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## Religiously-Motivated Medical Neglect: A Response to Professors Levin, Jacobs, and Arora

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# Religiously-Motivated Medical Neglect: A Response to Professors Levin, Jacobs, and Arora

Doriane Lambelet Coleman\*

## *Abstract*

*This Response to Professors Levin, Jacobs, and Arora's article To Accommodate or Not to Accommodate: (When) Should the State Regulate Religion to Protect the Rights of Children and Third Parties? focuses on their claim that the law governing religious exemptions to medical neglect is messy, unprincipled, and in need of reform, including because it violates the Establishment Clause. I disagree with this assessment and provide support for my position. Specifically, I summarize and assess the current state of this law and its foundation in the perennial tussle between parental rights and state authority to make decisions for and about the child. Because these are featured as examples in their work, I also summarize and assess the current state of the law on vaccinations and male circumcision. I conclude with some thoughts on Levin, Jacobs, and Arora's provocative suggestion that the law governing religious exemptions to medical neglect (as reformed according to their terms) might provide a template for addressing other accommodation claims such as those of religiously-motivated opponents of gay marriage.*

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### *I. Introduction*

There is no dearth of legal scholarship on the subject of religiously-motivated medical neglect. Much of that scholarship focuses on the federal government’s brief insistence in the period 1974 to 1983 that the states provide statutory exemptions to such neglect, and on the effects of those exemptions even as the government withdrew its mandate.<sup>1</sup> But the best of it transcends that historical moment and examines the phenomenon in its broader political and doctrinal context.<sup>2</sup> The central question in this context is generally, who decides for the child who, because of her infancy, cannot decide for herself? More specifically, who decides her religion and how she will be treated when she is ill or injured? Our society’s related commitments to liberalism and pluralism assure that the answer always starts with her parents; to the extent scholars have disagreed amongst themselves, it has only been about how much liberty parents have and should have,

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1. See generally, e.g., Wayne F. Malecha, *Faith Healing Exemptions to Child Protection Laws: Keeping the Faith versus Medical Care for Children*, 12 J. LEGIS. 243 (1985); Jennifer L. Rosato, *Putting Square Pegs in a Round Hole: Procedural Due Process and the Effect of Faith Healing Exceptions on the Prosecution of Faith Healing Parents*, 29 U.S.F. L. REV. 43 (1994); Rita Swan, *On Statutes Depriving a Class of Children of Rights to Medical Care: Can This Discrimination Be Litigated?*, 2 QUINNIPIAC HEALTH L.J. 73 (1998); see also *infra* note 76 (discussing the statutory and regulatory history).

2. See generally, e.g., SHAWN FRANCIS PETERS, *WHEN PRAYER FAILS: FAITH HEALING, CHILDREN, AND THE LAW* (2008); James G. Dwyer, *Spiritual Treatment Exemptions to Child Medical Neglect Laws: What We Outsiders Should Think*, 76 NOTRE DAME L. REV. 147 (2000); James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321 (1996); Walter Wadlington, *David C. Baum Memorial Lecture: Medical Decision Making for and by Children: Tensions Between Parent, State, and Child*, 1994 U. ILL. L. REV. 311 (1994).

and then about when and on what grounds the state properly intervenes to replace them as decision makers.

In this respect, Professors Levin, Jacobs, and Arora's article, *To Accommodate or Not to Accommodate: (When) Should the State Regulate Religion to Protect the Rights of Children and Third Parties?*,<sup>3</sup> is different; it focuses not on the political and doctrinal boundaries of parents' liberty—indeed, it is largely devoid of this discussion—but rather examines the law's treatment of religiously-motivated medical neglect as an aspect of its treatment of religion more generally.<sup>4</sup> This take on the subject from Law and Religion is a welcome addition to a literature that is otherwise typically bent against accommodations and missing the intellectual respect and multidisciplinary sophistication the Authors bring to the table. Their take is also interesting because it situates parental decision-making about the treatment of illness and injury within the broader literature on tolerance,<sup>5</sup> and because it highlights how much more carefully religiously-motivated parents may be accommodated than other religiously-motivated claimants.<sup>6</sup> The perspectives and reflections afforded

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3. 73 WASH. & LEE L. REV. 913 (forthcoming 2016). This Article follows from Professor Levin's earlier work, *Rethinking Religious Minorities' Political Power*, 48 U.C.D. L. REV. 1617, 1617 (2015), in which he argues against "the dominant view . . . that courts are indispensable for protecting religious minority groups from oppression by the majority"; and from Professor Jacobs and Arora's earlier work, *Ritual Male Infant Circumcision and Human Rights*, 15 AM. J. BIOETHICS 30 (2015).

4. Framed as it is, the Authors' article is about more than accommodation of medical neglect, of course. But, as I read it, this is its principal focus. It is also the area in which I have some expertise and so it is also the focus of this Response. Throughout, I use the term "medical neglect" both technically, to describe this particular area of the law which is a sub-set of maltreatment law, and more generally, to describe the set of fact patterns which are of concern to the Authors. These include medical neglect cases, but also vaccination cases (which are neglect in the absence of an exemption) and circumcision cases (which could theoretically be characterized as maltreatment, but as abuse not neglect). The Authors themselves speak of "religious practices" and "accommodations" that "impose health-related harm to children within a religious group or to third parties." See, e.g., Levin et al., *supra* note 3, at 913, 963.

5. See, e.g., Doriane Lambelet Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, 47 DUKE L.J. 717 (1998) (providing a similar analysis, but with immigrant parenting practices).

6. See, e.g., Levin et al., *supra* note 3, at 913, 919–45 (supporting their principal argument—that accommodations law in general is messy and

by these approaches have the potential to be illuminating and generative both within and outside of Law and Religion.

The fact that the Authors are interested in bringing theory to bear on practice, and that they have the tools to do so, is also welcome. Unfortunately, this aspect of their otherwise promising project falls short in this case. It falls short because it proceeds largely without regard to the extensive body of law and scholarship already on the particular subject of medical neglect, and because it ignores that parents are special individuals in American political philosophy and law so that the harm principle that otherwise governs the outcome of cases involving the limits on tolerance and religious accommodations reads differently in this context. The analysis that follows focuses on these two issues.

Part I summarizes the Authors' arguments and proposals. Part II offers a critique from family and children's law. This critique is primarily of their doctrinal work, which, I argue, causes them to assume that current law is different than it is and in need of reform, when in fact it largely mirrors their proposal. In the course of developing this point, Part II provides an up-to-date survey of the law's accommodation of religiously-motivated medical neglect, including religious opposition to vaccination mandates and the challenge to male circumcision. My Response concludes with a reflection on the Authors' suggestion that medical neglect law may provide a model for evaluating the merits of other kinds of accommodation claims including those touching on religious opposition to same sex marriage.

## *II. To Accommodate or Not*

In *To Accommodate or Not*, the Authors make two principal arguments and two proposals.

First, they argue that the law that applies when "religious practices . . . impose health-related harm to children within a religious group or to third parties" is "inconsistent" and that this situation exists because "legislators, courts, scholars, ethicists,

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unprincipled—with examples that feature the accommodation of religiously-motivated medical neglect against a backdrop of political and judicial decisions denying accommodations in other areas).

and medical practitioners have not offered a consistent way to analyze” the cases.<sup>7</sup> In support of this argument, they summarize the history of constitutional and statutory “expressions of accommodationism” in general, emphasizing shifts in degrees of respect for religiously-motivated conduct over time, across fact patterns, and depending on the government (federal or state) and branch of government (primarily judiciary or legislature) doing the accommodating.<sup>8</sup> Notably, this support does not involve an analysis of medical neglect law.

