



Vaccination of individuals lacking decision-making capacity during a public health emergency

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ABSTRACT

This paper explores the ethical challenges in deciding whether to vaccinate individuals lacking the decision-making capacity needed to provide informed consent during a public health emergency like COVID-19. The best interests standard ordinarily governs such decisions, which under the law in jurisdictions like England, Wales and Singapore takes into account the individual's past wishes and present preferences. However, in a public health emergency, the interests of third parties become more salient: those whom the unvaccinated individual might expose to infection have an interest in the individual's being vaccinated. While current mental capacity law has not been interpreted to take such public health considerations into account, we argue that such considerations are nevertheless ethically relevant, and can legitimately be weighed up alongside other considerations such as the preferences of the individual and impacts on their health. This is most relevant for individuals lacking decision-making capacity who have previously declined or presently resist vaccination. The public health impact of vaccination may in some instances be enough to outweigh preferences of the individual and justify providing vaccination against their past or present wishes.

I. INTRODUCTION

As COVID-19 vaccination drives continue around the world, informed consent is typically required before vaccination of patients with the capacity to provide such consent. Even where mandates are being put in place, consent is still required, albeit

with consequences in terms of access to public spaces or employment if an eligible individual chooses to decline vaccination. The requirement for informed consent is based on the familiar principle of respect for autonomy, particularly relevant for medical interventions like vaccination. However, this requirement does not carry over to patients who lack the capacity to provide valid consent. In the case of such patients, we have to appeal to other values in order to determine when the provision of treatment is ethically acceptable.

This article will consider some of the ethical issues in providing vaccination for adults lacking decision-making capacity. In particular, we will highlight how the notion of public interest is potentially relevant to determining whether such individuals should be vaccinated, and may play a role alongside the more well-established best interests test. Individuals lacking decision-making capacity to consent to vaccination are vulnerable in at least two important respects. Firstly, their lack of capacity limits their ability to protect their own interests, including in ensuring that a medical intervention is desirable and in line with their values and priorities. This is why the ‘best interests standard’ (discussed in more detail below) is ordinarily used to determine whether an individual lacking decision-making capacity should receive a given intervention. Secondly, such individuals may be at particular risk of harm during public health emergencies, as we see in the COVID-19 pandemic. For example, people with intellectual disabilities often lack capacity to consent, and have been found to be at substantially greater risk of becoming infected with COVID-19 and dying compared with the general population.¹ On this basis, some have suggested individuals with intellectual and developmental disabilities should be prioritized for COVID-19 vaccination.² It is also noteworthy that these individuals are at greater risk of harm from the social ramifications of COVID-19, including lockdowns, movement restrictions, and economic downturns.³ For example, individuals with intellectual and developmental disabilities have been disproportionately laid off and furloughed compared to other employees in the United States.⁴

Mental capacity is decision specific. Here, we focus on adults who cannot provide informed consent to receive a COVID-19 vaccination. References to ‘individuals lacking capacity’ will be used as shorthand for lacking the decision-making capacity to consent specifically to COVID-19 vaccination according to prevailing law in England and Wales; similar legislation is present in other jurisdictions like Singapore. We focus on these jurisdictions because they operate on very similar legislative frameworks, both entitled the Mental Capacity Act.

Lacking capacity to consent to vaccination is compatible with the individual being able to make other personal or medical decisions. It is also compatible with them being fully conscious and aware that they are about to receive an injection. However,

1 Margaret A. Turk et al., *Intellectual and Developmental Disability and COVID-19 Case-Fatality Trends: TriNetX analysis*, 13 *DISABILITY AND HEALTH JOURNAL* 100942 (2020); Jonathan Gleason et al., *The Devastating Impact of Covid-19 on Individuals with Intellectual Disabilities in the United States*, *NEJM CATALYST: INNOVATIONS IN CARE DELIVERY* (2021).

2 Emily Hotez et al., *Prioritizing COVID-19 Vaccinations for Individuals With Intellectual and Developmental Disabilities*, 32 *ECLINICALMEDICINE* 100749 (2021).

3 K. Courtenay & B. Perera, *COVID-19 and People With Intellectual Disability: Impacts of a Pandemic*, 37 *IR. J. PSYCHOL. MED.* 231–236 (2020).

4 Hotez et al., *op cit.* Note 2.

they would, due to some impairment, lack sufficient ability to understand, weigh, recall and/or communicate key details about the decision whether or not to receive a vaccination (see [Box 1](#)).

Box 1. Key points from mental capacity law in England and Wales and Singapore

- Adults are presumed to have capacity unless proven otherwise.
- An adult is deemed to lack capacity to make a particular decision when they are unable to:
 - (i) understand the information relevant to the decision;
 - (ii) retain the information;
 - (iii) use or weigh the information; or
 - (iv) communicate the decision
- This inability is due to an impairment of or disturbance in the functioning of the mind or brain.
- When someone lacks mental capacity to decide, the decision is made on their behalf by another individual as specified under the relevant legislation. This individual must consider clinical and non-clinical factors, such as the individual's past and present wishes and beliefs, and balance the benefits and burdens of the proposed intervention before coming to a decision that is in the individual's best interests.⁵

An individual lacking capacity might still express a desire not to receive a vaccination. This sort of case will pose particular challenges, which we will return to below.

We focus here on the question of vaccinating adults lacking capacity, rather than minors. While our arguments might also be applicable to that context (such that public interest justifies vaccinating minors who dissent), the context is sufficiently distinct that we do not make such claims here. Similarly, the literature on assent and dissent of adults lacking capacity might potentially be relevant, but as it is usually applied to the research context, we do not apply that literature to the present context of providing proven safe and effective vaccines. More relevant is a small body of work on ethical considerations in geriatric assent, which broadly intersects with the best interests standard as detailed below.⁶

To explore this issue, we will first discuss the current dominant paradigm for vaccinating individuals lacking capacity: the best interests standard. We will then contrast this with a broader approach, one that incorporates public interests as well—particularly the public interest in preventing viral transmission. Incorporating public interests requires taking a public health perspective rather than a purely medical one, and therefore going beyond the values or priorities a particular patient has or might

5 (Singapore Mental Capacity Act, section 6(7a) and England and Wales Mental Capacity Act, section 4(6a)).

