

Faculty Presentations - Key Points

“Jacobson v. Massachusetts and the Maturation of Public Health Law”

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In her presentation, Wendy Parmet wove together the compelling facts, issues, and people involved in the *Jacobson v. Massachusetts* case and traced the historic decision’s impact on law and public health. This was the first case in U.S. history to deal with the right of self-determination under the 14th Amendment regarding one’s own body. In the succeeding one hundred years *Jacobson* has been cited in many federal court reviews, often when individual rights are at issue, and has been given both positive and negative connotations.

Historical Context

- Massachusetts experienced many important historical events in the development of public health and related law. The state is known as the “birthplace of public health,” for its commitment to vaccination practices and its responses to the public health challenges posed by its role as a major seaport and landing for immigrants. Vaccination was introduced to North America in Boston, the first jurisdiction that required children to be vaccinated.
- In 1721, Boston’s Dr. Zabdiel Boylston became the first physician in North America to practice smallpox variolation, an early practice that entailed significant risks for the recipient and his or her contacts. Dr. Boylston learned of variolation from Cotton Mather, a Puritan minister who learned the practice from London medical publications. The more effective and safer practice of smallpox vaccination superseded variolation and was widely adopted by the mid-1800s. In 1850, Massachusetts became the first state to require smallpox vaccination as a condition of admission to school. Both practices initially met with considerable opposition from the medical and clerical communities, followed by growing acceptance—especially as government developed a regulatory regime to address safety concerns—and ultimately by free public clinics.

Smallpox, Social Strains, and the Public Health Response

- Boston in 1901 was in the midst of the “golden age” of public health. The field of public health had recently been professionalized. New laws had been passed to assure clean water and wholesome food. The bacteriological revolution was illuminating the causes of, and stimulating new approaches to preventing, infectious diseases. Life expectancy was climbing and the health of the general population was improving. This also was a time of social turmoil as new immigrants and industrialization swept the country. Throughout the nation there were religious and spiritual awakenings; laissez-faire capitalism dominated the economic scene; populism energized political unrest; and immigrants, especially in Boston, entered public life and began to take an active role in law-making.
- Deeply engrained fear of smallpox undoubtedly shaped the lens through which the judiciary looked at this case. Before 1901, smallpox, which had been a scourge of colonial times and was the first infectious disease that involved law as a tool for prevention, had waxed and waned as a threat to New England. Starting in 1901, however, it began to return. By 1902 the smallpox outbreak had caused nearly 300 deaths in Massachusetts and public health officials became alarmed about the potential for a widescale epidemic.

- The public, however, had become complacent and did not seem to share that sense of urgency. New immigrants and established citizens were skipping vaccinations, leaving the region's inhabitants increasingly vulnerable to smallpox. Public health officials took action nonetheless and, among other steps, sent teams of physicians and police officers out at night to vaccinate those they found in the streets, by force if necessary. The Cambridge board of health held contentious debates, finally enacting an ordinance requiring all residents to be vaccinated or to pay a \$5 fine.
- At least four people resisted the Cambridge order, including a city clerk, a worker from the water department, and Rev. Henning Jacobson. They, like many in the Boston area, may have belonged to an organized anti-vaccination movement that had ties to the Anti-Vaccination League in Great Britain. Rural Sweden, Rev. Jacobson's native home, also was a hotbed of anti-vaccination sentiments based on religious beliefs that held vaccination to be ungodly. Many believed smallpox was punishment for evil behavior and that affliction with the disease reflected divine intent.
- After emigrating from Sweden to the U.S., Rev. Jacobson studied in Illinois, ministered in Kansas, and ultimately was called to Boston to lead a congregation. He reportedly was pious, charismatic, and deeply respected. One can only speculate on what fueled his resistance; there is no written record of his personal reasons, and he did not ask his congregation to resist vaccination. He was, however, an outsider to the area and not part of the Harvard elite who demanded vaccination. He was a poor man and reportedly recounted negative experiences when vaccinated as a young man.
- Government regulation was in full bloom at the time and was decried by many as elitist and an offensive intrusion on individual liberty. Public health workers had not informed the community about potentially injurious consequences of smallpox vaccination, as the practice then was not completely sterile and could take several, sometimes painful, attempts to complete.
- The four Cambridge resisters were tried and convicted before a lower court in 1902. Only one had a lawyer. They appealed to superior court and were again convicted. Two of the four then appealed to the state's highest court and were represented by two prominent attorneys who argued that the Cambridge ordinance violated the 14th Amendment to the U.S. Constitution.
- The state court ruled against the plaintiffs, arguing that the state held police powers that could be used to limit individual liberty when disease threatened. The court stated that the rights of individuals must yield if necessary to protect the wellbeing of the whole community. The court emphasized that the Cambridge ordinance did not force anyone to be vaccinated, but rather gave citizens a choice between vaccination or paying a fine of \$5.

