Measles Outbreak: Public Health Authority, New York City’s Immunization Mandate, and the Current Legislative Landscape

June 4, 2019

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- Research interests/areas of expertise:
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  - Newborn Screening
  - Genetics and Privacy Laws
  - Emergency Public Health Response
  - Health Care Cost Reform
Presenter

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  - Obesity Prevention
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  - Immunization Law and Policy
  - Emergency Response
  - Infectious Diseases
The Return of Measles

Number of Measles Cases Reported by Year

2010-2019** (as of May 24, 2019)

CDC data as of May 24, 2019.
What Can Law Do to Increase Rates of Vaccination?

- The History of Vaccine Law
- *Jacobson v. Massachusetts*, Legacy & Questions
- Contemporary Case Law, Litigation over SB 277
- Revisiting Religious Exemptions
- Federal Intervention
- Moving Forward
## Vaccine Law in History

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
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<tbody>
<tr>
<td>Pre-17&lt;sup&gt;th&lt;/sup&gt; century</td>
<td>Variolation practiced in the Middle East and Asia</td>
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<tr>
<td>1721</td>
<td>Cotton Mather introduces variolation to N. America amidst controversy</td>
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<tr>
<td>1796</td>
<td>Edward Jenner develops the smallpox vaccine</td>
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<tr>
<td>1813</td>
<td>Congress passes “An Act to Encourage Vaccination”</td>
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<tr>
<td>1823</td>
<td>Boston mandates vaccination for school attendance</td>
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<tr>
<td>1855</td>
<td>Massachusetts enacts first state vaccine mandate</td>
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<tr>
<td>1905</td>
<td>Supreme Court decides <em>Jacobson v. Massachusetts</em></td>
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<tr>
<td>1922</td>
<td>Supreme Court upholds school-based vaccine law in <em>Zucht v. King</em></td>
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<tr>
<td>Year</td>
<td>Event</td>
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<tr>
<td>1955</td>
<td>Polio Vaccine/Cutter Incident</td>
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<tr>
<td>1964</td>
<td>ACIP formed</td>
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<tr>
<td>1968</td>
<td>Half of all states require vaccination for school attendance</td>
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<tr>
<td>1981</td>
<td>All states have vaccine mandates</td>
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<tr>
<td>1986</td>
<td>Congress passes National Childhood Vaccine Injury Act</td>
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<tr>
<td>1998</td>
<td><em>The Lancet</em> publishes Wakefield’s paper linking vaccines to autism</td>
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<tr>
<td>2015</td>
<td>Disneyland outbreak leads to SB 277</td>
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<tr>
<td>2019</td>
<td>Number of measles cases rise, Washington abolishes PBE, Maine becomes 4th state to abolish PBE and religious exemptions.</td>
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46 States Provide for Religious and/or Personal Belief Exemptions

Updates:

- **Washington** abolished personal belief exemption
- **Maine** abolished personal belief and religious exemptions
Jacobson v. Massachusetts
197 U.S. 11 (1905)

- Rejected 14th Amendment challenge to Massachusetts law requiring smallpox vaccination during an outbreak.
- Emphasizes that the police power allows state to pass reasonable health regulations.
- “Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.”
- Held that the legislature may delegate the power to require vaccination to the Board of Health.
“We say necessities of the case, because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening of the safety of all, might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere…”

“[T]he police power ... may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts.”

**Jacobson:** The Rorschach Test
Free Exercise Claims: Couldn’t be brought in 1905.
Must there be an outbreak? How severe?
Can the state forcibly vaccinate an individual?
Can the state quarantine individuals who refuse to be vaccinated?
How do contemporary due process cases, especially those affirming the right to make one’s own medical decisions, affect vaccine law?
Post-\textit{Jacobson} Supreme Court Cases

\textit{Zucht v. King}, 260 U.S. 174 (1922)

- Affirms Texas law requiring children to be vaccinated to attend school – even in absence of an outbreak.


- Stating in dicta: “Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself of religious grounds.”


- Neutral law of general applicability does not violate the Free Exercise Clause.
Jacobson’s Continuing Clout

Despite significant changes in due process law, courts continue to rely on Jacobson to uphold school vaccination laws, and rule that states need not provide religious exemptions.

