

Revisiting Jacobson: An Analysis of the Modern Day Implications of Jacobson v. Massachusetts

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ABSTRACT

Jacobson shows the utilitarian nature of governmental policy. When it comes to most public health actions, the government will act to provide the greatest amount of good for the greatest number of people. Ultimately, via examining multiple examples of socio-medical policy, we will find that Jacobson is a Supreme Court case that goes under the radar in terms in spite of its important impact on everyday life.

INTRODUCTION

In recent years, public health and the law have frequently interacted. A variety of issues have led to the government stepping in to create legislation that affects the individual in order to protect the general public. These actions are grounded in the 1905 Supreme Court case *Jacobson v. Massachusetts*. *Jacobson* set the stage for almost all public health law to follow. However, the case has had more than just a legal impact. In fact, *Jacobson* has made its mark on both societal policies and trends in healthcare and medicine. The case set a precedent for the valuing of public health over individual liberties when the two come into conflict. More generally, *Jacobson* shows the utilitarian nature of governmental policy. When it comes to most public health actions, the government will act to provide the greatest amount of good for the greatest number of people. Ultimately, via examining multiple examples of socio-medical policy, we will find that *Jacobson* is a Supreme Court case that goes under the radar in terms in spite of its important impact on everyday life.

ANALYSIS

Let us begin with the first and most obvious instance of *Jacobson* affecting society today: vaccination policy. There are two primary ways that vaccinations can affect the individual: through mandated vaccinations for children starting school, and by vaccination orders during a public health emergency. Starting with the former and most prevalent example, school entry requirements across the country are influenced by vaccination public health policy.

Every state in America requires students to be vaccinated against certain diseases before entering public or private school.^[1] The mandated vaccinations usually include one inoculation against mumps, measles, and rubella (MMR), another to prevent diphtheria, tetanus, and pertussis (DTaP), as well as others to combat polio, influenza, varicella, and hepatitis B. Such policies have been in place in the United States since the 1960s and 1970s, when a measles outbreak spread across the country. States also have laws in place that allow them to mandate vaccinations during a public health emergency, such as an outbreak of a communicable disease. The decision of whether to invoke the law lies with governors, state boards of health, or state health officers.^[2] For example, in Arizona the governor has the right during a state of emergency “to issue orders that mandate treatment or vaccination of persons who are diagnosed with illness resulting from exposure or who are reasonably believed to have been exposed or who may reasonably be expected to be exposed.”^[3] The law is written to give the government a wide range of powers in such circumstances. With a severe outbreak, just about everybody in a specific population would fall under such law. Other states have similarly legislated powers, with the differences being who decides when a situation is dire enough to trigger these powers and how they are carried out.

Jacobson’s impact in these cases is evident in states’ exemption policies. All states will exempt someone from vaccination for medical reasons; essentially, a person cannot be forcibly vaccinated if he is allergic to the vaccine. About a dozen states also recognize philosophical objections, while more allow for religious exemptions. If [1] religious or philosophical beliefs against vaccinations are sincerely and conscientiously held, and if the objector can provide proof of the belief (such as showing membership in a religious group that does not allow vaccinations), then the individual can be declared exempt. Aside from these instances, everyone is subject to vaccination laws. The logic in the *Jacobson* decision shows itself here. According to Justice John Harlan, who wrote the majority opinion, “Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”^[4] Although this applies to public health emergencies, the line of thought is still the same for school vaccination: When it comes to questions involving public health, the government values the protection of the general population over the rights of the public.

Jacobson has a direct corollary to disease prevention, as seen in the case involving Reverend Henning Jacobson, who did not trust the safety of smallpox vaccine.^[5] At the turn of the last century, Massachusetts was facing an epidemic. In 1900, there were 100 cases of smallpox reported in the state; by 1902, that number had risen to 2,314, with 284 reported deaths. The state mandated vaccinations for the general public in order to curb the spread of the disease. This was before religious or philosophical objections had been established, so everyone had to participate. Jacobson refused, and instead of paying a five-dollar fine (around \$150 today), he sued the state. The case eventually made it all the way to the Supreme Court, which ruled in favor of the state.