Second, the Authors argue that this “lack of consistency is a troubling artifact of our political system” which “raises serious constitutional questions that lie at the intersection of the Free Exercise and Establishment Clauses of the First Amendment.”<sup>9</sup> They say they accept that interests balancing—particularly that which involves a balancing of harms—is appropriate and even necessary in this area.<sup>10</sup> They also say they accept the facts of our federalism; in their words, that especially in “a multi-ethnic, multi-cultural, and multi-jurisdictional society such as ours,” interests balancing will “produce varying policies” since “different policymakers and communities may balance the interests differently in specific cases,”<sup>11</sup> so that “[d]ifferences in the accommodation of claims for different sorts of religious accommodations are not in themselves surprising or necessarily troubling.”<sup>12</sup> But, they insist, “there seem to be no principles at

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7. *Id.* at 913.

8. *See generally id.* at 919–45 (discussing the accommodation debate from scholarly, statutory, and constitutional perspectives).

9. *Id.* at 913–14.

10. *Id.* at 946 (noting, for example, that “the liberal values that require society to protect human life and impose an absolute ban on private killings easily supersede the values favoring individual religious freedom”). For instance, they accept that “laws that decline to accommodate religious objectors can be understood as principled efforts to balance the benefits of religious liberty against its costs.” *Id.*

11. *Id.* at 946–47

12. *Id.* at 945; *see also id.* at 937 (noting that “[o]ur federalist structure allows different states to preserve their different characters.”) Unfortunately, this acknowledgement does not appear to guide the Authors’ analysis going forward, as much of what they describe as inconsistent in the context of medical neglect law is in fact the result of federalism. Different states have adopted different approaches to what have traditionally been state law matters, including the regulation of the family and of medicine. *See infra* notes 17, 54,

play in the degree to which we permit or limit religious freedom in individual cases,”<sup>13</sup> and this is troubling because the First Amendment demands *principled* balancing.

Specifically on the point that the law’s approach to religious accommodations is unprincipled, the Authors point out that “[s]ometimes we allow religious groups to impose significant costs and harms on third parties”<sup>14</sup> and in other cases “statutes or regulations prohibit the exercise of religious freedom”<sup>15</sup> in circumstances that exhibit “no regard for the value of religious liberty despite the absence of documented harm to any individual.”<sup>16</sup>

[C]onsider for instance, parents who refuse to vaccinate their children against deadly diseases for reasons of religion, thus putting at grave risk both their own children and other children who cannot be successfully vaccinated. Or consider parents who are shielded by law from criminal charges when they withhold necessary medical treatment from their children for religious reasons. Here we seem to have embraced an extreme degree of religious liberty that ignores severe harms to children and third parties.

On the other hand, sometimes statutes or regulations prohibit the exercise of religious freedom even when there is little or no harm to anyone. Consider, for example, the plaintiff in [*Employment Division v.*] *Smith*, who wished to use controlled substances as part of his religious worship ceremonies but was denied even though the Government could articulate no third party harms, or even harms to the people who used the drugs in their rituals.<sup>17</sup>

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74–85 and accompanying text (highlighting the points that struck me in this regard). I acknowledge that this critique may be misplaced if what the Authors intended was merely to note that the accommodation of medical neglect (including vaccination exemptions) is much broader than (and thus inconsistent with) the accommodation of other religious claims. I took them at their word, however, that they also see medical neglect law itself as internally inconsistent. *Supra* note 7 and accompanying text.

13. Levin et al., *supra* note 3, at 948.

14. *Id.* at 948–49.

15. *Id.* at 949.

16. *Id.* at 950.

17. Levin et al., *supra* note 3, at 949 (citing *Employment Division v. Smith*, 494 U.S. 872 (1990)). The authors also cite *Holt v. Hobbs*, 135 S. Ct. 853 (2015), which they describe as involving “a prisoner who wished to grow a beard of one half inch in length to comply with his religious beliefs but was denied for

The Authors explain this inconsistency using “basic insights” from public choice theory,<sup>18</sup> namely that “religious groups operate in the political marketplace like other interest groups . . . . [W]hether they win or lose on a particular political issue is related less to a principled balancing of the competing underlying values than it is to the political dynamics in play.”<sup>19</sup> But, they argue, “we should demand more than ‘politics as usual’ in the context of religious accommodations that potentially harm children or third parties” because “both sides of the equation implicate constitutional values.”<sup>20</sup>

On this constitutional point, the Authors explain their view that the relationship between the First Amendment’s Free Exercise and Establishment Clauses requires *both* that “individuals and groups not be prevented from practicing their religious obligations as a result of bias, animus, or stereotyping on the part of lawmakers and officials” *and* that accommodations do not cause harm to “children and third parties . . . who do not choose to subject themselves to the same religious strictures.”<sup>21</sup>

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reasons so transparently baseless that Supreme Court Justices laughed at them.” *Id.*

18. *Id.* at 950.

19. *Id.* at 960.

20. *Id.* at 964. Critiquing this aspect of the Authors’ analysis is not the focus of my Response, but it bears noting that to support their central premise that the law’s approach to religious accommodations is inconsistent and unprincipled, in effect the Authors take an aerial, forest-through-the trees view of their subject which blurs the law’s essential details. This view assumes away history, in particular the evolution of the Supreme Court’s fundamental rights analysis; and it assumes away federalism, the separation of powers, and the standard relevance of case facts. In other words, the way the Authors propose to support their claim that the law in this area is “unprincipled” is by assuming away the very principles that make sense of its apparent messiness. *See, e.g., supra* notes 8, 12, 17 and accompanying text (providing examples of these erasures). For me, at least, this analytical move is not remedied by the Authors’ alternative story, that the dissatisfactory state of accommodations law can be explained using public choice theory. Although this story is surely right as to some accommodations—for example, I agree that religious exemptions to medical neglect laws are illustrative here—it is ultimately unnecessary because it does not do any work that is not already done by federalism and separation powers principles: different jurisdictions sometimes weigh harms differently and choose different approaches, and the three branches of government within a jurisdiction sometimes approach the issue differently given their different sources of authority and responsibilities.

21. *Id.* at 964. To support this proposition, the Authors cite Levin,

The Authors offer a three-part test “[t]o resolve these problems”<sup>22</sup> that “balances the competing interests . . . according to the yin and yang of the First Amendment Free Exercise and Establishment Clauses.”<sup>23</sup> The test is designed “to determine whether . . . [a] religious practice should be accommodated by legislators, courts, and medical practitioners.”<sup>24</sup> In essence, the test provides that the government “may restrict” religious practices that “creat[e] a substantial chance of death or major disruption of a physiological function or . . . major psychological morbidity” to in-group members, or that “create[] unreasonable burdens” to out-group members including to “society as a whole.”<sup>25</sup> It further provides that the government “has a constitutional obligation to limit the practice” if its effects are “severe.”<sup>26</sup> Finally, it sets out a non-discrimination provision that would prohibit the government from restricting religious practices which cause “harms of a similar magnitude” to those of “tolerate[d] . . . comparable mainstream practices.”<sup>27</sup> This same provision would require the government to restrict religious

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*Rethinking Religious Minorities’ Political Power*, *supra* note 3. They note that at page 1655 Levin “discuss[es] the line of cases interpreting the Establishment Clause to limit the accommodation of religious practices that harm third parties.” Levin et al., *supra* note 3, at 964 n.246. But none of the “third parties” in those cases are children burdened by their parents’ religious practices. See Levin, *supra* note 3, at 1655 n.184 (citing only to cases involving impermissible discrimination among religions and impermissible burdens on third party outsiders). And the Authors do not explain how they relate to the constitutionally different factual setting that is the parent-child relationship, which does not contemplate children as third parties vis à vis their parents. See *infra* notes 35–36 and accompanying text (further discussing this point).

22. Levin et al., *supra* note 3, at 914.

23. *Id.* at 965.

24. *Id.* at 914.

25. *Id.* at 966.

26. *Id.*

27. *Id.* at 966–67. The Authors provide infant circumcision as an example of such a prohibition:

[I]f a society tolerates infant circumcision performed by a doctor in hospitals for non-religious reasons, it must also tolerate religious Jews’ practice of home infant circumcision performed by a trained *mohel* (Jewish circumciser) unless the risks associated with this religious practice are of greater magnitude than those associated with the non-religious practice.