- Phillips v. City of New York, 775 F.3d 538 (2d Cir. 2015)
- Workman v. Mingo County Bd. of Educ., 419 F. App’x 348 (4th Cir. 2011)
The California Litigation

■ SB 277, which abolishes religious and PBEs, has been challenged as violating:
  - Substantive due process/state right to privacy
  - The Free Exercise Clause
  - Equal protection
  - State constitutional right to education
  - Violation of IDEA
  - RICO

■ To date state and federal courts have rejected all challenges:
The Paradox of Religious Exemptions

Although the Free Exercise Clause does not require religious exemptions, states that have such exemptions can face Establishment Clause and Equal Protection challenges:

- When an exemption favors some religions over others.
  

- If the exemption favors religious objectors over secular objectors.
  

- If the state officials have excessive authority to determine religious doctrine or sincerity.
  
On the Horizon: Reconsidering Religious Objections

Smith and hybrid claims

Hobby Lobby and the “undue burden” test –
But note the exception for vaccines

Federal Conscience Regulations, 45 CFR Pt. 88 -
Do not override state vaccine laws.
Beyond School Mandates

- Compulsory Vaccination
  Philadelphia, 1991

- Quarantines and Travel Bans
Federal Intervention

Federal agency action would raise questions of:

- Federalism
  - Commerce & Commandeering
  - Power to Tax & Spend
- Statutory Authority
- Religious Freedom Restoration Act

“If states continue to grant “wide exemptions” they’re “going to force the hand of federal health agencies.”
Former FDA Commissioner Scott Gottlieb
Moving Beyond *Jacobson*

- Are there other legal tools that may improve rates of vaccination?
- Do vaccine laws (unintentionally) increase resistance?
- What changes can we make to vaccination laws and policy to enhance trust and compliance?
- How do we respond if measles or vaccine-preventable diseases become endemic?
The 2019 Measles Outbreak

Thomas Merrill
General Counsel
New York City Department of Health and Mental Hygiene
Measles 101

• Characterized by fever and rash
• Highly contagious
  • Airborne and droplet transmission
  • Remains active for up to two hours
  • Infectious four days prior to rash
  • 90 percent of non-immune contacts will be infected
• Incubation period is 7-21 days
• Can be serious and even fatal
  • Complications include pneumonia and encephalitis
  • 1 to 2 child deaths per 1,000 children infected
Measles Resurgence

- Had Been declared eliminated in the U.S. in 2000
- Since then, there have been periodic outbreaks as a result of importation of the virus by people infected while traveling outside of the U.S.
- 2013 NYC outbreak
  - 58 cases
  - Was largest NYC outbreak since 1989-1991 measles insurgence and since measles was eliminated in the U.S.
  - Caused by one unvaccinated adolescent who acquired measles in the United Kingdom
  - Concentrated in Borough Park and Williamsburg among the Orthodox Jewish community
- Currently, there are large outbreaks throughout the world, including in Israel, Europe (Ukraine), Asia (Philippines, India), South America (Brazil, Venezuela), and Africa (Madagascar)
- Resurgence attributed to weak health systems, low vaccination rates, increased vaccine hesitancy, and anti-vaccination movement
Rockland County

• 28 percent of children unvaccinated
• Measles arrived with one traveler in September 2018; 225 cases as of May 8
• Emergency declared by County Executive on March 26 barring unvaccinated people from places of public assembly
• TRO issued on April 5 blocking its enforcement
  • Court refused to find that 166 cases was an “epidemic”
  • Order exceeded five day term specified in NY Executive Law
Epidemiology of the Current Outbreak
(as of May 29, 2019)