To the Supreme Court

- Rev. Jacobson appealed to the U.S. Supreme Court in 1904. Even though Rev. Jacobson had lost three times, he continued to press on legal questions related to the 14th Amendment, which guarantees due process protections and limits the power of the state. This was an evolving area of law at the time, and many businesses were also challenging new regulations. Supreme Court Justice Harlan wrote the legal opinion for the majority; the case was settled by a 7-2 vote. The opinion stressed these key points:

Police Power: The ruling stated that the 14th Amendment imposed limits on the police powers held by the states and that federal courts had authority to review exercises of police power under the amendment. The Court, however, did not see individual rights as absolute. Instead, it viewed individual liberties as emanating from a civil society and opined that it is only within the laws that protect the common good that individuals can exercise their liberty. The Court's conclusion that

the 14th Amendment protected liberty paved the way to modern constitutional cases on the right to privacy.

Deference to the Legislature: The ruling accepted that the “common good” applies to the right of society to protect itself from epidemics and that it is not the role of the courts to step into the shoes of the legislature in choosing the means by which to achieve that common good. Thus, deference to the state (manifested, in this case, in the Cambridge board of health) was upheld on the basis that the state could show grounds for its actions. (Notably, the Court did not consider medical evidence supporting vaccination as a chosen intervention. Instead, it essentially trusted the prevailing medical wisdom regarding vaccination). The Court did recognize, however, that there could be exceptions to this doctrine of judicial deference, for example, if the intervention chosen were cruel or inhuman.

Constitutional Limits: The Court articulated four standards for legitimate exercise of the police power for public health purposes:

Necessity: Public health measures must be necessary for the given problem they seek to address.

Reasonable Means: Moreover, the measures taken must have a reasonable relationship to the goal.

Proportionality: The burden the public health measures impose must not exceed, in some reasonable calculus, the benefits they bring.

Harm Avoidance: The public health measure should not cause harm to those subjected to it.

Conclusions

The Court’s ruling in *Jacobson* established foundational public health law and also contributed in important ways to the interpretation and application of constitutional law. Lessons we can learn from the case are that:

- The exercise of the police power is constrained by the rule of law. The ruling established the principle that police powers must be exercised within the Constitution which recognizes, and seeks to balance, the rights of the individual with the common good.
- The historical context is significant. The turn of the 20th century was a time of sweeping change with intense controversy surrounding public health, fueled by religious beliefs, political events, and often rancorous differences over the scientific evidence for vaccination and other interventions. This context framed the ways in which Rev. Jacobson’s case was perceived, advanced by his attorneys, and challenged by the state.
- Those who resist deserve public health’s respect. Rev. Jacobson, well respected in his church and community, brought forward a not unreasonable concern. Cambridge public health officials appear to have oversold the effectiveness of the smallpox vaccine. Administering the vaccine to a single individual often required repeated attempts. Officials underplayed negative side effects. *Jacobson* demonstrated that public health and other government officials should make efforts to understand and engage with those who resist or disagree with a recommended intervention. Sometimes, as in the *Buck v. Bell* case, resisters are proved correct. (See “Faculty Presentations” for related comments by Prof. Charity Scott.)

- The Constitution and public health laws provide a framework not only for public health interventions but also for productive, social debate. As part of its vaccination campaign, the Boston city board of health dispatched physicians and police officers to vaccinate by force and focused disproportionate attention on ethnic communities and immigrants. Resort to force, however, evaded the rule of law and was counterproductive, possibly fueling the community's resistance to vaccination. In contrast, the orderly progress of Rev. Jacobson's case through the court system contributed to resolution of a highly charged issue within a socially accepted framework of laws.

“Jacobson v. Massachusetts: Alternative Perspectives in 2005”

Charity Scott, JD, Professor of Law, Georgia State University School of Law

Speaking from the perspective of Rev. Henning Jacobson, Professor Scott highlighted the balance struck in the case between individual liberty and civil rights, on one hand, and state police power, on the other hand. She described instances in which individual liberties have been overwhelmed by the needs of the many and probed their legacy and lessons for public health. Among Professor Scott's key points:

- Pertinent cases in which abuses of police power and emphasis on the community's health protection have outweighed individual rights have involved quarantine, containment of venereal disease, public health experiments, reproductive health policies, eugenics, and in times of war and other crises.
- Public health policy makers and practitioners both should strive to strike a balance of individual rights with the common good and should consider policies that maximize protection of individual liberties simultaneously with protection of the common good.
- Our nation's commitment to due process protections is most strained during our most challenging and uncertain moments and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.
- In his written dissent to the majority's decision in *Korematsu*, Justice Jackson said that the Court's ruling would “lie around like a loaded weapon” waiting to be fired inappropriately.

