

CHAPTER XIV

VACCINATION

VACCINATION, or the introduction of vaccine virus into the human skin to cause an attack of cowpox (*vaccina*), is, when successfully carried out, a preventive of smallpox (*variola*).¹ Cowpox is a mild and harmless disease, whereas smallpox is a dangerous, communicable, and highly contagious disease. Before the general adoption of vaccination as a preventive measure, smallpox was widespread and often fatal, and was aptly characterized by Lord Macaulay as "the most terrible of the ministers of death." Since the adoption of vaccination, the disease has declined in prevalence and severity, although in 1937 there were nearly 12,000 cases of smallpox among unvaccinated persons in the United States. In 1940 there were about 2,800 cases, and in 1942 less than 1,000.

Because of the fact that one successful vaccination offers immunity against smallpox for at least seven years and two vaccinations usually confer permanent immunity, the routine vaccination and revaccination of young children and the immediate vaccination of all persons exposed to smallpox are advocated by physicians and public health officials. The process of vaccination, as customarily carried out with vaccines that are manufactured in establishments licensed and inspected by the Federal Government under an act of Congress passed in 1902 (32 Stat. 728, U.S.C. title 42), is almost invariably safe and harmless. The discomfort caused by the mild case of cowpox that follows a successful "take" is as nothing compared to the danger of an attack of smallpox, which may occur in either a mild or a virulent form.

Since the adoption in 1809 by the Commonwealth of Massachusetts of the first legislation in this country requiring vaccination, laws and regulations pertaining to vaccination have been promulgated in all the States.² Unlike the situation in numerous foreign countries where vaccination of the entire populace has been made compulsory for

1. The term "vaccination" is now also applied, perhaps somewhat loosely, to inoculation with any virus to prevent disease. Thus, there are vaccinations against typhoid fever, cholera, anthrax, Rocky Mountain spotted fever, and other diseases.

2. W. Fowler, *Smallpox Vaccination Laws, Regulations, and Court Decisions*, Supplement No. 60 to *Pub. Health Rep.*, U.S. Public Health Service, 1927. W. Fowler, *Principal Provisions of Smallpox Vaccination Laws and Regulations in the United States*, Reprint 2227, U.S. Public Health Service, 1941.

many years by national laws,³ there is no federal statute on this subject in the United States. The quarantine regulations of the United States Public Health Service require, however, that persons arriving in this country on ships upon which smallpox has occurred or is present, or coming from infected localities, shall be vaccinated or quarantined and denied entry unless protected by a successful vaccination or a previous attack of the disease.⁴ Officers and subordinates of the United States Public Health Service on duty at quarantine stations are also required to be vaccinated.

The value of legislation in the control of smallpox has been demonstrated in a survey conducted by the United States Public Health Service. The incidence of the disease is highest in the nine States having no important laws or regulations promoting or achieving vaccination of the population, and is even higher in the seven States having various prohibitive provisions regarding smallpox vaccination. The conclusion stated as a result of this investigation is:

The difference in the incidence of smallpox in the different areas of the United States is apparently related to the various provisions of law or regulation, especially with reference to the requirement of vaccination as a prerequisite to school attendance, the permitting of discretionary powers to local authorities, and prohibitive provisions. As was stated in a previous report, it is apparent that smallpox is lowest in those jurisdictions which have some type of universal routine vaccination requirements.⁵

The Legal Status of Vaccination

Vaccination requirements set forth in state legislation, municipal ordinances, board of health regulations, and school board regulations have given rise to a vast amount of litigation in this country. Since the first decision on the subject in 1830, there have been reported (to 1938) nearly a hundred decisions of courts of last resort on various legal aspects of vaccination.⁶ While there is some conflict in the deci-

3. Bavaria (1807), Denmark (1810), Sweden (1814), Prussia (1835), the United Kingdom (1853), German Empire (1874), Rumania (1874), Hungary (1876), Serbia (1881), and Austria (1886). *Encyclopedia Britannica*, 14th ed., vol. 22, page 922, 1929.

4. According to some medical authorities, a previous attack of smallpox does not necessarily prevent a second attack.

5. B. C. Hampton, *Smallpox in Relation to State Vaccination Laws and Regulations*, Reprint 2528, U.S. Public Health Service, 1944.

6. It is interesting to note that between the publication of the second and third editions of this book (1939 to 1947) there was no decision on vaccination by a court of last resort, and only two reported decisions by lower courts. The law on this subject seems to be static.

sions on certain aspects of vaccination, it is now a well-established principle of law in this country that under the police power of the States, legislatures may require vaccination of all citizens under certain conditions, and may delegate the power to require vaccination to municipal corporations and other political subdivisions of the State.