- Time period: September 30, 2018 through May 29, 2019
- 550 confirmed cases
- 52 identified chains of transmission, 32 of which are active; 11 importations (Israel, UK, Ukraine, NJ, NYS)
- Age range: <1 year to 66 years of age
  - 56 (17%) children <1 year of age
  - 162 (49%) children 1-4 years of age
  - 66 (20%) children 5-17 years of age
- 25 hospitalizations; 6 persons admitted to Intensive Care Unit
- Almost all cases reside in Williamsburg (267 cases, 81%) or Borough Park (52 cases, 16%) Brooklyn and are members of the Orthodox Jewish community
<table>
<thead>
<tr>
<th>Neighborhood</th>
<th>Cases</th>
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<tbody>
<tr>
<td>Williamsburg</td>
<td>379</td>
</tr>
<tr>
<td>Borough Park</td>
<td>69</td>
</tr>
<tr>
<td>Midwood/Marine Park</td>
<td>4</td>
</tr>
<tr>
<td>Sunset Park</td>
<td>4</td>
</tr>
<tr>
<td>Brighton Beach/Coney Island</td>
<td>3</td>
</tr>
<tr>
<td>Crown Heights</td>
<td>2</td>
</tr>
<tr>
<td>Flushing</td>
<td>2</td>
</tr>
<tr>
<td>Bensonhurst</td>
<td>1</td>
</tr>
<tr>
<td>Far Rockaway</td>
<td>1</td>
</tr>
<tr>
<td>Hunts Point/Longwood/Melrose</td>
<td>1</td>
</tr>
</tbody>
</table>
Measles Outbreak, NYC 2018-2019: Epi Curve by Rash Onset and Neighborhood (as of May 28, 2019)

Date of first positive lab result if rash onset unknown. Date of first report to DOH if rash onset unknown and no positive lab result.
Anti-vaccination Propaganda

https://issuu.com/peachmoms/docs/the_vaccine_safety_handbook_a4
Health Department Response

- Over 200 Health Department staff working on the outbreak
- Case and contact investigation
  - Set up dedicated call center
  - Station Health Department staff at one high volume facility at the epicenter of the outbreak to assist with potential exposures
  - Investigate all reported cases
  - Contact identification and notification (over 12,200 exposures)
- Public Health Laboratory has performed over 1,600 diagnostic tests
- Issued revised MMR recommendations for all children in affected communities
Excluding Unvaccinated Children

• While New York recognizes religious exemptions to school vaccination requirements, a local health department may order schools to exclude children with religious and/or medical exemptions during an outbreak

• Beginning in December, DOHMH began advising yeshivas and day cares to exclude unvaccinated children

• In April, 102 schools and daycares in Williamsburg were served with Orders directing them to exclude children

• NOVs issued for not complying or not cooperating with audits

• Five schools closed and required to submit CAPs

• Orders and audits led to better compliance
Public Health Emergency Declared

• Health Code §3.01 allows Commissioner to act
• Announced publicly in Williamsburg on April 9th
• Directed residents of ZIP codes 11205, 11206, 11221 and 11249 to be vaccinated within 48 hours
• Remained in effect until BOH meeting on April 17th
Board of Health Resolution (4/17/19)

- Declared the outbreak in ZIP codes 11205, 11206, 11211 and 11249 to be a public health nuisance
- Continued the requirement that residents/students/workers in these affected ZIP codes be vaccinated (or have proof of immunity or be able to demonstrate medical exemption)
- Per Administrative Code §17-148, Order was served by publication in City Record and in local media
- Violations of the Order punishable by a $1000 fine.
- Violations are daily and continuing
MMR Vaccine Uptake
Children Ages 6-59 Months, Williamsburg, Brooklyn

22,833 MMR doses to children ages <18 years, Williamsburg and Borough Park, Oct 2018-May 2019
Legal Challenge

• Five parents challenged the vaccination order claiming it was irrational and violated religious freedom

• On April 18, 2019, Justice Knipel denied motion for an injunction and dismissed their challenge finding:
  • Williamsburg at “the epicenter” of “the most significant spike in incidences in the United States in many years”
  • Petitioners unable to offer better and less restrictive alternative
  • Medical objections not supported by science

• Appellate Division denied TRO on April 30, 2019

• Appellate Division denied Motion for Preliminary Injunction on May 13, 2019
Where are we?

