Supreme Court considered a criminal complaint alleging Mr. Jacobsen's failure to comply with the Board of Health's regulation that required citizens to be vaccinated against smallpox. The Court rejected the arguments that the regulation consti-

tuted an unconstitutional invasion of his liberty and that compulsory vaccination is unreasonable, arbitrary, oppressive, and hostile to the inherent right of every free man to care for his own body and health in such a way as to him seems best.<sup>8</sup> The Court reasoned 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."<sup>9</sup> An orderly society and the common good require "manifold restraints to which every person is necessarily subject"; otherwise "disorder and anarchy" would prevail without "safety to its members." The Court stated unequivocally that "[R]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others."<sup>10</sup>

The Court concluded that even liberty is regulated by law:

The possession and enjoyment of all rights are subject to 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. 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. It is, then, liberty regulated by law.<sup>11</sup>

The Court's opinion was based in large measure on the principle of self-defense that the community had the right to protect itself against an epidemic of disease that threatens the safety of its members. Because "every well-ordered society" has "the duty of conserving the safety of its members," an individual's liberty interest "may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand."<sup>12</sup> Therefore, an individual's Fourteenth Amendment liberty interest does not preclude the state from compelling individuals to "submit to reasonable regulations established by the constituted authorities, under the sanction of the state, for the purpose of protecting the public collectively against such danger."<sup>13</sup>

### California's Immunization Law

California has had some form of mandatory vaccination for school age children

since 1889.<sup>14</sup> Currently, state law mandates immunization of school-age children against 10 specific diseases.<sup>15</sup> Each of the 10 diseases was added to the California code after careful consideration of the public health risks, costs to the state and health system, communicability, and rates of transmission.

Prior to 2014, obtaining a PBE was rather simple. All that was required was signing a form stating a personal objection to vaccination based on a parent's personal beliefs. In 2014, however, the legislature required parents to obtain the signature of a health care provider attesting to the fact that they were given information about the risks of vaccine-preventable diseases before making the decision not to vaccinate their child.<sup>16</sup> In his signing statement, Governor Jerry Brown recognized a religious exemption when he directed the Department of Public Health "to oversee this policy so parents are not overly burdened in its implementation...[and] to allow for a separate religious exemption on the form. In this way, people whose religious beliefs preclude vaccinations will not be required to seek a health care practitioner's signature."<sup>17</sup>

After the passage of AB 2109, legislators remained concerned that the rate of PBEs had increased dramatically since 1994. In 1994, approximately 0.6 percent of kindergarten students claimed PBEs. By 2009, the percentage had increased to 2.3 percent and in the 2013-14 school year, the number had increased to 3.15 percent, with some school districts showing much higher rates.<sup>18</sup> While the information requirement of AB 2109 helped to decrease the percentage of PBEs, the overall immunization rates went up only slightly, leading legislators to conclude that informed refusal was not sufficient to achieve effective immunization rates.<sup>19</sup> The measles outbreak that triggered the event causing legislators to move to eliminate PBEs led to 131 confirmed measles cases with 19 percent of those infected requiring hospitalization.<sup>20</sup>

### SB 277

On June 30, 2015, Governor Brown signed SB 277 into law abolishing PBEs to school immunization requirements. The law provided that if a parent had on file or filed a PBE prior to January 1, 2016, his or her child could be enrolled in school or day care, unless that child was at a "checkpoint," i.e., was a first-time enrollee in day care or kindergarten or was enrolling in the seventh grade.<sup>21</sup> Those first-time enrollees and students entering seventh grade were no longer

# MCLE Test No. 279

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour. You may take tests from back issues online at <http://www.lacba.org/mcleselftests>.