The legal rule applicable to compulsory vaccination was expressed in 1892 by Parker and Worthington in their treatise on public health and safety, as follows:

It is sometimes provided by law that persons who may have been exposed to contagion, or who came from places believed to be infected, and particularly children attending the public schools, shall submit to vaccination, under the direction of health authorities. This requirement is a constitutional exercise of the police power of the State, which can be sustained as a precautionary measure in the interest of the public health. But, as incidental to their general powers relating to the prevention of contagious diseases, the health authorities have the right to prescribe regulations with reference to vaccination, and they may require vaccination whenever, in their judgment, the interest of the public health will thereby be subserved. To this end, they are authorized, and even directed, to provide a suitable supply of fresh vaccine virus, of a quality and from sources either approved by the state board of health, or in their own judgment proper and reliable, and to furnish the means of thorough and safe vaccination to all persons who may need the same, and without charge to such persons as are unable to pay for the same. This does not mean that the health authorities must, themselves, attend to the vaccination of those who need it, but that they must provide the means of vaccination, by furnishing supplies of vaccine virus and employing competent physicians.⁷

In support of these legal principles, which have been cited with approval in later court decisions,⁸ these authors refer to several of the earlier cases on vaccination.⁹

The prevailing medical viewpoint on vaccination has been stated by Rosenau as follows:

Vaccination affords a high degree of immunity to the individual, and a well-nigh perfect protection to the community. To remain unvaccinated is selfish in that by so doing a person steals a certain measure of protection from the community on account of the barrier of vaccinated persons around him.

7. L. Parker and R. H. Worthington, *The Law of Public Health and Safety*, Albany, Bender, 1892.

8. *Blue v. Beach* (1900), 155 Ind. 121, 56 N.E. 89, 80 A.S.R. 195, 50 L.R.A. 64.

9. *Abeel v. Clark* (1890), 84 Cal. 226, 24, P. 383. *Hazen v. Strong* (1830), 2 Vt. 427. *Fort Wayne v. Rosenthal* (1881), 75 Ind. 156, 39 Am. R. 127.

Theoretically it would be ideal if all persons submitted to vaccination and revaccination voluntarily. But experience has shown that this is impractical, and, wherever tried, has failed. The best results have always been obtained where vaccination has been required, and, in my judgment, this is the only present means by which smallpox may be eliminated.¹⁰

Compulsory Vaccination

The constitutionality of statutes requiring general vaccination was decisively settled by the United States Supreme Court in a notable decision handed down in 1905.¹¹ In this case there was involved an act of the Massachusetts legislature empowering boards of health to require vaccination of the general populace when considered necessary. The law also stated that children might be exempt from the requirement when in the opinion of a physician the process would be undesirable, but it made no mention of such an exemption for adults. The boards of health were likewise directed to furnish free vaccine.

Acting under this state law, a city board of health adopted a regulation declaring that smallpox was prevalent in the city and ordering that all inhabitants who had not been vaccinated should be vaccinated. A court action challenging the validity of this board of health regulation was brought by an opponent of vaccination, but the regulation was upheld by the Supreme Judicial Court of Massachusetts,¹² whereupon an appeal was taken to the United States Supreme Court on constitutional grounds. It was alleged, among other things, that the law contravened the Preamble of the Federal Constitution, was inconsistent with the spirit of the entire instrument, and violated the bill of rights of individual citizens.

These contentions were dismissed as fallacious by the United States Supreme Court in a brilliant opinion delivered by Mr. Justice Harlan. It was pointed out by the court that the care of the public health forms a part of the police power of the States; that it is the duty and function of the state legislature, and not of the courts, to decide in the first instance, in view of all the facts and opposing theories, whether general vaccination is or is not desirable for the protection of the public health; that the determination as to what should be done in an emergency, such as the existence of smallpox, must be made by some appropriate body, and that the board of health is the logical

10. M. J. Rosenau, *Preventive Medicine and Hygiene*, 6th ed., New York, Appleton-Century, 1935.

11. *Jacobson v. Massachusetts* (1905), 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643, 8 Ann. Cas. 765. See Appendix 1, page 359.

12. *Comm. v. Jacobson* (1903), 183 Mass. 242, 66 N.E. 719, 67 L.R.A. 935.

agency; and that since the defendant in this case was not shown by the evidence to be other than a fit subject for vaccination, he must obey this law as a reasonable and proper exercise of the police power. Said the Court:

The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of the 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.

In its opinion, the court also referred to a case which had been recently decided in New York, in which the Court of Appeals of that State had upheld the exclusion of children from school unless vaccinated, and in which the New York court had declared that, while it did not and could not decide that vaccination was a preventive of smallpox, it could and did take judicial notice of the fact that this is the common belief of the people of the State.¹³

Again, in 1922, the United States Supreme Court had before it a question involving the constitutionality of a city ordinance requiring vaccination, in this instance as a prerequisite for attendance at school.¹⁴ The ordinance had been sustained as valid by a Texas Court of Civil Appeals,¹⁵ but the decision was appealed on the grounds that the ordinance deprived the plaintiff of liberty without due process of law, in violation of the Federal Constitution.