*Id.* at 989.

practices that cause severe harms if it prohibits mainstream practices that cause those harms.<sup>28</sup>

Finally, with some equivocation,<sup>29</sup> and without developing the point in any real detail,<sup>30</sup> the Authors suggest that their medical neglect test “has potential implications for a wide range of clashes between law and religion[.]”<sup>31</sup> including for “the debate over whether sexual orientation non-discrimination laws should accommodate religious dissent.”<sup>32</sup>

### *III. A Critique from Family and Children’s Law*

The focus of my critique of the Authors’ work from family and children’s law is both doctrinal and normative. It centers first on their claims about the Establishment Clause and then on their claims about the state of medical neglect law. Because their proposed test is based on these claims, its merits are also considered. In the process, I provide an up-to-date summary of the law applicable to religiously-motivated medical neglect.

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28. *See id.* (noting that “society cannot simultaneously tolerate comparable mainstream practices—religious or not—that impose similar harms”).

29. *See id.* at 1007 (noting, for example, that “while we do not discount the possibility that the test could play a guiding role in deciding such cases, the matter requires further consideration”).

30. The Authors devote approximately two pages to what is ultimately their most provocative argument, that the medical neglect test might be extrapolated to the “debate over whether sexual orientation non-discrimination laws should accommodate religious dissent.” *Id.* at 914; *see also id.* at 1006–08 (discussing this argument). In those pages, beyond referring back to their test and saying that interests balancing would be at issue, they do not detail how this would work or otherwise discuss the legal and policy implications of this particular proposed application. *See id.* at 1008 (discussing only “kinds of compromises [that] are reasonable attempts to balance the values of pluralism and religious freedom against those of monism and the protection of the interests of third parties in a manner compatible with the mandates of the religion clauses”).

31. *Id.* at 1006.

32. *Id.* at 914, 1006–08.

*A. The Establishment Clause and Medical Neglect Law*

To the extent the Authors are making doctrinal as opposed to normative claims, they err in their suggestions that the Establishment Clause (1) disallows accommodations that would cause harm to “children . . . who do not choose to subject themselves to the same religious strictures,”<sup>33</sup> and (2) requires the government affirmatively to intervene to protect children from serious harm that could result from religiously-motivated medical neglect.<sup>34</sup>

As to the former, the law of parental autonomy is clear that, aside from a few notable exceptions, children do not have the capacity to make choices of legal consequence, including about religion and medical treatment; their parents are formally charged with the right and responsibility to make these decisions in their place.<sup>35</sup> As a result, a child cannot choose legally to subject themselves or not to particular religious strictures. Their parents’ choices are formally theirs, meaning their parents’ religion is formally theirs; the law has adopted the legal fiction that the parents’ choice is the child’s choice. Thus, again doctrinally-speaking, it is not, as the Authors suggest, a prohibited establishment of religion for the state to recognize the

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33. *Id.* at 964.

34. *Id.* at 966.

35. See *Troxel v. Granville*, 530 U.S. 57, 58 (2000) (reaffirming the longstanding constitutional “presumption that fit parents act in their children’s best interests); *Parham v. J.R.*, 442 U.S. 584, 623 (1979) (establishing parents’ Fourteenth Amendment right to make medical decisions for their children and describing the best interests presumption and its operation); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (generally describing parents’ rights to determine their children’s religion and pre-majority lives and the limits of state authority in those respects); *Prince v. Massachusetts*, 321 U.S. 158, 165–66 (1944) (noting parents’ right to provide children with religious training); *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923) (first establishing parental rights, including “the right of the individual . . . to . . . establish a home and bring up children” and “to worship God according to the dictates of his conscience,” as being within the liberty secured by the Fourteenth Amendment); see also Doriane Lambelet Coleman & Philip M. Rosoff, *The Legal Authority of Mature Minors to Consent to General Medical Treatment*, 131 PEDIATRICS 786, 788–89 (Apr. 2013) (summarizing the law of parental autonomy as it relates to medical decision-making for children, including mature minors); Doriane Lambelet Coleman, *The Legal Ethics of Pediatric Research*, 57 DUKE L.J. 517, 545–559 (2007) (describing the boundaries of parents’ consent authority).

parents' religion as also being the child's religion. Indeed, I think it is fair to say both that because children are not third parties in the parent-child relationship the Establishment Clause is not at issue here,<sup>36</sup> and that it is unlikely that the Court would seriously entertain a different interpretation that conflicted with its parental autonomy jurisprudence.

As to the latter, the law is clear both that the Establishment Clause permits the government to privilege religion, just not any particular religion,<sup>37</sup> and that it does not contemplate affirmative action on the government's part of the sort the Authors imagine.<sup>38</sup>

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36. To the extent the Establishment Clause has been relevant in parents' rights cases to date, it has tended to be in two categories. The first comprise cases in which the claim is made that a public school's actions or requirements favor or burden a particular religion. *See generally, e.g.,* Lee v. Weisman, 505 U.S. 577 (1992) (considering a religious sermon at a public school graduation). The second comprise cases involving religious exemptions to medical neglect laws, which, as written, appear to privilege Christian Scientists or some other particular religious group. *See, e.g.,* Walker v. Superior Court, 763 P.2d 852, 875 (Cal. 1988) (Mosk, J., concurring) ("The one group of parents squarely protected by the terms of the statute are Christian Scientists, whose denomination sponsored the 1976 amendment to section 270 enacting its religious exemption.").

37. *See, e.g.,* Locke v. Davey, 540 U.S. 712, 717–25 (2004) (noting that the "play in the joints" between the Free Exercise and Establishment Clauses "permit[s] . . . but [does] not require[]" the states to accommodate religion in an otherwise neutral context); Lynch v. Donnelly, 465 U.S. 668, 673 (1983) (finding that the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any"); Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

38. The Authors write that "[t]he Supreme Court has suggested that legal tolerance or accommodation of religious practices that impose third-party harms *potentially* violate the Establishment Clause." Levin et al., *supra* note 3 at 991 (citing Levin, *Rethinking Religious Minorities' Political Power, supra* note 3, at 1655 (emphasis added). They apparently rely on this in the development of their medical neglect test, which provides in part that the government "has a constitutional obligation to limit the practice" if its effects are "severe." *Id.* at 966 (citing Levin, *Rethinking Religious Minorities' Political Power, supra* note 3, at 1657). That the government has no federal constitutional obligation affirmatively to intervene to protect children from parental maltreatment was specifically established in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). Although *DeShaney* was decided on Fourteenth Amendment liberty grounds, *id.* at 203, there is no indication there or elsewhere that the outcome would have been different had the case arisen instead on First Amendment Establishment Clause grounds. Apart from the factual points that make this unlikely—mostly having to do with the public duty doctrine, agency

Most specifically, although there is excellent scholarship on the point that equal protection doctrine might be marshalled in favor of a requirement that government treat children of religious parents as it treats children of non-religious parents,<sup>39</sup> neither the Equal Protection Clause nor the Establishment Clause have been successfully used toward this end.<sup>40</sup> The phenomenon that results—children of religious parents who are not protected by the state from suspected maltreatment to the same extent as children of non-religious parents—is well known amongst children’s law scholars and lawyers who practice in the field.<sup>41</sup> It is part of the constitutional scheme that has caused scholars to describe children—in effect *pre*-autonomous individuals—as “the Achilles heel of liberalism.”<sup>42</sup>

Ultimately, the Authors appear to be reading the religion clauses to include novel or non-traditional anti-discrimination norms: norms that would erase the distinctions between the autonomy afforded to (or recognized as existing in) children and adults, and between religiously- and other-motivated individuals.<sup>43</sup> If I am right to read the work this way, I am both

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discretion, and the fisc—there is also a dearth of law on the point that the Establishment Clause imposes any affirmative obligation on the government unless it is to remedy an existing violation of the Clause. *Cf.* *Salazar v. Buono*, 559 U.S. 700, 750 (2010) (Stevens, J., dissenting) (suggesting that the Establishment Clause may “impose affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a [particular] private religious message”). This is not the case here, where, consistent with Establishment Clause jurisprudence, the government has chosen to accommodate religious objections generally. *See* *Lynch*, 465 U.S. at 673.