6 John Coverdale et al., *Ethically Justified Clinical Strategies for Promoting Geriatric Assent*, 21 INT. J. GERIAT. PSYCHIATRY 151–157 (2006).

have had. We close by examining how one might incorporate such public interests in determining whether to vaccinate an individual lacking capacity. Our point is not that public health considerations should be dominant or overwhelm individual interests. Rather, public interests are ethically relevant and can defensibly be incorporated into decision-making, particularly in 'close' cases where it is unclear or not readily apparent whether vaccination is in the best interests of the individual, and where there is strong evidence of public health benefit. This account, then, is in line with Richard Huxtable's analysis of at least three potentially competing values underpinning mental capacity law: autonomy, best interests, and public interests.⁷

II. BEST INTERESTS STANDARD

The best interests standard for individuals lacking capacity is enshrined in law in a number of jurisdictions (see [Box 1](#)). Various aspects of this legal standard may be critiqued. For example, some may dispute that 'best interests' properly considered should include preferences, and instead argue the two are conceptually distinct.⁸ Certain theories of well-being may even imply that either past or present preferences should not be taken into account by individuals making decisions on behalf of individuals lacking capacity.⁹ Nevertheless, because our central critique is focused elsewhere, with our claim that the best interests standard is overly narrow in its focus solely on individuals, we will assume for the sake of argument that the past and present preferences should to some degree be taken into account by those making decisions on behalf of individuals lacking capacity. This is consonant with the best interests standard in England and Wales and Singapore. Rejecting this assumption would not undermine our underlying concern about public interests being absent from such determinations, though it might limit the contexts in which it would apply as there would be fewer tensions between best interests and public interests.

We will also treat best interests as including (among other factors) consideration of past and present preferences. There is some disagreement in the literature concerning whether, due to integration of preferences, a best interests legal standard is substantively different from a substituted judgment standard where the decisive question is what the individual would have wanted, if they had capacity.¹⁰ We intend to remain neutral on these questions, as our fundamental argument would be unaffected if instead best interests were conceptually separated from preferences and/or substituted judgments.

Before we put forward our main argument, we should first understand how the best interests standard would apply in the COVID-19 context.

In the context of COVID-19, the best interests standard may be sufficient to justify vaccinating most individuals who lack capacity to consent. As noted above, many

7 R. Huxtable, *Autonomy, Best Interests and the Public Interest: Treatment, Non-Treatment and the Values of Medical Law*, 22 MEDICAL LAW REVIEW 459–493 (2014).

8 Giles Birchley, *The Theorisation of 'Best Interests' in Bioethical Accounts of Decision-Making*, 22 BMC MED ETHICS 68 (2021).

9 David Degrazia, *Value Theory and the Best Interests Standard*, 9 BIOETHICS 50–61 (1995).

10 M. Donnelly, *Best Interests, Patient Participation and the Mental Capacity Act 2005*, 17 MEDICAL LAW REVIEW 1–29 (2008); Michael C. Dunn et al., *Constructing and Reconstructing 'Best Interests': An Interpretative Examination of Substitute Decision-Making Under the Mental Capacity Act*, 29 JOURNAL OF SOCIAL WELFARE AND FAMILY LAW 117–133 (2007); John Coggon, *Mental Capacity Law, Autonomy, and best Interests: An Argument for Conceptual and Practical Clarity in the Court of Protection*, 24 MED LAW REV 396–414 (2016).

individuals lacking capacity will have factors that correlate with greater risk of suffering more severely from COVID-19, such as intellectual disability, age, co-morbidities, or residence in a long-term care facility.¹¹ COVID-19 vaccines that are currently being distributed worldwide have been proven to substantially reduce that risk in two ways: the individual is much less likely to become infected with COVID-19; and if infected, they are less likely to become seriously ill or die.¹² Moreover, these studies suggested that the authorized vaccines have an acceptable safety profile in adults. As such, COVID-19 vaccines have been determined to be reasonably safe as well as meeting a pressing health need for individuals lacking capacity, and so typically an ordinary application of the best interests standard will justify provision of the vaccine. This will not always be the case, though, particularly for individuals at comparatively higher risk of negative side-effects from the vaccine and/or lower risk of morbidity or mortality from COVID-19. For these reasons, it is currently debatable whether COVID-19 vaccination is advisable for young children.¹³

Consideration of past or present expressed preferences are also legally relevant for determining best interests, even for individuals lacking capacity, and those considerations can be in tension with what family members believe is in the individual's interest, or the individual's narrow medical interests (taken to mean what would best promote life and health, rather than well-being more broadly construed). Those expressions are not decisive, however, and all things considered it may be in an individual's best interests per the legal standard in some circumstances to act against past or present expressed preferences. This application of the best interests standard is in line with several recent UK court decisions.

In the case of *Re E*, the Court of Protection ruled that it was in an incapacitous nursing home resident's best interests to receive a COVID-19 vaccine when accounting for her previous history of accepting influenza vaccination and the fact that, when asked about vaccination for Covid-19, she said she wanted what was best for her.¹⁴ Additionally, due to the particular vulnerability of nursing home residents like this patient, not receiving the vaccine would pose a real and significant risk to her, and it was therefore in her best interests to receive it.¹⁵ The subsequent case of *SD v Royal Borough of Kensington and Chelsea* similarly ruled regarding a nursing home resident who lacked capacity. Justice Hayden emphasized the need to protect and promote the individual's autonomy, that '[i]t is P's voice that requires to be heard and which should

11 Elizabeth J. Williamson et al., *Factors Associated With COVID-19-Related Death Using OpenSAFELY*, 584 NATURE 430–436 (2020); William Gardner, David States & Nicholas Bagley, *The Coronavirus and the Risks to the Elderly in Long-Term Care*, 32 JOURNAL OF AGING & SOCIAL POLICY 310–315 (2020); Laura Shallcross et al., *Factors Associated With SARS-CoV-2 Infection and Outbreaks in Long-Term Care Facilities in England: A National Cross-Sectional Survey*, 2 THE LANCET HEALTHY LONGEVITY e129–e142 (2021).

