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Ronald J. Colombo

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## WESTERN NEW ENGLAND LAW REVIEW

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WHEN EXEMPTIONS DISCRIMINATE: UNLAWFULLY  
NARROW RELIGIOUS EXEMPTIONS TO VACCINATION  
MANDATES BY PRIVATE COLLEGES AND UNIVERSITIES

RONALD J. COLOMBO\*

*Numerous colleges and universities have imposed COVID-19 vaccination mandates upon their students. Most of these mandates also include language purporting to recognize medical and religious exemptions. With regard to religious exemptions, some are unjustly discriminatory. Most notably, some give preference to students who are members of organized religions over students who are not. And even facially neutral exemptions can be administered in an unjustly discriminatory way by, for example, giving preference to one set of religious denominations over another, or by engaging in “religious profiling” (whereby students of a particular denomination are held completely beholden to the beliefs of that denomination, as ascertained by the school’s administration, despite their own sincere and genuine religious beliefs to the contrary).*

*Students attending public colleges and universities have federal,*

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\* Professor of Law, Maurice A. Deane School of Law, Hofstra University. Special thanks to my research assistant, Athina Giovalakis, for her incredible assistance with this project, and to Professors Julian Velasco and Gary Kalbaugh for their insightful comments and suggestions on a previous draft. I am also indebted to Senior Articles Editor, Victoria Thomas, and her team at the *Western New England Law Review* for their diligent efforts in finalizing this project, and to my daughters, Isabella and Christina Colombo, for their proofreading and editorial assistance. I would also like to acknowledge those students who, upon finding an earlier draft of this Article on SSRN, reached out to share their stories and plights with me. The fidelity they have shown to their deeply held religious beliefs in the face of tremendous pressure and at the cost of significant sacrifice has been profoundly inspiring. Finally, in the interest of full disclosure, I elected to write this paper not only because of my scholarly regard for religion and issues of religious liberty dating back to 1998, see Ronald J. Colombo, Note, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y.U. L. REV. 225 (1998) [hereinafter *Forgive Us Our Sins*], but also because of my personal involvement with the issues presented herein.

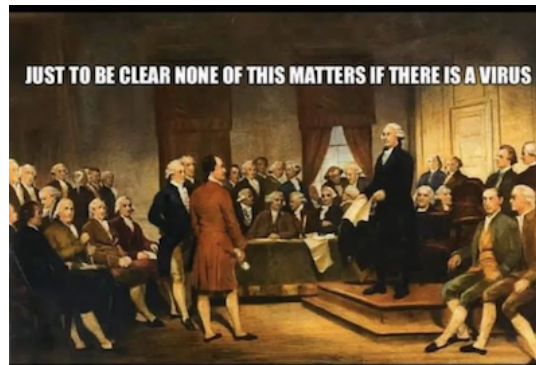
*constitutional, and statutory protections against such discrimination; students attending private institutions do not. Rather, students attending private colleges and universities are at the mercy of state and local law and are afforded only those protections against discrimination recognized by the jurisdiction in which their institution is located.*

*State antidiscrimination law is unlikely to entitle students attending a private college or university the right to a religious exemption from a COVID-19 vaccination mandate. But to the extent that state law generally prohibits discrimination on the basis of religion, a religious exemption to a private college or university vaccination mandate must be religiously neutral and must not discriminate against students whose opposition to the vaccine stems from divergent religious beliefs.*

*Although the research and insights presented herein should be applicable, in whole or in part, to any state with antidiscrimination laws protecting college students, this Article's focus will be on New York's Human Rights Law. It will demonstrate the ways in which religious exemptions can and do violate the law by illegally discriminating against students on the basis of religion. It will examine one particularly ill-advised and problematic policy (Hofstra University's) and also showcase a policy that comports with better practices (Syracuse University's).*

#### INTRODUCTION

An internet meme that made the rounds during the height of the COVID-19 pandemic featured the familiar painting “Washington as Statesman at the Constitutional Convention” by Junius Brutus Stearns with the words: “Just to be clear none of this matters if there is a virus.”<sup>1</sup>



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1. COVID-19 Meme Version of Junius Brutus Stearns's Painting “Washington as Statesman at the Constitutional Convention” (illustration), in Jon Caldara, *Caldara: Don't Forfeit Freedoms to Fear*, COMPLETE COLO. (Dec. 23, 2020),

The meme derides the dramatic curtailment of the individual rights and liberties of Americans throughout the COVID-19 pandemic, ranging from the shuttering of houses of worship,<sup>2</sup> to limitations on the number of individuals permissible in one's own home,<sup>3</sup> to the requirement to wear masks in public.<sup>4</sup>

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<https://pagetwo.completecolorado.com/2020/12/23/caldara-dont-forfeit-freedoms-to-fear/> [<https://perma.cc/VV3Q-C34N>]. For the original painting, and some background information relating thereto, see *George Washington Series by Junius Brutus Stearns*, JOY OF MUSEUMS VIRTUAL TOURS, <https://joyofmuseums.com/museums/united-states-of-america/richmond-virginia-museums/virginia-museum-of-fine-arts/washington-series-by-junius-brutus-stearns> [<https://perma.cc/6YP4-AL2N>].

2. See generally *Considerations for Communities of Faith*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 19, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/faith-based.html> [<https://perma.cc/Q5FF-JG85>]; VALERIE C. BRANNON, CONG. RSCH. SERV., LSB10450, UPDATE: BANNING RELIGIOUS ASSEMBLIES TO STOP THE SPREAD OF COVID-19 (2020), <https://crsreports.congress.gov/product/pdf/LSB/LSB10450> [<https://perma.cc/NB9D-QWVJ>]; Michael Gryboski, *1 in 5 Churches Facing Permanent Closure Within 18 Months Due to COVID-19 Shutdowns: Barna Pres.*, CHRISTIAN POST (Aug. 26, 2020), <https://www.christianpost.com/news/1-in-5-churches-face-closure-within-18-months-due-to-covid-19-shutdowns-barna-president.html> [<https://perma.cc/BP2X-CDCC>]. See also *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (mem.) (denying petitioners' application to enjoin Governor Steve Sisolak from enforcing an executive order limiting house of worship capacity); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (enjoining Governor Andrew Cuomo from enforcing his executive order's ten- and twenty-five-person occupancy limits on the Diocese); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (enjoining Governor Gavin Newsom from enforcing California's total ban on indoor religious worship); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (granting injunctive relief from a California regulation that had the effect of restricting at-home Bible studies and prayer meetings by limiting all gatherings in private homes to no more than three households at a time).

3. See generally *Guidance for Organizing Large Events and Gatherings*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 20, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html> [<https://perma.cc/YE7G-SCST>]; *Small and Large Gatherings*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 21, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/holidays/small-gatherings.html> [<https://perma.cc/G8NK-9BCF>]; *Restrictions on Public Gatherings in the COVID-19 Pandemic*, OUR WORLD IN DATA (Sept. 19, 2020), <https://ourworldindata.org/grapher/public-gathering-rules-covid?time=2020-09-19> [<https://perma.cc/2DL2-P9EQ>]; *2020 COVID-19 State Restrictions, Re-Openings, & Mask Requirements*, NAT'L ACAD. FOR STATE HEALTH POL'Y, <https://www.nashp.org/2020-state-reopening-chart/> [<https://perma.cc/VU46-V9N2>]; Elise Schoening & Lizzie Wilcox, *State-by-State Status Updates on Gathering Restrictions*, NORTHSTAR MEETINGS GRP. (Oct. 20, 2021), <https://www.northstarmeetinggroup.com/News/Industry/Coronavirus-states-cities-reopening-COVID-19-new-cases> [<https://perma.cc/R5NY-XA33>]. See also Tommy Beer, *Supreme Court Rules California Must Allow In-Home Religious Gatherings*, FORBES (Apr. 10, 2021, 10:53 AM), <https://www.forbes.com/sites/tommybeer/2021/04/10/supreme-court-rules-california-must-allow-in-home-religious-gatherings/> [<https://perma.cc/4WHZ-8S5Q>] (reporting upon the U.S. Supreme Court's decision striking down California's restrictions on in-home religious gatherings).

4. See generally *Use Masks to Slow the Spread of COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 12, 2021), <https://www.cdc.gov/coronavirus/2019->

Such responses to a crisis are not without precedent. President Lincoln suspended the Writ of Habeas Corpus during the Civil War,<sup>5</sup> the Great Depression prompted the imposition of groundbreaking regulations upon business and commerce,<sup>6</sup> World War II saw the construction of detention facilities for Japanese Americans,<sup>7</sup> the Red Scare gave rise to McCarthyism,<sup>8</sup> and the 9/11 attacks introduced America to waterboarding,<sup>9</sup> the Patriot Act,<sup>10</sup> and the Guantanamo Bay prison.<sup>11</sup>

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ncov/prevent-getting-sick/diy-cloth-face-coverings.html [https://perma.cc/EZ75-8W6]; *Guidance for Wearing Masks*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 19, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html> [https://perma.cc/557B-73D8]; Marie Fazio, *How Mask Guidelines Have Evolved*, N.Y. TIMES (July 9, 2021), <https://www.nytimes.com/2021/04/27/science/face-mask-guidelines-timeline.html> [https://perma.cc/5LNU-D9WU]; Kaia Hubbard, *These States Have COVID-19 Mask Mandates*, U.S. NEWS & WORLD REP. (Sept. 12, 2021, 10:29 AM), <https://www.usnews.com/news/best-states/articles/these-are-the-states-with-mask-mandates> [https://perma.cc/2PMQ-32F9].

5. See Scott Bomboy, *Lincoln and Taney's Great Writ Showdown*, NAT'L CONST. CTR.: CONST. DAILY. (May 28, 2021), <https://constitutioncenter.org/blog/lincoln-and-taneys-great-writ-showdown> [https://perma.cc/5BYA-FBZN].

6. See generally Gary Richardson, *The Great Depression*, FED. RSRV. HIST. (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/great-depression> [https://perma.cc/5AU5-TFY7]; *Study Aid: New Deal Legislation*, GILDER LEHRMAN INST. OF AM. HIST., <https://www.gilderlehrman.org/history-resources/teaching-resource/study-aid-new-deal-legislation> [https://perma.cc/52WX-6S4K]. See also Stephen Greene, *The Emergency Banking Act of 1933*, FED. RSRV. HIST. (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/emergency-banking-act-of-1933> [https://perma.cc/WPP6-EDFE]; Julia Maues, *Banking Act of 1933 (Glass-Steagall)*, FED. RSRV. HIST. (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/glass-steagall-act> [https://perma.cc/G2MT-JQGS]; Gary Richardson et al., *Gold Reserve Act of 1934*, FED. RSRV. HIST. (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/gold-reserve-act> [https://perma.cc/957K-MPDM]; Gary Richardson et al., *Banking Act of 1935*, FED. RSRV. HIST. (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/banking-act-of-1935> [https://perma.cc/YQ73-849Q].

7. See *Japanese-American Internment During World War II*, NAT'L ARCHIVES (July 8, 2021), <https://www.archives.gov/education/lessons/japanese-relocation> [https://perma.cc/QS9K-47AX].

8. See *McCarthyism / the "Red Scare,"* EISENHOWER LIBR., <https://www.eisenhowerlibrary.gov/research/online-documents/mccarthyism-red-scare> [https://perma.cc/8QK2-LF9B].

9. See Elisa Epstein, *CIA Contractor Details Torture of 9/11 Suspects*, HUM. RTS. WATCH (Jan. 27, 2020, 6:26 AM), <https://www.hrw.org/news/2020/01/27/cia-contractor-details-torture-9/11-suspects> [https://perma.cc/7LSZ-KWR3].

10. See *Uniting and Strengthening America by Providing Appropriate Tools to Restrict, Intercept and Obstruct Terrorism (Patriot) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended at 18 U.S.C. §§ 1, 101-06, 201-16).

11. See Jeannette L. Nolen, *Guantánamo Bay Detention Camp*, BRITANNICA (Mar. 13, 2020), <https://www.britannica.com/topic/Guantanamo-Bay-detention-camp> [https://perma.cc/SFQ7-F64F]. See generally *The Post-9/11 Era (Sept. 2001–Present): Legislative Materials*, LAWFARE, <https://www.lawfareblog.com/post-911-era-september-2001-present-legislative-materials> [https://perma.cc/5WG2-DJYD].