This precedent of using utilitarian calculation in public health law shows itself not just in vaccination policy, but other areas as well. For instance, the impact of *Jacobson* can be seen in quarantine law. The government has specific powers when it comes to quarantining individuals in times of public health emergencies. Fidler, Gostin, and Markel comment on this area: “Public health authorities possess a variety of powers to restrict the autonomy or liberty of persons who pose a public health threat.... Legal authority to exercise these powers in the United States can be found

at local, state, and federal levels.”^[6] In times of emergency and disease outbreak, then, the government has the right to quarantine or isolate individuals for the benefit of the general population. Two specific examples of this both involve tuberculosis. The first is the TB outbreak in New York City in the early 1990s. As Gasner, et al., comment, “In 1992, New York City reported 3811 cases of tuberculosis, nearly three times the number of cases reported 15 years before. The commissioner of health could issue orders compelling a person to be examined for suspected tuberculosis, to complete treatment, to receive treatment under direct observation, or to be detained for treatment.”^[7] For the city, the nature of the disease warranted quarantining individuals. If they do not complete treatment—it can take months to completely cure a patient of the disease—drug-resistant strains evolve. These strains of the disease are much tougher to treat and are more often fatal. Therefore, to prevent drug-resistant TB from spreading, the city quarantined individuals who had the disease and isolated those who refused treatment. The protocol was a success, reported Gasner: “New York City’s tuberculosis-control program has been highly successful; new cases decreased by 54.6 percent and cases of multidrug-resistant disease by 87.3 percent between 1992 and 1997.”^[8] By removing individuals from the general population, the city effectively curbed the spread of the disease and helped prevent drug-resistant strains from developing.

Another example of quarantine being used for tuberculosis is the Andrew Speaker incident, in 2007.^[9] Speaker was planning to travel abroad when it was discovered that he had a multidrug-resistant strain of TB. The Georgia Department of Public Health, in collaboration with the Centers for Disease Control, advised Speaker not to leave the country and was planning legal action to keep him from going abroad. Before health officials could reach him, however, he had already departed for Europe. Speaker was tracked down in Rome. The CDC reminded him of his diagnosis and warned to not to travel on commercial aircraft because of the threat he posed. He defied the order and flew to Prague for a few days before coming back to North America, to Montreal. He then traveled by car to New York, where he was ordered to Bellevue Hospital for evaluation and potential isolation. Once he arrived, he was issued a federal quarantine order, the first of its kind since 1963. Speaker was kept in isolation for several months to complete his treatment. He was transferred to multiple facilities, and a portion of his lung was removed, before he was finally declared non-contagious.

The actions of the CDC and the New York Commissioner of Health show *Jacobson’s* application. The Supreme Court’s decision in the case set up a “rule of reasonableness” when it comes to public health actions. According to Fidler, et al., “Following the ‘rule of reasonableness’ established in *Jacobson*...courts insisted that use of quarantine power be justified by ‘public necessity’ and that states may not act ‘arbitrarily’ or ‘unreasonably.’”^[10] *Jacobson* gave the outlines for when quarantine is allowable and justified. In the cases above, public necessity was established by the contagiousness and lethality of TB. The actions were deemed reasonable and non-arbitrary because they were utilized equally among all non-compliant TB patients. Recalling Justice Harlan’s specific usage of the term “self-defense,” the impact that *Jacobson* truly has in situations such as these is clear. We see public health law not as a routine form of policy but as a response to an attack. The Court established that the government has the right to defend the population against external health threats. The quarantines that resulted from the TB outbreaks clearly show this type of reaction.

A more literal application of self-defense stemming from *Jacobson* comes from the so-called war on terror. Bioterror specifically presents an interesting challenge for governments. As Annas elaborates: “Bioterrorism—the

deliberate release of a harmful agent to intimidate civilians and their government—constitutes a threat to public health that differs from any other public health threat that our country has faced. An Act of bioterrorism is both a state and federal crime.... Because of our...transportation system, communicable diseases can be spread in a short period of time.”^[11] Prior to September 11, the United States did not have a specifically coordinated bioterror attack plan. According to Annas, the only reason that former president Bill Clinton became engaged in the issue is because he read a Tom Clancy novel in which a bioterror attack occurred in the United States. After a wave of anthrax attacks after 9/11, hospitals, cities, states, and federal officials came around to setting protocols for dealing with bioterror attacks. This has included stockpiling vaccines, improving the public health infrastructure, and training emergency personnel to recognize and be able to treat diseases such as anthrax poisoning, smallpox, and bubonic plague, the most likely afflictions to be caused by a terrorist act.