In dismissing this appeal and upholding the constitutionality of the ordinance, Mr. Justice Brandeis stated for the United States Supreme Court that:

Long before this suit was instituted, *Jacobson v. Massachusetts*, 197 U.S. 11, had settled that it is within the police power of a State to provide for compulsory vaccination. That case and others had also

13. *Viemeister v. White* (1904), 179 N.Y. 235, 72 N.E. 97, 103 A.S.R. 859, 1 Ann. Cas. 334, 70 L.R.A. 796. In *Re Smith* (1895), 146 N.Y. 68, 40 N.E. 497, 28 L.R.A. 820, 48 A.S.R. 769, it was held that a city health officer could not order the vaccination or quarantine of persons not actually exposed to smallpox. Judicial notice of vaccination as effective immunization against smallpox was also taken in *Booth v. Board of Education* (Tex. 1934), 70 S.W. (2d) 350.

14. *Zucht v. King* (1922), 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194.

15. *Zucht v. King* (1920), 225 S.W. 267.

settled that a State may, consistently with the Federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative. *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358. And still others had settled that the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law. *Lieberman v. Van de Carr*, 199 U.S. 552. A long line of decisions by this Court had also settled that in the exercise of the police power reasonable classification may be freely applied and that regulation is not violative of the equal protection clause merely because it is not all-embracing. *Adams v. Milwaukee*, 228 U.S. 572, *Miller v. Wilson*, 236 U.S. 373, 384. In view of these decisions we find in the record no question as to the validity of the ordinance sufficiently substantial to support the writ of error. Unlike *Yick Wo v. Hopkins*, 118 U.S. 356, these ordinances confer not arbitrary power, but only that broad discretion required for the protection of the public health.

State laws authorizing political subdivisions of the State to require general vaccination when conditions warrant such action have likewise been sustained as valid by the highest courts in Georgia¹⁶ and North Carolina,¹⁷ and a United States District Court has refused to enjoin the operation of a state law requiring vaccination of school children, excluding from school those who were not vaccinated, and imposing a penalty for failure to attend school.¹⁸

While these decisions sanction and uphold the right of the State to make general vaccination compulsory when deemed necessary by a responsible and competent administrative board or agency, no court has ever ruled that any person may be forcibly vaccinated at any time. Such a drastic requirement would be an unreasonable interference with personal liberty. Compulsory vaccination means that all persons may be required to submit to vaccination for the common good, and that if they refuse to do so without adequate reason entitling them to legitimate exemption under the law, they may be arrested, fined, imprisoned, quarantined, isolated, or excluded from school, according to the appropriate circumstances in the particular case; but they cannot be forcibly vaccinated, desirable as such a procedure might be from the standpoint of public health protection. If there exists an alternative procedure that will be equally efficacious in protecting the public health, such as quarantine, it must be adopted in cases of recalcitrant and misguided opponents of vaccination.

16. *Morris v. City of Columbus* (1898), 102 Ga. 792, 30 S.E. 850, 42 L.R.A. 175, 66 A.S.R. 243.

17. *State v. Hay* (1900), 126 N.C. 999, 35 S.E. 459, 49 L.R.A. 588, 78 A.S.R. 691.

18. *Gillin v. Board of Education of Philadelphia* (1918), 250 F. 649.

The Vaccination of School Children

When a state legislature decides that vaccination shall be required as a prerequisite to attendance at school and adopts specific legislation to that effect, such a requirement is a proper exercise of the police power of the State. Legislation of this nature has been upheld as valid by the courts in California,¹⁹ New Hampshire,²⁰ New York,²¹ Pennsylvania²² and Washington.²³

So, too, where a state law authorizes municipalities, boards of health, or boards of education to require vaccination of school children when deemed necessary and desirable and to exclude unvaccinated children from school, such laws also represent a constitutional exercise of the police power of the State, and have been upheld by the courts in Alabama,²⁴ Connecticut,²⁵ Georgia,²⁶ Illinois,²⁷ Mississippi,²⁸ Ohio,²⁹ and Texas.³⁰

19. *Abeel v. Clark* (1890), 84 Cal. 226, 24 P. 383. *French v. Davidson* (1904), 143 Cal. 658, 77 P. 663. *State Board of Health v. Trustees of Watsonville School District* (1910), 13 Cal. App. 514, 110 P. 137.

20. *Barber v. School Board of Rochester* (1926), 82 N.H. 426, 135 A. 159. *Cram v. School Board of Manchester* (1926), 82 N.H. 495, 136 A. 263. *Covey v. Robinson* (1930), 84 N.H. 439, 152 A. 279. *State v. Drew* (1937), — N.H. —, 192 A. 629.