12 Fernando P. Polack et al., *Safety and Efficacy of the BNT162b2 mRNA Covid-19 Vaccine*, 383 N ENGL J MED 2603–2615 (2020); Merryn Voysey et al., *Safety and Efficacy of the ChAdOx1 nCoV-19 Vaccine (AZD1222) Against SARS-CoV-2: An Interim Analysis of Four Randomised Controlled Trials in Brazil, South Africa, and the UK*, 397 THE LANCET 99–111 (2021); Shaun Griffin, *Covid-19: AstraZeneca Vaccine Prevents 79% of Symptomatic Disease and 100% of Severe Disease, US Study Finds*, BMJ n793 (2021); Jamie Lopez Bernal et al., *Effectiveness of the Pfizer-BioNTech and Oxford-AstraZeneca Vaccines on covid-19 Related Symptoms, Hospital Admissions, and Mortality in Older Adults in England: Test Negative Case-Control Study*, BMJ n1088 (2021).

13 Dominic Wilkinson et al., *Should We Delay Covid-19 Vaccination in Children?*, BMJ n1687 (2021).

14 *Re E* [2021] EWCOP 7 [13].

15 *Re E* [2021] EWCOP 7 [19].

never be conflated or confused with the voices of others,' and that the risk to her life and health without the vaccine would be unacceptably high, and therefore it was in her best interests to receive it.¹⁶

The case of *Re CR* reaffirmed the principles of these earlier cases when applied to a slightly different context. While *Re E* and *SD* were concerned with elderly patients, this case concerned a 31 year-old individual with severe learning disabilities who also lacked capacity, but with a mixed history of resistance towards medical interventions.¹⁷ Additionally, there was no point in his life where *CR* had capacity upon which the Court could draw evidence of his previous preferences and values to reasonably ascertain how he would decide on vaccination. The Court referred to the Supreme Court decision of *Aintree University Hospitals v James*, which held that in determining someone's best interests, attention could be paid to factors that the individual would consider if he were able to do so.¹⁸ Thus, the Court ruled that it was in *CR*'s best interests to receive the vaccine, as he would likely have taken steps towards prolonging his life, which vaccination would tend towards.¹⁹ Furthermore, the vaccination was administered while *CR* was sedated as a result of his other medications. This leaves unknown the opinion of the Courts regarding vaccination that requires physical or chemical restraint, as such considerations have not been required thus far.

It is important to note that in none of these cases had the individuals presently or in the past opposed vaccination. None, then, had to grapple with a tension between expressed desires of an incapacitous individual versus their medical interests under the best interests test.

Some individuals lacking capacity, however, may be personally reluctant or even unwilling to be vaccinated. Others might have previously expressed general skepticism and resistance to vaccination, declining vaccination offers when they had the capacity to do so. UK courts, thus far, have taken the best interests standard to be the only relevant factor in deciding whether such individuals should be vaccinated, and have not accounted for the public health considerations we discuss in greater detail below. For instance, consider the recent case of *SS v London Borough of Richmond upon Thames and South West London Clinical Commissioning Group*. The incapacitous individual, *SS*, had no history of having taken vaccines in the past, and moreover presently refused the COVID-19 vaccine (along with other medical interventions).²⁰ There are two separate aspects of best interests at stake in such cases as *SS*'. First, present expressed preferences cannot be dismissed merely because the individual presently lacks capacity, according to the legal best interests standard. However, since the individual has been deemed to lack capacity, expressions of those values are likely to not be fully coherent, explicable, and/or fully informed. The second aspect may be more relevant to best interests: past reluctance when competent arguably has even stronger standing as a proxy for what the individual would presently want if they had capacity. This is clearly the case where an individual's past reluctance appears to be rational and adequately

16 *SD v Royal Borough of Kensington and Chelsea* [2021] EWCOP 14 [33].

17 *Re CR* [2021] EWCOP 19, 2.2.

18 *Re CR* [2021] EWCOP 19, 3.4.

19 *Re CR* [2021] EWCOP 19, 4.8.

20 *SS v London Borough of Richmond upon Thames and South West London Clinical Commissioning Group* [2021] EWCOP 31.

informed, as was judged to be the case for SS. Although, the relevance of even this second aspect of best interests may be tempered by the fact that earlier reluctance would have taken place in an entirely different context from the COVID-19 public health emergency, and preferences might well have changed if the individual had retained capacity. Considering both of these aspects, respect for a patient like SS demands those preferences nevertheless be taken into account, at least to some extent, in informing best interests.

This respect for an individual and their expressed preferences is distinct from considerations of the risk of physical resistance to vaccination, which may or may not be as reliable an indicator of opposition to vaccination. An individual who is dead-set against vaccination—or who is not, but more generally becomes agitated when presented with an injection²¹—could become injured during the vaccination process as a result of their resistance. There are also risks of such resistance causing harm to caregivers and those providing the vaccine, not to mention the potential loss of trust built up between the individual and their healthcare professionals and caregivers. Restraints, either chemical or physical, might be used to reduce these risks, but those restraints themselves carry risks. They may also threaten the dignity of the individual. For some individuals, risks of resistance and/or necessity of restraints would be a factor to be weighed against the benefits of vaccination. We set these considerations aside, however, to focus more squarely on expressed preferences.

