



## BEST OF THE JOURNAL

# WHAT RIGHT DOES THE STATE HAVE TO COMPEL VACCINATION? – REDUX

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**Editor’s Note:** In the Spring 2008 issue of JLGH, Christopher O’Connor, Associate General Counsel for Lancaster General Hospital, provided a comprehensive review of the legal question: Does the state have the right to compel vaccination? <sup>1</sup> At that time the issue was vaccination for Human Papilloma Virus (HPV) to prevent cervical cancer. As an elective immunization that could directly benefit only the person vaccinated, it did not have the implications of COVID-19 vaccination.

Now we are met on a different battlefield, where governments and employers are imposing mandates to be vaccinated against COVID-19 because control of the pandemic for the good of all requires vaccination even of the recalcitrant.

Because of the immediacy of this issue, I asked our office of legal counsel to update the previous article, which remains accessible on the JLGH website.<sup>1</sup>

## BACKGROUND

Historically, though some have always resisted compulsory vaccination as an infringement of personal liberty, the legal foundation for the states’ authority to compel vaccination has been firmly established for more than a century. In the seminal case, *Jacobson v. Massachusetts*,<sup>2</sup> the U.S. Supreme Court in 1905 upheld a Massachusetts law that granted permission to municipalities to compel vaccination against smallpox.

Cambridge, Mass., had imposed penalties ranging from fines to imprisonment for citizens who refused vaccination. Jacobson, a Massachusetts citizen, refused vaccination on the basis of a constitutional right to liberty, and to freedom from government intrusion. Massachusetts insisted on its right to exercise police power to address public health concerns, and argued that smallpox could only be prevented if most citizens were vaccinated. Jacobson was fined \$5, (about \$150 today), which established that he had been materially injured by the law.

The Supreme Court ruled in favor of

Massachusetts, specifically mentioning that an individual’s liberty interest has boundaries, and the state can compel vaccination for the benefit of the public’s health. By refusing vaccination, Mr. Jacobson was a “free rider” who sought to benefit from the actions of his vaccinated neighbors, a privilege the Court denied him.

## CURRENT STATUS OF COMPULSORY VACCINATION

Even before the *Jacobson* case, many states had required children to receive certain immunizations in order to be admitted to public or private schools. Today, all 50 states have vaccination requirements for school students, though exemptions for religious and medical reasons vary by state.

All states recognize exemptions for medical contraindications. Six states allow only medical exemptions, 26 states plus Washington, D.C., additionally permit religious exemptions, and the remaining 18 states also provide exemptions for personal beliefs.<sup>3</sup>

These exemptions allow states to appease their citizens and to avoid constitutional challenges, thus preventing considerable policy debates.

Pennsylvania’s regulations on immunization, which have not changed since 1997, label exemptions from school vaccination either “medical” or “religious,” but, religious exemptions encompass objections “on the basis of a strong moral or ethical conviction similar to a religious belief.”<sup>4</sup>

According to the 2019-2020 School Immunization State Summary for both Public and Private Schools, less than 1% of K-12 students in Pennsylvania were medically exempted from immunization, 1.4% received religious exemptions, and 1.6% received exemptions for strong philosophical convictions similar to religious beliefs.<sup>5</sup>

Since recommendations alone have historically proven ineffective in attaining herd immunity, government and private entities alike have faced a difficult choice between appeasing constituents by

prioritizing personal autonomy, or mandating vaccination for the greater good. This is not a new debate and the need to update this article illustrates that the debate is ongoing.

Following FDA approval of the HPV vaccine Gardasil® in 2006, the CDC issued guidelines recommending the vaccine for children between ages 11 and 12. The CDC continues to recommend HPV vaccination for 9- to 14-year-olds using Gardasil®9, but state legislatures have the authority to require vaccinations. Opponents of an HPV vaccination requirement raised concerns about the drug's safety, the expense of a vaccination mandate, parents' right to refuse, and the morality of vaccinating for a sexually transmitted infection. As a consequence of the extensive and often heated debate, only Hawaii, Rhode Island, Virginia, and Washington, D.C. passed laws requiring school students to obtain HPV immunizations.<sup>6</sup>

#### THE LEGAL AND ETHICAL ARGUMENTS

Many bioethicists believe that personal autonomy is an inherent and paramount right, and that a state oversteps its authority when it mandates vaccination of all citizens without granting exceptions based on personal autonomy. As already noted, however, courts have specifically declared that personal autonomy is not infinite, and have rejected as a general principle the notion that individual autonomy is paramount.