James G. Hodge, Jr., JD, LL.M., Associate Professor, Johns Hopkins Bloomberg School of Public Health, and Executive Director, Center for Law & the Public's Health

Professor Hodge spoke from the point of view of the attorneys who represented Massachusetts before the U.S. Supreme Court. He noted that the state viewed the case as a “must win” because its outcome was central to the state's ability to protect the health of its citizens. The state argued that public health practice makes an essential contribution to the citizens of the state and that it is the role and obligation of the state to do what no single person can do to protect the community's health.

The state hinged its argument on the proposition that state powers and individual rights are mutually supportive. Key supporting points were that:

- The state not only has the power but the duty to act ~ for no single person can do what the state can to protect the public's health. The state acknowledged that police powers have constitutional limits but that sovereign states were established to protect their citizens.

- The federal judiciary cannot usurp the role and powers of the state legislature (the principle of separation of powers). A line separates federal from state government powers. (In reality, this balance is like a pendulum swinging between state sovereignty and federal supremacy.) Courts cannot contradict legislative decisions unless they find them utterly arbitrary and unreasonable. In this case, the state argued, the Cambridge board of health acted in a fair and non-discriminatory manner; the judicial branch must respect the board's actions and the federal government must not interfere.
- Citizens do not exist as islands: A social contract exists between the state and its citizens; they are responsible to each other. Liberty does not safeguard against restraint.

In summary, Professor Hodge argued that the *Jacobson* ruling was crucial because the case illuminated themes that have been consistently cited and used to shape responsible public health practices and policies that limit individual interests only when truly necessary. This is evidenced in such diverse fields of public health as vaccination, quarantine and compulsory medical treatment, fluoridation, and traffic safety.

“Commentaries”

David E. Nahmias, JD, U.S. Attorney for the Northern District of Georgia

In his comments, Mr. Nahmias brought to bear the perspective of a trial lawyer and U.S. attorney whose office would defend government actions during a public health crisis. He concluded that the applicability to modern settings of the century-old *Jacobson* ruling remains an open question. The Supreme Court has relied on *Jacobson* and other rulings of that era but the law has evolved in significant ways. Other, more recent cases are being looked to and new ground is being established in this area as well. Judges and attorneys who may not be aware of the prevailing public health laws and relevant doctrines need new tools ~ such as public health law bench books and manuals ~ to represent their clients effectively and, with respect to judges, to be adequately informed about the legal powers of public health officials at all levels of government.

Mr. Nahmias further noted that:

- Even though *Jacobson* gives us a balancing test, such tests are applied depending in large part on each specific situation and according to the membership of the cognizant court. Balancing tests are only relevant in the context of the facts of a given case. The fact that the *Jacobson* decision was not unanimous reveals the subjective nature of the interpretation given by the majority. *Buck v. Bell* ~ a case in which the Court condoned government-ordered sterilization of a mentally incompetent woman ~ is a prime example that the “balance” can be struck in ways none of us would agree with today.
- The legal issues raised in *Jacobson* remain unsettled in important ways. The relevant balancing tests used today are much more complex. In addition, there is significantly more skepticism about government intervention due in part to a history of bad decisions. Government thus faces a much heavier burden of proof both within the legal community and among the general public when attempting to infringe on the freedom of individuals in the name of the common good.
- In this context, when the laws are inadequate (e.g., federal quarantine laws) and where past decisions are tainted, it becomes more unlikely that local governments would willingly accept guidance or intervention by the federal government. As a result, in the context of a public health emergency or crisis we are likely to see a disconnect between federal powers and those of local government. The worst-case scenario would be for the federal government to attempt to compel lower governments to act as it ordains, creating confusion and delays in response to crises.