39. *See generally* Dwyer, *The Children We Abandon*, *supra* note 2 (arguing that religious exemptions to child welfare laws violate the Equal Protection Clause).

40. *Cf.* *Brown v. Stone*, 378 So.2d 218, 223–24 (Miss. 1979) (holding that religious exemption to school vaccination requirement would violate equal protection rights of third-party children).

41. *See* Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 537–38, 538 n.354 (2005) (discussing this phenomenon).

42. *Id.* at 421.

43. As I read the Authors’ work, this effort is most evident in the “magnitude” prong of their medical neglect test. *See* Levin et al., *supra* note 3, at 969 (suggesting that accommodations are disallowed where “society has [not] chosen to permit mainstream practices that are comparable to the religious

sympathetic and disappointed. I am sympathetic because I would prefer a Constitution which did not privilege the accommodation claims of parents who are religiously-motivated—this not because I do not respect religion but because I respect all sincerely-held conscience-based claims.<sup>44</sup> I am also sympathetic because I would prefer a Constitution that recognized the right of all children to be launched into the rest of their lives as individuals and citizens with healthy, well-developed bodies and minds<sup>45</sup>—what they choose to do with those bodies and minds once they are launched and are unquestionably exercising autonomy, sans proxy, is finally their own business. I am disappointed because, at least in this work, the Authors do not develop these ideas. Rather, they

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conduct in question and that impose similar harms”). But it also shows in their earlier Establishment Clause discussion. *See, e.g., id.* at 964 (arguing that “religious accommodations that impose harms to children and third parties raise substantial questions under the Establishment Clause”); *id.* at 966 (requiring the government to intervene to protect children of religious minorities from severe harm if it also protects other children in these circumstances).

44. For example, I agree with what the Court wrote in *Prince v. Massachusetts*, 321 U.S. 158 (1944):

If appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charger’s prime place because they have unity in their human sources and functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life.

*Id.* at 164.

45. In this respect too, I am a big fan of *Prince* and of its famous admonition: “Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.” *Id.* at 170; *see generally* Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals’ Dilemma*, 96 COL. L. REV. 1093 (1996) (arguing that the cultural defense to immigrant crime, including instances in which the latter is religiously-motivated and as it effects children, is a violation of American anti-discrimination norms). I am not, on the other hand, a fan of the Court’s application of this law to the *Prince* facts.

rest on the claim without more that “the yin and yang” of the religion clauses somehow requires these readings.<sup>46</sup>

*B. The Law’s Treatment of Religiously-Motivated Medical Neglect*

The Authors are undoubtedly correct that religious exemptions to medical neglect law that result in serious harm are “bad for children and society at large.”<sup>47</sup> Nevertheless, their most problematic claim is that the law governing such accommodations is internally messy and unprincipled.<sup>48</sup> This claim is problematic because it lacks relevant support and because, in fact, clear and principled law does exist in this area. Indeed, their proposed fix largely replicates that law.

As I note in the Introduction, the Authors chose not to ground their argument in an analysis of medical neglect law; instead, they focus on the law governing accommodations in general. These choices caused them either to miss seeing or accounting for law that significantly complicates their claim. The three maltreatment-related accommodation fact patterns they do discuss—vaccinations,<sup>49</sup> circumcision,<sup>50</sup> and medical neglect<sup>51</sup>—are illustrative.

The United States Supreme Court ruled early on that vaccination mandates as prophylactic public health measures are valid exercises of the states’ police powers,<sup>52</sup> including as against claims of parental rights. As the Court famously wrote in *Prince v. Massachusetts*, a “parent . . . cannot claim freedom from

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46. Levin et al., *supra* note 3, at 965.

47. *Id.* at 955; *see also id.* at 966 (proposing a test to sort permissible from impermissible accommodations in this context).

48. *See supra* notes 7–17 and accompanying text (summarizing the Authors’ arguments in these respects).

49. Levin et al., *supra* note 3 at 1001–06.

50. *Id.* at 916, 989. To the extent that male circumcision would qualify as maltreatment, it would be as medical abuse, not neglect, but I include it here because the Authors have chosen to use it as an example of an accommodation that could be analyzed using their proposed medical neglect test. *See also supra* note 4 (reconciling the relevant language).

51. Levin et al., *supra* note 3 at 957.

52. *See Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905) (upholding a state’s right to require vaccination of residents for smallpox).

compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community nor the child to communicable disease or the latter to ill health or death.”<sup>53</sup> Consistent with this constitutional authority, all states have enacted vaccination mandates.<sup>54</sup> Medical exemptions for individuals whose immune systems are weak to the point where vaccination is overly risky were read in almost immediately everywhere.<sup>55</sup> Religious and other conscience-based exemptions were added later, typically in periods when the diseases at issue were under control and herd immunity was thought to have been achieved, so that the accommodations and free riding were viewed as low cost or even cost free.<sup>56</sup> In other words, legislators have not tended to act in the face of “deadly diseases” or in circumstances where religious objectors were “putting at grave risk both their own children and other children who c[ould not] be successfully vaccinated.”<sup>57</sup> The contemporary story is illustrative: As it has become apparent that some accommodations are no longer low cost or cost free, policymakers around the country

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53. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *see also* *Zucht v. King*, 260 U.S. 174, 177 (1922) (upholding a state’s right to make vaccination of schoolchildren mandatory). Notably, the Court recently denied certiorari in *Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015), a hard-fought case which would have had it revisit its decisions in *Jacobson* and *Zucht*. *Phillips v. City of New York*, 136 S.Ct. 104 (2015). *See also generally* Erwin Chemerinsky and Michele Goodwin, 110 NW. U. L. REV. 589 (2016) (setting out the history of compulsory vaccination laws and emphasizing their constitutionality).

54. *Vaccination Exemptions*, HISTORY OF VACCINES (Jan. 27, 2016), <http://www.historyofvaccines.org/content/articles/vaccination-exemptions> (last visited July 16, 2016) (on file with the Washington and Lee Law Review); *see also generally* JARED P. COLE & KATHLEEN S. SWENDIMAN, CONGRESSIONAL RESEARCH SERVICE, MANDATORY VACCINATIONS: PRECEDENT AND CURRENT LAWS (May 21, 2014) <https://www.fas.org/sgp/crs/misc/RS21414.pdf> (providing an overview of mandatory vaccination laws).

55. *See Vaccination Exemptions*, *supra* note 54; *see also* *Jacobson v. Massachusetts*, 197 U.S. 11, 38–39 (1905) (suggesting this exception in dicta).

56. *See* Kevin M. Malone and Alan R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights*, in *LAW IN PUBLIC HEALTH PRACTICE* 262–63 (Richard A. Goodman et al. eds., 2009) (explaining the concept of herd immunity and the low cost of free riding where herd immunity has been achieved); *id.* at 273–80 (providing a history and analysis of religious exemptions to vaccination requirements); *id.* at 271 (providing a brief history of the use of schools as the vehicle to achieve herd immunity).

57. Levin et al., *supra* note 3, at 949.

have advocated for new restrictions consistent with these developments,<sup>58</sup> and there is some indication that administrators on the ground are interpreting their authority to restrict existing accommodations more broadly.<sup>59</sup> The result has been a reduced incidence of disease.<sup>60</sup> The effects of federalism aside,<sup>61</sup> this is clearly not a messy story, nor is it an unprincipled one.