- Community or "herd" immunity occurs when a significant proportion of the population is vaccinated.  
True.  
False.
- All 50 states require children to receive certain vaccinations before attending public school.  
True.  
False.
- Generally speaking, there are three types of exemptions to the requirement that children be vaccinated before entering school: medical, religious, and philosophical or personal belief.  
True.  
False.
- Not all states grant exemptions from mandatory vaccination of children for medical reasons.  
True.  
False.
- Most states grant exemptions for persons who have bona fide religious beliefs against immunization.  
True.  
False.
- All states grant exemptions for persons who have personal or philosophical beliefs against immunization.  
True.  
False.
- An individual's Fourteenth Amendment liberty interest always precludes the state from compelling individuals to submit to reasonable regulations for the purpose of protecting the public.  
True.  
False.
- California's immunization law is codified in Health and Safety Code Section 120325 et seq.  
True.  
False.
- Health & Safety Code Section 120325 mandates immunization of school-age children against 10 specific diseases: diphtheria, hepatitis B, haemophilus influenzae type b, measles, mumps, pertussis (whooping cough), poliomyelitis, rubella, tetanus and varicella (chickenpox).  
True.  
False.
- Before SB 277, parents could exempt their child from immunization based on their personal belief.  
True.  
False.
- The personal belief exemption (PBE) to mandatory childhood vaccination was eliminated under SB 277.  
True.  
False.
- The religious exemption to mandatory childhood vaccination was eliminated by SB 277.  
True.  
False.
- Under SB 277, children are able to attend school if they either receive the immunizations required by law or obtain a medical exemption from the requirement from an authorized health care provider.  
True.  
False.
- Authorized health care providers include school nurses and certain naturopaths, in addition to medical and osteopathic doctors.  
True.  
False.
- The regulations enacted under SB 277 do not apply to private schools or day care centers.  
True.  
False.
- Kindergartners are allowed to conditionally enroll in school if they have not completed the required vaccinations under certain conditions.  
True.  
False.
- After SB 277, parents with personal or philosophical objections to vaccinations may homeschool their children on their own or in collaboration with a few other families, or participate in certain independent study programs offered by public schools.  
True.  
False.
- The courts have found that SB 277 violates due process and equal protection under the U.S. Constitution.  
True.  
False.
- Education is a fundamental interest under the California Constitution.  
True.  
False.
- After the passage of SB 277, the number of children claiming PBEs declined, but the rate of children claiming medical exemption increased dramatically.  
True.  
False.



## HEALTH FIRST

Name \_\_\_\_\_

Law Firm/Organization \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_

State/Zip \_\_\_\_\_

E-mail \_\_\_\_\_

Phone \_\_\_\_\_

State Bar # \_\_\_\_\_

### INSTRUCTIONS FOR OBTAINING MCLE CREDITS

- Study the MCLE article in this issue.
- Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
- Mail the answer sheet and the \$20 testing fee (\$25 for non-LACBA members) to:

Los Angeles Lawyer  
MCLE Test  
P.O. Box 55020  
Los Angeles, CA 90055

Make checks payable to Los Angeles Lawyer.

- Within six weeks, Los Angeles Lawyer will return your test with the correct answers, a rationale for the correct answers, and a certificate verifying the MCLE credit you earned through this self-study activity.
- For future reference, please retain the MCLE test materials returned to you.

### ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

- True  False

allowed admission to the state's public and private schools and day-care centers unless they complied with the vaccination requirements.<sup>22</sup>

Under SB 277, children are able to attend school or daycare—public or private—if they either receive the immunizations required by law or obtain a medical exemption from the requirement from a licensed physician.<sup>23</sup> The medical exemption requires a written statement by a licensed physician to the effect that the condition of the child or the medical circumstances of the child are such that immunization is not considered safe.<sup>24</sup> Children may also be conditionally accepted into a school or day-care program if they are in the process of completing a series of vaccinations. In other words, if parents wish to leave their children unvaccinated, absent an acknowledged medical reason to do so, they cannot send them to school or day care. After enactment of SB 277, the options for parents with personal or philosophical objections to vaccinations were to homeschool their children on their own or in collaboration with a few other families or to participate in certain independent study programs offered by public schools.<sup>25</sup> The law also provided an option for students who qualify for an individualized education program, or IEP.<sup>26</sup>

### The Challenge

In July 2016, a group of parents and organizations filed *Whitlow v. California Department of Education*,<sup>27</sup> seeking to block the implementation of SB 277. The lawsuit claimed, among other things, that the law would deprive their children and families of due process and equal protection, as well as violate their rights of access to a public education under *Serrano v. Priest*.<sup>28</sup>

**Due Process.** In their complaint, the plaintiffs in *Whitlow* alleged that SB 277 impinges on fundamental liberties by denying children with PBEs the opportunity to attend school and stigmatizing children with PBEs as “vectors of disease” and by violating both parental rights regarding decision-making concerning their child's health and education and children's rights to bodily integrity. In response, the court cited *Zucht v. King*, a 1922 decision in which the court rejected arguments that vaccination laws denied the plaintiffs due process and equal protection when the plaintiff's children were excluded from a Texas public school because they were not vaccinated.<sup>29</sup> Based on the reasoning in *Jacobson*, the court stated it was “settled that it is within the police power of a State to provide for compulsory vaccination.”<sup>30</sup> The court additionally found that imposing

a mandatory vaccine requirement on school children as a condition of enrollment does not violate substantive due process. The court in *Whitlow* noted that this case is even one more step removed from a due process violation since it involves the removal of an exemption that is not required under the law. The removal of the PBE subjects the children to mandatory vaccination, but the state is well within its powers to condition school enrollment on vaccination.<sup>31</sup>