- One hundred years after the *Jacobson* ruling, courts no longer simply defer to legislative judgments on scientific and medical issues. More often, a battle of experts ensues in which each side gets equal time to present facts. This can result in significant delays in decisions until the court hears all opposing arguments.
- Many statutory changes have limited the ability of governments to impose restrictions on individuals since the 1905 ruling, e.g., the Religious Freedom Restoration Act, the anti-detention act, and procedural due process. These changes in law have contributed to an environment in which it is much harder to compel an individual to act and for the government to withstand judicial scrutiny.
- If a governmental action involves any type of compulsion directed toward individuals the chances are good that it will end up in federal court ~
- as seen in the 2005 Terry Schiavo case. There has been a significant revolution in individual constitutional liberties (civil liberties), including the right to refuse unwanted medical treatment. As a result, it is now much more difficult for governments to impose limits on the exercise of individual liberties.
- There is a great need for public health leaders to prepare the lawyers and judges who will hear “*Jacobson*-like” cases. The reality is that most judges have little or no expertise in public health issues. Similarly, the lawyers defending such cases will be civil lawyers with little background or experience in public health or criminal law. When a public health crisis strikes and a health department applies quarantine or intervenes to prevent the spread of disease, it is likely the issue will end up in federal court with a claim that the state is violating individual rights. It is highly likely that neither the lawyer nor the judge will have proper training in these areas, yet they will have to go into court that afternoon and start making decisions that may have implications for the health of cities, states, or the entire nation.

Alfred DeMaria, Jr., MD, State Epidemiologist, Massachusetts Department of Health

Dr. DeMaria is a senior public health official for the state that in the late 1800s authorized local boards of health to compel smallpox vaccination, leading ultimately to the *Jacobson* ruling. Dr. DeMaria described the dynamic tension that surrounds attempts to practice public health in a way that is respectful of human rights but also is rooted in the science of epidemiology and in calculations of the potentially vast human costs associated with disease epidemics. Among his main points, Dr. DeMaria noted that:

- The *Jacobson* case provides an important perspective on concepts of necessity, reasonableness, proportion and minimizing harm. Lessons can be gleaned from the case that help us understand not only what governments are allowed or empowered to do but also how government actions can respect human rights while protecting the public from disease.
- It is significant that the 1901-1903 smallpox outbreak in Massachusetts led to significant improvements in health regulation and in the practice of public health.
- A lesson the case teaches public health professionals is to be closely attentive to the ways in which government powers are carried out. Health officials and practitioners should be continually cognizant of the great powers they possess and of the serious abuses that have accompanied use of those powers in the past.
- The *Jacobson* case must be examined in its totality, starting with the enormity of the threat posed by smallpox, a horrendous disease that had killed untold numbers of people in the U.S. and throughout the world. The public harbored great fear of smallpox yet vaccination, the preventive measure of choice, was not a simple matter. Vaccine was produced by an unregulated industry that

had significant manufacturing problems. Vaccination practices were crude and even unsafe; those vaccinated actually could contract syphilis from the procedure. Public concerns about the safety of the procedure thus were not totally unfounded. On the flip side, smallpox was on the rise at the time and public health officials felt tremendous pressure to take decisive action. They also had a strong professional sense that they were taking the right approach (even including forceful vaccination of “tramps” and the homeless who frequented the rail yards) and perceived support for their actions as smallpox-related deaths rose and fell.

Clifford Rees, JD, General Counsel, New Mexico Department of Finance and Administration, and former legal counsel to the New Mexico Department of Public Health

In his comments, Mr. Rees offered the perspective of a practicing public attorney in a state health department who deals with day-to-day applications of public health law. He observed that he had not studied *Jacobson* in law school or in a professional setting but that it was directly relevant to his practice in public health law. In addition, Mr. Rees noted that:

- The precedent set by *Jacobson* was cited in testimony to the New Mexico legislature to help make the case for the state’s right to implement a state drug policy on the use of medical marijuana even though the federal government has direct jurisdiction over drug policy.
- The *Jacobson* case can be an excellent teaching tool with a variety of audiences on issues of emergency preparedness, on identifying gaps in existing laws, and in drafting legislation to protect individuals’ interests while allowing health departments to exercise appropriate police powers. Mr. Rees noted also that *Jacobson* is a valuable teaching tool with law audiences; he has used it for this purpose. Interested citizens understood the essence of the ruling and found it a useful lens through which to explore and appreciate issues involved in government’s attempt to protect the health of the public at large.
- The *Jacobson* case can be a helpful tool to explain and promote understanding of the powers granted to public health departments. In the case of New Mexico, many of those powers stem from the 1919 state law that created the first state health department in the aftermath of the Spanish flu pandemic.
- As a contemporary public health lawyer reads *Jacobson*, it is clear that much has changed in the legal environment. For example, the Supreme Court summarily dismissed the freedom of religion argument in its 1905 ruling; further, 1st Amendment law has evolved greatly since 1905. Thus, while *Jacobson* casts a bright, educational light on the core issues, public health officials realize that they face a broader spectrum of relevant legal issues today than their counterparts did a century earlier. These issues implicate religious beliefs, the concept of medical necessity, and a host of additional issues.