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PERSPECTIVE

COVID vaccine mandates and the right to swing your arms

By Timothy D. Reuben

Last week, about eight months after taking office, President Joe Biden finally announced that enough is enough and ordered that people who were not getting vaccinated against COVID-19 get vaccinated. “We’ve been patient, but our patience is wearing thin,” Biden said. “And your refusal has cost all of us.” In the same week, the Los Angeles Unified School District similarly decided to require its students and employees to be vaccinated. Both these actions follow many other companies and organizations, including many private schools, which have required vaccinations for employees, students, contractors and even customers.

Opponents of the growing trend to require vaccinations of all have claimed that government has no right to mandate medical treatment, that such actions violate their rights and infringe upon freedom itself. For example, Governor Greg Abbott of Texas attacked President Biden’s mandate: “Abbott — who has resisted making vaccinations mandatory in any form in Texas, going as far as to bar local governments and school districts from enacting their own vaccine mandates — dubbed Biden’s move to compel businesses with more than 100 employees to make their workforce either get the shot or submit a negative COVID-19 test

result each week ‘a power grab.’” Abbott issued a statement that Texas would “continue to combat” the efforts of the federal government to require vaccinations, emphasizing the rights and freedom of individuals to make their own choices about these issues.

But Abbott has got it wrong both about the law and particularly about freedom. Long ago in 1924, Benjamin Cardozo wrote in “The Growth of the Law”: “Complete freedom — unfettered and undirected — there never is.” In truth, freedom does not give the right to impinge on the rights and safety of others — no one can yell fire in a crowded theater — and the law has always provided that individual rights give way to the public health and safety. Indeed, the examples of government regulation for the protection of the public have long been established in many contexts, so it is actually surprising that it has taken so long for Biden to make his order. It is even more inexplicable (and arguably irresponsible) that other state government officials like Abbott have not already made such mandates or at least followed the president’s lead. And while the 10th Amendment does reserve to the states any powers not given to the federal government, this is a national emergency which requires federal action to protect all Americans.

Salus populi suprema lex, a Latin phrase attributed to Cicero, is translated: Let the safety of the people be the supreme law. It was

one of the bases of old English law and found its way into American constitutional jurisprudence as “police power” which has been described as the “capacity of the states to regulate behavior and enforce order within their territory for the betterment of the health, safety, morals, and general welfare of their inhabitants.” Ironically, the Latin phrase is part of the Missouri state motto, but Missouri has not issued any mandate for vaccination.

So, where the science is so clear, why are so many state governments reticent to act where it is both their obligation and in their power to do so?

Quite obviously, those state governors and officials who shamelessly resist requiring their citizens to get vaccinated are doing so for political reasons — law has nothing to do with it. Even where a majority of a state’s population support requiring vaccinations, it appears that the vocal minority that angrily demonstrates at anti-vax rallies has a large enough political influence to dissuade elected officials (who are mostly Republican) from doing what is obviously the right thing for their citizens. The problem is that the virus is not bound by state lines, so the irresponsible positions of governors like Abbott put at serious risk people throughout our entire nation and indeed the world.

According to an old adage which is attributed to various people including Oliver Wendell

Holmes and Abraham Lincoln: “Your right to swing your arms ends just where the other man’s nose begins.” In today’s world, if someone allows themselves to infect many others and even incubate a variant that will most certainly infect and likely kill others, the same rule applies. Spreading the virus through your nose and mouth is not as visible as a punch but it should be treated the same. In fact, most people, instead of having someone infect them with this virus, would rather just be hit in the nose. ■

Timothy D. Reuben is the founding principal of Reuben Raucher & Blum in Brentwood. He handles matters at both the trial and appellate level and in arbitration and specializes in complex matters including real estate, intellectual property, unfair competition, and related business disputes.



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