In fact, although it is neither uniform nor unfailing, in general vaccination law's accommodation of religion in contexts where harm is unlikely, and its efforts to restrict accommodations in contexts where the risk of harm is heightened, is entirely

58. See, e.g., Sarah Breitenbach, *Here's Why States Want to Make it Tough to Skip Childhood Vaccines*, PBS NEWSHOUR: THE RUNDOWN (May 25, 2016), <http://www.pbs.org/newshour/rundown/heres-why-states-want-to-make-it-tough-to-skip-childhood-vaccines/> (last visited July 16, 2016) (noting the current public policy push to eliminate religious and philosophical exemptions to vaccination requirements) (on file with the Washington and Lee Law Review); Saerom Yoo, *Oregon One of Many States Seeking Tougher Vaccine Laws*, STATESMAN J. (Mar. 13, 2015), <http://www.statesmanjournal.com/story/news/health/2015/03/14/oregon-one-many-states-seeking-tougher-vaccine-laws/70317498/> (last visited July 16, 2016) (noting in 2015 that "15 states have introduced policies that would strengthen their school immunization requirements" and that "trends in statehouses across the country sow a motivation to clamp down on nonmedical exemptions") (on file with the Washington and Lee Law Review).

59. See, e.g., *Phillips v. City of New York*, 775 F.3d 538, 541 (2d Cir. 2015) (noting that a state department of education official inquired into the sincerity of a mother's religious opposition to vaccination and ultimately denied her request for an exemption on that basis).

60. See, e.g., *Measles Cases and Outbreaks*, CTRS. FOR DISEASE CONTROL AND PREVENTION (June 1, 2016), <http://www.cdc.gov/measles/cases-outbreaks.html> (last visited July 16, 2016) (providing a summary of the incidence of measles outbreaks in the United States from 2010 through approximately the first half of 2016, as these were connected with vaccination rates, and noting that in the first five months of 2016 there were 19 cases of measles as compared with a high of 667 in 2014) (on file with the Washington and Lee Law Review); Liz Szabo, *California Governor Signs Strict Law Requiring Vaccination for Most Kids*, USA TODAY (June 30, 2015), <http://www.usatoday.com/story/news/2015/06/30/california-vaccine-bill/29485063/> (last visited July 16, 2016) (noting California's decision to eliminate religious and personal exemptions following measles outbreak and providing data on rate of disease relative to herd immunity depending on state of the law) (on file with the Washington and Lee Law Review).

61. Federalism itself makes law messy, of course, and vaccination law is no exception. See *supra* note 55 (providing references to the states' vaccination laws). The Authors affirm that the resulting inconsistencies are not what concern them. See Levin et al., *supra* note 3, at 961 (noting that "the law does, indeed *must*, tolerate all kinds of inconsistencies").

consistent with the Authors' overall approach and with their specific proposal that the government restrict practices that cause serious harm to in-group members or place unreasonable burdens on out-group members.<sup>62</sup>

Male circumcision is governed by state law, and no state has yet prohibited the practice; it is legal without an accommodation everywhere in the country. Specifically, circumcision has long been considered to be a medical procedure whose benefits outweigh its inherent harms,<sup>63</sup> and thus there has been no need for the law to develop an exception to abuse definitions for religiously-motivated parents. Given this, I am assuming that the Authors' interest in the issue stems from the fact that the longstanding medical consensus has wavered in recent years,<sup>64</sup> and, as a result, the propriety of the procedure is increasingly subject to challenge. Although this challenge currently takes place on the cultural, academic, and ethical fronts<sup>65</sup>—the latter of which is of special importance to Professors Jacobs and Aurora, who are academic physicians and have written separately on the subject—it does suggest that legal actors might also need eventually to consider whether to accommodate parents who are

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62. Levin et al., *supra* note 3, at 966.

63. See, e.g., Mike Stobbe, *Circumcision Benefits Outweigh the Risk*, *CDC Says*, TODAY HEALTH & WELLNESS (Dec. 2, 2014), <http://www.today.com/health/circumcision-benefits-outweigh-risks-cdc-says-1D80331010> (last visited July 16, 2016) (describing this history and reaffirming the general consensus) (on file with the Washington and Lee Law Review).

64. See *id.* (noting the growing “opposition from anti-circumcision advocacy groups”); see also Jacobs & Arora, *Ritual Male Infant Circumcision*, *supra* note 3, at 30–31 (describing and countering medically and ethically-based opposition to male infant circumcision); Peter W. Adler, *Is Circumcision Legal?*, 16 RICH. J.L. & PUB. INT. 439, 442 (2013) (noting the shifting positions of the American Academy of Pediatrics and of “[s]ome foreign medical associations”).

65. See, e.g., Chris Silva, *To Circumcise or Not to Circumcise: A New Father's Question*, N.Y. TIMES (Mar. 1, 2016), [http://www.nytimes.com/2016/03/04/fashion/mens-style/circumcision-fatherhood-dilemma.html?\\_r=0](http://www.nytimes.com/2016/03/04/fashion/mens-style/circumcision-fatherhood-dilemma.html?_r=0) (last visited July 16, 2016) (examining current cultural norms around circumcision) (on file with the Washington and Lee Law Review); Jacobs & Arora, *supra* note 3, at 30 (noting that academic “[o]pponents of male circumcision have increasingly used human rights positions to articulate their viewpoint”); Adler, *supra* note 65, at 443 (examining ethics of non-therapeutic circumcisions); British Medical Association, *The Law and Ethics of Male Circumcision: Guidance for Doctors*, 30 J. MED. ETHICS 259, 259–62 (2004) (summarizing non-therapeutic circumcision practices).

religiously (as opposed to medically or culturally) motivated.<sup>66</sup> A discussion of this eventuality is beyond the scope of this Response. However, the Authors are certainly right that the discussion should include consideration of both the physical harm, pain, and injury at issue, and the extent to which these consequences are accommodated in other contexts so that any determination of circumcision's legal status is equitable.<sup>67</sup> To this

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66. This possibility seemed more realistic from 2007 to 2012, the period in which the American Academy of Pediatrics was reviewing the evidence in favor of and against circumcision, and in 2012, when it issued what some considered to be a "lukewarm" continued endorsement of the procedure. See American Academy of Pediatrics, Task Force on Circumcision, *Circumcision Policy Statement*, 130 PEDIATRICS 585, 585 (2012), available at <http://pediatrics.aappublications.org/content/130/3/585> ("Although health benefits are not great enough to recommend routine circumcision for all male newborns, the benefits of circumcision are sufficient to justify access to this procedure for families choosing it and to warrant third-party payment for circumcision of male newborns."); see also, e.g., Shawnee Barton, *The Circumcision Wars: What's a Parent to Do?*, ATLANTIC (July 29, 2013), <http://www.theatlantic.com/health/archive/2013/07/the-circumcision-wars-whats-a-parent-to-do/278155/> (last visited July 16, 2016) (describing the AAP's endorsement as "lukewarm") (on file with the Washington and Lee Law Review). It was in this period that anti-circumcision activists in California garnered support for ballot measures that would ban circumcisions in some localities. Jennifer Medina, *Efforts to Ban Circumcision Gain Traction in California*, N.Y. TIMES (June 4, 2011), [http://www.nytimes.com/2011/06/05/us/05circumcision.html?\\_r=0](http://www.nytimes.com/2011/06/05/us/05circumcision.html?_r=0) (last visited July 16, 2016) (on file with the Washington and Lee Law Review). The CDC's 2014 affirmation of the historical consensus, see *supra* note 63 (discussing this affirmation), together with the traditional deference the law gives to parents to make medical decisions for their children within the range of reasonableness, see *supra* note 35 (discussing Supreme Court precedents upholding the rights of parents to make reasonable medical decisions), makes it unlikely that any state in this period would seek to prohibit standard forms of the practice. See, e.g., *Gov. Brown Signs Bill to Prevent Male Circumcision Bans in California*, CBS SFBAYAREA (Oct. 2, 2011), <http://sanfrancisco.cbslocal.com/2011/10/02/governor-brown-signs-bill-to-prevent-male-circumcision-bans-in-california/> (last visited July 9, 2016) (reporting that the Governor's action was based in the state's authority to regulate medical practice and to protect religious liberty) (on file with the Washington and Lee Law Review).

