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THE PROBLEM OF VACCINATION NONCOMPLIANCE: PUBLIC HEALTH GOALS AND THE LIMITATIONS OF TORT LAW

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“Any successful immunization program will inevitably create a situation, as the disease becomes rare, where the individual parent’s choice is at odds with society’s needs.”

—Roy Anderson and Robert May,
“The Logic of Vaccination.” *New Scientist*

INTRODUCTION

Imposing tort liability on parents who fail to vaccinate their children would not serve the public health and public policy interests that drive childhood immunization efforts. The public policy goals of vaccination are to slow the spread of disease and to reduce mortality and morbidity. Our country’s public health laws already play a substantial role in furthering these goals. Although application of tort law may be an appropriate response to some of the problems that result from vaccination noncompliance, there also is a need to cultivate public understanding of the connection between individual actions and collective wellbeing. It is doubtful that the imposition of individual tort liability will achieve this goal.

I. THE PROBLEM OF VACCINATION NONCOMPLIANCE

The goal of public health law is to protect the wellbeing and safety of the entire population, balanced against the interests of specific individuals. Immunization is a collective good that requires shared responsibility. Public health laws requiring vaccination compliance demand that each of us take a small risk to protect the community at large. Immunizing a sufficient proportion of the population creates a “herd immunity”—a collective benefit derived from immunization of the majority of the population, which imparts protection to those who remain unvaccinated by impeding the spread of

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contagions. Whether motivated by misplaced conviction or reasoned calculation, some parents may shield their children from the discomfort and risks associated with vaccination, yet enjoy the protection that widespread vaccination provides for the community. At a certain point, however, once enough children go unvaccinated, both these children and the rest of the community become vulnerable to disease.

Failing to vaccinate is a failure to protect the interests of those who are most vulnerable. Children, whether they are immunized or not, are particularly vulnerable members of society, dependent on their parents to make decisions about their health. Hence children are most likely to be injured by an increase in vaccination noncompliance. Also at great risk are those who cannot be vaccinated for medical reasons (e.g., persons with HIV, cancer, pregnancy, or allergies). Thus, the harm that freeloading causes is not equitably distributed.

When parents fail to immunize their children, they not only expose their own children to a greater risk of disease, but they also place others in the community at heightened risk. As more people freeload, fewer remain in the vaccinated “herd,” thus increasing the risk of contracting an illness among those who are unvaccinated. Additionally, because vaccinations do not always impart complete immunity, even those who are vaccinated will encounter greater risks due to diminished herd immunity if enough people are unvaccinated.

While legislatures and advocates have cast vaccination exemptions as matters of individual rights, there are other policy consequences to these rules. Such rules pose a problem of aggregation. Although it may be both rational and within a parent’s right to choose not to immunize his or her child, when this seemingly individual decision is replicated by many parents across the country, it leads to diminished herd immunity and diminished protection for all against disease. This aggregation problem might serve as a justification for the use of tort law in some cases. If an individual’s rights infringe on the rights of another, tort law provides a way to redress the harm caused. On the other hand, even if tort law is successful in awarding damages and thereby doing justice to the people who are immediately harmed, tort law still may not compel the behavior that will further the public’s health.

Although only a small percentage of parents in the United States currently seek out a personal belief exemption, these numbers are rising rapidly, as bioethicist Nancy Berlinger describes in a [report](#), “Conscience Clauses, Health Care Providers, and Parents,” from the 2008 *Hastings Center Bioethics Briefing Book*. As a result, clusters of families who are not vaccinating their children are inadvertently creating communities with weaker herd immunities, further increasing the likelihood of an infectious outbreak. As people lose sight of how their own welfare is connected to that of society, they may fail to adequately respect the importance of a collective herd immunity. While some groups of like-minded parents have formed tightly knit communities in solidarity with each other, they may not see themselves in solidarity with a family two zip codes away.

