

Deliberation By Consensus

By Gary Krasner — June 15, 2004

In a few days, it will be the first anniversary of the *Lawrence v Texas* Supreme Court decision overturning Texas's sodomy law. Many of my conservative colleagues have referred to this case, among others, to demonstrate that the Court and the nation generally have become too liberal and/or immoral. That may be a valid issue for discussion, but this article doesn't get into that. Instead, it was a comment by Justice Scalia afterwards that prompted this essay, which concerns an issue I've been deeply involved with for 25 years, and which has greater implications for Americans than whether people of the same gender may sleep together.

Writing in the minority of the June 26th 2003 decision that states cannot outlaw private homosexual acts, Antonin Scalia complained that in the absence of new case law during the 17 years since they last addressed this issue, the court today apparently took a side in the cultural wars based upon mere popular sentiment. But this isn't new. In a landmark case almost a century ago, the high court specifically declared that it was deferring to popular consensus, and on no less a matter than the scientific efficacy of a public health practice that has since become the cornerstone of modern medicine.

Today, all states have mandatory immunization requirements for children attending school. The rights of states to impose these mandates was upheld in 1905 in "*Jacobson v. Commonwealth of Massachusetts*" [197 US 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905)], but without considering the plaintiff's medical arguments against the efficacy of the (then) required smallpox vaccine, nor of the practice of vaccination generally. The court simply held that the theory supporting vaccination (acknowledging the imperfection of individual vaccines) "is the common belief of the people of the state...".

On that aspect, the court relied heavily on *Viemeister v. White* [179 NY 235, 72 N.E. 97 (1904)], the lower circuit decision of the prior year. In '*Viemeister*', the court affirmed the NY state legislative mandate, based on "the common belief of the people" that

vaccination fulfills its promise, "whether it does in fact or not."

Through '*Jacobson*' and its progeny, a hierarchical system emerged which depends on experts whose authority must be taken as given. With the rise of the status of allopathic physicians in the U.S., the judiciary accepted the doctrine of "High Medical Authority". [197 US 11, at p.30] Courts thereafter indiscriminately accepted mainstream medical consensus. Within that mainstream though, the system could acknowledge that some vaccines may fail, but not the practice of vaccination itself. Not the basic belief. To this day, physicians who are too vocal in their criticism of that belief face professional sanctions and revocation of their licenses to practice medicine. Researchers similarly have been denied grants and employment opportunities.

In appealing cases involving public health mandates, compulsory treatment laws, school vaccination exemptions, pesticide spraying (etc.), 'high medical authority' has been instrumental in excluding out-of-hand, not only countervailing scientific theories, but also published medical studies that challenge the prevailing view. Thus describes the root of the problem in expanding political freedom to dissent or to qualify for waivers from these mandates: The courts do not consider opinion outside the consensus view, and the establishment discourages dissent from within its own ranks, at the same time the mainstream view is granted substantial police and subpoena powers by way of public health agencies.

Striking down the Texas sodomy law may have been justified on grounds of 'Equal Protections' and privacy arguments. I'm not a lawyer, and I don't know either way. But if the Court did indeed take into account social acceptance of homosexuality, I think it was far less egregious than gauging the popularity of a scientific issue. Because science is not a popularity contest. The scientific method, its system of proofs, and debate in open forums are what SHOULD decide science and medical issues. Unfortunately, institutional inertia, vested interests,

politics, peer pressure and groupthink have too often thwarted discovery and the need for new ideas to replace wrong ideas.

Why is this Issue Important to All Americans?

The concept of nationhood assumed a novel expression and direction with the birth of America. Up until then, people were ruled by monarchies and/or religious institutions. The concept that ordinary men should direct their own affairs and establish laws themselves grew in the 17th and 18th centuries.

It was also felt that people should be free to opt out of some of the common mandates of the day, if they conflicted with their strongly held personal beliefs and ideologies. Since historically, religious beliefs were the most common form of strongly held philosophical beliefs, ‘religion’ was stipulated by name in our Bill of Rights. Thus, the notion of ‘rights of the minority’ through protections of individual and personal liberties was established, and became the basis for many legal exemptions from civil laws. Today, for example, there are 47 states that allow parents to reject vaccination mandates for schoolchildren based on religious objections, while only 19 states permit parents to opt out based on philosophical beliefs. But in most states, pediatric and public health organizations actively lobby to rescind all legal waivers pertaining to vaccinations.

Many would be surprised to learn that some of the framers of the Constitution were concerned about the growing influence of the organizations of medical practitioners, and thought it prudent to include in the original Bill of Right language that would protect minority views about health and the healing arts. Dr. Benjamin Rush was one of the Signers of the Declaration of Independence and the Surgeons General of the Continental Army of the United States. Dr. Rush and colleague, Dr. Josiah Bartlett (a Congressman who was the second person to sign the Declaration of Independence) endeavored to include the guarantee for medical freedom in the First Amendment, alongside the civil and religious freedoms.

Benjamin Rush said in 1790, “The Constitution of this Republic should make special provision for

Medical Freedom as well as Religious Freedom... To restrict the art of healing to one class of men and deny equal privileges to others will constitute the Bastille of medical science. All such laws are un-American and despotic. They are fragments of monarchy and have no place in a Republic.” One may learn more how the current monopoly in the healing arts had developed in the U.S., by referring to: “Rockefeller Medicine Men” by E. Richard Brown (1979, Univ. of Calif. Press), and “For Her Own Good: 150 Years Of Experts’ Advice To Women” by Barbara Ehrenreich and Deirdre English (1978, Anchor Press).

Freedom of choice comes in many forms. Few people realize that they don’t possess the right to refuse many types of medical mandates, until they learn that they’ve failed to qualify for whatever exemption provisions that may exist—IF they exist at all for that mandate. I’m most acquainted with the NY State vaccine mandates for school. Here, by law, parents must persuade the school principal (who’s the official “gatekeeper” for this law) that their personal religious belief opposing vaccination is (1) “genuinely religious” in nature—and not philosophical—and (2) that their belief is “sincerely held”. Perhaps as many as half the applicants fail this two-tier test, and are then forced to either (a) homeschool their child; (b) hire a lawyer and appeal the school’s decision; (c) move out of NY; (d) move to another town and try again with another school.

Such is the state of “freedom” regarding medical mandates: Parents wishing to make responsible medical decisions for their own children, but are not permitted. So don’t be misled by Justice Scalia’s complaint. Public consensus is often the basis of judicial decisions, and in science and medicine, it has become institutionalized by the doctrine of High Medical Authority—which simply means that the court will listen solely to the most number of doctors with the most vested in the status quo, and will not adjudicate on the merits of the science itself.

Which then begs the question: In those times when the court shuns case law or declines to hear arguments on the merits of an issue, and instead prefers to rule via plebiscite, one may reasonably ask why we need the courts at all? We can all just vote on these issues, can’t we?