21. *Re Walters* (1895), 84 Hun 457, 32 N.Y.S. 322. *Viemeister v. White* (1904), 179 N.Y. 235, 72 N.E. 97, 70 L.R.A. 796, 103 A.S.R. 859, 1 Ann. Cas. 334. *People v. Ekerold* (1914), 211 N.Y. 386, 105 N.E. 670, L.R.A. 1915 D 223, 37 Ann. Cas. 552. *Re Whitmore* (1944), 47 N.Y.S. (2d) 143. A decision of the Domestic Relations Court holding that the vaccination requirement for school children is not an interference with freedom of religion.

22. *Field v. Robinson* (1901), 198 Pa. 638, 48 A. 873. *Stull v. Reber* (1906), 215 Pa. 156, 64 A. 419, 7 Ann. Cas. 415. *Comm. ex rel. Carson v. Rowe* (1907), 218 Pa. 168, 67 A. 56. *Lee v. Marsh* (1911), 230 Pa. 351, 79 A. 564. *Marsh v. Earle* (Pa. 1938), 24 F. Supp. 385. *In re Marsh* (1940), 140 Pa. Super. 472, 14 A. (2d) 368.

23. *State ex rel. McFadden v. Shorrock* (1909), 55 Wash. 208, 104 P. 214. *State ex rel. Lehman v. Partlow* (1922), 119 Wash. 316, 205 P. 420.

24. *Herbert v. Demopolis School Board* (1916), 197 Ala. 617, 73 So. 321.

25. *Bissell v. Davison* (1894), 65 Conn. 183, 32 A. 348, 29 L.R.A. 251.

26. *Morris v. City of Columbus* (1898), 102 Ga. 792, 30 S.E. 850, 42 L.R.A. 175, 66 A.S.R. 243.

27. *Hagler v. Larner* (1918), 284 Ill. 547, 120 N.E. 575.

28. *Hartman v. May* (1934), 168 Miss. 477, 151 So. 737, 93 A.L.R. 1408. See 93 *American Law Reports* 1413 for a comprehensive article on vaccination of school children.

(Continued on next page.)

If such powers of local health or educational authorities may properly and reasonably be implied from general health legislation, the exclusion of unvaccinated children from school will likewise be upheld, according to decisions in Michigan,³¹ Minnesota,³² and Missouri.³³

In the absence of state legislation specifically requiring the vaccination of school children, or delegating the power to require it to the political subdivisions of the State, a somewhat more difficult legal question arises. If, however, smallpox is present in a State or in a community, the decisions of the courts of last resort in this country uniformly sustain the right of public health authorities and/or educational authorities to adopt reasonable regulations for the vaccination of school children and the exclusion of the unvaccinated from school. In the presence of an emergency, such as an epidemic or threatened epidemic of smallpox, this action is justified under the general powers of health authorities to prevent and control dangerous contagious diseases, and to take all necessary measures for the protection of the public health.

In accordance with this principle, rules and regulations of state health departments making vaccination a prerequisite to school attendance when smallpox is present have been upheld as valid by the courts in Arkansas,³⁴ Indiana,³⁵ Kentucky,³⁶ and South Dakota.³⁷ Similarly, the regulations of local boards of health to this same effect, when smallpox is present, have been pronounced lawful and valid by the

29. *State ex rel. Milhoof v. Board of Education of Barberton* (1907), 76 Oh. St. 297, 81 N.E. 568, 10 Ann. Cas. 879.

30. *Zucht v. San Antonio School Board* (Tex. 1914), 170 S.W. 840. *Staffel v. San Antonio School Board* (Tex. 1918), 201 S.W. 413. *Zucht v. King* (Tex. 1920), 225 S.W. 287; affirm. in 260 U.S. 174. *City of New Braunfels v. Waldschmidt* (1918), 109 Tex. 302, 207 S.W. 303.

31. *People ex rel. Hill v. Board of Education of City of Lansing* (1923), 224 Mich. 388, 195 N.W. 95.

32. *State ex rel. Freeman v. Zimmerman* (1902), 86 Minn. 353, 90 N.W. 783, 58 L.R.A. 78, 91 A.S.R. 351. *Bright v. Beard* (1916), 132 Minn. 375, 157 N.W. 501, Ann. Cas. 1918 A. 399.

33. *Re Rebenack* (1895), 62 Mo. App. 8. *State ex rel. O'Bannon v. Cole* (1909), 220 Mo. 697, 119 S.W. 424, 22 L.R.A. (N.S.) 986.

34. *State v. Martin* (1918), 134 Ark. 420, 204 S.W. 622.

35. *Blue v. Beach* (1900), 155 Ind. 121, 56 N.E. 89, 50 L.R.A. 64, 80 A.S.R. 195.

36. *Board of Trustees of Highland Park School District v. McMurtry* (1916), 169 Ky. 457, 184 S.W. 390. *Hill v. Bickers* (1916), 171 Ky. 703, 188 S.W. 766.