In time, some of these actions, including ones taken during the current pandemic, were declared unconstitutional.<sup>12</sup> But not all were undertaken by public authorities. The McCarthy Era was, for example, characterized by private blacklists as much as by anything else.<sup>13</sup> The aftermath of 9/11 included ugly acts of private discrimination against Muslim Americans.<sup>14</sup> Victims of these nongovernmental harms are not protected by the U.S. Constitution, but rather must look for redress elsewhere.<sup>15</sup>

This Article examines one particular category of victims of private misconduct during the continuing COVID-19 pandemic: religious students attending private universities and colleges. A large number of

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12. See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating the National Industrial Recovery Act as an unconstitutional designation of legislative authority); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (declaring the Frazier-Lemke Farm Bankruptcy Act to be in violation of the Fifth Amendment); *United States v. Butler*, 297 U.S. 1 (1936) (holding that the Agricultural Adjustment Act was an unconstitutional exercise of Congress's taxing and spending powers); *R.R. Ret. Board v. Alton R.R.*, 295 U.S. 330 (1935) (invalidating the Railroad Retirement Act of 1934 because of due process violations and because it was not a regulation of interstate commerce); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (holding that the Bituminous Coal Conservation Act of 1935 exceeded the bounds of Congress's Commerce Clause power); *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that the federal habeas statute applied extraterritorially and was not dependent upon U.S. citizenship and concluding that detainees at Guantanamo were "entitled to invoke the federal courts' authority under [28 U.S.C.] § 2241"); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that Hamdi, a U.S. citizen being detained indefinitely at Guantanamo as an unlawful enemy combatant, was entitled to some due process guarantees); *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that Guantanamo prisoners had a constitutional right to the writ of habeas corpus and that the Military Commissions Act of 2006 was an unconstitutional suspension of that right); *Roman Cath. Diocese of Brooklyn, N.Y. v. Cuomo*, 141 S. Ct. 63 (2020) (enjoining Governor Andrew Cuomo from enforcing his executive order's ten- and twenty-five-person occupancy limits on the Diocese); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (enjoining California Governor Gavin Newsom from enforcing California's total ban on indoor religious worship); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (granting injunctive relief against a California regulation that had the effect of restricting at-home Bible studies and prayer meetings by limiting all gatherings in private homes to no more than three households at a time).

13. See generally ELLEN SCHRECKER, *Blacklists and Other Economic Sanctions, in THE AGE OF MCCARTHYISM: A BRIEF HIST. WITH DOCUMENTS* (St. Martin's Press 1994); Allison Perlman, *Hollywood Blacklist*, BRITANNICA (Jan. 28, 2020), <https://www.britannica.com/topic/Hollywood-blacklist> [<https://perma.cc/PV5Q-94MS>].

14. See Lenna Jawdat, *Experiences of Discrimination Among Arab Americans and Muslim Americans Post-9/11 Attacks* 3–6 (2012) (M.A. thesis, Smith College) <https://scholarworks.smith.edu/cgi/viewcontent.cgi?article=1973&context=theses> [<https://perma.cc/L9T9-KRRH>]; Rebecca A. Clay, *Muslims in America, Post 9/11*, AM. PSYCH. ASS'N (Sept. 2011), <https://www.apa.org/monitor/2011/09/Muslims> [<https://perma.cc/5JYX-CKRX>].

15. For a brief discussion of when private action is deemed "government action," see *infra* text accompanying notes 25–28. For a more thorough analysis of the state action doctrine see Ronald J. Colombo, *Corporate Entanglement with Religion and the Suppression of Expression*, 45 SEATTLE U. L. REV. (forthcoming 2022) [hereinafter *Corporate Entanglement with Religion*], <https://ssrn.com/abstract=3867663> [<https://perma.cc/K6BX-D7K5>].

private universities and colleges adopted COVID-19 vaccination mandates as a condition of attendance<sup>16</sup>—mandates that a significant number of students cannot comply with because of their sincerely held religious beliefs against vaccinations in general or the COVID-19 vaccines in particular. Lacking recourse to either the U.S. Constitution or federal civil rights legislation, aggrieved students are left at the mercy of whatever rights are afforded to them under state law. For over 500,000 private college and university students,<sup>17</sup> this means New York State law, the focus of this Article.<sup>18</sup>

New York law does not apparently require private colleges and universities to promulgate religious exemptions to vaccination mandates, but it does prohibit such institutions from discriminating against its students on the basis of religion.<sup>19</sup> Consequently, if a private, higher educational institution adopts a religious exemption to a vaccination mandate, that exemption must be nondiscriminatory—both facially and as applied. Although this conclusion represents a rather natural, logical application of New York’s Human Rights Law,<sup>20</sup> this precise issue seems to be a matter of first impression in New York. Perhaps this explains why numerous New York private colleges and universities have articulated religious exemption policies that by their very terms violate New York law by discriminating against students on the basis of religion.<sup>21</sup>

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16. See Chris Burt, *State-By-State Look at Colleges Requiring COVID-19 Vaccines: The Complete List of Higher Education Institutions Mandating Vaccination for the Fall 2021-22 Semester*, UNIV. BUS. (Oct. 12, 2021), <https://universitybusiness.com/state-by-state-look-at-colleges-requiring-vaccines/> [<https://perma.cc/TQ9G-J2DL>].

17. See *NY State Higher Education Enrollment (2019–20)*, N.Y. STATE EDUC. DEP’T, <https://data.nysed.gov/highered-enrollment.php> [<https://perma.cc/Q9U9-U7Y7>].

18. Although this Article focuses on New York’s antidiscrimination law, its insights should be applicable, in whole or in part, to the law of any state that prohibits discrimination against college and university students on the basis of religion. See CAL. EDUC. CODE § 220 (Deering 2021); COLO. REV. STAT. § 24-34-601 (Deering 2021); 14-200 DEL. ADMIN. CODE § 225 (2021) (providing that no person in Delaware be excluded, or denied benefits, of any program or activity receiving approval or financial assistance from or through the State of Delaware on the basis of religion); D.C. CODE § 2-1402.41 (2021); IDAHO CODE § 67-5909 (2021); IOWA CODE § 216.9 (LexisNexis 2021); ME. REV. STAT. ANN. tit. 5, § 4601-02 (West 2021); MICH. COMP. LAWS SERV. § 37.2402 (LexisNexis 2021); MINN. STAT. ANN. § 363A.13 (West 2021); MONT. CODE ANN. § 49-2-307 (2021); N.Y. EXEC. LAW § 290 (Consol. 2021); OR. REV. STAT. § 659.850 (2021); 24 PA. CONS. STAT. §§ 5003–5004 (2021); S.C. CODE ANN. § 59-1-435 (2021); S.D. CODIFIED LAWS § 20-13-22 (2021); see also OKLA. STAT. tit. 25, §§ 1401–1402 (2021) (prohibiting religious discrimination in a place of public accommodation); VA. CODE ANN. § 2.2-3904 (2021) (prohibiting religious discrimination in a place of public accommodation).

19. N.Y. EXEC. LAW § 296(4) (McKinney 2018).

20. See EXEC. §§ 290–301.

21. See, e.g., HOFSTRA UNIV., REQUEST AND CERTIFICATION—RELIGIOUS EXEMPTION FROM COVID-19 VACCINE REQUIREMENT [hereinafter REQUEST AND CERTIFICATION], <https://www.hofstra.edu/sites/default/files/2021-05/religious-exemption-covid-19.pdf> [<https://perma.cc/6EM4-MDTJ>].

This Article will proceed in five Parts followed by a conclusion. Part I will address the civil rights of students at private colleges and universities under federal law. Part II will set forth the right, under New York law, of students at private colleges and universities to be free from unjust discrimination on the basis of religion. Part III will survey relevant precedent to establish that a religious exemption to vaccination requirements, if not religiously neutral, constitutes unjust discrimination in violation of New York law (and, accordingly, under functionally equivalent laws enacted by other jurisdictions). Included in this survey will be precedent construing the religion clauses of the First Amendment. Although the First Amendment is not generally applicable to private actors such as nonpublic colleges and universities, it precludes the government from discriminating on the basis of religion and, as such, provides helpful and persuasive authority on what constitutes discrimination. Part IV will address how otherwise facially lawful exemption policies could be administered in an unlawful way. Part V will review the religious exemption regime applicable to state-mandated vaccines in New York. This Part will then compare two paradigmatic religious exemptions promulgated by New York schools in response to their private imposition of a COVID-19 vaccine mandate: one from Syracuse University<sup>22</sup> and one from Hofstra University.<sup>23</sup> The Syracuse exemption, at least as written, serves as a blueprint for institutions to follow, as its nondiscriminatory nature conforms well to the requirements of New York's Human Rights Law.<sup>24</sup> Conversely, the Hofstra policy, facially repugnant to New York's Human Rights Law, exemplifies the inappropriately discriminatory approach adopted by some institutions—a vivid example of what not to do.

#### I. THE CIVIL RIGHTS OF PRIVATE COLLEGE AND UNIVERSITY STUDENTS UNDER FEDERAL LAW

When it comes to the issue of religious liberty, students at private colleges and universities are among some of the least protected members of American society. Two factors contribute to this state of affairs.

The first is that, as private institutions, such colleges and universities are not organs or instrumentalities of the government. This removes them from the reach of the protections enshrined in the U.S. Constitution.<sup>25</sup>

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22. See SYRACUSE UNIV., COVID-19 VACCINATION—EXEMPTION REQUEST AND WAIVER OF RESPONSIBILITY (May 3, 2021) [hereinafter WAIVER OF RESPONSIBILITY], [<https://perma.cc/FLU8-G2P9>].

23. See REQUEST AND CERTIFICATION, *supra* note 21.

24. See EXEC. §§ 290–301.

25. Students at public colleges and universities do have rights protected by the First Amendment. See Gregg E. Clifton, *University Policy Mandating COVID-19 Vaccines for Student-Athletes Blocked by Sixth Circuit*, NAT'L L. REV. (Oct. 11, 2021), [<https://www.natlawreview.com/article/university-policy-mandating-covid-19-vaccines->



Under the “state action doctrine,” private institutions can, under certain circumstances, be treated like government actors for constitutional purposes.<sup>26</sup> This doctrine, however, has been ill-defined and unpredictably applied, prompting one commentator to write: “There is little coherence to the Supreme Court’s State action jurisprudence.”<sup>27</sup> In any event, the doctrine is most likely inapplicable to private colleges and universities.<sup>28</sup>

Second, regarding the vast regime of federal civil rights legislation, the protection of students from religious discrimination is an unfortunate lacuna.<sup>29</sup> Private institutions receiving federal funding are prohibited from discriminating on the basis of race, color, national origin, sex, disability, and age—but not religion.<sup>30</sup> This was no mere oversight, as apparently the omission of religious discrimination within the ambit of prohibitions set forth in Title VI of the Civil Rights Act of 1964 (and future amendments to date) resulted from concerns over how such a prohibition would affect sectarian schools.<sup>31</sup>

In contrast to the treatment of students, employees are protected from religious discrimination under Title VII of the Civil Rights Act,<sup>32</sup> and all persons are protected from religious discrimination in places of public

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student-athletes-blocked-sixth-circuit [<https://perma.cc/7GCJ-WA4Q>] (reporting upon the Sixth Circuit’s decision upholding a district court’s issuance of a preliminary injunction predicated upon Western Michigan University’s alleged violation of its students’ First Amendment rights). Conversely, individuals are not protected by the Constitution from the actions of nonpublic (private) entities. See John Balitis & Michael Bohan, *Protest: A Path to Unemployment?*, ARIZ. ATT’Y, Dec. 2017, at 34, 35–36, [https://www.myazbar.org/AZAttorney/PDF\\_Articles/1217Protest.pdf](https://www.myazbar.org/AZAttorney/PDF_Articles/1217Protest.pdf) [<https://perma.cc/LYY6-YVSN>].

26. Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 128–29 (2004).

27. Eric Sirota, *Can the First Amendment Save Net Neutrality?*, 70 BAYLOR L. REV. 781, 841 (2018). For a more thorough analysis of the state action doctrine see *Corporate Entanglement with Religion*, *supra* note 15.

28. See *State v. Schmid*, 423 A.2d 615, 619–23 (N.J. 1980).

29. See Joshua C. Weinberger, Comment, *Religion and Sex in the Yale Dorms: A Legislative Proposal Requiring Private Universities to Provide Religious Accommodations*, 147 U. PA. L. REV. 205, 219–23 (1988); see also *Religious Discrimination*, OFF. FOR C.R., U.S. DEP’T OF EDUC. (Dec. 4, 2020), <https://www2.ed.gov/about/offices/list/ocr/religion.html> [<https://perma.cc/XQ4F-ABEX>] (“None of the laws that [the Office for Civil Rights] enforces expressly address religious discrimination.”).

30. See Kenneth L. Marcus, *The Most Important Right We Think We Have but Don’t: Freedom from Religious Discrimination in Education*, 7 NEV. L.J. 171, 172 (2006).