- Since April 9, more than 2000 children in Williamsburg have received the MMR as of May 8
- Yeshivas and Day Cares are complying with exclusion orders and allowing DOHMH to audit them
- As of May 28th, more than 120 people have been issued Notices of Violation for not being immunized or not immunizing their children
  - First cases heard at OATH on May 30th
  - More than 50 withdrawn because proof of vaccine or immunity submitted
- Epi data is starting to suggest an end to the outbreak
MEASLES OUTBREAK: 
THE CURRENT LEGISLATIVE LANDSCAPE

Allison N. Winnike, J.D. 
President & CEO

4 June 2019

The Network for Public Health Law
LEARNING OBJECTIVE

Learn about efforts to make legislative changes in under-immunized states to limit vaccination exemptions and solidify emergency declaration powers
THE IMMUNIZATION PARTNERSHIP

Vision
› A community protected from vaccine-preventable diseases

Mission
› To eradicate vaccine-preventable diseases by educating the community, advocating for evidence-based public policy, and supporting immunization best practices
STATE MANDATORY IMMUNIZATION LAWS

› All states have mandatory immunization laws for children as a condition of school attendance
› Some states have mandatory immunization laws for attendance at schools of higher education
› Some states have mandatory immunization laws for health care workers
› Many states provide for mandatory or compulsory immunization during a declared public health emergency
TYPES OF EXEMPTIONS

Medical

Non-Medical

Religious

Personal Belief
Where the exemptions are

Four Texas counties — including Harris County — are among the top 15 U.S. counties for having kindergarteners with non-medical exemptions for vaccinations.

Data is for 2016-17
Texas and Pennsylvania data is for 2015-16

1. Maricopa, Ariz. (Phoenix) 2,947
2. Salt Lake, Utah (Salt Lake City) 956
3. King, Wash. (Seattle) 940
4. Multnomah, Ore. (Portland) 711
5. Oakland, Mich. (Troy) 686
6. Utah, Utah (Provo) 662
7. Harris (Houston) 592
8. Tarrant (Fort Worth) 518
9. Collin (Plano) 478
10. Macomb, Mich. (Warren) 477
11. Wayne, Mich. (Detroit) 466
13. Travis (Austin) 413
14. Jackson, Mo. (Kansas City) 412
15. Spokane, Wash. (Spokane) 405

Source: Public Library of Science Medicine
COUNTY-LEVEL NME RATES, 2016-2017

NUMBER OF CONSCIENTIOUS OBJECTIONS IN TEXAS PUBLIC AND PRIVATE SCHOOLS

STATE LEGISLATIVE ACTIVITY
MAINE

- H.P. 586/L.D. 798 removed NME and expanded medical exemption form to include physician, nurse practitioner, or physician assistant judgment
- Passed 23 May 2019
- Signed 24 May 2019
- Effective 1 Sep 2021
WASHINGTON

› H.B. 1638 removed personal belief exemption to MMR vaccine requirement
  › Personal belief exemptions still available for all other required vaccines
› Passed 24 April 2019
› Signed/partially vetoed 10 May 2019
› Effective 28 July 2019
S.B. 276 would authorize California Department of Public Health to determine whether the underlying condition cited in a medical exemption meets CDC guidelines.

- Passed Senate 22 May 2019
- Governor signaled opposition on 1 June 2019
NEW YORK

› A02371/S02994 would remove religious NME

› Senate Majority Leader indicated there may be enough vote to pass Senate (30 May 2019)

› Governor indicated support
OREGON

› H.B. 3063 would remove NME

› Passed House 6 May 2019

› Governor agreed to kill all NME bills (including H.B. 3063) in exchange for GOP approval of H.B. 3427, authorizing a new business tax for education on 13 May 2019
COLORADO

› H.B. 1312 would have required NME form filled out in person at a state health department office

› Died 2 May 2019
PUBLIC HEALTH EMERGENCY RESOURCES
PREPARING FOR A PANDEMIC: AN EMERGENCY RESPONSE BENCHBOOK AND OPERATIONAL GUIDEBOOK FOR STATE COURT JUDGES AND ADMINISTRATORS

Model bench book for states by the Conference of Chief Justices Pandemic and Emergency Response Task Force

http://ncsc.contentdm.oclc.org/cdm/ref/collection/facilities/id/195
Control Measures and Public Health Emergencies: A Texas Bench Book

Resource for public health officials, judges, district attorneys, and elected officials

Thank You!

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