37. *Glover v. Board of Education of Lead* (1900), 14 S.D. 139, 84 N.W. 761.

highest courts in Arkansas,³⁸ Indiana,³⁹ Kentucky,⁴⁰ Michigan,⁴¹ Minnesota,⁴² and Utah;⁴³ and local school board or board of education requirements for vaccination under the same conditions (no direct statutory authority, but smallpox prevalent) have been held good by courts in Missouri,⁴⁴ North Carolina,⁴⁵ Pennsylvania,⁴⁶ South Dakota,⁴⁷ and Texas.⁴⁸

The determination by a board of health that smallpox is present in sufficient prevalence to justify vaccination requirements is conclusive, in the absence of bad faith, according to an Indiana decision,⁴⁹ and a school child actually exposed to smallpox may be required to be vaccinated even when there is a state law prohibiting general compulsory vaccination.⁵⁰

The regents of a state university have the right to require successful vaccination as a condition precedent to entrance to the university even in the absence of direct statutory authority to this effect, according to two decisions of the District Court of Appeals of California.⁵¹

38. *Auten v. School Board of Little Rock* (1907), 83 Ark. 431, 104 S.W. 130.

39. *Blue v. Beach* (1900), 155 Ind. 121, 56 N.E. 89, 50 L.R.A. 64, 80 A.S.R. 195. *State ex rel. Horne v. Bell* (1901), 157 Ind. 25, 60 N.E. 672.

40. *Highland Park v. McMurtry* (1916), 169 Ky. 457, 184 S.W. 390. *Hill v. Bickers* (1916), 171 Ky. 703, 188 S.W. 766.

41. *People ex rel. Hill v. Board of Education of City of Lansing* (1923), 224 Mich. 388, 195 N.W. 95.

42. *State ex rel. Freeman v. Zimmerman* (1902), 86 Minn. 353, 90 N.W. 783, 58 L.R.A. 78, 91 A.S.R. 351.

43. *State ex rel. Cox v. Board of Education of Salt Lake City* (1900), 21 Utah 401, 60 P. 1013.

44. *Re Rebenack* (1895), 62 Mo. App. 8. *State ex rel. O'Bannon v. Cole* (1909), 220 Mo. 697, 119 S.W. 424, 22 L.R.A. (N.S.) 986.

45. *Hutchins v. School Committee of Town of Durham* (1904), 137 N.C. 68, 49 S.E. 46. *Morgan v. Stewart* (1907), 144 N.C. 424, 57 S.E. 149.

46. *Duffield v. Williamsport School District* (1894), 162 Pa. 476, 29 A. 742, 25 L.R.A. 152. *Comm. ex rel. Schaffer v. Wilkins* (1922), 271 Pa. 523, 115 A. 887.

47. *Glover v. Board of Education of Lead* (1900), 14 S.D. 139, 84 N.W. 761.

48. *McSween v. School Trustees of City of Fort Worth* (1910), 60 Tex. C.A. 270, 129 S.W. 206. *Staffel v. San Antonio School Board* (Tex. 1918), 201 S.W. 413. *Johnson v. Dallas* (Tex. 1927), 291 S.W. 972. *Christman v. Tompkins* (Tex. 1928), 5 S.W. (2d) 257.

49. *Vonnegut v. Baun* (1934), 206 Ind. 172, 188 N.E. 677.

50. *Bright v. Beard* (1916), 132 Minn. 375, 157 N.W. 501, Ann. Cas. 1918 A 399.

51. *Williams v. Wheeler* (1913), 23 Cal. App. 619, 138 P. 937. *Wallace v. Regents of University of California* (1925), 75 Cal. App. 274, 242 P. 892.

In a comprehensive and able discussion of the power of local health departments to require vaccination of school children or their exclusion from school when smallpox is present, the Supreme Court of Indiana pointed out in a leading case⁵² that, while there was no express statute in the State making vaccination compulsory, boards of health were properly vested with the power of making rules and regulations under legislative authority. Said the court:

This being true, and an emergency on the account of danger from smallpox having arisen, and the board believing, as we may assume, that the disease would spread through the public schools, and further believing that it would be prevented, or its bad effects lessened, by the means of vaccination, and thereby afford protection to the pupils of such schools and the community in general, it would certainly have the right, under the authority with which it was invested by the State, to require, during the continuance of such danger, that no unvaccinated child be allowed to attend the public schools; or the board might, under the circumstances, in its discretion, direct that the schools be temporarily closed during such emergency, regardless of whether or no the pupils thereof refused to be vaccinated. If vaccination was the most effective means of preventing the spread of the disease through the public schools,—and this the local board seems to have determined,—it then became, not only the right, but the duty, of the board to require that the pupils of such schools be vaccinated, as a sanitary condition imposed upon their privilege of attending the schools during the period of the threatened epidemic of smallpox.