67. Levin et al., *supra* note 3, at 966–67 (proposing the Authors' test). In their earlier work, Jacobs and Arora suggest that comparisons should be made to accommodations for commonly accepted physical risk-taking and bodily injury such as participation in contact sports, elective aesthetic surgery, growth hormone, and ear piercing. Jacobs & Arora, *supra* note 3, at 36. I agree with this analysis. See Coleman, *The Legal Ethics of Pediatric Research*, *supra* note 35, at 555 (describing religiously-motivated circumcision and these other practices as "de facto exceptions" to child maltreatment laws).

I would add consideration of parental motivation. Although this is not doctrinally required, as a normative matter, it would make sense to ensure that the objective of the procedure was in the best interests of the child.<sup>68</sup> Again, however, there is nothing about the legal story to date that is messy or unprincipled.<sup>69</sup>

Medical neglect law is more complicated and thus it is not so easily summarized. In this respect, it might be described as messier than vaccination and circumcision law. On the other hand, like these, it is also generally consistent and principled, including in the Authors' sense of the word. And with one exception,<sup>70</sup> its terms generally mirror the Authors' proposal for legal reform.

The federal government and all of the states include medical neglect in their definitions of neglect.<sup>71</sup> Medical neglect is typically defined as the failure to provide the child with necessary or adequate medical treatment, and as with all other forms of maltreatment, state intervention in the family to protect the child is authorized when the child has suffered or is at risk of suffering serious or life-threatening illness or injury as a result.<sup>72</sup>

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68. See Coleman, *The Legal Ethics of Pediatric Research*, *supra* note 35, at 545–52 (describing the boundaries of parents' consent authority, the best interests presumption, and the physical abuse standard).

69. The Authors flag "female genital alteration" as an issue in their introduction. Levin et al., *supra* note 3, at 916–17. They do not, however, discuss the relevant law, aspects of which could be considered messy and unprincipled. See generally Coleman, *The Seattle Compromise*, *supra* note 5 (discussing the practice and the legal reaction to it in the United States).

70. See *supra* notes 34–46 and accompanying text (discussing the Authors' argument that the Establishment Clause imposes an obligation on the government to act affirmatively to protect children from serious harm, and the expression of this argument in their proposed test).

71. See *Definitions of Abuse and Neglect in Federal Law*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/can/defining/federal/> (last visited June 24, 2016) (providing federal definitions of abuse and neglect) (on file with the Washington and Lee Law Review); CHILD WELFARE INFORMATION GATEWAY, DEFINITIONS OF ABUSE AND NEGLECT IN STATE LAW 2 (2014) [hereinafter ABUSE AND NEGLECT IN STATE LAW], <https://www.childwelfare.gov/pubPDFs/define.pdf#page=2&view=Types%20of%20abuse> (setting out the states' definitions of abuse and neglect).

72. See generally ABUSE AND NEGLECT IN STATE LAW, *supra* note 71 (providing state definitions of medical neglect). This standard for medical interventions in particular pre-dates CAPTA and is a significant feature of the traditional common law. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166–167 (1944) (noting that "[t]he right to practice religion freely does not include

Consistent with the applicable federal mandate, all jurisdictions require reporting, investigation, and intervention in the family to protect children who are believed to be medically neglected or at risk of such.<sup>73</sup>

Religious exemptions are commonly found in state statutes.<sup>74</sup> Unfortunately, the Authors mischaracterize the motivation underlying their adoption, and this causes them to misstate the scope of the exemptions' effect. Specifically, it was not that “[s]tate legislatures . . . treated [religiously-motivated medical neglect] with astonishing solicitude,”<sup>75</sup> but rather, as I note in the Introduction, that state legislatures were required by the federal government to include exemptions in their codes as a condition for receiving federal funds under the Child Prevention and Treatment Act of 1974 (CAPTA).<sup>76</sup> Although this requirement

liberty to expose . . . the child . . . to ill health or death”); *State v. Perricone*, 181 A.2d 751, 760 (N.J. 1962) (upholding the right of the state to appoint a guardian to authorize necessary blood transfusions for a child against the wishes of his Jehovah’s Witness parents); *cf. In re Green*, 292 A.2d 387, 390 (Penn. 1972) (summarizing the case law in the area and holding that the state’s interest does not override parental rights “when the child’s life is in no immediate danger”).

73. See ABUSE AND NEGLECT IN STATE LAW, *supra* note 71, at 3 (setting out reporting requirements).

74. See generally Religious Exemptions to Medical Treatment of Children in State Civil and Criminal Codes, CHILD, INC., [http://childrenshealthcare.org/?page\\_id=24#Exemptions](http://childrenshealthcare.org/?page_id=24#Exemptions) [hereinafter CHILD, INC.] (last visited June 24, 2016) (providing up-to-date information on applicable state and federal laws) (on file with the Washington and Lee Law Review).

75. Levin et al., *supra* note 3, at 994 (noting also that the wide adoption of exemptions signifies that “virtually every state legislature has decided to accept greater risk to the health and life of children of religious parents”).

76. See *supra* note 1 and accompanying text (introducing the federal mandate). The Child Prevention and Treatment Act of 1974 (CAPTA) requires states receiving federal funds to protect children from maltreatment including from neglect. Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C. §§ 5101–5119c (2003)). In 1975, the Department of Health, Education, and Welfare (HEW) issued a regulation further conditioning the receipt of federal funds on the adoption of a religious exemption providing as follows:

A parent or guardian legitimately practicing his religious beliefs who thereby does not provide specific medical treatment for a child for that reason alone shall not be considered a negligent parent or guardian; however, such an exception shall not preclude a court from ordering that medical services be provided to the child where his health requires it.

45 C.F.R. § 1340.1-2(b)(1) (1975). This mandate was rescinded in 1983. Child Abuse and Neglect Prevention Treatment Program, Final Rule, 48 Fed. Reg.

was withdrawn in 1983,<sup>77</sup> only a few states have gone through the reverse legislative process necessary to get their exemptions off the books. The states that retain them apparently do so for reasons ranging from an affirmative ideological or political commitment to the exemptions' terms<sup>78</sup>—which is consistent with the Authors' original suggestion—to inertia in the wake of both legislative and judicial qualifications and nullifications—which is not.<sup>79</sup>

Where exemptions exist, they are contained in the civil code, the criminal code, or both; and, as the Authors note, they typically provide that parents cannot be held responsible for neglect solely on the basis that they have chosen to treat their children's injuries and illnesses with prayer or other form of spiritual treatment.<sup>80</sup> Consistent with the fact that most exemptions were enacted pursuant to federal mandate and not solicitude at the local level, and with the fact that the mandate

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3698–3704 (1983); *see also* Swan, *supra* note 1, at 58–61 (summarizing the history of the federal mandate); Maleka, *supra* note 1, at 246 (noting that most of the exemptions were enacted in response to [HEW] regulations"). Professor Levin recognizes this point in his earlier work, but then (as the Authors do here) he describes the states' reaction as "astonishing solicitude . . . toward religious groups and individuals" rather than as the expected response to a federal mandate. Levin, *Rethinking Religious Minorities' Political Power*, *supra* note 3, at 1654. More generally, Levin makes a good case in that earlier work that the majoritarian branches of government have been more solicitous in this area than the courts; however, as I describe here, there is also a lot of evidence to the contrary that complicates his story. *See* 45 C.F.R. § 1340.1-2(b)(1) (providing the exception in the federal regulation); *infra* notes 82–83 and accompanying text (noting the exceptions to the exemptions in related state statutes).

77. *See generally* HHS *Historical Highlights*, U.S. DEP'T OF HEALTH AND HUM. SERVS. (Aug. 22, 2014), <http://www.hhs.gov/about/historical-highlights/index.html> (last visited July 9, 2016) (noting this milestone) (on file with the Washington and Lee Law Review).

78. A few states fall into this category. *See* CHILD, INC., *supra* note 74 (noting that Arkansas, Idaho, Iowa, Ohio, and West Virginia stand out in this respect).