For certain individuals, though a vaccine would medically benefit them, it might not be in their best interests to be vaccinated according to the standard set out in the law. In the case mentioned above, SS was judged to be just such an individual. Though Justice Hayden agreed that vaccination would be in SS' *medical* interests, he also concluded that in all likelihood the individual would have refused the vaccine if competent. This conclusion is consonant with the legal best interests standard including considerations of patient preferences. He also noted that there would be practical difficulties in administering the vaccine in the face of present refusal due to the likely necessity of additional restraints (as contrasted with *Re CR*, where the patient was already routinely put under chemical restraint). As a result, he ruled that compelling SS to receive the vaccine was against SS' best interests.²²

Our discussion thus far has centered on the individual's best interests and expressed preferences concerning their own vaccination. However, the individual being vaccinated is not the only one with an interest in their vaccination. In discussion of geriatric assent, some have noted that effects of care decisions on third parties such as those who care for individuals lacking capacity are ethically relevant.²³ In the present context of vaccination, a wider body of public or third parties' interests in an individual being vaccinated (or in a group of individuals being vaccinated) may also be ethically relevant in decision-making regarding the vaccination of those lacking capacity. We will now turn to consider how these public health considerations beyond the individual are relevant, particularly in the context of a public health emergency.

21 Fionnuala Cooney, *Patient Satisfaction with a Hepatitis B Vaccination Programme Among Persons With an Intellectual Disability*, 13 J INTELLECT DISABIL 203–219 (2009).

22 *SS v London Borough of Richmond Upon Thames and South West London Clinical Commissioning Group* [2021] EWCOP 31.

23 Coverdale et al., *supra* note 6.

III. PUBLIC HEALTH AND PUBLIC INTEREST

Medical ethics is principally concerned with the micro scale, concerning the patient, their healthcare providers, their family, and so forth.²⁴ Generally, this is an appropriate approach, since those with a substantial stake in a patient's being treated for a certain disease or receiving a certain intervention are typically limited to a small circle. The interests of others may come into play in various ways, including with regard to resource allocation and instances where a patient poses a threat to others, but the primary ethical consideration revolves around the rights, welfare, and autonomy of a given patient. This approach is reflected in mental capacity law and related guidance, which focus squarely on protecting and promoting the interests of the individual lacking capacity.²⁵

In contrast, public health ethics resides at a more macroscale. It is not restricted to a medical setting, nor focused on particular interactions or relationships between individuals, except to consider the application of a particular public health measure for individuals as members of a population. Many parts of public health are oriented towards ensuring individuals' compliance with a public health measure that promotes the public interest, particularly with regard to promoting the health and well-being of the population at large.²⁶ Individual rights and interests are relevant, but may act primarily as constraints on the appropriate and legitimate pursuit of public interests via public health measures, such as restrictions on movement for those who have been infected with a communicable disease.

Vaccination during a public health emergency like COVID-19 should be viewed through the latter, public health lens. Vaccines are developed in order to prevent disease across the whole population: young and old, sick, and healthy. That is not to say the whole population will necessarily be eligible to receive a vaccine; there may be limitations in safety or efficacy data as well as medical contraindications for some individuals. COVID-19 vaccines, for instance, were not initially tested in children, and some adults with severe allergic reactions are advised against receiving them.²⁷ Still, the goal of a vaccination drive is generally to vaccinate as many individuals as possible, in order to both reduce burden of disease in a population, prevent disease spread, and protect vulnerable, vaccine-ineligible people.

For reducing the burden of disease, the interests of the individual receiving a vaccine and the public at large are often aligned. An individual obviously directly benefits when, due to a vaccine, they are less likely to become infected, suffer, and die. The public also indirectly benefits insofar as that individual is less likely to require substantial healthcare resources for treatment—both because they are less likely to present at hospital, and

24 Peter Sedgwick, *Medical Individualism*, 2 THE HASTINGS CENTER STUDIES 69 (1974).

25 Mental Capacity Act 2005. [online] Section 16A. Available at: <http://www.legislation.gov.uk/ukpga/2005/9/contents>; Office of the Public Guardian, Code of Practice: Mental Capacity Act (Chapter 177a). Available at https://www.msf.gov.sg/opg/Documents/CSC.MSF.OPGWebsite/Documents/Code_of_Practice_Oct16_final.pdf; Helen J. Taylor, *What Are 'Best Interests'? A Critical Evaluation Of 'Best Interests' Decision-Making In Clinical Practice*, 24 MED LAW REV 176–205 (2016).

26 LAWRENCE O. GOSTIN & LINDSAY F. WILEY, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* (Third edition ed. 2016); Angus Dawson & Marcel Verweij, *The Meaning of 'Public' in 'Public Health'*, in *ETHICS, PREVENTION, AND PUBLIC HEALTH* (Angus Dawson & Marcel Verweij eds., 2007).

27 Centers for Disease Control and Prevention, *What to Do if You Have an Allergic Reaction After Getting A COVID-19 Vaccine*, (2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/allergic-reaction.html> (last visited May 18, 2021).

because they are less likely to require extraordinary measures if they do. More broadly, reducing ill-health in the population is strongly in the public interest. Conversely, any adverse events caused by a vaccine harm both the individual and society, for similar reasons: the individual's own health is worsened, and society may need to bear some of the costs of treating those effects, and/or dealing with their broader consequences such as reduced trust in a vaccination program.

By contrast, prevention of spread and protection of vulnerable others is much more directly in the public, rather than individual, interest. Whilst an individual may certainly want to avoid causing harm to others, this is a much more diminished interest than the actual third-party interest to avoid being harmed. Moreover, from a public health perspective, there is a strong public interest in preventing disease from spreading throughout a population, which not only expands the direct harm to the population from the disease itself, but also may threaten healthcare systems as they become overwhelmed. Public health measures like lockdowns, travel restrictions, and social distancing may reduce this risk of spread, but come with their own costs to society. A vaccine that reduces or prevents transmission could mitigate those social costs by reducing or eliminating the necessity of such onerous public health interventions.

For COVID-19, the evidence base for vaccines' prevention of disease, and reduction of disease severity is currently much stronger than evidence for prevention of transmission. However, there is a growing evidence base for vaccines' ability to prevent transmission as well.²⁸ In light of this evidence, an individual's refusal to vaccinate poses a public health risk: not only their own health is at stake, but the health of everyone else with whom they may interact and spread disease.