However, the Model State Emergency Health Powers Act, enacted on October 23, 2001, utilized *Jacobson's* logic the most straightforward. The original model of the act allowed government officials to declare a state of public health emergency. This declaration, according to Annas, “gives state public health officials the authority to take over all health care facilities in the state, order physicians to act in certain ways, and order citizens to submit to examinations and treatment, with those who refuse to do so subject to quarantine or criminal punishment.”^[12] The act gives public health officials immense authority. They can commandeer health care facilities, and physicians and citizens who fail to follow the orders of public health personnel are subject to criminal penalties. On top of this, as in the TB cases, individuals who are deemed a “public health risk,” which includes being at risk of contracting a communicable disease, having a contagious condition, or having possibly been exposed, are subject to either quarantine or isolation. Quarantine and isolation are also options if, as before, an individual refuses to be vaccinated or treated for specific conditions.

It is clear that the logic of *Jacobson* is in play here as well. As Annas writes about the Health Powers:

The model act is based on the belief that in public health emergencies, there must be a trade-off between the protection of civil rights and effective public health interventions. There is, of course, precedent for this belief, and the preamble to the model act cites the 1905 case *Jacobson v. Massachusetts* in stating the proposition that “the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the ‘common good.’”^[13]

When it comes to the war on terror, civil liberties get pushed to the side for the protection of the public at large. Whether all instances of such are justifiable is a different story. However, the logic behind the *Jacobson* decision plays a key role in how we approach terrorism. The self-defense rhetoric that Harlan used in his majority opinion applies more here than anywhere else. We are utilizing public health measures to quite literally defend ourselves against outside threats. For public health officials attempting to combat the effects of bioterror, the protection of the majority

is vastly more important than the civil liberties of the individual. If ensuring the well-being of the general population requires the restriction of rights for the everyday person, so be it.



Two final instances in which the logic of *Jacobson* reigns supreme are of a more medical nature than the examples discussed above. First, the effectiveness of and importance placed on vaccinations today reflect the rationale behind the actions of the state of Massachusetts in *Jacobson*. The reason the case even occurred was because of the effect that vaccinations have on public health. Massachusetts mandated smallpox vaccinations in response to an outbreak. The results speak for themselves. Because of widespread vaccination policies, smallpox has all but been eradicated. Another disease, polio, has been entirely eliminated from the United States because of vaccination efforts.^[14] However, continued vaccinations play a key role in prevention. According to the American Society of Health Pharmacists, “It would only take one person with polio virus coming from another country to bring the disease back here if we were not protected by vaccine.”^[15]

There have been other instances in the past few years that show the importance of vaccination to public health. Measles, preventable with the common MMR vaccine, is normally a disease of the past because of mandatory vaccination regulations. However, an outbreak occurred in Indiana in 2005 in an area where vaccination levels were low.^[16] A study in the *New England Journal of Medicine* concluded that “high vaccinations levels in the surrounding community and low rates of vaccine failure averted an epidemic. Maintenance of high rates of vaccination coverage,

including improved strategies of communication with persons who refuse vaccination, is necessary to prevent future outbreaks and sustain the elimination of measles in the United States.”^[17] Clearly, vaccination programs are a critical part of preventing more disease outbreaks from occurring—an affirmation of the logic behind *Jacobson*, one hundred years after the case was decided.

The reason why vaccination programs are so important is because they work. As the previously cited study shows, the only areas where diseases that are preventable via vaccines are prevalent are areas where people don’t get vaccinated. The reason why Massachusetts health professionals were so insistent that individuals be vaccinated in 1902 is because vaccinations were shown to work. We can still see the results today, when we recognize that smallpox is essentially a disease of the past. The rationale used in determining why the actions of Massachusetts in *Jacobson* were so important is the same being utilized today.