79. Most states fall into this category. *See infra* note 82–83 and accompanying text (surveying the states and their exceptions to the exemptions). In between are states where political battles have been fought over the repeal of the exemptions. *See* PETERS, *supra* note 2, at 15–18 (describing these battles).

80. *See supra* note 76 (setting out the relevant part of the regulation); Levin *et al.*, *supra* note 3, at 79 (describing the standard exemption); *see also* Swan, *supra* note 1, at 80–82 (providing examples of different state statutes, including their locations in the code and limitations).

itself included the condition that the exemptions “shall not preclude a court from ordering that medical services be provided to the child where his health requires it,”<sup>81</sup> they typically do not prevent Child Protective Services (CPS) and the courts from acting to protect children who are believed to have been medically neglected or who are at risk of such, especially when the children’s circumstances are emergent and life threatening.<sup>82</sup> In some states this important qualification is set out as it was in the federal regulation: as an exception to the exemption in the code itself.<sup>83</sup> In others it has been read in by courts interpreting the

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81. 45 C.F.R. § 1340.1-2(b)(1) (1975).

82. Importantly, they also typically do not insulate others who are not parents from their legal obligations to report and investigate suspected medical neglect. *See, e.g.*, MINN. STAT. § 626.556 (2015) (providing that the exemption does not alter mandated reporters’—including parents’—duty to report “if a lack of medical care may cause serious danger to the child’s health”); MO. REV. STAT. § 210.115 (2015) (providing that exemption does not alter the state’s authority to “accept reports concerning such a child and may subsequently investigate or conduct a family assessment as a result of that report”); *see also generally* ABUSE AND NEGLECT IN STATE LAW, *supra* note 71, at 4 (noting that although a majority of state statutes include a religious exemption in their reporting requirement, the provisions’ caveats and conditions mean that, in effect, fewer than a majority of states absolve mandated reporters of their obligations in this context).

83. *See, e.g.*, ALA. CODE § 26-14-7.2 (2015) (providing that the exemption “shall not preclude a court from ordering that medical services be provided to the child when the child’s health requires it”); COLO. REV. STAT. § 19-3-103 (2015) (“[T]he religious rights of a parent, guardian, or legal custodian shall not limit access of a child to medical care in a life threatening situation or when the condition will result in serious disability”); FLA. STAT. ANN. § 39.01 (2015) (“[The] exception does not: 1. Eliminate the requirement that such a case be reported to the department; 2. Prevent the department from investigating such a case; or 3. Preclude a court from ordering, when the health of the child requires it . . . .”); GA. CODE ANN. § 15-11-107.R49-5-180 (2015) (providing the same language as Colorado’s statute); IOWA CODE § 232.68 (2015) (providing the same language as Alabama’s statute); KY. REV. STAT. ANN. § 600.020 (providing that the exemption “shall not preclude a court from ordering necessary medical services for a child”); LA. CHILD. CODE ANN. ART. § 603 (2014) (providing that the exemption does not “prohibit the court from ordering medical services for the child when there is substantial risk of harm to the child’s health or welfare”); MICH. COMP. LAWS § 722.634 (2015) (providing that the exemption “shall not preclude a court from ordering the provision of medical services or nonmedical remedial services recognized by state law to a child where the child’s health requires it nor does it abrogate the responsibility of a person required to report child abuse or neglect”); MINN. STAT. ANN. § 626.556 (2016) (providing that, notwithstanding exemption, “if lack of medical care may result in serious danger to the child’s health, the local welfare agency may ensure that necessary

exemption's "solely" or "that reason alone" language,<sup>84</sup> or results from judicial decisions finding the exemptions inapplicable or

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medical services are provided to the child"); MO. REV. STAT. § 210.115 (2015) (providing that the exemption does not alter the state's authority to "accept reports concerning such a child and may subsequently investigate or conduct a family assessment as a result of that report" or "to ensure that medical services are provided to the child when the child's health requires it"); MONT. CODE ANN. § 41-3-102 (2015) (providing that the exemption "may not be construed to limit the administrative or judicial authority of the state to ensure that medical care is provided to the child when there is imminent substantial risk of serious harm to the child"); OHIO REV. CODE ANN. § 2151.03 (2014)

providing that the exemption "does not abrogate or limit any person's responsibility . . . to report . . . child neglect that is known or reasonably suspected or believed to have occurred, and children who are known to face or are reasonably suspected or believed to be facing a threat of suffering . . . neglect and does not preclude any exercise of the authority of the state, any political subdivision, or any court to ensure that medical or surgical care or treatment is provided to a child when the child's health requires the provision of medical or surgical care or treatment"

OKLA. STAT. ANN. 10A § 1-1-105 (2016) (providing that the exemption does not "prevent a court from immediately assuming custody of a child and ordering whatever action may be necessary, including medical treatment, to protect the child's health or welfare"); 23 PA. CONS. STAT. ANN. § 6304 (2014) (providing that, where exemption applies, the "county agency shall closely monitor the child and the child's family and shall seek court-ordered medical intervention when the lack of medical or surgical care threatens the child's life or long-term health"); R.I. GEN. LAWS ANN. § 11-9-5 (2015) (providing that the exemption does not "preclude the court from ordering medical services or nonmedical services recognized by the laws of this state to be provided to the child where his or her health requires it"); WIS. STAT. ANN. § 48.981 (2015) (providing the same language as Alabama's exemption).

84. *See, e.g.*, Walker v. Superior Court, 763 P.2d 852, 852 (Cal. 1988) (holding that "child welfare statutes providing that children receiving treatment by prayer shall not 'for that reason alone' be considered abused or neglected did not evince legislative sanction for prayer treatment of children in life-threatening circumstances"); *In re Eric B.*, 235 Cal. Rptr. 22, 27-28 (Cal. App. 3d 1987), which held that "[t]he purpose of [the exemption] appears to be rather limited," that "[i]t simply identifies one factor to be considered by the juvenile court," and that

[i]t clearly does not preclude the court, exercising its 'very extensive discretion in determining what will be in the best interests of a child' from concluding that spiritual treatment alone is not sufficient to arrest a danger which otherwise requires that dependency be declared in order that the minor can receive conventional medical treatment deemed more likely to succeed.

*Id.*; People in Interest of D.L.E., 645 P.2d 271, 274 (Colo. 1982) ("[T]he meaning of the statutory language, 'for that reason alone,' is quite clear. It allows a finding of dependency and neglect for other reasons,' such as where the child's

invalid on other grounds.<sup>85</sup> Either way, the effect is that the longstanding common law rule typically continues to operate: even in jurisdictions with exemptions, the state still can intervene in the family to protect children from medical neglect that causes or risks serious illness or injury.<sup>86</sup>

To be clear, this does not mean that accommodations are ineffective or innocuous. Many children have died or suffered serious injury as a result of religiously-motivated medical neglect.<sup>87</sup> The law is not the direct cause of these harms, of course; but it has surely served and surely continues to serve a powerful expressive function that lends indirect support to religiously-motivated parents' practices, even when these formally cross the line from legal to illegal.

In general, this is because parents' Fourteenth Amendment liberty, which is already quite significant, is enhanced when it is religiously motivated.<sup>88</sup> This is simultaneously a reflection and

life is in imminent danger despite any treatment by spiritual means.”)

85. See, e.g., *Newmark v. Williams*, 588 A.2d 1108, 1114 (Del. 1991) (applying the best interests balancing test to determine whether the state could force Christian Scientist parents to accept medical treatment for a child with cancer because of concerns that the statutory exemption violated the Establishment Clause).