Individual interests may act as a constraint on the acceptability of public health restrictions or requirements. That is to say, the public interest in the public health intervention needs to outweigh or override the rights of individuals to govern their own lives and make decisions for themselves, in order to be acceptable. While such a bar must be overcome for any restriction, including mask mandates and travel restrictions, some have argued that the bar is particularly high when overriding individual preferences also involves a violation of bodily integrity and non-trivial risks of side-effects to the individual, as is the case with vaccination. One reason proffered for this higher bar is the notion that our bodies are particularly integral to our sense of self.²⁹ On such a view, to violate the body is to violate the core part of who we are, and as such, is a more significant violation of autonomy than external public health restrictions. For the purpose of this paper, we are neutral on whether such a higher bar is in fact warranted, and simply note this as a point of consideration under a public health model of vaccination.

28 Anoop S.V. Shah et al., *Effect of Vaccination on Transmission of SARS-CoV-2*, 385 N ENGL J MED 1718–1720 (2021); Chris Stokel-Walker, *What Do We Know About Covid Vaccines and Preventing Transmission?*, BMJ o298 (2022).

29 Jonathan Herring & Jesse Wall, *The Nature and Significance of the Right to Bodily Integrity*, 76 C.L.J. 566–588 (2017).

III.A. Applying the Public Interest Standard to Individuals

Lacking Capacity: Two Routes

We are now in a position to examine how public interest could factor into a determination of whether to vaccinate an individual lacking capacity. At least two possible justificatory routes are available: appeal to the individual's other expressed or inferred values; and appeal to the interest of the public. As we will show, the latter route is more promising.

(i). Individual Values Justification

Working within existing interpretations of legal frameworks might suggest a manner in which public interests can indirectly figure as relevant values in an individual's best interests.

Most individuals do not merely care about their own well-being, but also that of their loved ones, those around them, as well as society at large. For most, then, protecting others from suffering disease and death would be consonant with their values. This reflects our broader reasons to act in self-interest as well as the interests of others.³⁰ To the extent that vaccination prevents disease transmission, an additional justification within the best interests framework for vaccination would be the presumed and/or expressed desire to protect others.³¹ On this account, a crucial question to address would be whether the individual lacking capacity would in fact agree to be vaccinated, if they had the capacity to appraise and weigh up considerations of the public interest in their being vaccinated.

England and Wales' Mental Capacity Act 2005 requires that when making a decision in the best interests of the person, the decision-maker consider 'all relevant circumstances' and 'other factors that he would be likely to consider if he were able to'.³² This leaves room for expansion outside the patient's immediate best interests. It is arguable, then, that the public health interest, the person's susceptibility to COVID-19, the 'burden' on their loved ones in caring for them if they develop the COVID-19 infection, and/or the risk of them transmitting the disease to others, especially loved ones, are relevant considerations for decision-making.

While this specific consideration relating to vaccination protecting others has not been considered by any law court (including in the case of SS above), we can draw a parallel to other cases in terms of weighing up benefits to others when a decision-maker is considering a decision on another's behalf. For example, in *Re Y*, the English Court of Protection held recently that it can be in a person's best interests to donate stem cells in order to benefit a loved one. In this case, an 18-year-old woman lacked capacity to decide whether to donate her stem cells to her mother who had chronic leukemia.³³ The court weighed up the benefits and burdens of the proposed donation and concluded that it was in the woman and her mother's best interests for the donation to proceed given the social, emotional, and psychological benefits it would bring to her, such that she would wish to prolong her mother's life. Additionally, in the patient's

30 William K. Frankena, *Sidgwick and the Dualism of Practical Reason*, 58 *MONIST* 449–467 (1974).

31 ALEX RUCK KEENE ET AL., *Rapid Response Guidance Note: Vaccination and Mental Capacity (Third Update)*, (2021), <https://www.39essex.com/rapid-response-guidance-note-vaccination-and-mental-capacity/>.

32 England and Wales Mental Capacity Act, section 4(6a).

33 *A NHS Foundation Trust v MC* [2020] EWCOP 33.

limited capacity, she was aware that she may have the ability to extend her mother's life, and had repeatedly expressed a desire to help in whatever way she could. Essentially, her would-be autonomous decision was judged based not on the direct benefit it would bring her (there is no benefit from donating bone marrow), but based on the relationship to her mother and the benefit that prolonging her mother's life would bring her. This judgment was not exceptional or without precedent. Over twenty years prior to *Re Y*, a similar decision was made to allow bone marrow donation by an individual lacking capacity.³⁴

This approach, though, does not take the moral force of public interests seriously enough. For individuals with capacity, there is not a general requirement that a particular public health intervention be acceptable to them or consonant with their actual values, if others' wellbeing does not matter so much to them. While norms of public justification may appeal to the general accessibility of the value of public interest grounds for vaccination, it is not guaranteed that everyone will share such values (for example, some may be less concerned about spreading the virus to strangers, or at least those beyond their immediate family). Thus it is not guaranteed that a decision made on behalf of an individual lacking capacity that relies solely on the best interests standard will adequately take public interests into account.

Broadly speaking, simply not caring (or not caring enough) about public interests hardly suffices to excuse someone from restrictions designed in the public interest. This applies just as much with regard to following traffic ordinances for the protection of others' safety as it would in abiding by reasonable public health restrictions. Indeed, if public health interventions were already perfectly aligned with individuals' preferences, there would be no need for any restrictive or coercive approaches.

(ii). *Public Interests Justification*

An alternative is to suggest, as we do, that public interest is a quite separate consideration that can in some instances directly serve to justify overriding components of the best interests standard, such as an individual lacking capacity's wishes, where these conflict. The general principle that public interests considerations can outweigh considerations of autonomy is itself not terribly controversial—it is even accessible to libertarians who endorse the Harm Principle, whereby the only coercive interventions that may be justified are those that prevent an individual from harming others, to the extent that failing to take precautions against exposing others to infection arguably constitutes causing harm.³⁵ Preventing the spread of COVID-19 through vaccination is just one way an individual can be prevented from harming others. And indeed, it is commonplace to find public health legal mechanisms according to which even individuals with capacity can be subject to interventions against their will, in order to protect the broader public from disease spread.³⁶

34 Dermot Feenan, *A Good Harvest? Re Y (Mental Incapacity: Bone Marrow Transplant)*, 9 CHILD AND FAMILY LAW QUARTERLY 305–312.