Some assert that even asking about a person's vaccination status is an infringement of their liberty, often citing the Health Information Portability and Accountability Act (HIPAA) as an applicable federal protection. This argument is erroneous because HIPAA protects an individual's personal health information from disclosure by health care providers; no HIPAA rule prevents an organization from asking about a person's vaccination status.<sup>7</sup>

There are also ethical reasons that favor vaccine mandates for health care workers. Many of these were discussed in JLGH by Dr. Alan Peterson in regard to the flu vaccine in 2011.<sup>8</sup> First, health care providers must put the patient's interest first and put their own personal preferences aside. Next, health care organizations must use policies that implement and honor the requirement to "First, Do No Harm." Additionally, health care workers have a unique duty to protect the vulnerable; one component of that duty is to take all feasible

measures to prevent disease, especially by not transmitting a disease to a patient. Last, workers in the health care industry must set an example for the broader community and build confidence in vaccination programs.

A state must balance its obligation to guard the public's health against every citizen's right to personal autonomy. In evaluating the legality of a state's program of compulsory vaccination, courts consider numerous factors such as the relative safety of the vaccine, the degree of intrusiveness of administering the vaccine, the severity of the preventable disease, and the ease with which it is transmitted. For example, all states require school-age children to be vaccinated against pertussis, doubtless because of the disease's ease of transmission, its severity, and the low degree of personal intrusion necessary to administer the vaccine. These considerations outweigh any unsubstantiated concerns about its safety.

#### VACCINATION AGAINST CORONAVIRUS-19

On May 19, 2021, the University of Pennsylvania Health System announced a requirement for all employees and clinical staff to be fully vaccinated against COVID-19 by Sept. 1 with the Pfizer, Moderna, or Janssen vaccines. At that time, all were being distributed under Emergency Use Authorizations from the FDA, though full approval has now been granted for the Pfizer vaccine.

As courts have made clear in the past, any government or private entity considering a vaccine mandate should weigh the competing interests of personal autonomy and concerns about safety against the severity and transmissibility of the virus. Although many of the purported side effects are objectively false (e.g., the vaccine does not make you magnetic and cannot alter your DNA), it is true that the vaccine has only been in use in humans since December 2020, so any long-term effects cannot be definitively known.

Considering that more than 34 million cases of COVID-19 have been reported in the United States and over 610,000 Americans have lost their lives to the disease, the danger to the public should be uncontested, but some individuals argue that vaccination is unnecessary for them because they fall into a relatively low-risk demographic. Just as the court told Mr. Jacobson in 1905, herd immunity is only attainable if everyone who can get the vaccine does so. Each citizen's vaccination benefits

the public health by decreasing that person's risk of contracting or transmitting the virus.

#### THE FUTURE

Since the legal foundation of compulsory vaccination is well-settled, future challenges to a state's authority to mandate vaccination will likely focus on the safety and public health benefit of specific vaccines. So far, California is the first state to announce that all public employees and health care workers must provide proof of vaccination or weekly negative COVID tests. In stark contrast, at least six states have already passed laws preventing public schools from requiring COVID-19 vaccination. Another 34 states have introduced bills that would prohibit requiring someone to demonstrate their vaccination status.<sup>9</sup>

For the COVID-19 vaccine, the weighing of safety against the public health benefit will undoubtedly continue to stir debate. The benefit to the individual is substantiated by evidence that the vaccine prevents infection and lessens the severity of symptoms, but will courts agree that COVID-19 is a public health concern that rises to the level of smallpox, measles, and other traditionally preventable diseases? Once the FDA grants full approval, the fear of hypothetical side effects will lose some standing, but how long after a vaccine's development is it really "proven" safe?

The essential questions will remain: what, if any, are the limits of personal autonomy, and when, and to what extent, does a state's compulsory vaccination program unconstitutionally invade personal autonomy?

#### REFERENCES

1. O'Connor CM. What right does the state have to compel vaccination? human papilloma virus and its implications. *J Lanc Gen Hosp.* 2008;3: 6-8. <http://www.jlgh.org/Past-Issues/Volume-3-Issue-1/Medico-Legal-and-Ethical-Matters.aspx>
2. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, (1905).
3. Exemptions permitted to school and child care immunization requirements, May 2021, <https://www.immunize.org/laws/exemptions.pdf> (last visited July 26, 2021).
4. 24 P.S. 13-1303a.
5. Pennsylvania Department of Health School Immunization Law Report System, <https://www.health.pa.gov/topics/Documents/Programs/Immunizations/School%20Immunization%20Survey%20Summary%20for%20Pa%202019-2020.pdf> (last visited July 26, 2021).
6. National Conference on State Legislatures, <https://www.ncsl.org/research/health/hpv-vaccine-state-legislation-and-statutes.aspx> (last visited July 22, 2021).
7. If my employer requires proof of my COVID-19 vaccination status, does that violate my rights under HIPAA?, <https://www.hhs.gov/answers/if-my-employer-requires-proof-of-my-covid-19-vaccination-status/index.html> (last visited July 27, 2021).
8. Peterson AS. It's Time to Mandate Influenza Vaccination in Healthcare Workers. *J Lanc Gen Hosp.* 2011; 6(4).
9. Vaccine passports: 50 states with bans, limitations & green lights, <https://www.beckershospitalreview.com/digital-transformation/vaccine-passports-10-states-with-bans-limitations-green-lights.html> (last visited July 27, 2021).

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