Being vaccinated, like paying taxes or serving on a jury, can be considered a responsibility of citizenship. If vaccination compliance is indeed a responsibility of citizenship, then the case for enforcement through tort law might be strengthened. Those who do not take precaution via vaccination have failed to fulfill a duty, albeit a civic one. Allowing a few people to freeload using herd immunity at the expense of the wider community imposes a social injustice. But this injustice is not amenable to remedy via tort law.

II. CONCERNS REGARDING THE USE OF TORT LAW FOR CASES OF VACCINATION NONCOMPLIANCE

While the imposition of tort liability on noncompliant parents might add an additional level of defense to public health and safety, this effect is likely to be marginal and is unlikely to serve the goals that motivate vaccination programs. Tort claims are unlikely to deter additional parents from forgoing vaccination. Education is more likely to be effective. Parents must be informed of the risks of vaccination relative to the risk of contracting the illness that the vaccine prevents. Although parents who choose not to vaccinate their children may be acting out of love and a desire to protect their children from the putative risks and discomfort of vaccination, this desire is often misguided. For example, the Centers for Disease Control and Prevention [website page](#), *Vaccine Safety: Mercury and Vaccines (Thimerosal)*, notes that even though there is no scientific proof that any vaccine or vaccine preservative causes autism, some parents still believe they do. These parents are failing to properly balance the risk of infection with the risk of vaccine side effects. Despite the risks it imposes on their children, some parents remain adamant in their decision to forego vaccination of their child. If such people are not deterred by either the legal obstacles to getting an exemption or the health risks that vaccination noncompliance places on their child, it is unlikely that they will be swayed by a remote threat of potential civil litigation.

In addition to failing to recognize the health risk they are imposing on their own children, noncompliant parents are also failing to consider the harm they are doing to society. These parents should be reminded that disease control is a social responsibility that one must bear as a member of a modern society.

However, tort law is unlikely to ameliorate the problems caused by either informed or uninformed decisions not to vaccinate. Moreover, tort law would be unlikely to encourage parents who adamantly refuse to immunize their children to consider the public's wellbeing. In addition to failing to encourage informed parents to vaccinate, tort law also fails to help those uninformed or underinformed parents who need access to a regular physician and accurate information, not ex post legal consequences. Tort is good at resolving individual injuries. The remote threat of being sued is unlikely

to alter a noncompliant parent's determination to protect his or her children from perceived harm.

Even if, in some cases, tort liability may be able to successfully compensate an injured party (and one could advance a normative justification for a tort suit), there is still a pragmatic argument against these types of suits: they are disruptive of community cohesion and may hinder the broader public policy goal of encouraging compliance with vaccination. Supporting tort suits as the solution for vaccination noncompliance is supporting an adversarial remedy that will only compound the problem of parental alienation and further impair the ability of these parents to factor community welfare into their decision-making process. While individuals are understandably most interested in redressing their own private grievances, and tort law continues to primarily serve as a system for individual compensation, tort law is also often employed to further public policy (e.g., deterrence, efficient loss spreading, etc.).

The development of an ethic of solidarity and a renewed sense of investment in and connection to the welfare of others are important aspects of the solution to this problem. While an ethic of solidarity is not something that can be legislated or regulated into existence, it is a social state that can be cultivated by human endeavor, especially through education. Whether tort liability for failure to vaccinate will promote or erode this ethic of solidarity is a critical question.

To the extent that noncompliance with childhood vaccination programs may do harm to third parties, such as through exposure to disease, tort may provide an appropriate remedy and victims may be entitled to compensation. However, the greatest harm imposed by vaccination noncompliance will most likely be an unrealized one—an increase in the risk of exposure to contagions in the event of an outbreak.