35 Jason Brennan, *A Libertarian Case for Mandatory Vaccination*, 44 J MED ETHICS 37–43 (2018).

36 GOSTIN AND WILEY, *supra* note 26; Jonathan Pugh, *The United Kingdom's Coronavirus Act, Deprivations of Liberty, and the Right to Liberty and Security of the Person*, 7 JOURNAL OF LAW AND THE BIOSCIENCES lsa011 (2020).

In the case of individuals with decision-making capacity, such interventions normally need strong justificatory force to outweigh or override an individual's objections to the intervention. However, objections to vaccination will be somewhat weaker considerations for individuals lacking capacity. There is not space here to properly explore the moral underpinnings of this difference, but at least two approaches are supportive: rights-based and epistemic.

On one approach to this issue, individuals with the capacity to make decisions about vaccination possess the right to waive their claim against bodily interference, but individuals lacking capacity do not. The individual normally has the ability to determine what happens to their body, including for reasons of personal and public interest, and overriding refusal is to rescind the power an individual normally has to govern what happens to their own body. But for those lacking capacity, individuals' abilities to govern their own lives are already limited, and so the decision of whether to waive the claim against interference rests with a decision-maker as determined by prevailing local laws. As a result, overriding refusal does not involve abrogating an individual's rights over their body, and is less morally objectionable.

This divergence of rights may in part help explain why a vaccine mandate, if it is to be justified at all, will typically not involve physically compelling individuals who object to vaccination. Rather, they would be subject to fines or exclusion from certain public spaces.³⁷ By contrast, individuals lacking capacity may sometimes have interventions conducted on them over their objections. Currently, this is based on the best interests standard, but as we argue here, such compulsion could also be further justified by advertent to public interests.

On another approach, lack of capacity puts up an epistemic barrier to respecting individuals' values and priorities: we can no longer be certain what an individual's preferences and values would be, if they could appropriately consider and weigh up the relevant information. Because the decision-maker's credence in the validity of an expressed preference of someone lacking capacity is lower, the decision-maker would be warranted in giving less weight to that expressed preference than if the individual had capacity.

Previous objections made when an individual had capacity may carry some weight, but would not be decisive, at least when such objections were expressed prior to the availability of a particular vaccine in a particular context. Such objections would not have been informed of the relevant risks and benefits of a given vaccine, or of the broader context in which the vaccination is taking place. This is especially pertinent during the COVID-19 pandemic, an unprecedented global event that has fomented a similarly unprecedented global vaccination drive.³⁸

Nevertheless, those making decisions on behalf of someone lacking capacity can legitimately weigh respect for past and present preferences along with their broader interests against other morally relevant considerations, including the public interest.

37 WORLD HEALTH ORGANIZATION, *COVID-19 and Mandatory Vaccination: Ethical Considerations*, 5 (2022), <https://www.who.int/publications/i/item/WHO-2019-nCoV-Policy-brief-Mandatory-vaccination-2022.1>.

38 Alison Shepherd, *Under Starters Orders: NHS's Biggest Ever Vaccine Drive*, BMJ n87 (2021).

IV. OBJECTIONS

IV.A. Equal Weight

Our approach (consonant with applicable law) would apply a different standard in accounting for the preferences of individuals lacking capacity as compared with those possessing capacity. John Coggon has, on the contrary, argued that the preferences and values of an individual lacking capacity should be given equal weight as one possessing capacity, consonant with both English law and the Convention on the Rights of Persons with Disabilities.³⁹ This may be true in theory, but is predicated on epistemic parity: that the preferences and values can be equally well ascertained for an individual with capacity as one without. However, this parity does not exist in practice, where for individuals lacking capacity there is a substantial gap between expressed preferences and what decision in context would fully accord with an individual's considered values and priorities. Indeed, different legal approaches to decision-making for those without capacity are necessary precisely because informed, reflective preferences are not equally known for both cases.

Notably, the Convention on the Rights of Persons with Disabilities also allows for safeguards to protect the will and preferences of individuals with disabilities to be 'proportional and tailored to the person's circumstances.'⁴⁰ Public health considerations are one reasonable factor that could be taken into account in assessing the proportionality of providing vaccination to an individual lacking capacity against their present or past expressed wishes.

IV.B. Scope of Public Interest

Our approach relies heavily on considerations of public interest, but it may be raised that the concept of public interest is too vague to be fit for purpose. Indeed, conceptually it could include a wide range of considerations relating to impact of vaccination on the wider society. Nevertheless, the concept of public interest has found considerable application in the law despite or perhaps even in part because of that vagueness. Such vagueness, after all, can allow for flexibility to interpret it in context as appropriate.⁴¹ As for the present context of vaccination, we can specify public interest to relate specifically to the public health goals of a public vaccination drive. This may vary, but will include factors such as reducing the likelihood of spreading the virus to others as well as likelihood of contributing to healthcare systems becoming overwhelmed with a surge in cases.

To be sure, the public health frame is not a perfect fit for the present context. Public health interventions operate at the group or societal level, unlike the individual-level decision of whether to vaccinate someone lacking capacity. In this context, public interest considerations would need to be couched in terms of the marginal social benefit of vaccinating one particular individual. Public health interventions are not normally analyzed in this individual-level manner. Nevertheless, this form of analysis is reasonable, and can be inferred from public health exhortations for universal

39 Coggon, *supra* note 10; UN GENERAL ASSEMBLY, *Convention on the Rights of Persons with Disabilities: Resolution/adopted by the General Assembly*, (2007), <https://www.refworld.org/docid/45f973632.html>.