This court pointed out, moreover, that the local board of health did not attempt, by its order, to compel the appellant's son to be vaccinated, but gave him the option or choice of either being vaccinated or remaining out of school until the danger had passed. "Surely," declared the court, "there can be no substantial agreement advanced adverse to the reasonableness of a rule or order of health officials which is intended and calculated to protect, in a time of danger, all school children, and the families of which they form a part, from smallpox or other infectious diseases."

State laws requiring vaccination of school children or of the general populace, or authorizing local boards of health or education to make such requirements, form a valid exercise of the police power of the State, regardless of whether smallpox is actually present or not.

When no cases of smallpox are present in a community and no imminent danger of the disease exists, and there is no state law directly or impliedly authorizing compulsory vaccination, local boards of health

52. *Blue v. Beach* (1900), 155 Ind. 121, 56 N.E. 89, 50 L.R.A. 64, 80 A.S.R. 195.

may, nevertheless, adopt and enforce reasonable vaccination requirements for school children, according to the decisions in some States. In the absence of specific legislation, or the presence of an emergency, this power has been denied in other States. Only on this aspect of vaccination are the decisions of the courts at variance and in conflict.

Thus, in a number of early cases in Illinois,⁵³ Kansas,⁵⁴ Michigan,⁵⁵ and Wisconsin,⁵⁶ it was held that in the absence of statutory authority vaccination could not be required by state or local authorities when no cases of smallpox were present in the schools or in the community. To the same effect is a somewhat later decision in North Dakota.⁵⁷ The Illinois courts have also held invalid, as unreasonable, orders of a city health commissioner declaring smallpox to be epidemic in a certain district and requiring vaccination of all school children before admission to school.⁵⁸ In Iowa, a city ordinance making it unlawful to admit unvaccinated pupils to school was held invalid, but only on the technical ground that its subject was not clearly expressed in its title as required by law.⁵⁹ In Georgia, it has been held that an order by a school attendance officer for vaccination of pupils was void because such an order was beyond the scope of his authority.⁶⁰

Contrary to the decisions holding that vaccination cannot be required by local authorities when no smallpox exists are a number of cases in other States, notably Arkansas⁶¹ and Mississippi,⁶² in which

53. *Potts v. Breen* (1897), 167 Ill. 67, 47 N.E. 81, 39 L.R.A. 152, 59 A.S.R. 262. *People ex rel. Lawbaugh v. Board of Education* (1899), 177 Ill. 572, 52 N.E. 850.

54. *Osborn v. Russell* (1902), 64 Kan. 507, 68 P. 60.

55. *Mathews v. Kalamazoo Board of Education* (1901), 127 Mich. 530, 86 N.W. 1036, 54 L.R.A. 736.

56. *State v. Burdge* (1897), 95 Wis. 390, 70 N.W. 347, 37 L.R.A. 157, 60 A.S.R. 123.

57. *Rhea v. Board of Education of Devils Lake* (1919), 41 N.D. 449, 171 N.W. 103. See *Clowes v. Edmonton School Board* (1915), 9 Alb. L.R. 106, 25 D.L.R. 449.

58. *People ex rel. Jenkins v. Board of Education of City of Chicago* (1908), 234 Ill. 422, 84 N.E. 1046, 17 L.R.A. (N.S.) 709, 14 Ann. Cas. 943. *Burroughs v. Mortensen* (1924), 312 Ill. 163, 143 N.E. 457.

59. *Tones v. Independent School District of Des Moines* (1920), 190 Ia. 244, 180 N.W. 157. The Supreme Court of Iowa refused to enjoin the exclusion of an unvaccinated child from school in *Baehne v. School District of Manly* (1926), 201 Ia. 625, 207 N.W. 755.

60. *Sherman v. Board of Education* (1928), 165 Ga. 889, 142 S.E. 152.

61. *State v. Martin* (1918), 134 Ark. 420, 204 S.W. 622.

62. *Hartman v. May* (1934), 168 Miss. 477, 151 So. 737, 98 A.L.R. 1408.

it has been held that ordinances requiring vaccination as a prerequisite to attendance at school are reasonable even when no smallpox is present and there is no specific legislation on this subject.

Methods of Vaccination

Since compulsory vaccination is a legitimate exercise of the police power of the State in the interests of the public health, it logically follows that the proper methods of vaccination may be prescribed by health authorities. Thus, when the regulations called for introduction of the bovine virus into the skin by scarification, it has been held in decisions in Arkansas,⁶³ Pennsylvania,⁶⁴ and Texas⁶⁵ that the homeopathic method of administering vaccine, by giving it internally, was not a compliance with the vaccination requirement.