31. See *id.* at 174. There are, of course, ways to address these concerns while still protecting the vast majority of students from discrimination on the basis of religion. See, e.g., N.Y. EXEC. LAW § 292(37) (McKinney 2018) (excluding from the definition of covered “educational institution[s],” sectarian schools). But Congress, alas, has lacked either the will or creativity to devise one. See *id.*

32. 42 U.S.C. § 2000e-2.

accommodation under Title II of the Civil Rights Act.<sup>33</sup> Although “public accommodation” might sound like a promising avenue for students, that term has been narrowly interpreted to cover only “five categories of establishments: ‘lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment;’ and establishments located within covered establishments and open to the public.”<sup>34</sup> Students who suffer from religious discrimination with regard to university housing, dormitories, and eateries would appear to have a cause of action against a wrongdoer under Title II<sup>35</sup>—but this question has not been resolved definitively.

## II. THE CIVIL RIGHTS OF PRIVATE COLLEGE AND UNIVERSITY STUDENTS UNDER NEW YORK LAW

New York, like most other states, has enacted legislation to supplement the federal constitutional and statutory civil rights of its residents.<sup>36</sup> New York’s legislation is known as the state’s “Human Rights Law,” and was enacted “to eliminate and prevent discrimination in employment, in places of public accommodation, resort or amusement, in educational institutions, in public services, in housing accommodations, in commercial space and in credit transactions . . . .”<sup>37</sup>

The law declares equality of opportunity to be a “civil right” and, regarding education, declares:

The opportunity to obtain education . . . without discrimination because of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, marital status, or disability, as specified in section two hundred ninety-six of this article, is hereby recognized as and declared to be a civil right.<sup>38</sup>

“Educational institutions” are defined by the statute to include (of relevance to this Article) “any education corporation or association which holds itself out to the public to be non-sectarian and exempt from taxation

33. § 2000a(a).

34. See Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 639–40 (2016) (quoting 42 U.S.C. § 2000a(b)); see also Tara E. Thompson, Comment, *Locating Discrimination: Interactive Web Sites as Public Accommodations Under Title II of the Civil Rights Act*, 2002 U. CHI. LEGAL F. 409, 412 (2002).

35. See *Religious Discrimination*, *supra* note 29.

36. See N.Y. EXEC. LAW §§ 290–301 (McKinney 2018); *Civil Rights Laws and Legislation*, NAT’L CONF. OF STATE LEGISLATURES (Jan. 16, 2017), <https://www.ncsl.org/research/civil-and-criminal-justice/civil-rights-laws-and-legislation.aspx> [<https://perma.cc/826N-QZU4>].

37. EXEC. § 290(3).

38. *Id.* § 291(2). New York is not alone in prohibiting religious discrimination in the context of higher education. See *supra* note 18.

pursuant to the provisions of article four of the real property tax law.”<sup>39</sup> This encompasses nonprofit, non-sectarian private universities and colleges.<sup>40</sup>

The operative provision of New York’s Human Rights Law protecting college and university students is set forth in section 296(4), and reads, in its entirety, as follows:

It shall be an unlawful discriminatory practice for an educational institution to deny the use of its facilities to any person otherwise qualified, or to permit the harassment of any student or applicant, by reason of his race, color, religion, disability, national origin, sexual orientation, gender identity or expression, military status, sex, age or marital status, except that any such institution which establishes or maintains a policy of educating persons of one sex exclusively may admit students of only one sex.<sup>41</sup>

Liability under the Human Rights Law extends not only to the institution ultimately responsible for prohibited misconduct. The law defines as “an unlawful discriminatory practice” the act of any person “to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so.”<sup>42</sup> This should give pause to administrators who implement unlawful policies,<sup>43</sup> or who would implement lawful policies unlawfully.<sup>44</sup>

Because the Human Rights Law is a “remedial statute,” its terms “must be liberally construed to accomplish its beneficial purposes, one of which is to eliminate discrimination in educational institutions.”<sup>45</sup> To do this, however, we must first ascertain whether the understanding of “discrimination” under the Human Rights Law is somehow idiosyncratic. That is, whether the Human Rights Law employs a particularized definition of “discrimination,” separate and apart from how most courts have defined the term. By all indications, it does not.

The term “discrimination” first appears in section 290(3) of the law, as part of its statement of purposes.<sup>46</sup> As mentioned earlier, the stated purposes of the Act include the objective to “eliminate and prevent discrimination” in various areas, including education.<sup>47</sup> Thereafter, it

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39. EXEC. § 292(37).

40. *See, e.g.*, N.Y. Univ. v. N.Y. State Div. of Hum. Rts., 378 N.Y.S.2d 842, 847 (Sup. Ct.), *aff’d*, 373 N.Y.S.2d 719 (App. Div. 1975).

41. EXEC. § 296(4).

42. *Id.* § 296(6).

43. *See infra* Section III.C.

44. *See infra* Part IV.

45. 18 N.Y. JUR. 2D *Civil Rights* § 28 (2021).

46. EXEC. § 290(3).

47. *Id.*

appears in section 291 where the law declares that “[e]quality of opportunity” is a civil right.<sup>48</sup>

The term “discrimination,” however, is not itself defined. Rather, the definitional section of the law—section 292(4)—defines the term “unlawful discriminatory practice.”<sup>49</sup> That term, “unlawful discriminatory practice,” encompasses conduct prohibited by the law, and is defined as including “only those practices specified” in certain operative sections of the law (namely, sections 296, 296-a, 296-c, and 296-d).<sup>50</sup> And this returns us, for our purposes, to section 296(4), quoted above.<sup>51</sup>

Section 296(4) carves out from otherwise prohibited conduct those institutions that have a “policy of educating persons of one sex exclusively”; they may admit students of only one sex.<sup>52</sup> Every other educational institution is precluded from “deny[ing] the use of its facilities,” to “any person otherwise qualified” (or to “permit the harassment of any student or applicant”) on the basis of (“by reason of”)<sup>53</sup> the enumerated prohibited characteristics: “race, color, religion, disability, national origin, sexual orientation, gender identity or expression, military status, sex, age or marital status.”<sup>54</sup>

Denying a student, who is otherwise qualified, use of school facilities “by reason of” that student’s religion would exemplify the dictionary definition of discrimination: “to make a distinction in favor of or against a person or thing on the basis of the group, class, or category to which the person or thing belongs, rather than according to actual merit.”<sup>55</sup> Consequently, a policy, practice, or course of conduct found to constitute discrimination elsewhere, under some other regime’s laws or regulations, should—all things being equal—be found to constitute discrimination in New York if committed by an educational institution against one of its students.

Might there be some wiggle room for discrimination against students in educational institutions that falls outside the purview of section 296(4)’s prohibition on “deny[ing] the use of its facilities” or “permit[ing] the harassment of any student or applicant”?<sup>56</sup> The law would most clearly appear to cover discriminating with respect to admission decisions, access to courses and classrooms, participation in campus activities, and similar

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48. *Id.* § 291.

49. *Id.* § 292(4).

50. *Id.*

51. *See supra* text accompanying note 41.

52. EXEC. § 296(4).

53. *Id.*

54. *Id.*

55. *Discriminate*, WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1989).

56. Neither “facilities” nor “harassment” is defined by the Human Rights Law. *See* EXEC. § 292.

undertakings. Might it plausibly allow an educational institution to assign inferior grades to a student on account of his or her religion? Or withhold the conferral of a diploma on account of race or sex? The literal text of the statute would seem to permit such misconduct, but it is nearly impossible to imagine that a court would sanction any such things, especially in light of the requirement to “liberally construe[]” the law’s terms.<sup>57</sup>

As becomes quickly apparent, therefore, New York’s Human Rights Law fills the gap in federal civil rights legislation by providing college and university students powerful protections against discrimination on the part of the schools they attend or seek to attend.

### III. THE UNLAWFULNESS OF DISCRIMINATORY RELIGIOUS EXEMPTIONS TO VACCINE MANDATES AT PRIVATE COLLEGES AND UNIVERSITIES UNDER NEW YORK’S HUMAN RIGHTS LAW

Part II having set forth New York’s prohibition on religious discrimination in private higher education,<sup>58</sup> this Part III will apply that prohibition to the question of religious exemptions to vaccine mandates. It will first, however, contextualize the question by briefly discussing vaccine mandates per se at private colleges and universities. Next, it will address the issue of religious discrimination in the promulgation of exemptions as a general matter. In its final Section, this Part will examine the issue of religious discrimination in the promulgation of exemptions to vaccine mandates in particular.

#### A. *Vaccine Mandates at Private Colleges and Universities*

Before delving into the question of religious exemptions to vaccine mandates at private colleges and universities, let us first contextualize the issue by briefly addressing private collegiate vaccine practices in general.

Under state law, in New York and elsewhere, a short list of immunizations is necessary as a condition of college or university attendance.<sup>59</sup> New York’s list includes measles, mumps, and rubella.<sup>60</sup> Added to this list is meningococcal disease (meningitis),<sup>61</sup> but with a twist: a student may attend college in New York without immunization against meningococcal disease if—after receiving information about the disease

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57. 18 N.Y. JUR. 2D *Civil Rights* § 28 (2021).

58. *See supra* Part II.

59. *See State Laws and Mandates by Vaccine*, IMMUNIZATION ACTION COAL. (May 24, 2021), <https://www.immunize.org/laws/> [<https://perma.cc/UZ36-E66W>]; *see also* 166 AM. JUR. *Trials* 353 (2020).

60. N.Y. PUB. HEALTH LAW § 2165(1)(d) (McKinney 2020).

61. *Id.* § 2167(1)(e).

from his or her school—the students submits a signed acknowledgment indicating that they will not be receiving the vaccine.<sup>62</sup>

Against that backdrop, a number of private colleges and universities have historically imposed immunization requirements beyond that which are required by the states in which they are located.<sup>63</sup> Notwithstanding this well-established practice, it is far from clear that private colleges and universities can impose a vaccination requirement upon their students with regard to any vaccine at any time.<sup>64</sup> The COVID-19 vaccination mandates were not rolled out as a condition of admittance only for new students, but rather as a condition of return for continuing students as well.<sup>65</sup> And with regard to new students, in many cases the mandate was announced well after incoming freshmen had already made their matriculation choices.<sup>66</sup>

Under the law of New York and other states, students stand in a contractual relationship with their respective colleges/universities.<sup>67</sup>

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62. *Id.* § 2167(3)(b).

63. Allison Noesekabel & Ada M. Fenick, *Immunization Requirements of the Top 200 Universities: Implications for Vaccine-Hesitant Families*, 35 *VACCINE* 3661, 3665 (2017) (stating that “nearly half of elite universities have implemented more vaccination requirements than legally required”).

64. See I. Glenn Cohen & Dorit Rubinstein Reiss, *Can Colleges and Universities Require Student Covid-19 Vaccination?*, *HARV. L. REV. BLOG* (Mar. 15, 2021), <https://blog.harvardlawreview.org/can-colleges-and-universities-require-student-covid-19-vaccination/> [<https://perma.cc/7JSY-2HME>].

65. See Zamira Rahim, *US Colleges Will Require Students To Be Vaccinated, Despite State Policies*, *CNN* (Apr. 9, 2021, 8:39 AM), <https://www.cnn.com/2021/04/09/world/coronavirus-newsletter-intl-04-09-21/index.html>.

66. See *COVID-19 Vaccine Required for In-Person SUNY, Hofstra Students This Fall, Officials Say*, *NEWSDAY* (May 10, 2021, 8:33 PM), <https://www.newsday.com/news/health/coronavirus/covid-19-vaccine-requirement-suny-1.50242180> [<https://perma.cc/DCL5-V6KY>]. Hofstra University, for example, announced its novel COVID-19 vaccination mandate in May 2021—well after most high school seniors had decided upon which college to attend in the fall. *Id.*

67. *Rolph v. Hobart & William Smith Colls.*, 271 F. Supp. 3d 386, 405 (W.D.N.Y. 2017). The court explained:

Under New York law, an implied contract is formed when a university accepts a student for enrollment: if the student complies with the terms prescribed by the university and completes the required courses, the university must award him a degree. The terms of the implied contract are contained in the university’s bulletins, circulars and regulations made available to the student. Implicit in the contract is the requirement that the institution act in good faith in its dealing with its students. At the same time, the student must fulfill his end of the bargain by satisfying the university’s academic requirements and complying with its procedures.

*Id.* (quoting *Papelino v. Albany Coll. Of Pharmacy of Union Univ.*, 633 F.3d 81, 93 (2nd Cir. 2011); see *Dasrath v. Ross Univ. Sch. of Med.*, No. 07CV2433CBARER, 2008 WL 11438041, at \*4 (E.D.N.Y. Aug. 6, 2008) (“Under New York law, a student may sue his school for breach of contract.”); see also Laura Krugman Ray, *Toward Contractual Rights for College Students*, 10 *J.L. & EDUC.* 163, 167 (1981).