40 UN GENERAL ASSEMBLY, *supra* note 39 at 12.4.

41 Richard C. Box, *Redescribing the Public Interest*, 44 THE SOCIAL SCIENCE JOURNAL 585–598 (2007).

vaccination: every (individual) person has reason to be vaccinated for the sake of contributing towards a public good of reduction of transmission. The application of public health considerations to individual decisions is also in line with claims that we all have moral obligations to be vaccinated.⁴² The present discussion does not presuppose the existence of such an obligation. However, the motivation behind the argument for an obligation (that is, vaccinating the individual benefits society greatly at low cost to the individual) would support the premise here, namely that there are meaningful benefits to society through reduction of virus spread from even one individual being vaccinated.

IV.C. Avoiding Exploitation

This approach will immediately raise a concern of exploiting the vulnerable: advancing the public interest at the expense of the best interests of those who lack decision-making capacity. This may be an instance of compounding disadvantage, since such individuals already have diminished ability to protect and promote their own interests. Such a concern could be further grounded in well-documented historical instances of mistreatment of individuals lacking capacity, either in their own interests or the purported interest of society. For example, early-mid 20th century coercive eugenics programs targeted individuals deemed unable to make reproductive decisions for themselves, forcibly sterilizing individuals purportedly both in their own interests and those of society.⁴³ Even if vaccination does not rise to the level of intrusion of sterilization, objections may be raised about expanding the remit of decision-makers in ways that could re-open avenues of abuse.

Three points can be highlighted in response. One, it is worth reiterating that those lacking capacity are themselves at higher risk of harm from COVID-19, particularly those who reside in communal facilities. High vaccination rates among such residents helps mitigate the risk of a handful of unvaccinated dissenters. But while vaccines are highly effective at preventing infection, they are not completely so; breakthrough infections can and do still occur. In addition, some will be medically ineligible for vaccination. In this way, vaccinating those lacking capacity may provide benefits to the whole disadvantaged group of individuals lacking capacity. In other words, the main tension may not be between the interests of vulnerable individuals versus the public at large, but rather between an individual's interest versus that of other vulnerable individuals. In such an instance, exploitative concerns appear less pressing.

Two, our approach is predicated on the idea that it is less wrongful to act against the expressed preference of an individual lacking capacity, as compared with one possessing capacity. If that is the case, treating the two cases differently is not one of exploiting a vulnerability; rather, it is one of appropriately responding to different moral valence of overriding preferences. This would be in contrast with a public health strategy that, for instance, targeted distribution of vaccines specifically to those who could not consent for themselves, in the hopes of higher uptake rates than the general population. In that instance, there would be a case that public health officials were

42 Alberto Giubilini, Thomas Douglas & Julian Savulescu, *The Moral Obligation to be Vaccinated: Utilitarianism, Contractualism, and Collective Easy Rescue*, 21 MED HEALTH CARE AND PHILOS 547–560 (2018).

43 Martin S Pernick, *Eugenics and Public Health in American History*, 87 AMERICAN JOURNAL OF PUBLIC HEALTH 1767–1772 (1997).

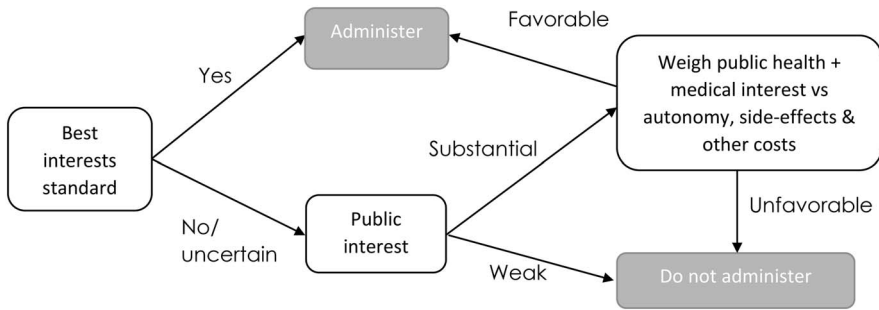


Figure 1. Decision tree for vaccinating individuals lacking capacity.

seeking to take advantage of incapacity to promote public health. But on the contrary, we do not suggest vaccines should be offered by priority to those lacking capacity in virtue of their inability to consent. Instead, our proposal would be applicable whenever individuals lacking capacity are eligible for vaccination based on standard public health prioritization frameworks.

Three, the historical record shows that abuse can be just as easily in the name of best interests as in the name of public interests. Mental capacity law and related institutions like the court of protection are designed (however imperfectly) to mitigate and prevent such abuse. To the extent that such institutions effectively protect against abuse of the best interests standard through court oversight and review, so too should they be effective if public interests are integrated as well. In other words, the risk of abuse is present—and appropriate mitigative efforts similar—whether or not we expand the scope of relevant considerations to include public interests.

Depending on the strength and coherence of the individual's reluctance to become vaccinated, the compromise to their own well-being, as well as the degree of protection afforded to others via their vaccination, public health considerations could make a difference. They may justify provision of vaccine to someone lacking capacity when, if only their personal interests and autonomy were under consideration, vaccination would not be justifiable.

V. HOW TO INTEGRATE THE PUBLIC INTEREST STANDARD

In implementing this proposed public interest standard, those making decisions on behalf of individuals who cannot consent to vaccination for themselves would do well to take a stepwise approach (see Figure 1). That means first considering the individual's best interests, including past expressed preferences/values. (We are neutral on whether the latter is conceptually a subcomponent of the former, but as discussed above, the present argument takes the legal conceptualization of best interests here as a given.) Oftentimes, these will be sufficient to resolve the question of vaccination: when the vaccine confers substantially greater benefit than harm to the individual, and there is evidence of past acceptance of vaccination, the decision to vaccinate will be straightforward. Because vaccination of the population is also in the public interest, public interest is unlikely to count against vaccination. So, for ease of decision-making, public interest need not be considered at much—if any—length.