**Equal Protection.** The plaintiffs claimed that SB 277 was a denial of equal protection under the law because it treats children with PBEs differently from other children in denying them an education. The court noted, however, that the Equal Protection Clause of the U.S. Constitution does not forbid classifications. “It simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike.” The court found that children with PBEs are not similarly situated to children without PBEs.<sup>32</sup>

The plaintiffs also argued that children with PBEs were treated differently from children who were not yet vaccinated but at a “checkpoint.” The “checkpoints” provision in the law provides a grace period for children with PBEs to remain in their grade span while their parents comply with the new law. Rather than drawing legislation that would have immediately impacted all children with PBEs (approximately 200,000, according to the plaintiffs), the legislation has a more limited effect by initially focusing only on those children with PBEs who are advancing to the next grade level (approximately 33,000, according to the plaintiffs). The “checkpoints” provision therefore provides parents with an orderly opportunity to comply with the law and softens the impact of SB 277 through graduated application. The court therefore concluded that the law is rational.<sup>33</sup>

The court also determined these classifications did not burden any fundamental right and are therefore subject to rational basis, not strict scrutiny, review. Under this test, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification. First, the court found a rational basis for treating children with PBEs differently from other children: children with PBEs are not completely vaccinated, if at all, while the latter are fully vaccinated. Allowing the latter to attend school and excluding the former is rationally related to the state's interest in protecting public health and safety.<sup>34</sup>

**Serrano Claim.** The plaintiffs in *Whitlow* also claimed that SB 277 violates their rights to education under the California

constitution. In *Serrano v. Priest*, the California Supreme Court found in a series of cases that the state's financing of California schools denied equal protection to some students on the basis of income distribution.<sup>35</sup> The court held in this case that education is a fundamental interest.<sup>36</sup>

The state in *Whitlow* stipulated that education is a fundamental interest and that the heightened “compelling interest” test is the applicable standard.<sup>37</sup> Applying this standard, the court cited a long line of cases that held society has a compelling interest in fighting the spread of contagious diseases through mandatory vaccination of school-aged children.<sup>38</sup> The court observed that this was the legislature's intent in enacting SB 277.<sup>39</sup> The plaintiffs attempted to distinguish these cases on the grounds that the vaccine mandates in some of those cases were enacted during times of outbreaks. The court responded that the state's interest in protecting the public health and safety of children does not depend on or need to correlate with the existence of a public health emergency.<sup>40</sup> The safety interest exists regardless of the circumstances of the day and is equally compelling whether it is being used to prevent outbreaks or eradicate diseases.

Finally, the plaintiffs argued that SB 277 was not narrowly tailored because the previous law, which allowed for PBEs, served the same purpose as SB 277 and was a less restrictive means of achieving that purpose.<sup>41</sup> The court stated that comparing new law to old has nothing to do with heightened scrutiny analysis and that the correct analysis is whether removal of the PBE by SB 277 is narrowly tailored to address the identified interest, that is, “a means for the eventual achievement of total immunization” of appropriate school-aged children.<sup>42</sup>

The court stated: “The objective of total immunization is not served by a law that allows for PBEs, whether the PBE rate is 2% or 25%. Conditioning school enrollment on vaccination has long been accepted by the courts as a permissible way for states to inoculate large numbers of young people and prevent the spread of contagious diseases.” Moreover, states can impose those vaccination requirements without providing religious or conscientious exemptions. While removing the PBE is an aggressive step, so, too, is the goal of providing a means for the eventual achievement of total immunization. An aggressive goal requires aggressive measures, and the State of California has opted for both here.<sup>43</sup>

The court concluded that the right of education—fundamental as it may be—is

no more sacred than any of the other fundamental rights that have readily given way to a state's interest in protecting the health and safety of its citizens, particularly school children. Because a personal belief exemption is not required in the first instance, the state can remove it—and impinge on education rights—in light of the compelling interest here. In this context, removal of the PBE is necessary or narrowly drawn to serve the compelling objective of SB 277.<sup>44</sup>

