

2015

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Michelle Corda

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Recommended Citation

Michelle Corda, *The Vaccination Debate: From the Playground to the Courtroom*, 20 Pub. Interest L. Rptr. 109 (2015).

Available at: <https://lawcommons.luc.edu/pilr/vol20/iss3/2>

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Feature Article
**The Vaccination Debate: From the Playground
to the Courtroom**

Michelle Corda

One. That is the average number of deaths per year caused by measles in the United States from 1995 to 2012.¹ Heart disease accounted for 597,689 deaths in the United States in 2010 alone.² Even though the mortality rate for measles is much, much lower than many other diseases due to the success of the measles vaccine in the U.S., the decision to vaccinate against measles is still a matter of life or death for many.³

THE KRAWITT FAMILY LAWSUIT

For some families, the decision of whether or not to vaccinate is not a decision at all. Rhett Krawitt cannot be vaccinated.⁴ Rhett, now 6, has battled leukemia for most of his young life.⁵ Rhett underwent multiple rounds of chemotherapy for over three years to try and rid his body of the cancer.⁶ Just last year, Rhett finished his final round of chemo and received news that he was in remission.⁷ Now, however, the Krawitts have a new health concern to worry about: measles.⁸ The chemotherapy worked to attack the cancer, but it also weakened Rhett's immune system and it may take months for his body to rebuild and his immune system to strengthen.⁹ Until then, he cannot get all of his immunizations.¹⁰ In the mean time, Rhett must rely on herd immunity –

¹ *Measles: Epidemiology and Prevention of Vaccine-Preventable Diseases*, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 7, 2012), available at <http://www.cdc.gov/vaccines/pubs/pinkbook/meas.html>

² *Health, United States, 2013*, CENTERS FOR DISEASE CONTROL AND PREVENTION (2014), available at <http://www.cdc.gov/nchs/data/abus/abus13.pdf#039> (June 6, 2015).

³ Lisa Aliferis, *To Protect His Son, A Father Asks School To Bar Unvaccinated Children*, NPR (Jan. 27, 2015, 5:05 PM), available at <http://www.npr.org/blogs/health/2015/01/27/381888697/to-protect-his-son-a-father-asks-school-to-bar-unvaccinated-children>.

⁴ Aliferis, *supra* note 3.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

counting on everyone around him for protection.¹¹ Herd immunity occurs “when a critical portion of a community is immunized against a contagious disease, [at that point] most members of the community are protected against that disease because there is little opportunity for an outbreak.”¹² According to Jerry Williamson, M.D., MJ, CHC this is only reached when 95 percent of the population is immunized against any given disease.¹³

Unfortunately for the Krawitts Rhett lives in Marin County, California, “a county with the dubious honor of having the highest rate of ‘personal belief exemptions’ in the Bay Area and among the highest in the state.”¹⁴ A “personal belief exemption” permits parents to lawfully send their children to schools even when they remain “unvaccinated against communicable diseases like measles, polio, whooping cough and more.”¹⁵ In Marin County this year alone, 6.45 percent of parents are exercising a personal belief exemption from vaccinations for their children.¹⁶ At Rhett’s elementary school the rate is even higher, at 7 percent.¹⁷

Carl Krawitt, Rhett’s father, says “it’s not just schools where diseases can spread . . . it’s the library, the playground, the airport, the whole community.”¹⁸ Carl believes that people should be held liable for making choices that hurt the herd immunity and put other people’s lives at risk.¹⁹ “If you choose not to immunize your own child and your own child dies because they get measles, OK, that’s your responsibility, that’s your choice. But if your child gets sick and gets my child sick and my child dies, then . . . your action has harmed my child.”²⁰

¹¹ *Id.*

¹² *Community Immunity (“Herd Immunity”)*, VACCINES.GOV (Apr. 16, 2015), available at <http://www.vaccines.gov/basics/protection/>

¹³ Interview with Jerry Williamson, M.D., MJ, CHC, Apr. 28, 2015.

¹⁴ Aliferis, *supra* note 3.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Tamar Lewin, *Sick Child’s Father Seeks Vaccination Requirement in California*, THE NEW YORK TIMES (Jan. 28, 2015), available at http://www.nytimes.com/2015/01/29/us/father-of-boy-with-leukemia-asks-california-school-officials-to-bar-unvaccinated-students.html?hp&action=click&pgtype=Homepage&module=second-column-region®ion=top-news&WT.nav=top-news&_r=3.

¹⁹ *Id.*

²⁰ Aliferis, *supra* note 3.