The situation will be more complicated under either of two scenarios: the benefits of vaccination do not so clearly outweigh the risks for the individual; and/or the individual is presently or has in the past expressed opposition to vaccination. In those scenarios, public interest considerations may aid in decision-making, though in different ways. Consider first a case of marginal risk–benefit ratio. An individual lacking capacity could personally be at low risk of contracting COVID-19, but perhaps comparatively higher risk of side-effects. For example, there are recent reports of very rare blood clots in younger to middle aged women for AstraZeneca and Johnson & Johnson vaccines.⁴⁴ Younger individuals are also at comparatively lower risk of suffering and dying of COVID-19,⁴⁵ while recent past infection may reduce the risk of a subsequent infection.⁴⁶ In contexts where, additionally, COVID-19 is currently well-contained and only those vaccines are readily available, it may not be in the individual's best interest to be vaccinated.

Nevertheless, vaccinating such individuals could advance public interest by preventing transmission of disease to third parties, reducing total burden of disease in society and potentially reducing exposure of others at higher risk of harm from infection. This risk is particularly acute in care homes, where the risk of going unvaccinated may accrue to especially vulnerable individuals.⁴⁷ Depending on how marginal the risk–benefit ratio is, the strength of evidence on prevention of transmission, and the magnitude of expected public benefit from preventing transmission, public interest considerations could tip the balance in favor of vaccination.

Alternatively, a case may be made against vaccinating an individual lacking capacity because of past or current objection. Perhaps medically, the benefits outweigh the risks of vaccination for an individual, but not to an overwhelming degree. The individual's autonomy interests in not being vaccinated could in the first instance tip the scales against vaccination, as was ruled in the case of SS. Public interest considerations could tip the scales back the other way, in a similar manner. Application of public interest considerations would depend on the factors just mentioned (risk/benefit ratio, transmission evidence, and public benefit from transmission prevention), along with the further consideration of the individual's past or present objection. As discussed in the previous section, this objection is ethically relevant, but not decisive. It is to be weighed up against all those other factors.

We do not mean to suggest that, in the case of SS, a public interest consideration would have necessarily resulted in SS being vaccinated against her present wishes. Rather, more modestly, we would suggest it is at least ethically legitimate for the public interest in vaccination to be weighed up along with other relevant factors in making such a determination.

44 Andreas Greinacher et al., *Thrombotic Thrombocytopenia after ChAdOx1 nCov-19 Vaccination*, N ENGL J MED NEJMoa2104840 (2021); Jessica R. MacNeil et al., *Updated Recommendations from the Advisory Committee on Immunization Practices for Use of the Janssen (Johnson & Johnson) COVID-19 Vaccine After Reports of Thrombosis with Thrombocytopenia Syndrome Among Vaccine Recipients—United States, April 2021*, 70 MMWR MORB. MORTAL. WKLY. REP. 651–656 (2021).

45 Williamson et al., *supra* note 11.

46 Elisabeth Mahase, *Covid-19: Past Infection Provides 83% Protection for Five Months But May Not Stop Transmission, Study Finds*, BMJ n124 (2021).

47 A COMAS-HERRERA ET AL., *MORTALITY ASSOCIATED WITH COVID-19 IN CARE HOMES: INTERNATIONAL EVIDENCE*, (2020).

While we cannot in this paper specify how inclusion of public interest would affect individual court judgments, in general our proposal would make it more likely on balance that individuals lacking capacity would end up being vaccinated. Such an outcome would advance public health goals by helping (even if to a modest extent) increase the proportion of the population that is from COVID-19, potentially reducing transmission and the likelihood of individuals overburdening strained healthcare systems. Indeed, it is precisely the publicly beneficial effect of vaccinating those lacking capacity that we argue should be included in determining whether such individuals should be vaccinated, alongside the traditional best interests considerations.

VI. CONCLUSION

It is often noted that best interests assessments on behalf of individuals lacking capacity are holistic judgments.⁴⁸ A variety of factors must be weighed up and considered. There is no strict formula—some degree of discretionary and critical judgment is necessary. We would submit that public interests are an additional factor that should be taken into consideration by decision-makers. For vaccination in particular, there is a strong public health interest in minimizing the spread of disease from one individual to another. These interests are morally relevant when considering and justifying public health interventions, including coercive restrictions on movement and gatherings. While vaccinating those lacking capacity is importantly distinct from coercive restrictions on movement, both can reasonably take into account the public health implications of a given intervention.

At present, mental capacity laws have not been interpreted to give space for such public interest considerations, except in the manner discussed above, where an individual's values are known to align with the public interest in being vaccinated. However, public interest plays a much more central role in infectious disease law and provides justification for most if not all legally sanctioned interventions. Due consideration may need to be given to merging these two legal frameworks for vaccinating individuals lacking capacity during a public health emergency. While it is not possible in this paper to estimate the impact of expanding mental capacity law to include public interest considerations in terms of number of judgments that might reach different conclusions, we can at least say that—insofar as decision-makers should take into account all ethically relevant considerations—such a revision is warranted on ethical grounds.

Even if vaccine mandates for those with capacity are not well-justified given severe autonomy violations, the situation is decidedly more complex for those lacking capacity. It is at least an open question whether, in particular cases, the public interest can adequately ground a decision to vaccinate an individual for whom vaccination would otherwise be unjustified based on their own best interests.

FUNDING

This research was funded in whole, or in part, by the Wellcome Trust [Grant number WT203132/Z/16/Z]. For the purpose of open access, the author has applied a CC BY

48 NUFFIELD COUNCIL ON BIOETHICS, PUBLIC HEALTH: ETHICAL ISSUES, (2007); Charles Foster, *The Rebirth of Medical Paternalism: An NHS Trust v Y*, 45 J MED ETHICS 3–7 (2019).

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CONFLICT OF INTEREST

Julian Savulescu is a Partner Investigator on an Australian Research Council grant LP190100841 which involves industry partnership from Illumina. He does not personally receive any funds from Illumina. He is also a Bioethics Committee consultant for Bayer. No other authors have any Conflicts of Interest to declare.