Basic contract law principles ordinarily preclude one party from unilaterally modifying the terms of contract without the assent of the other.<sup>68</sup> To circumvent this, colleges typically inform students that they reserve the right “to change any of the statements, procedures, regulations, fees, or conditions” pertaining to enrollment “without prior notice,” and assert the right to do so in a way that “affect[s] all actively enrolled students who have not yet graduated.”<sup>69</sup> Whether this power is as unlimited as asserted is outside the scope of this Article.

Further, unlike every other vaccination mandate previously imposed upon students, the COVID-19 mandates originally required the injection of a vaccine not yet fully approved by the Food and Drug Administration, but rather only permitted via an “Emergency Use Authorization.”<sup>70</sup> That itself presented a novel situation which, according to some commentators, rendered the COVID-19 mandates entirely unlawful.<sup>71</sup> Nevertheless, in the months that followed the FDA did grant full approval for one COVID-19 vaccine (Pfizer-BioNTech),<sup>72</sup> and presumably others will follow. As such, the question of the legality of religious exemptions remains one of primary importance.

#### B. *Religious Discrimination in the Promulgation of Exemptions Generally*

There is extremely little direct precedent, and apparently none in New York, bearing upon the specific issue of discriminatory religious exemptions to private vaccination requirements promulgated by educational institutions. Indeed, there are few reported cases of religious discrimination claims brought against educational institutions under New York’s Human Rights Law at all.

Regarding vaccination exemptions, perhaps the answer lies in the novelty of the present situation. Some, if not most, institutions appear to

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68. *Beacon Term. Corp. v. Chemprene, Inc.*, 429 N.Y.S.2d 715, 718 (App. Div. 1980) (“Fundamental to the establishment of a contract modification is proof of each element requisite to the formulation of a contract, including mutual assent to its terms.”).

69. HOFSTRA UNIV., *GUIDE TO PRIDE STUDENT HANDBOOK 2021–2022* 3 (2021), [https://www.hofstra.edu/pdf/studentaffairs/deanofstudents/commstandards/commstandards\\_gu\\_idetopride.pdf](https://www.hofstra.edu/pdf/studentaffairs/deanofstudents/commstandards/commstandards_gu_idetopride.pdf) [<https://perma.cc/JY38-TCE3>].

70. See Ameer Benno, *Colleges and the COVID-19 Vaccine*, N.Y. L.J. (July 9, 2021, 10:15 AM), <https://www.law.com/newyorklawjournal/2021/07/09/colleges-and-the-covid-19-vaccine/?slreturn=20210818161744> [<https://perma.cc/3NB6-MZRN>] (“Requiring students to take a COVID-19 vaccine while they are still in EUA status violates the law.”). *But see* Cohen & Reiss, *supra* note 64 (“While we have concluded that, under the existing federal statutes and case law, colleges and universities have broad discretion to require vaccination as a condition of a full return to campus, there are admittedly areas where more clarity would be desirable.”).

71. See Benno, *supra* note 70.

72. *FDA Approves First COVID-19 Vaccine*, U.S. FOOD & DRUG ADMIN. (Aug. 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine> [<https://perma.cc/ME8R-Q2AY>].

hew only to those immunization requirements imposed by state law.<sup>73</sup> This in turn implicates well-established exemptions promulgated by the state itself.<sup>74</sup> For example, before the COVID-19 pandemic, Hofstra University had not imposed upon its students vaccination requirements beyond those of New York State.<sup>75</sup> Consequently, Hofstra University had not previously been responsible for promulgating its own religious exemption policy to vaccination. As will be discussed, when pressed to do so, Hofstra—as with some other schools—adopted a religious exemption policy different than New York’s.<sup>76</sup>

In any event, the dearth of case law construing New York’s Human Rights Law section 296(4)<sup>77</sup> compels us to examine how religious discrimination has been defined in other contexts as well. Featured most prominently among these is Title VII of the Civil Rights Act—federal legislation prohibiting religious discrimination in the context of employment.<sup>78</sup> New York courts have frequently entertained Title VII employment discrimination claims together and simultaneously with employment discrimination claims brought under New York’s Human Rights Law. And in so doing, they have not suggested a divergent definition or understanding of what constitutes “discrimination.”<sup>79</sup> Indeed, employment discrimination claims brought under Title VII and New York Human Rights Law claims are “all subject to the [same] . . . analysis.”<sup>80</sup>

Also helpful is an exploration of cases arising under the religion clauses of the First Amendment. This may seem—initially at least—inapposite, as the religious clauses of the U.S. Constitution address the relationship between citizen and state, and serve to constrain the power of government.<sup>81</sup> As mentioned, they do not ordinarily apply to restrict the conduct of private actors.<sup>82</sup> And certainly there is much in the way of First Amendment jurisprudence that is indeed inapplicable to our present inquiry. That said, a critical thread running through cases construing the

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73. *See, e.g.*, HOFSTRA UNIVERSITY WELCOME GUIDE 2020-2021 6 (2020), <https://media.intostudy.com/image/upload/intoStudy/downloads/welcome-guides/2020-2021/2020-202120Hofstra%20Welcome%20Guide.pdf> [<https://perma.cc/Q33H-BJTF>]. Immediately before the COVID pandemic, Hofstra, for example, only required those vaccinations mandated by the State of New York. *See id.*

74. *See infra* Section V.A.

75. *See supra* note 3.

76. *See infra* Section V.C.

77. N.Y. EXEC. LAW § 296(4) (McKinney 2018).

78. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

79. *See, e.g.*, *Siddiqi v. N.Y.C. Health & Hosps. Corp.*, 572 F. Supp. 2d 353 (S.D.N.Y. 2008); *Mandell v. County of Suffolk*, 316 F.3d 368 (2d Cir. 2003).

80. *Siddiqi*, 572 F. Supp. at 365.

81. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1155-66 (2d ed. 1988).

82. *See supra* notes 25-28 and accompanying text.



First Amendment is that of nondiscrimination and neutrality.<sup>83</sup> In the words of the Supreme Court: “the established principle [is] that the Government must pursue a course of complete neutrality toward religion.”<sup>84</sup> Neutrality is, of course, presumptively the opposite of discrimination; to discriminate is, as previously noted, “to make a distinction in favor of or against a person or thing on the basis of the group, class, or category to which the person or thing belongs, rather than according to actual merit.”<sup>85</sup> Thus, by including First Amendment case law in our analysis, an additional universe of situations is made available to us in which courts have examined whether a particular practice or course of conduct constitutes discrimination. While not precedentially binding, these cases are highly persuasive since they address largely identical questions.<sup>86</sup>

As a threshold matter, nondiscrimination with respect to religion requires “denominational neutrality.”<sup>87</sup> To impose different standards upon different religions “discriminates against” certain religions.<sup>88</sup> This rule applies not only to regulations in general, but also to the promulgation and administration of exemptions to them. Admittedly, a conceptual difficulty accompanies any religious exemption because it necessarily makes distinctions among religions in a certain way: it serves to relieve a burden imposed upon certain believers, leaving alone those believers upon whom the burden in question is not imposed. And although some—especially in the First Amendment context—have asserted that this violates the Establishment Clause, this has not posed a difficulty to the administration of exemptions or accommodations, nor has it been deemed discriminatory.<sup>89</sup>

An important Supreme Court decision bearing upon the subject of denominational neutrality is *Larson v. Valente*,<sup>90</sup> and it bears close scrutiny.

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83. See TRIBE, *supra* note 81, at 1160, 1162.

84. See *id.* at 1188 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985)).

85. *Discriminate*, *supra* note 55.

86. See David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241, 259–60 (1995) (explaining that both the Free Exercise Clause and the Establishment Clause, at a minimum, “prohibit[] laws that discriminate . . . against a particular religion”).

87. See TRIBE, *supra* note 81, at 1190.

88. See *Larson v. Valente*, 456 U.S. 228, 230, 255 (1982) (holding that imposing “certain registration and reporting requirements upon only those religious organizations that solicit more than fifty per cent [sic] of their funds from nonmembers discriminates against such organizations in violation of the Establishment Clause of the First Amendment”).

89. See TRIBE, *supra* note 81, at 1188–89.

90. See *Larson*, 456 U.S. at 228.

*Larson* concerned Minnesota’s “Charitable Solicitation Act,” pursuant to which a number of significant burdens were placed upon charitable organizations in the state:

A charitable organization subject to the Act must register with the Minnesota Department of Commerce before it may solicit contributions within the State. With certain specified exceptions, all charitable organizations registering under [section] 309.52 must file an extensive annual report with the Department, detailing, inter alia, their total receipts and income from all sources, their costs of management, fundraising, and public education, and their transfers of property or funds out of the State, along with a description of the recipients and purposes of those transfers. The Department is authorized by the Act to deny or withdraw the registration of any charitable organization if the Department finds that it would be in “the public interest” to do so and if the organization is found to have engaged in fraudulent, deceptive, or dishonest practices.<sup>91</sup>

The Act exempted from its provisions “religious organizations that received more than half of their total contributions from members or affiliated organizations.”<sup>92</sup> This was known colloquially as the “fifty per cent [sic] rule.”<sup>93</sup> Unification Church, a religious organization that did not qualify for the exemption on account of the fifty percent rule, brought suit under the First and Fourteenth Amendments to the U.S. Constitution.<sup>94</sup> This statutory scheme, and its accompanying exemption, did not reek of religious favoritism or hostility toward a particular denomination.<sup>95</sup> Yet it was struck down.<sup>96</sup>

The *Larson* Court began its discussion of the issue by proclaiming that “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”<sup>97</sup> It proceeded to hold that the “fifty per cent [sic] rule . . . clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents.”<sup>98</sup> Consequently, the Court applied its most exacting level of examination to the legislation—the strict scrutiny standard of the compelling government interest test<sup>99</sup>—and concluded that it violated the Constitution.<sup>100</sup>

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91. *Id.* at 231 (internal citations omitted).

92. *Id.* at 231–32.

93. *Id.*

94. *Id.* at 232–33.

95. *See* *TRIBE*, *supra* note 81, at 1192.

96. *Larson*, 456 U.S. at 255.

97. *Id.* at 244.

98. *Id.* at 246.

99. *Id.* at 246–47.

100. *Id.* at 255. *Larson* overruled, or confined to its particular factual circumstances, the

Again, to be clear, private colleges and universities are not government actors subject to the First Amendment. But discrimination is discrimination; preferential treatment is preferential treatment. *Larson* did not suggest that the concepts of “neutrality” or “preference” employed in its holding were terms of art.<sup>101</sup> Thus, if a private educational institution operates in a state such as New York, in which legislation precludes discrimination based on religion, a course of conduct parallel to that which occurred in *Larson* should be found to constitute discriminatory, preferential treatment.

Two lower court cases have addressed the question of discrimination in religious exemptions. The most relevant is a rare case arising in part under New York’s Human Rights Law: *Siddiqi v. New York City Health & Hospitals Corporation*.<sup>102</sup> *Siddiqi* was an employment discrimination case brought under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, 42 U.S.C. § 1981, New York City Administrative Code section 8-107, and the New York Civil Rights Act section 296.<sup>103</sup> *Siddiqi* alleged, among other things, religious discrimination on account of “unequal treatment based on religion.”<sup>104</sup> More specifically, he alleged that his employer “refuse[d] to give Muslims time off to observe their religious holidays but does give time off to adherents to other religions.”<sup>105</sup> The court held that, if proved, this would constitute a form of discrimination in the terms and conditions of employment—an “impermissible favoring of one religious group over another.”<sup>106</sup>

Similarly, in *Booth v. Maryland*, the plaintiff, a Rastafarian, alleged that he was denied a religious exemption by his employer—the Maryland Department of Public Safety and Correctional Services—with regard to

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earlier case of *Gillette v. United States*, 401 U.S. 437 (1971). *Larson*, 456 U.S. at 246–47, 246 n.23. In *Gillette*, the Court was more accommodating of denominational preferences (within the context of the military during the Vietnam War). See *Gillette*, 401 U.S. at 454. The only other situation in which an exemption lacking denominational neutrality was upheld was in *Rupert v. Director, U.S. Fish & Wildlife Serv.*, 957 F.2d 32 (1st Cir. 1992). *Rupert* upheld the constitutionality of an exemption from the Bald Eagle Protection Act’s prohibition on the use of eagle feathers for Native American religions, but not other religions. *Id.* at 35–36. The Court justified this deviation from First Amendment jurisprudence due to the “unique legal status” of Native Americans. See *id.* at 34 (quoting *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974)).

101. See *Larson*, 456 U.S. at 228. Further, there is no reason to believe that New York’s Human Rights Law derogates in its understanding of discrimination from that expressed in *Larson*. See *supra* notes 45–56.

