



# WHAT RIGHT DOES THE STATE HAVE TO COMPEL VACCINATION?

## *Human Papilloma Virus and Its Implications*

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### INTRODUCTION

Despite attempts by libertarian groups to label compulsory vaccination an infringement of personal liberties, and despite concerns raised by parents' groups about the potential for adverse health consequences from vaccination (e.g. the claim that thimerosal is a cause of autism), the legal foundation for the states' authority to compel vaccination is well established, and has been so for more than a century.

### BACKGROUND

In the seminal case, *Jacobson v. Massachusetts*,<sup>1</sup> the United States Supreme Court in 1905 upheld a Massachusetts law that granted permission to municipalities to compel vaccination against smallpox. Cambridge, Massachusetts imposed just such a law, which imposed penalties ranging from fines to imprisonment on citizens who refused vaccination. Mr. Jacobson, a Massachusetts citizen, chose not to be vaccinated and defended his decision on the basis of a constitutional right to liberty and freedom from government intrusion. Massachusetts insisted that its program of compulsory vaccination was a valid exercise of its police power to address public health concerns, and argued that an outbreak of smallpox can only be contained if most citizens have been vaccinated. Jacobson was fined \$5.00, a not inconsiderable sum at the time, which established that he had been materially injured by the law.

The Supreme Court ruled in favor of Massachusetts, stating that compulsory vaccination in order to benefit the public's health was a reasonable exercise of the state's police power. The Court specifically mentioned that an individual's liberty interest is not without boundaries, and the state can compel its citizens to be vaccinated if it will benefit 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 be vaccinated against a variety of diseases

in order to be admitted to public or private schools. It was also true then, and is now, that only a handful of states recognize an exception based on a personal belief that vaccination is an infringement of one's liberty interest. That exception provides a "philosophical" exemption that enables those with strong convictions about personal autonomy to opt out of compulsory vaccination.

Many other states, however, including the Commonwealth of Pennsylvania, recognize only those exceptions that are based on religious beliefs or medical contraindications;<sup>2</sup> exceptions which allow those states to appease their citizens and to avoid constitutional challenges. Pennsylvania's compulsory vaccination law with similar limited exceptions dates to 1895, and it has remained virtually unchallenged since 1922. Thus, as a general principle, compulsory vaccination has been immune from any considerable policy debates.

The success of mass vaccination is based on the principle of "herd immunity," by which even those relatively few individuals who are not vaccinated are protected from the disease because they have so little chance of exposure to an infected individual. According to the 2006 statistical report from the Centers for Disease Control and Prevention, approximately 90% of Pennsylvania children ages 19-35 months received the various vaccines required by Pennsylvania law.<sup>3</sup>

Vaccination has been widely successful in the United States, although in some communities the traditional vaccination rate is significantly lower than the national average. In these communities, there is evidence to suggest there is a higher incidence of diseases that are preventable by vaccination.

### THE LEGAL AND ETHICAL ARGUMENTS

Many bio-ethicists 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.

A state's obligation to guard the health of the public is an interest that competes with personal autonomy, and the state must balance these competing interests. 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 questions about its safety.

#### VACCINATION AGAINST HUMAN PAPILLOMA VIRUS (HPV)

Recent deliberations in state legislatures about compulsory vaccination against HPV with the new vaccine Gardasil™ have prompted high decibel discussions about the legal and ethical foundations of compulsory vaccination. Further fuel has been provided by questions about the safety of such traditional vaccines as DTaP, MMR, and Polio that have been raised by outspoken parents and activists. These groups have questioned the safety of these vaccines, and have advanced what they consider evidence to suggest an association between traditional vaccines and childhood diseases such as autism and diabetes. These objections come from small but highly vocal groups, and they have garnered significant media attention. Even though no scientific evidence exists that links traditional vaccines with any increase in childhood diseases, the skeptics have nonetheless organized a movement that questions programs of compulsory vaccination. The combination of concern about the safety of traditional vaccines and the recent legislative consideration of compulsory HPV vaccination, accounts for the sometimes raucous debates about a state's authority to compel vaccination.

As of January 2008, forty-two states and the District of Columbia have, in some form, considered legislation requiring education about, availability of, and funding for the HPV vaccine. Of those states considering legislation relating to HPV vaccination, legislation in twenty-four states proposes mandatory vaccination programs.<sup>4</sup> Considering that Gardasil™ was approved by the United States Food and Drug Administration only in the summer of 2006, it is surprising that so many states have taken such swift action to implement a mechanism that would require all teenage females to be vaccinated against HPV. It is not surprising, however, that a vocal chorus of concerned citizens, including physicians and bio-ethicists, have called for further discussions in an effort to slow the legislative momentum. They particularly object to the failure of states to consider satisfactory opt-out provisions, and their failure to adequately study the safety and efficacy of Gardasil™. In addition, many skeptics question the public health benefits of HPV vaccination. As of the writing of this article, only one state, Virginia, has passed legislation that actually mandates HPV vaccination for teenage females.<sup>5,6</sup>

#### 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. If future research seriously questions the safety of traditional vaccines, the authority of a state to mandate even traditional vaccinations could be considerably restricted.

For HPV, however, the argument now focuses on the public health benefit. If the vaccine prevents cervical cancer, the benefit to the individual is obvious, but is HPV a public health concern that rises to the level of measles, polio, and other traditionally preventable diseases? If the argument that it is not a public concern is accepted, the authority of the state to mandate vaccination would face significant scrutiny and could potentially be ruled an unconstitutional infringement of one's liberty interest.

The ultimate question will be: What, if any, are the limits of personal autonomy? When, and to what extent, does a state's compulsory vaccination program unconstitutionally invade personal autonomy?

**REFERENCES**

1. Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, (1905).
2. 24 P.S. 13-1303a.
3. National Immunization Survey, <http://www.cdc.gov/vaccines/stats-surv/imz-coverage.htm#nis> (last visited February 1, 2008).
4. National Conference on State Legislatures, <http://www.ncsl.org/program/health/HPVvaccine.htm> (last visited February 1, 2008).
5. Virginia's legislature later passed legislation delaying the implementation of the HPV vaccination program.
6. Texas' governor mandated vaccination against HPV by executive order, but Texas' legislature later rescinded the executive order.

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