Carl Krawitt is attempting legal action to try to prevent unvaccinated students from attending school.²¹ Carl's suit "demands that his local school board require all students who can be, but have not been, vaccinated to stay at home, so that Rhett can more safely attend the school."²²

THE LEGAL DEBATE

Can liability be imposed over the decision to vaccinate? Tension is growing between the interest in protecting public health and safety and protecting individual liberty.²³ On one side of the debate are those who believe a parent's choice to opt out of vaccinating their children should not be "unrestricted or unfettered."²⁴ Arthur Caplan, head of the Division of Medical Ethics at New York University Langone Medical Center, believes "there[i]s too much 'wobble room'" for parents to choose not to vaccinate their children.²⁵ This leaves those who cannot be vaccinated for medical reasons at risk of catching the disease from people who have merely chosen to opt-out.²⁶ Caplan believes that "if an unvaccinated person visits a hospital nursery or a cancer ward . . . or you send an unvaccinated child to daycare with newborns . . . parents should pay damages for death or disability resulting from a disease outbreak."²⁷ Parent's have right to make decisions about their child's health, however, "liberty regarding vaccination ends at the start of a vulnerable person's body," according to Caplan.²⁸

On the other side of the debate are those who believe vaccination is a personal choice.²⁹ Many who choose not to vaccinate have "faith based personal beliefs."³⁰ John Carroll, superintendent of Lagunitas Elementary School in San Geronimo, California, where 40 percent of students have not been vac-

²¹ Richard A. Epstein, *Measles Vaccine*, NEWSWEEK (Feb. 3, 2015), 1:32 PM, *available at* <http://www.newsweek.com/measles-vaccine-whose-rights-are-risk-304157>.

²² Epstein, *supra* note 21.

²³ Epstein, *supra* note 21.

²⁴ Jacoba Urist, *Should you be able to sue a parent for not vaccinating their child?*, TODAY PARENTS (Feb. 2, 2015, 1:50 PM), *available at* <http://www.today.com/parents/should-you-be-able-sue-parent-not-vaccinating-their-child-2D80459459>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Jack Healy & Michael Paulson, *Vaccine Critics Turn Defensive Over Measles*, NEW YORK TIMES (Jan. 30, 2015), *available at* http://www.nytimes.com/2015/01/31/us/vaccine-critics-turn-defensive-over-measles.html?_r=0.

³⁰ *Id.*

cinated against measles, says this basis is not so much “religious as it is a belief that they raise their children in a natural, organic environment and are suspicious of pharmaceutical companies and big business.”³¹

Many believe that holding parents liable for choosing not to vaccinate would be challenging.³² “Life has lots of risks,” explained Mary Holland, research scholar and director of the Graduate Lawyering Program at NYU Law School.³³ “The idea of imposing legal liability on parents who don’t vaccinate implies that vaccines are both perfectly safe and perfectly effective.”³⁴ With personal liberty, public health, and legal liability all playing roles in the debate to vaccinate, it is a complicated and highly divisive topic among parents.

WHO DECIDES?

Each state has the ability to determine how vaccinations will be handled in that state through their individual police power.³⁵ In 1905, the United States Supreme Court in *Jacobson v. Massachusetts* held that a mandatory vaccination law did not violate the Fourteenth Amendment right to liberty.³⁶ In *Jacobson*, a Massachusetts law was at issue.³⁷ The law allowed cities to require residents to be vaccinated against smallpox.³⁸ Jacobson refused to comply with the requirement and was fined five dollars.³⁹ The Court held that the law was a legitimate exercise of the state’s police power to protect the public health and safety of its citizens.⁴⁰ Local boards of health determined when mandatory vaccinations were needed, thus making the requirement neither unreasonable nor arbitrarily imposed.⁴¹ In its opinion the Supreme Court refrained from defining the limits of police power, but it “distinctly recognized the authority of a State to enact quarantine laws and ‘health laws of every description.’”⁴²

Since *Jacobson*, courts have interpreted police power to include allowing “public officials to take strong action against individuals who posed threats to

³¹ *Id.*

³² Urist, *supra* note 24.

³³ Urist, *supra* note 24.

³⁴ *Id.*

³⁵ Denise Grady, *Vaccinations Are States’ Call*, NEW YORK TIMES (Feb. 16, 2015), available at http://www.nytimes.com/2015/02/17/health/vaccinations-are-states-call.html?_r=0.

³⁶ *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 38 (1905)

³⁷ *Id.*

³⁸ *Id.* at 12-13.

³⁹ *Id.* at 13.

⁴⁰ *Id.* at 37.

⁴¹ *Id.* at 39.