Tort liability is often ineffective at redressing unrealized harms. While there have been attempts at redressing unrealized harm through tort, such as, for example, *Potter v. Firestone Tire & Rubber Co.*, where plaintiffs sued for medical monitoring following a suspected toxic exposure, such cases pose difficult jurisprudential problems that may be compounded when applied to the problem of infectious disease. In the absence of a disease outbreak, for what remedy would potential litigants sue? Perhaps those who choose to not vaccinate their children should be responsible for the cost of disease monitoring or other prophylactic measures to counter the risk that they have imposed. Tort could serve as a mechanism for shifting the costs of disease monitoring from those who bear the risk to those who imposed the risk. But even this would be better achieved through regulation.

Finally, lawsuits for failure to vaccinate may raise thorny evidentiary and procedural problems. Following an outbreak prompted by vaccination noncompliance, plaintiffs may have trouble identifying the wrongdoer. It is difficult to trace contagions through both place and time. Even if this type of tracking were available and the relevant actors could be identified, would we penalize the last freeloader, the individual who directly infected the plaintiff, or every unvaccinated person who passed on the contagion? While one an-

swer to an administratively difficult claim is to bar suit, another is to let people fail to state a claim. In some instances, it is conceivable that causation might be possible to trace. It is arguable that such suits should not be barred simply because most would fail.

But a better answer, rather than focusing on an ex post distribution of blame, would be to take steps to prevent harm in the first place. The advancement of public health remedies, such as syndromic surveillance projects in coordination with local health departments and hospitals, may be able to identify and prevent the rapid spread of a disease outbreak.

III. ALTERNATIVES TO TORT LITIGATION

Vaccines are often called victims of their own success. A new generation of parents across the country has not witnessed the tragic effects of diseases like polio, smallpox, measles, and whooping cough. A generation ago, the risk of contracting a deadly disease far outweighed the risk of the vaccination. As vaccinations became ubiquitous and herd immunity grew, society collectively forgot about the shared experience of communicable disease that once impressed the importance of prophylaxis upon the public imagination.

In effectuating public health goals, there is an important place for statutes and regulations, which have been successful in guiding behavior through requirements such as vaccination laws. Vaccinations should be made more available and affordable; all people living in the United States should be provided with vaccines regardless of their ability to pay for them. There is also a place for education about vaccination and a place for cultivating a sense of shared responsibility for public health. There are practical steps the government can take to help people appreciate the value of the community, and the relevance of the collective wellbeing both to their individual welfare and also to the shared wellbeing of their community. The United States already has an excellent foundation; there are effective public health laws that grant the necessary powers to handle individuals who are a threat to the public's health (e.g., through quarantine). We could make public health law better by reforming the vaccine exemption process. For example, we could refuse to allow further legislation that whittles down laws requiring vaccination. One way to do this might be to limit the scope for vaccination exemptions. A further helpful measure would be to implement an informed refusal process. Under such a policy, a doctor would first be obliged to explain the risks of not receiving the vaccination. Parents who refuse such treatment could be required to sign informed refusal documents that acknowledge that they understand the risks they are inflicting on their children and the community. From the perspective of policy and protecting herd immunity, the reason for the exemption is irrelevant. Regardless of whether the parents object to vaccination on religious or philosophical grounds, the law should insist on a robust system of informed refusal.

CONCLUSION

Tort liability addresses civil trespasses that one commits against another. Through redress of private wrongs, tort liability may serve public purposes. While tort law may be able to redress the private wrongs that stem from vaccine noncompliance, it is likely that tort will not do justice to the public harm that is done, nor further the public health goals of vaccination. For these reasons, tort law is not the right public policy tool to bring to bear on the problem. Using tort law to impose liability on parents who fail to vaccinate their children will only aggravate the problem of alienation from a larger sense of community and make it harder for parents to get past their own immediate, individual interests. Although using the law is an appropriate response to the increasing problem of vaccination noncompliance, the law employed should be public health law and not tort law. Even if plaintiffs could prevail in court, redressing the immediate damage done to these individuals would not ameliorate the real social harm, nor would it likely encourage the desired behavior that will further public health goals.