102. See *Siddiqi v. N.Y.C. Health & Hosp. Corp.*, 572 F. Supp. 2d 353 (S.D.N.Y. 2008).

103. *Id.* at 357.

104. *Id.* at 369.

105. *Id.* at 371.

106. *Id.* Elsewhere, the court noted that Title VII and New York Human Rights Law claims are adjudicated under the same standards. See *id.* at 365.

its grooming policy.<sup>107</sup> The plaintiff's dreadlocks were deemed unacceptable under the policy, and his request for an exemption was denied—whereas both Jewish and a Sikh employees were granted exemptions to the same policy on account of their beards.<sup>108</sup> Although the grooming policy was religiously neutral, and not problematic per se, the Fourth Circuit held that this did not end the inquiry.<sup>109</sup> The plaintiff had a potentially cognizable claim that his employer unconstitutionally engaged in religious discrimination by “favor[ing] other religions over his religion” when it “granted religious exemptions to others who were similarly situated to him” while denying his requests for an exemption.<sup>110</sup>

A case related to the issue of exemptions would be that of *Church of Scientology of Georgia Inc. v. City of Sandy Springs*.<sup>111</sup> The plaintiff in that case, the Church of Scientology, submitted a rezoning application, along with a request for certain zoning variances, to the city in order to accommodate the expansion of its facilities.<sup>112</sup> The plaintiff alleged that it was “subjected to a higher scrutiny and a lengthier approval process than other comparator churches” in connection with its zoning application.<sup>113</sup> The plaintiff's application “was delayed an additional five months beyond the [one hundred and twenty] days typically required by the City for zoning approval.”<sup>114</sup> This, in conjunction with other allegations, was deemed sufficient to create a triable issue of fact on whether defendant had “acted with a discriminatory purpose” in handling the plaintiff's zoning application in violation of the Religious Land Use and Institutionalized Persons Act.<sup>115</sup>

Although *Siddiqi*, *Booth*, and *Church of Scientology* are possible examples of religious discrimination *against* particular faiths, it is important to remember that—as *Larson* makes clear—such hostility is not a necessary component to a religious discrimination case.<sup>116</sup> This point was driven home by *Mandell v. County of Suffolk*.<sup>117</sup> In *Mandell*, the plaintiff, a former deputy police inspector, established a prima facie case of religious discrimination under both Title VII and the New York State Human Rights Law by adducing evidence that his superior was biased *in*

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107. *Booth v. Maryland*, 327 F.3d 377, 378 (4th Cir. 2003).

108. *Id.* at 380–81.

109. *See id.* at 381.

110. *Id.*

111. *See Church of Scientology of Ga., Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328 (N.D. Ga. 2012).

112. *See id.* at 1339–41.

113. *Id.* at 1372.

114. *Id.* at 1372–73.

115. *Id.* at 1376.

116. *See supra* text accompanying notes 95–100.

117. *See Mandell v. County of Suffolk*, 316 F.3d 368 (2d Cir. 2003).

*favor* of a particular religion.<sup>118</sup> As the Second Circuit explained, “to establish a claim of religious discrimination, plaintiff does not have to prove that defendants discriminated solely against his religion. An employer discriminating against any non-Catholic violates the anti-discrimination laws no less than an employer discriminating only against one discrete group, in this case, Jews.”<sup>119</sup>

Similarly, laws prohibiting religious discrimination “protect[] not only people who belong to traditional, organized religions, such as Buddhism, Christianity, Hinduism, Islam, and Judaism, but also others who have sincerely held religious, ethical or moral beliefs.”<sup>120</sup> Although membership in an organized religion may be probative of the sincerity of a person’s beliefs, “an individual need not be a member of an organized religion to hold sincere beliefs.”<sup>121</sup> Consequently, the generic preference in favor of, or of course bias against, adherents of organized religion over those whose religious beliefs are not neatly tied, or tied at all, to an organized religion is a form of impermissible discrimination.<sup>122</sup> As one commentator explained, within the constitutional context, “if a state wanted to offer a religious exemption it could not limit the exemption to organized religions because that discriminated in favor of certain religious beliefs and against others.”<sup>123</sup>

### C. *Religious Discrimination in the Promulgation of Vaccine Exemptions Specifically*

Having surveyed the law regarding religious discrimination in the promulgation and administration of religious exemptions generally, let us now apply these principles to the question of religious exemptions to vaccination mandates, specifically under New York law.

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118. *See id.* at 379.

119. *Id.* at 378.

120. *Religious Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <http://www.eeoc.gov/laws/types/religion.cfm> [<https://perma.cc/TN3V-FKZZ>]. Although religious exemptions need not extend to non-religious ethical or moral beliefs, the core point remains: laws against religious discrimination are not denomination specific; they protect religious believers of all faiths, organized or not. *See id.*

121. Susan E. Prince, *Preaching Religious Views at Work*, HR WIRE (Feb. 11, 2002).

122. *See* Barry Nobel, *Religious Healing in the Courts: The Liberties and Liabilities of Patients, Parents, and Healers*, 16 U. PUGET SOUND L. REV. 599, 691 (1993).

123. Dorit Rubinstein Reiss, *Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements*, 65 HASTINGS L.J. 1551, 1568 (2014); *see also* Bronx Household of Faith v. Bd. of Educ., 855 F. Supp. 2d 44, 54 (S.D.N.Y. 2012) (holding that New York City schools violated the First Amendment by limiting the use of their facilities to only certain religious groups because the policy was not neutral and “discriminate[d] between those religions that fit the ‘ordained’ model of formal religious worship services . . . and those religions whose worship practices are far less structured” (internal citations omitted)).

Setting aside the question of harassment (as outside the scope of this Article), let us turn to the parameters of a lawful vaccine exemption based upon religion under section 296(4) of the New York Human Rights Law. Recall that section 296(4) makes it unlawful for an educational institution, such as a private college or university, to “deny the use of its facilities to any person otherwise qualified . . . by reason of his . . . religion.”<sup>124</sup> A vaccination mandate containing no religious exemptions would not seem to run afoul of section 296(4) because it would not serve to deny the use of college or university facilities on the basis of religion.<sup>125</sup> Rather, the denial of the use of school facilities to any particular student would be based upon the student’s status as unvaccinated. The student’s reasons for not being vaccinated, be they religiously predicated or otherwise, would simply not factor into the school’s denial of use.

However, the legal landscape changes dramatically once an educational institution promulgates a religious exemption. Such promulgation changes the status quo from one in which a student’s religious objections to vaccination have no bearing upon his or her eligibility to use the institution’s facilities to one in which the student’s religious objections becomes a determining factor. And because of New York’s prohibition on religious discrimination regarding the use of school facilities,<sup>126</sup> religious exemptions, once announced, must be extended to all genuine and sincere takers. Put differently, the religious exemption cannot serve as a screen by which some students can be denied access to the educational institution’s facilities, and others permitted access, on account of their divergent religious beliefs. In light of the religious exemption, it is no longer the unvaccinated status of a religious student that bars him or her from use of a school’s facilities. Rather, the school’s assessment of that student’s religious beliefs becomes the determining factor. Such assessment may extend to verifying the genuineness and sincerity of the student’s beliefs, but it cannot extend to discretionary favoring or disfavoring of beliefs for purposes of awarding the exemption.<sup>127</sup> Certainly, a preference for, or aversion to, particular religious denominations is unlawfully discriminatory. But as *Larson* and its progeny teaches, so also is a preference for large religions versus small religions, and organized religions versus religions lacking a structure or

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124. See N.Y. EXEC. LAW § 296(4) (McKinney 2018).

125. Of course, this requires a fact-specific inquiry. A vaccine mandate imposed for the specific purpose of excluding students of a particular religious sect, for example, would clearly seem to violate section 296(4) of the New York Human Rights Law.

126. See EXEC. § 296(4).

127. See *Larson v. Valente*, 456 U.S. 228, 244 (1982); *Siddiqi v. N.Y.C. Health & Hosps. Corp.*, 572 F. Supp. 2d 353, 371 (S.D.N.Y. 2008); *Booth v. Maryland*, 327 F.3d 377, 381 (4th Cir. 2003); *Church of Scientology of Ga., Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328, 1375–76 (N.D. Ga. 2012); *Mandell v. County of Suffolk*, 316 F.3d 368, 379 (2d Cir. 2003).

hierarchy.<sup>128</sup> In short, any approach that prejudices one set of genuine and sincere religious beliefs over another constitutes unlawful discrimination based on religion.

A concrete example can help clarify. Consider the extreme hypothetical of a university that announced a religious exemption to its vaccination mandate, but one *only available* to Episcopalians with religious beliefs precluding them from taking the vaccine in question. Is there any question that such an exemption would violate section 296(4) of New York's Human Rights Law? Could the university possibly prevail by arguing that its rejections of exemption requests for Jewish, Roman Catholic, Muslim, or Evangelical students were not on account of their religion, but rather on account of their (un)vaccinated status? Of course not—the only relevant difference between these objecting students and the objecting Episcopalian students would be their religion.

Let us consider an opposite extreme example. Imagine a college with a religious exemption policy to a vaccination mandate that specifically *excluded* Lutherans from seeking an exemption. Could such a policy conceivably be upheld? To ask the question is to answer it: of course not, as this too would constitute blatant discrimination among students on the basis of religion.

What about a preference for, or bias against, individuals on account of their membership in an organized religion, generally speaking? Could an educational institution condition a religious exemption, in whole or in part, upon a student's membership in an organized religion? Could it exclude from consideration all applications from students whose religious beliefs are not connected to any "name brand" faith tradition? Absolutely not—this would be strictly forbidden as a form of religious discrimination.

Finally, let us consider the more likely situation of a religious exemption policy that only made exemptions available to students who oppose immunization in general,<sup>129</sup> versus to students who opposed receipt of a particular vaccine currently being mandated. As becomes readily apparent, this is simply a manifestation of the first two examples but stripped of denominational labels. That is, instead of declaring that only students belonging to *Religion X* may claim the exemption—or that students belonging to *Religion Y* may not claim the exemption—the school would be substituting an irrelevant proxy to do exactly the same thing. Just as a school could not limit an exemption to Jewish students alone, it could not limit an exemption to students whose faiths recognize Saturday as the Sabbath.

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128. See *Larson*, 456 U.S. at 244; *Religious Discrimination*, *supra* note 120; *Nobel*, *supra* note 122, at 700–01.

129. See Ben Finley, *Church of the First Born Practices a Strict Faith*, RELIGION NEWS SERV. (Apr. 24, 1996), <https://religionnews.com/1996/04/24/church-of-the-first-born-practices-a-strict-faith/> [<https://perma.cc/BX36-82UJ>].

With respect to the COVID-19 vaccination mandates currently in circulation, whether a student has a religious objection to some other or all other vaccinations is simply irrelevant. All that matters is whether the student has a religious objection to the COVID-19 vaccine that is just as genuine and just as sincere as any other student articulating a religious objection thereto. Any attempt to limit qualifying exemptions to students whose religions oppose all vaccinations in general is little more than exercising preference to one group of denominations over another based upon a factor unrelated to the merits of the exemption. As has become clear, that constitutes impermissible religious discrimination.

#### IV. UNLAWFUL ADMINISTRATION OF A RELIGIOUS EXEMPTION POLICY

Even though a religious exemption policy may be facially problematic, it is possible that those responsible for administering it could do so in such a way as to prevent discriminatory results. Conversely, the opposite is possible as well: that an otherwise facially lawful policy could be administered in a discriminatory way. To this possibility we now turn our attention.

There are four broad and overlapping ways in which administrators of a religious exemption policy might take an otherwise lawful policy and apply it in an unlawfully discriminatory way: (a) by playing favorites among religious beliefs opposed to vaccination, crediting some while discrediting others; (b) by refusing exemptions to those students whose personal religious beliefs diverge from the denomination to which they belong; (c) by dismissing the religious beliefs of those students who do not belong to a hierarchical religion with clear teaching on vaccination; and (d) by denying exemptions to students whose denominations impose upon them a religious obligation to follow their properly formed consciences with regard to vaccination.

##### A. *Favoring or Disfavoring Based upon Religious Beliefs Per Se*

The first and most easily recognizable way for an otherwise lawful policy to be discriminatorily administered would be to deny vaccination exemptions for some students who submitted qualifying requests while granting them to other students, with the only material difference being their different religious beliefs. *Siddiqi*, discussed previously, provides an analogous example to that.<sup>130</sup> Denying a Christian student who objected to a particular vaccine because of its connection to abortion,<sup>131</sup> while

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130. See *Siddiqi v. N.Y.C. Health & Hosps. Corp.*, 572 F. Supp. 2d 353, 371 (S.D.N.Y. 2008) (where an employee sued his employer for granting only leave requests made by employees of certain religions, but not for Muslims, despite a general policy that allowed employees to take time off to observe their respective religious holidays).