**Religion Exemption Claim.** The plaintiffs additionally argued that SB 277 violates their free exercise of religion under the First Amendment by failing to provide a religious exemption to the vaccine mandate and by forcing parents to choose between their faith and their children's education. They also contended that their religious liberty was infringed by the state by allowing for "secular" exemptions, such as medical reasons, an IEP or home schooling, but not for religious reasons.<sup>45</sup>

The court first held that the strict scrutiny standard was not applicable in this case because SB 277 was, as the plaintiffs conceded, a neutral law of general application and, as such, was subject to rational basis review, "even when 'the law has the incidental effect of burdening a particular religious practice.'"<sup>46</sup> The court thereafter found that the plaintiffs were unlikely to succeed on the merits of their free exercise claims, citing the authorities to the effect that the right to practice religion freely does not include the liberty to expose the community or the child to communicable diseases.

### Epilogue

The plaintiffs' efforts to prevent the enforcement of SB 277 in *Whitlow* were summarily rejected by the court, and, after the court denied their application for injunction, the plaintiffs in *Whitlow* quickly dismissed their complaint. That is not to say, however, that the opposition to mandatory vaccination has disappeared. Some parents have sought other means to avoid vaccination of their school-age children. After the passage of SB 277, the number of children claiming PBEs declined, but the rate of children claiming medical exemption increased dramatically. A study published in the *Journal of American Medical Association* found that the percentage of kindergartners with medical exemptions was mostly stable between .15 percent and .17 percent between 2005 and 2015; however, between 2015 and 2016, the rate jumped from .17 percent to .51 percent.<sup>47</sup> The authors noted:

The increase in the number of [med-



GL Howard and Company CPAs, LLP

## EFFECTIVE SUPPORT FOR WHITE COLLAR ISSUES

562.431.9844 • [www.glhowardandcompanycpas.com](http://www.glhowardandcompanycpas.com)

ONE LEGAL®

The easiest way to file and serve in California

## BECAUSE COURT FILING SHOULD BE A PIECE OF CAKE

- ✓ ALL-IN-ONE SERVICE
- ✓ SIMPLE BILLING & STATEMENTS
- ✓ WORLD-CLASS TRAINING & SUPPORT
- ✓ 5 STAR RATED BY LEGAL PROFESSIONALS



Get started today and your first 30 days of eFiling and eService are free

[onelegal.com/california](http://onelegal.com/california)

ical exemptions] granted in 2016 further weakens the immediate effect of S.B. 277 and may limit its long-term benefits if sustained.... Moreover, because the largest increases in medical exemptions percentage occurred in regions with high past [personal belief exemption] use, portions of California remain susceptible to vaccine-preventable disease outbreaks in the near future.<sup>48</sup>

As a result, additional measures may be required to ensure optimum immunization in the school-age population. One option is to increase scrutiny of and enforcement against doctors who help parents circumvent the vaccination requirements. Another is to further amend the law to clarify what constitutes a valid medical reason for exemption from vaccination.<sup>49</sup>

Other approaches are more extreme. For instance, a school district could conceivably be held liable for negligently allowing an infected child to attend school. Alternatively, there may be potential liability of a parent who fails to vaccinate his or her child. Physicians and law professors have written extensively about the potential legal ramification of not vaccinating a child, including civil or criminal liability of parents who refuse to vaccinate their children to the detriment of the health of other school children or the community.<sup>50</sup> At present, it is not clear what steps are necessary. What is clear is that children have a right to attend school in a safe environment and parents have a responsibility to ensure that their children do not pose a risk to the safety of others. ■

(Briceland), Ch. 24; see S.B. 277 Senate Third Reading Bill Summary, [http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb\\_0251-0300/sb\\_277\\_cfa\\_20150407\\_101248\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0251-0300/sb_277_cfa_20150407_101248_sen_comm.html) [hereinafter S.B. 277 Senate Third Reading].

<sup>15</sup> Health & Safety Code §120325 requires immunization of appropriate age groups against diphtheria, hepatitis B, haemophilus influenzae type b, measles, mumps, pertussis (whooping cough), poliomyelitis, rubella, tetanus and varicella (chickenpox).