The term "successful vaccination" has been construed by the Supreme Court of Washington to mean a case in which the customary reaction has been obtained by the operation, or when three operations have been performed without obtaining the reaction.⁶⁶

Requirements that the vaccination be performed by a licensed physician are also valid,⁶⁷ but where a certificate of unfitness for vaccination was required from a registered physician practicing in the town in which the child resides, such a certificate issued by a licensed physician who resided in a neighboring community but conducted a practice in the town where the child resided would usually be satisfactory, although the determination as to the validity of the certificate is the proper function of the health authorities.⁶⁸

In some States, it has been ruled by the attorney general or other administrative officers that osteopaths and chiropractors are not authorized under the laws to perform vaccinations or administer antitoxin and similar biological products. An unvaccinated drugless healer, licensed to practice his profession, is not exempt from vaccination and if exposed to smallpox must either be vaccinated or submit to quarantine, according to a leading decision of the Supreme Court of Washington.⁶⁹

63. *Brazil v. State* (1918), 83 Ark. 431, 104 S.W. 130. *Allen v. Ingalls* (1931), 182 Ark. 991, 33 S.W. (2d) 1099.

64. *Lee v. Marsh* (1911), 230 Pa. 351, 79 A. 564.

65. *Abney v. Fox* (Tex. 1923), 250 S.W. 10.

66. *State ex rel. McFadden v. Shorrock* (1909), 55 Wash. 208, 104 P. 214.

67. *Vonnegut v. Baun* (1934), 206 Ind. 172, 188 N.E. 677.

68. *Covey v. Robinson* (1930), 84 N.H. 439, 152 A. 279.

69. *City of Seattle v. Cottin* (1927), 144 Wash. 572, 258 P. 520.

Vaccination Certificates

Certificates showing that a child or other person has been successfully vaccinated or is an unfit subject for vaccination may be required from licensed physicians by the health authorities.⁷⁰ A child having a certificate of unfitness for vaccination may, nevertheless, be excluded from school in times of emergency, such as an outbreak of smallpox.⁷¹ New certificates may also be required routinely or whenever in the opinion of the health or school authorities these are desirable.⁷²

Expenses of Vaccination

Many States have laws providing that vaccine shall be furnished free and vaccinations performed at public expense, although the classes of persons allowed this service vary in different jurisdictions. Thus, in the earliest of the cases on vaccination, decided in Vermont in 1830,⁷³ it was held that the selectmen of a town had the power to employ a physician to vaccinate exposed inhabitants of the town; and in another early case, decided in New Hampshire in 1853,⁷⁴ town authorities were upheld in their employment of a physician to administer vaccination, even though in this particular case the family was not indigent. The duty of a city, rather than a county, to pay for free vaccinations given to approximately 10,000 school children, teachers, and janitors under authorization of a state law, has also been upheld in Michigan.⁷⁵

A county medical society and certain individual physicians were denied an injunction by the Alabama Supreme Court to enjoin the payment of fees to a physician by the county commissioners, for services rendered on a contract between the physician and the county whereby he vaccinated persons to prevent the spread of smallpox in the county.⁷⁶

70. *Lee v. Marsh* (1911), 230 Pa. 351, 79 A. 564.

71. *Hammond v. Town of Hyde Park* (1907), 195 Mass. 29, 80 N.E. 650.

72. *Spofford v. Carlton* (1921), 238 Mass. 528, 131 N.E. 314. *Barber v. School Board* (1926), 82 N.H. 426, 135 A. 159. *Commonwealth v. Childs* (1938), 299 Mass. 367, 12 N.E. (2d) 814.

73. *Hazen v. Strong* (1830), 2 Vt. 427.

74. *Wilkinson v. Albany* (1853), 28 N.H. 9. *McIntire v. Pembroke* (1873), 53 N.H. 462.

75. *Keho v. Board of Auditors of Bay County* (1926), 235 Mich. 163, 209 N.W. 163. See *Thomas v. Mason* (1894), 39 W. Va. 526, 20 S.E. 580, 26 L.R.A. 727, holding that a town must pay for medical treatment of smallpox.

76. *Commissioners' Court of Perry County v. Medical Society of Perry County* (1900), 128 Ala. 257, 29 So. 586.

In Maryland⁷⁷ and South Carolina,⁷⁸ counties have been held liable for payment of fees to physicians for vaccinations performed under state laws authorizing counties to provide such free services, but in Georgia a decision has been handed down to the effect that counties have no power to purchase vaccine⁷⁹ and that they are without authority to pay for vaccinations or for the treatment of smallpox patients.⁸⁰

Where a city board of health employs one of its own members to vaccinate indigent pupils, the city has no liability to pay for such services by one of its own officials, according to an early decision in Indiana.⁸¹ Under existing statutes in many States, however, a board of health may authorize the health officer, when he is a licensed physician, to perform vaccinations for reasonable compensation, provided that the board considers such services to be extraordinary.

Conflicts with Compulsory Education Laws

Since all children of school age are entitled to an education and usually are required to attend school up to a certain age, but may be excluded from school for failure to be vaccinated, the question arises as to whether such exclusion is a proper defense against prosecution under compulsory education laws.