⁴² Epstein, *supra* note 21.

the health of others by the spread of communicable diseases.”⁴³ According to Richard A. Epstein, a senior lecturer at the University of Chicago, even though police power has no explicit textual authorization in the Constitution, it is evident that the “Constitution’s various provisions protecting individual liberty must at times give way to government control in response to health hazards.”⁴⁴

IMPOSING LEGAL LIABILITY

It is unlikely that suits brought by parents against the families of unvaccinated children will be successful with the current formation of the law.⁴⁵ According to George Annas, Chair of the Department of Health Law and Bioethics at Boston University, “the parent of a child who caught measles from a purposefully unvaccinated child could sue, but it would be hard to win.”⁴⁶ Annas believes one possibility is to contend that there was a breach of moral responsibility.⁴⁷ However, he maintains, “it would be extremely difficult to argue [that moral responsibility] as a tort case.”⁴⁸

To succeed in a tort lawsuit, Sara Rosenbaum, a health law and policy professor at George Washington University, said the plaintiff would need to demonstrate that “the child was injured by measles, prove that the nonvaccinating parents caused the other child’s measles, and show that they had a duty to protect other children from their unvaccinated child but breached duty.”⁴⁹ Cause and duty, necessary elements of the case, may be challenging to prove due to the extremely contagious nature of measles.⁵⁰ Since measles spreads rapidly and infects an average of 18 people for every one sick person, in the event of an outbreak, it would be difficult to determine who got the virus from whom and who should ultimately be liable.⁵¹

If courts were to find that liability can be imposed on the families who choose not to vaccinate their children, liability may also be imposed on families who do not take extensive steps to ensure vulnerable children, like Rhett

⁴³ *Id.*

⁴⁴ *Id.*; Hoover Institution, *available at* <http://www.hoover.org/profiles/richard-epstein> (Mar. 23, 2015).

⁴⁵ *Why the Vaccine Debate Is Unlikely to Land in the Courtroom*, KMBZ (Feb. 6, 2015, 9:19 PM), *available at* <http://www.kmbz.com/Why-the-Vaccine-Debate-Is-Unlikely-to-Land-in-the-/20881804>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

Krawitt, are not exposed to situations where they can contract the disease.⁵² “The parents of the child too young or unable to get the measles vaccine for medical reasons may have a [similar] duty to keep their child away from unvaccinated children, putting some of the blame on them.”⁵³

THE FUTURE OF THE VACCINATION DEBATE IN THE COURTROOM

Under current law, experts believe that succeeding in tort litigation would be very difficult. Rosenbaum says that “once you allow individuals to make choices on all sides – whether to immunize or not immunize, take your child to school or not – you get into the murky world of tort litigation.”⁵⁴ Rosenbaum believes the issue of vaccination is really a public health issue.⁵⁵

Epstein predicts the Krewitt lawsuit will likely be unsuccessful. Epstein expects the suit will fail “on the shoals of modern administrative law, which vests a large and virtually unreviewable discretion in local health officials to decide whether this action is required.”⁵⁶ Epstein also believes that “if the school board should deem the risk sufficient to call for those suspensions, it is equally unlikely that any parent who refuses to vaccinate their children for either religious or medical reasons could have any success in keeping them in school.”⁵⁷ The deference we give to the decisions of public officials to allow unvaccinated students to attend school could possibly be reversed, giving officials the authority to *mandate* that unvaccinated students must stay home.⁵⁸

A possible solution proposed by some legal and public health experts to protect both public health and personal liberty would be to eliminate both personal and philosophical exemptions entirely, and to preserve the “religious [exemptions] but enforce them strictly.”⁵⁹ For this to happen, state legislatures would have to individually vote to eliminate the exemptions.⁶⁰ If the exemptions continue to exist in state statutes, it will be impossible to stop granting them to parents who seek them in order to avoid vaccinating their children.⁶¹

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Vaccine Debate*, *supra* note 45.

⁵⁵ *Id.*

⁵⁶ Epstein, *supra* note 21.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Grady, *supra* note 35.

⁶⁰ *Id.*

⁶¹ *Id.*

Ultimately, we need to find a compromise somewhere.⁶² Jerry Williamson, M.D., MJ, CHC, believes this can only be achieved by continuing the dialogue.⁶³ He believes it is necessary to continue to “invest in research programs and improve vaccine safety.”⁶⁴ Finally, Williamson believes “we need to be prepared to engage in debates about what constitutes acceptable and unacceptable risks.”⁶⁵ The discussion needs to continue in order to determine what is best for our country, communities, schools, and, most importantly, children.

⁶² Williamson, *supra* note 13.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*