<sup>16</sup> A.B. 2109, 2011-12 Leg. Reg. Sess. (Cal. 2012), Ch. 821, 2012 Cal. Stat. 94, codified at HEALTH AND SAFETY CODE §210365. “Authorized health care providers” was broadly defined to include school nurses and certain naturopaths, in addition to MD’s and osteopathic doctors. HEALTH AND SAFETY CODE §210365(b), (f).

<sup>17</sup> Letter from Governor Edmund G. Brown, Jr. to the Members of the California State Assembly on signing of A.B. 2109 (Sept. 30, 2012), available at <https://www.ca.gov/wp-content/uploads/2017/09/AB-2109-signing-message.pdf>.

<sup>18</sup> Dorit Rubinstein Reiss, *Vaccines, School Mandates, and California’s Right to Education*, 63 UCLA L. REV. DISC. 98 (2015) (citing Cal. Dep’t Health, Immunization Branch, 2014-2015 Kindergarten Immunization Assessment Results (Feb. 2015)), available at <http://www.uclalawreview.org/vaccines-school-mandates-californias-right-education> [hereinafter Rubenstein Reiss].

<sup>19</sup> S.B. 277 Senate Third Reading, *supra* note 14.

<sup>20</sup> L. Barraza et al., *The Latest in Vaccine Policies: Selected Issues in School Vaccinations, Healthcare Worker Vaccinations, and Pharmacist Vaccination Authority Laws*, 45 J. LAW, MEDICINE & ETHICS 16,17 (2017).

<sup>21</sup> HEALTH AND SAFETY CODE §120335(g).

<sup>22</sup> HEALTH AND SAFETY CODE §120335(g)(3).

<sup>23</sup> HEALTH AND SAFETY CODE §120370. S.B. 277 added a requirement that the doctor consider medical history, though it’s unclear what effect that will have, if any. The provision seems to give doctors broad discretion to grant medical exemptions, and there is currently no real path to oversee that discretion. See Rubenstein Reiss, *supra* note 18.

<sup>24</sup> HEALTH AND SAFETY CODE §120370.

<sup>25</sup> HEALTH AND SAFETY CODE §20335(f).

<sup>26</sup> HEALTH AND SAFETY CODE §20335(h).

<sup>27</sup> Whitlow v. Cal. Dep’t of Education, 203 F. Supp. 3d 1079 (S.D. Cal. 2016).

<sup>28</sup> *Id.*; Serrano v. Priest, 18 Cal. 3d 728 (1976).

<sup>29</sup> Zucht v. King, 260 U.S. 174, 176 (1922).

<sup>30</sup> *Id.*

<sup>31</sup> Whitlow, 203 F. Supp. 3d at 1089.

<sup>32</sup> *Id.* at 1088 (citing Nordlinger v. Hahn, 505 U.S. 1, 10 (1992)) (“Evidence of different treatment of unlike groups does not support an equal protection claim.”); Wright v. Incline Village Gen. Improvement Dist., 665 F.3d 1128, 1140 (9th Cir. 2011).

<sup>33</sup> Whitlow, 203 F. Supp. 3d at 1088.

<sup>34</sup> *Id.*

<sup>35</sup> Serrano, 18 Cal. 3d at 766.

<sup>36</sup> *Id.*; see Butt v. State of California, 4 Cal. 4th 668 (1994).

<sup>37</sup> The court assumed, without necessarily agreeing that the heightened standard was the correct standard. Looking at the issue more closely, Professor Rubenstein Reiss concluded that the heightened standard was not the appropriate standard, arguing that the class of children intentionally unvaccinated does not constitute a suspect classification, since it is a choice not to vaccinate, as opposed to an income status or ethnic group whose status is immutable. Rubenstein Reiss, *supra* note 18.

<sup>38</sup> Among the cases cited by the court are Abeel v. Clark, 84 Cal. 230 (1906) (“The legislature has power

to enact such laws as it may deem necessary, not repugnant to the constitution to secure and maintain the health and prosperity of the state, by subjecting both person and property to such reasonable restraints and burdens as will effectuate such objects.”); Zucht v. King, 260 U.S. 174, 176 (1922) (stating it is “settled that it is within the police power of a state to provide for compulsory vaccination.”); Jacobson v. Commonwealth of Mass., 197 U.S. 11 (1905) (“[T]he police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”); Workman v. Mingo County Bd. of Ed., 419 Fed. Appx. 348 (4th Cir. 2011) (holding that there is a “compelling interest of society in fighting the spread of contagious diseases through mandatory inoculation programs.”); Brown v. Stone, 378 So. 2d 218, 223 (Miss. 1979) (holding that “protection of the great body of school children attending the public schools” against diseases through mandatory vaccination serves a “compelling public purpose”); Cude v. State, 237 Ark. 927, 932 (1964) (holding that mandatory vaccination of school children “does not violate the constitutional rights of anyone, on religious grounds or otherwise.”); Board of Educ. v. Maas, 56 N.J. Super. 245, 164 (1959) (similar); Viemeister v. White, 84 N.Y.S. 712 (1903).