131. See, e.g., Athanasius Schneider, *Covid Vaccines: "The Ends Cannot Justify the*



providing an exemption to a Muslim student who objected to the same vaccine because of the use of pork gelatin in its manufacture<sup>132</sup> would also be an example of this. A related form of the same problem would extend the exemption only to students of faiths who oppose all vaccination, versus a student whose faith is opposed to one particular vaccine. For reasons to be discussed, this too constitutes denominational discrimination.<sup>133</sup>

### B. *Discrimination Against Heretics*

The second way an otherwise lawful religious exemption policy could be made unlawful would be to execute it in such a way as to deny an exemption to those students whose good faith religious beliefs somehow diverge from the religious denomination that the student generally identifies with. Put bluntly, this might be considered discrimination against heretics.<sup>134</sup> Or, more accurately, discrimination against those students perceived, by the university acting in a magisterial capacity, as heretics.

Consider, for example, a university's decision to deny religious exemptions brought by all students who identify as Catholic. "Catholics need not apply" might not be written into the policy guidelines explicitly, but the policy could be administered in such a way as to effectively preclude any Catholic student from claiming the exemption. The college's rationale would not necessarily be antipathy towards its Catholic students, but might rather be that its administration has assessed Catholic teaching, perhaps via a review of certain bishops' statements, and has concluded that the Catholic Church has no opposition to the vaccines being mandated.

Would this be permissible under section 296(4) of New York's Human Rights Law if challenged by a Catholic student who genuinely and sincerely believes the vaccine is wrongful based upon their own understanding of the Catholic religion? Could the college, potentially a fully secular institution at that, tell the Catholic student that his understanding of his Catholic religion was "incorrect" and thereby deny the student an exemption?

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*Means*," CRISIS MAG. (Dec. 11, 2020), <https://www.crisismagazine.com/2020/covid-vaccines-the-ends-cannot-justify-the-means> [<https://perma.cc/XBL6-SQHQ>].

132. See, e.g., Victoria Milko, *Concern Among Muslims over Halal Status of COVID-19 Vaccine*, ABC NEWS (Dec. 20, 2020, 5:51 AM), <https://abcnews.go.com/Health/wireStory/concern-muslims-halal-status-covid-19-vaccine-74826269> [<https://perma.cc/B6CH-35W7>].

133. See *infra* Section IV.C.

134. "[A] professed believer who maintains religious opinions contrary to those accepted by his church or rejects doctrines prescribed by his church." *Heretic*, WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1989).

As a threshold matter, religious questions can be notoriously complicated, and intrareligious disputes are far from uncommon.<sup>135</sup> It takes an uncanny amount of hubris for a university administrator to arrogate upon himself or herself the authority to decide what a denomination's religiously binding teaching is upon a given subject, and to enforce that decision upon a student. More importantly, however, even if an administrator assumes such an inquisitorial role, religious beliefs labeled heretical by the university are not per se disingenuous or insincere, nor are they somehow entitled to less protection against discrimination than orthodox religious beliefs. It is the individual student who is requesting the exemption—not the religious leaders whom the college may be referring to in such a situation. Consequently, it is the student's beliefs that are paramount—not those of any particular clergyman, regardless of his status within the student's church. Indeed, few can be unaware of the phenomenon, especially in America, of individuals adopting heterodox religious beliefs at odds with the official teaching of their particular denomination.<sup>136</sup>

In short, it would constitute an act of unlawful discrimination for a university to deny a student's religious exemption request based solely upon the student's religious affiliation. If the student's exemption request satisfies the university's guidelines by establishing that the student holds a good faith, sincere religious vaccination objection, the university must grant the exemption request regardless of university's determination that the student's beliefs diverge from the sect or denomination the student identifies with.<sup>137</sup>

### C. Denigration of Non-Hierarchical Religions

The third way an otherwise lawful religious exemption policy could be discriminatorily administered is by limiting exemptions solely to students belonging to those specific denominations that impose upon their adherents avoidance of the vaccine in question.<sup>138</sup> As will be discussed, drawing up a list of religions for which exemption requests will be

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135. See, e.g., *These Four Cardinals Asked Pope Francis to Clarify 'Amoris Laetitia'*, CATH. NEWS AGENCY (Nov. 14, 2016), <https://www.catholicnewsagency.com/news/34915/these-four-cardinals-asked-pope-francis-to-clarify-amoris-laetitia> [<https://perma.cc/3PDN-8TZA>] (reporting upon four cardinals' request that Pope Francis clarify certain statements contained in his Apostolic Exhortation *Amoris Laetitia* because of their apparent incongruity with Catholic teaching).

136. See Julie Byrne, *Indie Catholicism Is Real: Married Clergy, LGBT Ordination, and Sacramental Justice for All*, RELIGION DISPATCHES (Oct. 21, 2016), <https://religiondispatches.org/indie-catholicism-is-real-married-clergy-lgbt-ordination-and-sacramental-justice-for-all/> [<https://perma.cc/3RCN-CB6J>] (discussing the proliferation of "independent" Catholic communities that embrace practices and beliefs contrary to those of the Catholic Church).

137. Assuming such guidelines are themselves lawful.

138. See Finley, *supra* note 129.

approved, and a list of religions for which exemption requests will not be approved, patently constitutes discrimination based on religion.<sup>139</sup> For a student's religious beliefs may not conform exactly with his or her denominational preference. And the university would be engaged in unlawful religious discrimination by resolving exemption requests based upon a student's general denominational preference instead of his or her genuinely held religious beliefs specific to the vaccine in question.<sup>140</sup>

However, such an approach would also be problematic because of its effects upon students who belong to no particular organized religion—nondenominational believers, or “nones.”<sup>141</sup> Their religious beliefs would not be credited, nor entitled to fair and equal treatment, because of their lack of connection with a particular denomination. Consequently, those students whose religious beliefs are not linked to a hierarchical organization empowered to make proclamations regarding vaccination would be unjustly discriminated against.<sup>142</sup>

Perhaps the best case on point for this proposition is *Kolbeck v. Kramer*.<sup>143</sup> In *Kolbeck*, plaintiff sought a religious exemption from his university's medical testing requirements.<sup>144</sup> The university's position was that only Christian Scientists could claim such an exemption,<sup>145</sup> and since plaintiff was not a Christian Scientist, his purported religion was not a “true faith.”<sup>146</sup>

The court reminded the parties that the “State or any instrumentality thereof cannot, under any circumstances, show a preference of one religion over another.”<sup>147</sup> It then proceeded to castigate the university for doing exactly that:

The suggestion that plaintiff does not have a *bona fide* religion to qualify for this exemption, in view of the facts and the law on this question, indicates an arbitrary and capricious policy for a State University. There is no right on the part of a political subdivision of a State to take discriminate action against a person in reference to his religious views. Membership in a recognized religious group cannot

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139. See *infra* Section IV.D.

140. See *supra* Section IV.B.

141. See Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 17 (2013) [hereinafter *The Naked Private Square*].

142. See *supra* text accompanying note 129.

143. See *Kolbeck v. Kramer*, 202 A.2d 889 (N.J. Super. Ct. Law Div. 1964), *modified* 214 A.2d 408 (N.J. 1965).

144. *Id.* at 889.

145. *Id.*

146. *Id.* at 891.

147. *Id.* at 893.

be required as a condition of exemption from vaccination under statute and constitutional law.<sup>148</sup>

#### D. *Discrediting of Contingent Religious Obligations*

A fourth way of discriminatorily administering an otherwise lawful religious exemption policy would be by discrediting the beliefs of those students who belong to faiths in which adherents are not clearly and specifically enjoined from taking a particular vaccine, but who instead are under an equally serious religious obligation to assess their individual consciences given their unique personal situation. Put differently, the policy would discriminate against faiths and belief systems that require personal discernment in such situations before religious obligations attach.

For example, the Catechism of the Catholic Church teaches that “[a] human being must always obey the certain judgment of his conscience. If he were deliberately to act against it, he would condemn himself.”<sup>149</sup> As the renowned Catholic apologist Peter Kreeft has explained, our conscience is derived from God, and, consequently, “has absolute, exceptionless, binding moral authority over us, demanding unqualified obedience.”<sup>150</sup> Consequently, regardless of what one’s pastor might teach or believe, if a Catholic student’s religiously formed conscience requires him or her to abstain from vaccination, that student has a religious obligation to so abstain,<sup>151</sup> and should qualify for a religious exemption.<sup>152</sup> This issue has arisen in connection with the COVID-19 vaccines because, as of this writing, all those available in the United States can be linked to a fetal cell line originally derived from a procured abortion.<sup>153</sup> The

148. *Id.* (emphasis in original).

149. CATECHISM OF THE CATHOLIC CHURCH ¶ 1790 (1994).

150. Peter Kreeft, *The Argument from Conscience*, in *FUNDAMENTALS OF THE FAITH* (Ignatius Press 1988), <https://www.catholiceducation.org/en/religion-and-philosophy/apologetics/the-argument-from-conscience.html> [<https://perma.cc/526M-3XAV>].

151. See John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 323 (1998) (noting that both Christians and Catholics are taught that judgments of conscience are “illuminated by faith,” and that Catholics are further taught to obey such judgments).

152. Although Pope Francis personally concluded that receipt of the COVID-19 vaccine is morally licit, he, in another context, expounded traditional Catholic teaching when he proclaimed:

There is sin, even for those who have no faith, when conscience is not followed. Listening to and obeying conscience means deciding in the face of what is understood to be good or evil. It is on the basis of this choice that the goodness or evil of our actions is determined.

Francis, *Letter to a Non-Believer*, VATICAN (Sept. 4, 2013), [https://www.vatican.va/content/francesco/en/letters/2013/documents/papa-francesco\\_20130911\\_eugenio-scalfari.html](https://www.vatican.va/content/francesco/en/letters/2013/documents/papa-francesco_20130911_eugenio-scalfari.html) [<https://perma.cc/3BQ3-MFCD>].

153. See *Guidance on Getting the COVID-19 Vaccine*, CHILD. OF GOD FOR LIFE,

Colorado Catholic Conference (the “united voice of the Catholic bishops of Colorado”)<sup>154</sup> ably addressed this very situation. In a letter to the Catholic faithful concerning COVID-19 vaccination mandates, the Conference underscored traditional Catholic teachings on the subject of vaccination, declaring that “[t]here is a moral duty to refuse the use of medical products, including certain vaccines, that are created using human cells lines derived from abortion . . . .”<sup>155</sup> A limited exception to this duty exists “only under case-specific conditions,” and as such “the use of some COVID-19 vaccines is morally acceptable under *certain circumstances*.”<sup>156</sup> Paramount in determining the Catholic student’s religious obligation with regard to COVID-19 vaccines, therefore, is the student’s assessment of his or her particular situation and the judgment of the student’s conscience. Once this judgment has been formed, the student is “morally required to obey his or her conscience.”<sup>157</sup> In light of the preceding, the Colorado Catholic Conference took the additional step of providing a letter template “available to be signed by pastors of the Faithful if a Catholic wants a written record that they are seeking exemption on religious grounds” from a COVID-19 vaccination mandate.<sup>158</sup>

No better example of this situation, and the confusion it can engender among those charged with adjudicating religious exemption requests, can be provided than that of the case *Healy v. United States Coast Guard*.<sup>159</sup> Although this case concerns a government actor (the U.S. Coast Guard), and although it was brought under the Religious Freedom Restoration Act, the gravamen of the complaint was the discriminatory approach that defendant took in evaluating the plaintiff’s exemption request.<sup>160</sup> Healy’s application for a preliminary injunction read as follows:

Lt. Cdr. Healy submitted a religious exemption request because the Hepatitis A vaccines that might be used on him were derived from

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<https://cogforlife.org/guidance/> [<https://perma.cc/YX4W-ACCU>]; CHARLOTTE LOZIER INST., COVID-19 VACCINE CANDIDATES AND ABORTION-DERIVED CELL LINES (2021), <https://s27589.pcdn.co/wp-content/uploads/2020/12/COVID-19-Vaccine-Candidates-and-Abortion-Derived-Cell-Lines.pdf> [<https://perma.cc/U969-RKJ6>].

154. *Who We Are*, COLO. CATH. CONF. (2021), <https://cocatholicconference.org/about-us/> [<https://perma.cc/TH3P-F7NA>].