86. See *supra* note 72 (discussing the states' ability to intervene in exemption cases). For example, hospitals still routinely act to assure that Jehovah's Witness children receive life-saving blood transfusions. See, e.g., *Niebla v. San Diego*, 967 F.2d 589 (9th Cir. 1992) (rejecting the argument that giving a child a necessary blood transfusion despite the parents' objection violates the parents' constitutional rights); *In re Elisha McCauley*, 565 N.E.2d 411 (Mass. 1991) (same); *J.V. v. State*, 516 So.2d 1133 (Fla. App. 1987) (same). And CPS still routinely acts on reports that Christian Scientist children and children of other religious minorities are not receiving life-saving medical care. See, e.g., *In re Eric B.*, 235 Cal. Rptr. at 23 (rejecting argument that requiring parents to follow physician's cancer treatment recommendations violated parents' religious freedom); *In re Pamela Hamilton*, 657 S.W.2d 425 (Tenn. 1983) (holding that child's right to cancer treatment outweighs father's free exercise right); see also *People in Interest of D. L. E.*, 645 P.2d 271 (Colo. 1982) (holding that state can intervene to protect a child whose "life is in imminent danger" as a result of parent's refusal to provide conventional medical treatment on religious grounds).

87. See PETERS, *supra* note 2, at 11–14 (discussing this history).

88. See *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972) (noting this point in the context of Amish parents' First and Fourteenth Amendment claims); *Prince v. Massachusetts*, 321 U.S. 158, 164–65 (1945) (noting this point in the context of a Jehovah's Witness guardian's First and Fourteenth Amendment claims).

reinforcement of important political and cultural norms about parental autonomy, and in particular about the relative rights of religiously- and other-motivated parents to raise their children as they see fit without state intervention. As a result, many mandated reporters, CPS, and courts exercising lawful discretion are likely to be more sensitive about whether and how to intrude in the family to protect a child who is believed to have suffered or to be at risk of suffering religiously-motivated medical neglect. Sometimes not enough may be done to protect children in these circumstances because—even as it draws a formal line at serious and certainly life-threatening neglect—the law sends a particularly strong message about the sanctity of religious families.

Where they exist, statutory exemptions both reinforce this general message and provide important specificity which is missing from the definitive source: they signal that even in the absence of a Supreme Court free exercise decision on point, at least statutorily parental liberty to raise one's child in one's religion does include the right to choose spiritual treatment for illness and injury.<sup>89</sup> Notwithstanding the limitations built into this right,<sup>90</sup> some prosecutors, judges, and juries have had difficulty finding parents criminally blameworthy or subjecting them to incarceration for the harm that their religious (objectively good) intentions caused their children.<sup>91</sup> Although state actors do not typically hesitate to intervene in a family to protect an at-risk child and to supervise the family following a child's death in this context,<sup>92</sup> to the extent that criminal

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89. As the Authors argue, this is an example of “[t]he majoritarian branches of government . . . go[ing] far beyond what the Supreme Court has required in accommodating religious freedom.” Levin et al., *supra* note 3, at 940; see also Levin, *Rethinking Religious Minorities' Political Power*, *supra* note 3, at 1654 (“These accommodations are wholly the creature of statute. In neither the vaccination nor the medical treatment context have the federal courts interpreted the Constitution to require such accommodations . . .”).

90. See *supra* notes 83–84 and accompanying text (discussing and citing to exceptions to the exemptions).

91. See, e.g., PETERS, *supra* note 2, at 3–14 (describing the facts and proceedings in the *Heilmans* case as an illustration of this phenomenon and detailing the difficulties inherent in prosecuting these cases generally).

92. See, e.g., *id.* at 8 (providing a poignant illustration of this tendency).

sanctions express the community's special moral outrage, they may be missing as a result the exemptions.<sup>93</sup>

It is not clear that the Authors would have it differently. They share the law's commitments to accommodations so long as the state lacks evidence that a child is suffering or at risk of suffering serious harm, and to intervention in the family to protect the child where such evidence exists. And although they appear concerned that parents who have avoided discovery until it is too late may not always be successfully prosecuted or incarcerated, their proposal for reform focuses—as current law does—on protecting children not punishing parents. There are excellent arguments on both sides of this issue,<sup>94</sup> but to me, at least, this focus makes sense. Punishing parents may have some indirect and incremental effect on child protection.<sup>95</sup> However, the prosecutions are complicated and also politically fraught,<sup>96</sup> and they risk different harm to the family's remaining children, many if not most of whom are likely to be better off if their parents are supervised but not in jail.<sup>97</sup> Finally, although ongoing supervision is not as attention-grabbing as a prosecution, this strategy is not without its own expressive power.

#### IV. Conclusion

In the end, the Authors suggest that their approach to medical neglect cases may provide a useful template for resolving questions about the propriety of accommodations in other contexts. For example, they suggest that it might apply to “the debate over whether sexual orientation non-discrimination laws

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93. *See id.* at 14 (discussing advocates Rita Swan and Seth Asser's “insist[ence] that dozens of lives would be saved every year if local authorities zealously and consistently enforced criminal neglect, manslaughter, and criminally negligent homicide statutes against spiritual healers”).

94. *See id.*

95. *See id.*

96. *See id.* at 14–18.

97. *See generally* Michael Wald, *Intervention on Behalf of “Neglected” Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975) (arguing that state intervention on behalf of maltreated children also causes harm that must be balanced against their parents' actions as decisions are made about their continuing care).

should accommodate religious dissent.”<sup>98</sup> Although they do not develop this particular application, they are generally thoughtful in their consideration of both the merits and limitations of future extrapolations. To these careful considerations I suggest the following additional caveat.

The Authors’ template is based on a premise, which holds that “a religious practice that imposes significant costs or harms on participants in the practice or on third parties should not be tolerated, but that in the absence of such harm, we should be entirely accommodating of religious minorities’ deviations from general social and legal expectations.”<sup>99</sup> They call this “American baseline accommodationism,” and they characterize it as “noncontroversial.”<sup>100</sup> As applied to medical neglect cases, this baseline premise results in “a default rule that religious practices should be respected unless they unduly interfere with the real and measurable interests of children within the religion and others outside the religious group.”<sup>101</sup> As I have described, medical neglect law generally reflects the Authors’ proposed rule in these respects.

The Authors’ take on what medical neglect law should be, and why, makes sense *as a matter of principle* because the parties at issue are parents who are presumed to be acting in their children’s best interests, their children who are viewed in law as being one with their parents, and the state which has authority to intervene in the parent-child relationship only when it appears that the best interests presumption may be rebutted. This same take makes a lot less sense—indeed, I would argue none at all—in circumstances where there is no similar operative presumption; this includes situations where third parties and constitutionally significant harms are at issue.

Thus, although the Authors are correct that certain measures featured in their test—including direct effects, indirect effects, and magnitude—are applicable beyond medical neglect, *as a matter of different principle* the test used to determine when

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98. Levin et al., *supra* note 3, at 913; *see also id.* at 1007 (discussing the harms of sexual orientation non-discrimination laws).

99. *Id.* at 947.

100. *Id.*

101. *Id.* at 966.

the best interests presumption is overcome so that the state can recognize the child as having separate, protectable interests should not be the test used to determine when the state can recognize and protect the constitutional rights of autonomous individuals—such as the religiously-motivated and same-sex couples—who stand as equals in the first instance. Children may be “the Achilles heel of liberalism,”<sup>102</sup> but the law otherwise treats as equal all those who wish “to marry, establish a home and bring up children, to worship God according to the dictates of [their] own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”<sup>103</sup> Like the Constitution, real American baseline accommodationism does not require the law to privilege the individual who wishes “to worship God according to the dictates of his own conscience” and to discriminate in his favor (via presumptions or otherwise) against the individual who wishes “to marry, establish a home and bring up children.” What this means is that to remain noncontroversial, baseline accommodationism has to define its tipping points—“significant costs or harms” and “undue interference”—automatically to include competing constitutional rights, or it has to be revised consistent with the majoritarian sense that “the state’s interest . . . in prohibiting . . . discrimination overrides the general commitment to accommodationism.”<sup>104</sup>

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102. Coleman, *Storming the Castle*, *supra* note 41, at 421.

103. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *see also Obergefell v. Hodges*, 135 S.Ct. 2584, 2593, 2597–99 (2015) (holding that state laws banning same-sex marriage violate the Equal Protection and Due Process Clauses).

104. Levin et al., *supra* note 3, at 944.