In a New York case the Court of Appeals has decided that exclusion of a child from school for refusal to comply with a law requiring vaccination is no defense to a prosecution of a parent for failure to cause attendance of the child at school.⁸² But in Ohio a lower court has held that a parent, who is willing to send his child to school but cannot because the child is excluded for failure to comply with a rule of the board of education requiring vaccination, may not be convicted under the compulsory education act.⁸³ On the other hand, another lower court in Ohio, while upholding this same principle, nevertheless ruled that a child deprived of schooling because of failure to be vaccinated thereby becomes a dependent, for which the person responsible, such as the parent, may be prosecuted.⁸⁴

77. *County Commissioners v. McClintock* (1883), 60 Md. 559.

78. *Mathias v. Lexington County* (1908), 79 S.C. 402, 60 S.E. 970.

79. *Daniel v. Putnam County* (1901), 113 Ga. 570, 38 S.E. 980, 54 L.R.A. 292.

80. *Barksdale v. Hayes* (1910), 134 Ga. 348, 67 S.E. 852.

81. *Fort Wayne v. Rosenthal* (1881), 75 Ind. 156, 39 Am. R. 127.

82. *People v. Ekerold* (1914), 211 N.Y. 386, 105 N.E. 670, L.R.A. 1915 D 223, 37 Ann. Cas. 552. *People v. McIlwain* (1915), 151 N.Y.S. 366. See *Comm. v. Green* (1929), 268 Mass. 585, 168 N.E. 101.

83. *State v. Turney* (1909), 12 Oh. C.C. (N.S.) 33, 31 Oh. C.C. 222.

84. *In re Hargy* (1920), 23 Oh. N.P. (N.S.) 129.

Injuries Caused by Vaccination

Although millions of persons have been successfully vaccinated without injury, the operation may occasionally result in injury since the wound is subject to the same possibilities of infection that may occur in any wound which is negligently or improperly cared for.

Thus, it has been held in Ohio that an infection following vaccination of a worker by a company physician is such an unusual occurrence that it will be compensable as an accident under workmen's compensation laws,⁸⁵ and there have been decisions to similar effect in Michigan⁸⁶ and Texas.⁸⁷ Where, however, an industrial concern offered to have its employees vaccinated without charge in the company hospital, pursuant to a recommendation of a city board of health, and injury resulted in one instance, it was held by the Connecticut Supreme Court of Errors that since the vaccination was optional and voluntary the injury was not compensable under the workmen's compensation act of that State.⁸⁸

A minor, aged seventeen, who was employed by a railroad company and was vaccinated by the company physician, suffered an injury. It was held by the Mississippi Supreme Court that, although he was employed without parental consent, he could not sue under a statute making employment unlawful, since it was shown by the evidence that he had sufficient intelligence to understand and appreciate the consequences of vaccination, and since his parents, knowing of his employment, interposed no objections to the vaccination.⁸⁹ A steamship company has likewise been held not liable for vaccination of a passenger by a ship's surgeon, where such vaccination was necessary and desirable.⁹⁰

A municipal corporation is not liable for negligence in enforcing a compulsory vaccination ordinance even when a person who is vaccinated is injured by impure vaccine, since the municipality is acting

85. *Spicer Mfg. Co. v. Tucker* (1934), 127 Oh. St. 421, 188 N.E. 870.

86. *Neudeck v. Ford Motor Co.* (1930), 249 Mich. 690, 229 N.W. 438. *Krout v. J. L. Hudson Co.* (1918), 200 Mich. 287, 166 N.W. 848, L.R.A. 1918 F 860.

87. *Texas Employers Insur. Ass'n v. Mitchell* (Tex. 1930), 27 S.W. (2d) 600.

88. *Smith v. Seamless Rubber Co.* (1930), 111 Conn. 365, 150 A. 110, 69 A.L.R. 856. *Jefferson Printing Co. v. Ind. Comm.* (1924), 312 Ill. 575, 144 N.E. 356.

89. *Gulf & S.I.R. Co. v. Sullivan* (1928), 155 Miss. 1, 119 So. 501. *McAuliffe v. State* (1919), 176 N.Y.S. 679, 107 Misc. 553.

90. *O'Brien v. Cunard S.S. Co.* (1891), 154 Mass. 272, 28 N.E. 266, 13 L.R.A. 329.

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in a governmental capacity, according to decisions in Georgia,⁹¹ Pennsylvania,⁹² and South Carolina.⁹³

91. *Wyatt v. City of Rome* (1898), 105 Ga. 312, 31 S.E. 188, 42 L.R.A. 180, 70 A.S.R. 41.

92. *Howard v. City of Philadelphia* (1918), 250 Pa. 184, 95 A. 388, L.R.A. 1916 B 917.

93. *Sandell v. South Carolina* (1922), 104 S.C. 567, 119 S.E. 776. See Chapter XVII, on Liability of Municipal Corporations.