155. *A Letter from the Bishops of Colorado on COVID-19 Vaccine Mandates*, COLO. CATH. CONF. (Aug. 5, 2021), [https://cocatholicconference.org/wp-content/uploads/2021/08/21-8-5\\_Letter\\_from\\_CO\\_bishops-on\\_vaccine\\_mandates\\_FINAL.pdf](https://cocatholicconference.org/wp-content/uploads/2021/08/21-8-5_Letter_from_CO_bishops-on_vaccine_mandates_FINAL.pdf) [<https://perma.cc/W3GN-4W8J>].

156. *Id.* (emphasis added).

157. *Id.*

158. *Id.*

159. *See* Application for Preliminary Injunction, *Healy v. U.S. Coast Guard*, No. 1:08CV00001 (D.D.C. Jan. 2, 2008), 2008 WL 7184974.

160. *See id.*

cells taken from the lung tissue of a child of 14 weeks gestation who was dissected upon his elective abortion . . . . Lt. Cdr. Healy is a practicing Catholic who strongly opposes abortion, and believes that if he receives one of these vaccines he would be impermissibly participating in the evil of abortion, and in societal structures that facilitate abortion, in violation of his conscience . . . . Therefore, he sent a memo explaining the Catholic principles that counsel against his cooperation in an abortion in this way. His request satisfied the Coast Guard's requirements for submitting such a request.

Defendants, through Captain Brent Pennington, denied Lt. Cdr. Healy's religious exemption request. Captain Pennington denied the request solely because of his theological disagreement with Lt. Cdr. Healy about Catholic teaching. Captain Pennington denied Lt. Cdr. Healy's request precisely because Lt. Cdr. Healy did not share Captain Pennington's view of the implications of Catholic orthodoxy. Captain Pennington declared that, in his view, Catholic teaching "does not state that these immunizations are against the religious tenets of the Catholic Church." In doing so, Captain Pennington also implicitly communicated that only members of churches or religions which present institutional condemnations of the vaccine at issue qualify for religious exemption. Thus, Captain Pennington has excluded members of the Catholic Church (and others like it) from the religious exemption policy, because the Church sets forth defining general ethical principles against abortion-derived vaccines and leaves it to its members to apply these principles to their particular circumstances.

Captain Pennington's foray into Catholic theology is in no way authorized by the Coast Guard's religious exemption policy, which simply calls for the religious objector to state the religious beliefs and tenets motivating his objection. Moreover, [d]efendants' decision blatantly violates federal constitutional and statutory protections. Defendants have no compelling or even rational interest in discriminating against Catholics and declaring the proper interpretation of Catholic theology.<sup>161</sup>

Healy complained that the Coast Guard's "imposition of discrimination upon a facially permissive policy" was "manifestly unfair."<sup>162</sup> He criticized Coast Guard officials for acting as "arbiters of religious orthodoxy, probing whether a church's doctrines are sufficiently opposed to vaccination and whether the applicant has interpreted those doctrines correctly."<sup>163</sup> In summation, Healy asserted that the defendants have imposed a rule that discriminates among religious beliefs, questions

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161. *Id.* (citations omitted).

162. *Id.*

163. *Id.*

and purports to decide the definition of true Catholic belief, forces him or her to violate his deep commitment to the sacredness of human life, and is unjustified by the text of their religious exemption Instruction that allows religious personnel to object to vaccination.<sup>164</sup>

Upon these facts, Healy requested a preliminary injunction against the Coast Guard to prevent adverse action against him for refusing the Hepatitis A vaccine.<sup>165</sup> Six days later, the government agreed “not to vaccinate or take any adverse action against [Healy] until such time as the case is decided on the merits.”<sup>166</sup> In return, the motion for an injunction was withdrawn.<sup>167</sup> Later that year, Healy received official notification that the Coast Guard “would reverse their previous decision denying him a religious exemption from the Hepatitis-A vaccine.”<sup>168</sup>

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One can recognize why a university may be tempted to adopt some of the approaches set forth above. A bright line approach,<sup>169</sup> for example, permits a university to draw up a list of religions for which exemption requests may be approved and a list of religions for which exemption requests will be denied. This simplifies the administration of its exemption program tremendously. Further, it can help the university navigate the difficult task of assessing the sincerity of a student claiming to be of a certain religion, but who asserts a religious objection not clearly found in that religion’s teachings. But New York’s Human Rights Law does not permit an exception to their prohibitions against discrimination predicated upon administrability concerns.<sup>170</sup>

In assessing a claimant’s request for a religious exemption, the decision-maker in question does have the right to assess the sincerity of the claimant’s beliefs and assertions.<sup>171</sup> But such an assessment can be an occasion for mischief, providing a pretext for discrimination on the

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164. *Id.*

165. *Id.*

166. *See* Healy v. U.S. Coast Guard, No. 1:08CV00001 (D.D.C. dismissed May 9, 2008).

167. *Id.*

168. Debi Vinnedge, *Military Exemption Allowed*, CHILD. OF GOD FOR LIFE (May 12, 2008), <https://cogforlife.org/2008/05/12/military-exemption-allowed/> [<https://perma.cc/F9X6-9B7J>].

169. *See supra* Section IV.B.

170. *See* N.Y. EXEC. LAW §§ 290–301 (McKinney 2018).

171. Hillel Y. Levin, *Private Schools’ Role and Rights in Setting Vaccination Policy: A Constitutional and Statutory Puzzle*, 61 WM. & MARY L. REV. 1607, 1628 (2020) (recognizing, however, that the limited nature of the rule “strips adjudicators of one crucial tool they would use in other contexts requiring a judgment as to a witness’s honesty, and thus makes the endeavor more difficult”).

grounds of “insincerity.”<sup>172</sup> For that reason, “the courts have made it clear that sincerity inquiries must be narrow, going only to the question of whether a claimant for a religious exemption honestly believes that her religious beliefs prohibit her from engaging in certain behavior.”<sup>173</sup> In doing so, “decision makers may not infer insincerity of a religious belief from its implausibility.”<sup>174</sup> The Supreme Court made this point forcefully in *United States v. Ballard*, famously explaining as follows:

The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.<sup>175</sup>

In sum, means other than “religious profiling” must be utilized to assess the merits and credibility of exemption requests. These could include, perhaps, the request of letters attesting to the student’s beliefs by others who know him, or some sort of documented history of acting upon these same beliefs in the past. But to force a belief upon the student that he or she does not have, or to deny the credibility of the student’s assertion of a belief just because it fails to, in the university’s estimation, conform itself to the “official” teaching of an organized religion, is deeply problematic and a violation of New York law.<sup>176</sup>

Similarly, one can understand why educational institutions might, while stopping short of drawing up formal lists of religions from which exemptions will be granted or denied, gravitate towards practices that only grant exemption requests hailing from those students whose religions set

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172. *Cf. Baer-Stefanov v. White*, No. 08C3886, 2009 WL 3462421, at \*7–8 (N.D. Ill. Oct. 22, 2009) (finding potentially unlawful an exemption regime that empowered the secretary of state to “determine[] which religious orders or sects have . . . bona fide religious convictions” justifying an exemption from state’s driver licensing laws).

173. Levin, *supra* note 171.

174. *Id.*

175. *United States v. Ballard*, 322 U.S. 78, 87 (1944).

176. In its nonbinding advice to employers, the United States Equal Opportunity Commission has specifically addressed this very issue:

An employer . . . should not assume that an employee is insincere simply because some of his or her practices deviate from the commonly followed tenets of his or her religion, or because the employee adheres to some common practices but not others. As noted, courts have held that “Title VII protects more than . . . practices specifically mandated by an employee’s religion.”

U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2021-3, SECTION 12: RELIGIOUS DISCRIMINATION (2021) (alteration in original) (footnotes omitted) (quoting *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 475 (7th Cir. 2001)), <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination> [<https://perma.cc/ZR7F-KVHU>].



forth clear-cut, black-and-white teachings about vaccination. This too can help the institution determine both the existence and the credibility of a student's professed religious belief.<sup>177</sup> It could also serve to disqualify many otherwise qualified applicants from receiving exemptions—and keeping the numbers down on exemption approvals is most likely a priority of the institution. But again, ease of administrability does not excuse a religious discrimination. Nor does a desire to artificially depress the number of exemptions awarded. Students whose religious beliefs are more complicated and more nuanced than others cannot be discriminated against on account of those objectives. In its nonbinding guidance to employers faced with the very same challenge, the Equal Employment Opportunity Commission advised the following:

Because the definition of religion is broad and protects beliefs, observances, and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, observance, or practice, the employer would be justified in seeking additional supporting information.<sup>178</sup>

As per one commentator who succinctly summarized the relevant legal landscape:

In effect, courts allow individuals to define the meaning of “religion” for the purposes of the Civil Rights Act. For example, inter-group disputes over religious beliefs do not preclude successful claims. Nor does the fact that the beliefs in question are not mandated by the plaintiff's religion. Indeed, protected religious beliefs need not be part of an organized religion at all.<sup>179</sup>

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177. An issue outside the scope of this Article is the definition of “religion” generally. The prevailing approach within the courts is to use a “functional” definition of religion, which compares the role that the belief in question “plays in the individual's or group's life” as compared to the role played by traditional religions in the life of believers, with the qualifier that the belief be somehow tethered to the supernatural. See Ethan Blevins, *A Fixed Meaning of “Religion” in the First Amendment*, 53 WILLAMETTE L. REV. 1, 26 (2016); TRIBE, *supra* note 81, at 1182. For a deeper discussion of this subject, see *Forgive Us Our Sins*, *supra* note \*.

178. See U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 176.

179. Sujit Choudhry, *Distribution vs. Recognition: The Case of Anti-Discrimination Laws*, 9 GEO. MASON L. REV. 145, 172 (2000) (footnotes omitted).

## V. A CRITICAL ANALYSIS OF RELIGIOUS EXEMPTIONS TO VACCINE MANDATES

This final Part will critically examine a pair of actual religious exemption policies to vaccination mandates and assess their compliance with New York law. A particularly good one hails from Syracuse University, and a particularly bad one hails from Hofstra University. As a predicate to that, however, this Part will first review the exemptions promulgated by New York State itself as part of its statutory regime of college vaccinations.

### A. *New York State's Statutory Religious Exemption to College Vaccination*

Precedent has established that “the state may require vaccinations for all college students without granting religious exemptions, but if it grants such exemptions it may not prefer one religion over another.”<sup>180</sup> This flows ineluctably from the First Amendment, pursuant to which such preferential treatment would violate both the Establishment Clause and the Free Exercise Clause.<sup>181</sup> To this end, New York has promulgated a religious exemption to its state-imposed roster of vaccines, which must be honored if an applicant meets its criteria.<sup>182</sup> This does not bear directly upon the issue of religious exemptions promulgated by private educational institutions, but nevertheless provides us with an example worthy of examination. The New York State exemption is summarized as follows:

A student may be exempt from vaccination if, in the opinion of the institution, that student or student's parent(s) or guardian of those less than 18 years old holds genuine and sincere religious beliefs which are contrary to the practice of immunization. The student requesting exemption may or may not be a member of an established religious organization. Requests for exemptions must be written and signed by the student if 18 years of age or older, or parent(s), or guardian if under the age of 18. The institution may require supporting documents. It is not required that a religious exemption statement be notarized. In the event of an outbreak, religious exempt individuals should be protected from exposure. This may include exclusion from classes or campus.<sup>183</sup>

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180. Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1626 n.285 (1989) (citing *Kolbeck v. Kramer*, 214 A.2d 408 (N. J. 1965) (per curiam)).

181. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

182. See N.Y. PUB. HEALTH LAW § 2165(9) (McKinney 2020); N.Y. COMP. CODES R. & REGS. tit. 10, § 66-2.2(e) (2021).

183. *Section I - Requirements*, N.Y. STATE DEP'T OF HEALTH, (Aug. 2018), [https://www.health.ny.gov/prevention/immunization/handbook/section\\_1\\_requirements.htm](https://www.health.ny.gov/prevention/immunization/handbook/section_1_requirements.htm)

New York's approach is not uncommon—many states recognize religious exemptions along similar lines.<sup>184</sup>

The New York religious exemption wisely limits an institution's assessment of an exemption application to the ascertainment of "genuine and sincere religious beliefs" on the part of the student.<sup>185</sup> In other words, the college or university in question may not attempt to challenge the student's understanding of his or her religion, nor engage in any sort of theological second-guessing.

The New York exemption also acknowledges that "[t]he student requesting exemption may or may not be a member of an established religious organization."<sup>186</sup> This is important because it precludes an institution from limiting exemptions to students drawn from organized religions; not every student with genuine and sincere religious beliefs will have a published catechism to refer to, or a religious leader from whom a letter in support can be procured.