<sup>39</sup> See HEALTH AND SAFETY CODE §20325 (“In enacting this chapter...it is the intent of the Legislature to provide: (a) A means for the eventual achievement of total immunization of appropriate age groups against the following childhood diseases....”).

<sup>40</sup> See Maricopa County Health Dept. v. Harmon, 156 Ariz. 161, 166 (1987) (rejecting argument that “there is no compelling state interest in taking limited and temporary steps to combat a reasonably perceived risk of the spread of measles absent a serologically confirmed case.”); Sadlock v. Bd. of Educ., 137 N.J.L. 85, 90 (1948) (rejecting argument that compulsory vaccination law could not stand “since at the time of its adoption, there was no epidemic or threatened epidemic of smallpox...and that, therefore the resolution performed no reasonable exercise of the police power.”); Mosier v. Varren County Bd. of Health, 308 Ky. 829, 831 (1948) (“the health authorities are not required to wait until an epidemic exists before acting, but it is their duty to adopt timely measures to prevent one.”).

<sup>41</sup> *Id.* at 1091.

<sup>42</sup> *Id.* (citing HEALTH AND SAFETY CODE §120325(a)).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1085-86.

<sup>46</sup> *Id.* at 1086-87.

<sup>47</sup> Paul L. Delamater et al., *Change in Medical Exemptions From Immunization in California After Elimination of Personal Belief Exemptions*, 318 J. AM. MED. ASS’N 863 (2017).

<sup>48</sup> Amina Khan, *After California got rid of personal exemptions for vaccines, medical exemptions went way up*, L.A. TIMES, Sep. 5, 2017, available at <http://latimes.com>.

<sup>49</sup> Editorial, “Anti-vaxxers have found a way around California’s strict new immunization law. They need to be stopped” L.A. TIMES, Nov. 8, 2017, available at <http://latimes.com>.

<sup>50</sup> Anthony Ciolli, *Mandatory School Vaccinations: The Role of Tort Law*, 81 YALE J. BIOLOGY & MED. 129 (2008), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2553651>; Dorit Rubenstein Reiss & Lois A. Weithorn, *Responding to the Childhood Vaccination Crisis: Legal Frameworks and Tools in the Context of Parental Vaccine Refusal*, 63 BUFF. L. REV. 881 (2015), available at [https://repository.uhastings.edu/cgi/viewcontent.cgi?article=2480&context=faculty\\_scholarship](https://repository.uhastings.edu/cgi/viewcontent.cgi?article=2480&context=faculty_scholarship).

<sup>1</sup> Whitlow v. Cal. Dep’t of Educ., 203 F. Supp. 3d 1079 (S.D. Cal. 2016).

<sup>2</sup> Ten Great Public Health Achievements—United States, 1900-1999, Centers for Disease Control and Prevention, <https://www.cdc.gov> (last visited Apr. 26, 2018).

<sup>3</sup> Vaccines Protect Your Community, U.S. Dep’t of Health & Human Servs., [www.vaccines.gov/basics/work/protection/index.html](http://www.vaccines.gov/basics/work/protection/index.html) (last visited Feb. 15, 2018).

<sup>4</sup> Public Health Law: State School Immunization Requirements and Vaccine Exemption Laws, <https://www.cdc.gov/phlp/docs/school-vaccinaions.pdf> at n.1. & Appendix A (last visited Feb. 15, 2018) (listing various states’ requirements).

<sup>5</sup> HEALTH AND SAFETY CODE §120370.

<sup>6</sup> *Id.* at 2 (cataloguing 9 attributes in exemptions within various states).

<sup>7</sup> Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905).

<sup>8</sup> *Id.* at 26.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 26-27 (quoting Crowley v. Christensen 137 U.S. 86, 89 (1890)).

<sup>12</sup> Jacobson, 197 U.S. at 28.

<sup>13</sup> *Id.* at 29-30.

<sup>14</sup> In 1889, students who were not vaccinated against smallpox were not allowed to attend school. S.B. 92