Notable is the exemption's phraseology that the mandate need not apply to "a person who holds genuine and sincere religious beliefs which are contrary to the practices herein required."<sup>187</sup> This suggests that the exemption is only available for those students who oppose, wholesale, "the practice of immunization," and not available for those students who oppose a particular vaccine.<sup>188</sup> Semantically, however, this provision is much more limited. Very simply, one can argue that a student who finds certain vaccines religiously acceptable, while finding other vaccines religiously unacceptable, opposes "the practice of immunization" if such term is defined as the practice of receiving every recommended vaccine. That student could be said to merely find certain individual vaccines religiously acceptable while opposing the generalized "practice of immunization." Those vaccinations would be exceptions to the student's general rule of opposition.

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[<https://perma.cc/UPA9-F6L5>].

184. See, e.g., ILL. ADMIN. CODE tit. 77, § 694.210 (2002):

A student may be exempted from the immunization requirements specified in this Part upon acceptance by the designated recordkeeping office of a written and signed statement by the student (or the student's parent or guardian, if the student is a minor) detailing the student's objection to immunization on religious grounds. The objection must set forth the specific religious belief that conflicts with the immunization. The religious objection may be personal and need not be directed by the tenets of an established religious organization. General philosophical or moral reluctance to allow immunizations will not provide a sufficient basis for an exception to statutory requirements.

185. PUB. HEALTH § 2165(9); tit. 10, § 66-2.2(e).

186. *Section I - Requirements*, *supra* note 183.

187. PUB. HEALTH § 2165(9).

188. *Section I - Requirements*, *supra* note 183. Indeed, the New York State Department of Health, in summarizing the meaning of New York statutory and regulation language, utilized the exact language: "contrary to the practice of immunization." *Id.*

Semantics aside, the problematic repercussions of interpreting “practice of immunization” as it sounds are obvious. Consider the case of an orthodox Jewish or Muslim student who opposed the receipt of a particular vaccine because it was derived from pork and/or contained pork gelatin.<sup>189</sup> No court would uphold a vaccination exemption regime that made exemptions available to only certain religions (such as members of the Church of the First Born, who do in fact object to all forms of vaccination on religious grounds)<sup>190</sup> but not to other religions (such as Orthodox Jews and Muslims, who have more selective objections to vaccination). This would be a form of impermissible denominational preference.<sup>191</sup>

B. *A Model Exemption: Syracuse University*

Syracuse University provides an example of a privately promulgated religious exemption policy to a mandatory, university-imposed vaccination that comports well with New York’s Human Rights Law. The policy, in its entirety, reads as follows:

Syracuse University requires individuals accessing their campus facilities to get a COVID-19 vaccine. The facilities include, for example, dining halls, recreational facilities, gyms, classrooms, and instructional areas. This requirement is extended to SUNY-ESF students who would access and use those campus facilities.

Students may request either a medical or religious exemption.

1. Medical exemption is allowed if a physician submits a written, signed, and dated statement indicating that, in their professional opinion, immunization is medically contraindicated and would endanger the health of the individual.
2. Religious exemption is allowed if a student (or parent/guardian if under age 18) submits a written, signed, and dated statement that an immunization conflicts with sincerely held religious beliefs.

*Indicate which exemption you are requesting.*

Medical Exemption

\_\_\_ I am requesting exemption from the COVID-19 vaccine requirements for medical reasons. Please see attached statement from my personal physician regarding my request for medical exemption.

—OR—

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189. See Milko, *supra* note 132.

190. See Finley, *supra* note 129.

191. See *supra* Section IV.A.

### Religious Exemption

\_\_\_ I am requesting exemption from the COVID-19 vaccine requirements for sincerely held religious reasons. Please see attached statement regarding my request for religious exemption.<sup>192</sup>

Syracuse's policy requires only the information necessary to assess the sincerity of the student's objection to vaccination. The policy's requirements are reasonable and not unduly burdensome, broadcasting a certain sincerity on the part of the university regarding its exemption policy.

Although it does not explicitly state that students of any religious background may apply for the exemption, Syracuse's policy requires nothing that could be deemed prejudicial for or against students from an organized religion. It does not, for example, require a letter from a religious leader.<sup>193</sup> This is critically important, as it avoids the pitfall of discriminating against particular religious beliefs on account of their lack of association with an organized denomination.<sup>194</sup>

Finally, Syracuse University's policy is not worded in such a way that suggests the exemption is only available to students whose religious beliefs preclude the receipt of all vaccines—explicitly observing that a student may have an objection to “*an* immunization.”<sup>195</sup> This too helps prevent the university from violating New York Human Rights Law by discriminatorily preferring one denomination, or group of denominations, over another.<sup>196</sup>

### C. *A Problematic Exemption: Hofstra University*

In contrast to the religious exemptions promulgated by New York and Syracuse University, the Hofstra University exemption gets much wrong, and is arguably in striking noncompliance with state law. In its entirety, the Hofstra exemption reads as follows:

Hofstra University policy requires that all students, other than those who are in entirely online programs or are taking all classes remotely, must be vaccinated before returning to campus for the fall. A student may be exempted from the University's vaccination requirement if, in the opinion of the University, that student holds

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192. WAIVER OF RESPONSIBILITY, *supra* note 22. The form also requires the student to initial four waivers, indicating this understanding that certain restrictions may be imposed upon him on account of his unvaccinated status. *See id.* These restrictions may be problematic for other reasons, but do not implicate the issue of religious discrimination.

193. *See id.*

194. *See supra* Section IV.C.

195. *See* WAIVER OF RESPONSIBILITY, *supra* note 22 (emphasis added).

196. *See supra* Section IV.A.

genuine and sincere religious beliefs which are contrary to the practice of immunization.

Objections based on personal beliefs, sociological grounds, morals or philosophy fall outside the scope of religious exemption.

#### Instructions

For consideration of a religious exemption, students must provide all of the following:

1. A statement signed and written by the student:

- Stating that the student holds religious beliefs contrary to vaccination;
- Demonstrating that the student's religious beliefs are genuinely and sincerely contrary to vaccination; and
- Detailing the religious principles that form the basis of the objection to vaccination.

2. A document from the religious organization to which the student belongs supporting the basis of the religious beliefs which are contrary to vaccination, which must be signed by a religious leader of the religion, and which must include the name, address, and phone number/email of the religious leader.

Hofstra University will not accept or consider letters or signatures from parents or legal guardians for religious exemption requests, unless student is under 18 years of age. In such a case, both the student and parent/guardian must review and sign the applicable documentation and this form as indicated below.

The University reserves the right at any time up until a decision has been made to request additional supporting documentation.<sup>197</sup>

The first impression made by the Hofstra exemption is its partial unintelligibility. The policy absurdly declares: "Objections based on personal beliefs, sociological grounds, morals or philosophy fall outside the scope of religious exemption."<sup>198</sup> What are religious beliefs if not "personal beliefs?" Are religious objections supposed to be based upon

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197. REQUEST AND CERTIFICATION, *supra* note 21.

198. *Id.*

someone *else's* beliefs pursuant to the Hofstra policy, and not one's *own personal* beliefs? And is there anyone who fails to recognize that for perhaps the vast majority of individuals, their moral beliefs are largely synonymous with their religious beliefs?<sup>199</sup> Even philosophy can be correlative with religion for many people.<sup>200</sup> This nonsensical language could be salvaged by adding or inferring an additional qualifier such as “solely” to this text. For example: “Objections based *solely* upon personal beliefs, sociological grounds, morals, or philosophy that fall outside the scope of religious exemptions.” To some, this oversight may be a small thing; to others, however, it broadcasts that Hofstra crafted the policy with a particular lack of care and thoughtfulness.

More seriously incongruous with the law is Part 2 of the application, requiring “[a] document from the religious organization to which the student belongs supporting the basis of the religious beliefs which are contrary to vaccination, which must be signed by a religious leader of the religion, and which must include the name, address, and phone number/email of the religious leader.”<sup>201</sup> This requirement is impermissibly discriminatory on several grounds.

First, it presupposes the student's adherence to a “religious organization” complete with “religious leader[s].” There are few clearer examples of denominational preference and discrimination based on religion than this. Treating students who belong to organized religions differently than those who do not is a form of religious discrimination.<sup>202</sup>

Second, this policy requires that, even if the student belongs to an organized religion, the student's religious beliefs must be perfectly aligned with that religion's teaching regarding vaccination. As previously discussed, the divergence of an individual's religious beliefs from that of their religious superiors is not an uncommon phenomenon, especially among Americans.<sup>203</sup> This divergence makes the individual's religious beliefs no less genuinely and sincerely held, but may make it much more difficult for the student to procure the requisite letter from a religious leader. This too, therefore, constitutes a form of impermissible religious discrimination—one that I have referred to above as discrimination against “heretics” because it fails to grant equal regard and respect to those

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199. See PEW RSCH. CTR., U.S. PUBLIC BECOMING LESS RELIGIOUS 64 (2015), <https://www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious/> [<https://perma.cc/K78E-2BBW>].

200. See, e.g., LEO XIII, AETERNI PATRIS: ENCYCLICAL OF POPE LEO XIII ON THE RESTORATION OF CHRISTIAN PHILOSOPHY 1 (1879), [https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_04081879\\_aeterni-patris.pdf](https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_04081879_aeterni-patris.pdf) [<https://perma.cc/Z5CW-54R3>].

201. REQUEST AND CERTIFICATION, *supra* note 21.

202. See *supra* Section IV.C.

203. See *supra* text accompanying note 136; see also *supra* Section IV.B.

students whose religious beliefs veer from the religion to which they belong.<sup>204</sup>

#### CONCLUSION

Colleges and universities in New York may impose vaccination mandates upon their students. Whether all such mandates are lawful, for all vaccines, mandated in all circumstances, remains to be seen.

In an era of professed prioritization of diversity, equity, and inclusion concerns,<sup>205</sup> few educational institutions would want to be exposed for excluding students of faith from their purview. Few would want to find themselves within the merely two percent of colleges and universities that, according to one survey, lack religious exemptions to their vaccination mandates.<sup>206</sup> Such might not be socially acceptable and, moreover, would put the institution at a disadvantage in the competition for tuition and donor money. Thus, despite the drive by colleges and universities to impose COVID-19 vaccination mandates upon their students, the vast majority have promulgated religious exemptions thereto.

Putting aside the question of whether religious exemption by a private educational institution is required under New York law, once promulgated, the exemption must comply with New York's Human Rights Law—particularly section 296(4) addressing discrimination on the part of educational institutions.<sup>207</sup>

Unfortunately, as we have seen, some exemption policies apparently do not comply with the law.<sup>208</sup> Regardless of their motivations, certain educational institutions appear to believe that their exemption policies may—one way or another, explicitly or implicitly—discriminate against particular religions. This belief is manifested primarily via policies that give preference to organized religions over other religions or give preference to what the institution has decided are orthodox believers versus heterodox believers. Typically, institutions demonstrate this preference by mandating that students produce a letter from a religious leader.

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204. See *supra* Section IV.B.

205. See Jill Anderson, *Harvard EdCast: Colleges as Courageous Spaces*, HARV. GRAD. SCH. OF EDUC. (Oct. 30, 2019), <https://www.gse.harvard.edu/news/19/10/harvard-edcast-colleges-courageous-spaces> [<https://perma.cc/U66X-QTFS>].

206. See Noesekabel & Fenick, *supra* note 63, at 3663. *But see supra* text accompanying notes 205–06 (regarding Hofstra University's decision to end and revoke all religious exemptions to its COVID-19 vaccination mandate).

207. See N.Y. EXEC. LAW § 296(4) (McKinney 2018).

208. See *supra* Section V.C. Although the focus of this Article has been on New York State, it is likely that the problem detailed herein occurs in other states as well—more specifically, in any states that retain anti-discrimination laws applicable to educational institutions.



Concerning even facially lawful exemption policies, educational institutions must resist the temptation to administer them in unlawful ways for the sake of convenience, or more nefariously, to simply reduce the number of exemptions granted to otherwise qualified applicants. Such problematic methods include:

- Preparing internal lists of “approved” versus “disapproved” religions for purposes of deciding exemption requests;
- “Religiously profiling” a student by imposing certain religious beliefs upon that student contrary to the student’s own representations;
- Adopting rules of thumb requiring students seeking an exemption to be opposed to all immunizations versus a particular vaccination in question; and
- Denigrating the beliefs of those students that are more nuanced, turning upon the judgment of their religiously informed consciences, versus black-and-white denominational teachings.

For many, it is an axiomatic principle of moral philosophy that the ends cannot be used to justify the means.<sup>209</sup> Even if one posits that college and university administrators are acting with the purest of intentions, they should not and, at least in New York and other states with similar human rights legislation, cannot administer a vaccination mandate that discriminates against students on the basis of religion when adjudicating exemptions thereto. This lesson in discrimination must cease.

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209. See Vera Bergelson, *Crimes and Defenses of Rodion Raskolnikov*, 85 KY. L.J. 919, 936 (1997).