Herd immunity is another public health concept in use today that had corollaries in *Jacobson*. Known more gently as community immunity, herd immunity refers to the concept that if enough people in a population are vaccinated against a disease, it will eventually die out. A disease needs to continue to be transmitted in order for it to survive. If the line of transmission stops, the disease dies out. This is why smallpox and polio are nonexistent in the United States. Still, certain levels of vaccination need to be maintained in order for the disease to remain suppressed. According to the CDC, smallpox and polio require a minimum vaccination rate of 80 to 85 percent of the population, whereas diseases such as measles and diphtheria require rates upward of 94 percent.^[18]

It is critical for individuals to be vaccinated, even when a disease is rare, for two reasons. First, as the American Society for Health Pharmacists noted before, if we stop immunizing against polio and someone from another country with the disease comes to the United States, incidences of the disease will increase again. The only reason why polio and other rare diseases haven’t reappeared in the United States is because we maintain herd immunity levels. Second, certain individuals cannot be vaccinated for medical reasons. Some people are allergic to various components of the vaccine, be it the dead cells used to create immunity, additives used to preserve the vaccine, or the material used to keep the cells suspended in solution. Since these people cannot receive the vaccination, herd immunity levels need to be maintained them. Although the concept of herd immunity was unknown in the early 20th century, essentially the same logic was used in the lead-up to *Jacobson*. The only way for an entire community to be protected is if as many people as possible get vaccinated. Medical officials at the time understood the concept of allergic reactions, so those who could not receive the vaccination didn’t. However, they mandated that everyone else had to. We follow essentially the same line of thinking today when crafting public health vaccination policy concerning vaccinations, but we now have a better understanding of the role of herd immunity in the protection of the general population, meaning the importance of vaccinations that the state of Massachusetts saw in *Jacobson* has increased exponentially.

CONCLUSION

If anyone argues that case law from hundreds of years ago has no impact on everyday life, *Jacobson* is the clear rebuttal. From public health policy to medical innovation and discovery, the logic utilized in that decision still applies today. The basic utilitarian calculation that the greatest good ought to be given for the greatest number of people informed both the decision itself and the ramifications of it that we see today. From our responses to global bioterror to vaccination policy for children about to start school, the rhetoric used in the *Jacobson* decision rings as true today as it did more than a hundred years ago. The government still places a greater importance on public health than on individual liberties, especially in times of emergency. It is clear that *Jacobson v. Massachusetts* has an indelible impact on public health policy and the social views of medicine that will continue for the next hundred years and beyond.

[1] Welborn, Angie A. et al, "Mandatory Vaccinations: Precedent and Current Laws" CRS Report for Congress, January 18, 2005, <http://www.fas.org/sgp/crs/RS21414.pdf>, pg 2-3

[2]*Ibid*, pgs. 3-4

[3]*Ibid*

[4]*Jacobson v. Massachusetts*, 197 U.S.11 (1905), ***31, Accessed via Lexis Nexis

[5] Parmet, Wendy E., Richard A. Goodman, and Amy Farber. "Individual Rights Versus The Public's Health — 100 Years After *Jacobson v. Massachusetts*" *New England Journal of Medicine* 352, no. 7 (2005): 652-654.

[6] Fidler, David, Lawrence Gostin, and Howard Markel. "Through the Quarantine Looking Glass: Drug-Resistant Tuberculosis and Public Health Governance, Law, and Ethics." *The Journal of Law, Medicine, and Ethics* 35, no. 4 (2007): pg. 620

[7] Gasner, M. Rose, Khin Lay Maw, Gabriel E. Feldman, Paula I. Fujiwara, and Thomas R. Frieden. "The Use Of Legal Action In New York City To Ensure Treatment Of Tuberculosis." *New England Journal of Medicine* 340, no. 5 (1999): pg. 359

[8]*Ibid*

[9] Fidler, pg. 617-8

[10]*Ibid*, pg. 621

[11] Annas, George J.. "Bioterrorism, Public Health, And Civil Liberties." *New England Journal of Medicine* 346, no. 17 (2002): pg. 1337

[12]*Ibid*, pg. 1338

[13]*Ibid*, pg. 1399

[14] "Polio Vaccine", American Society of Health Pharmacists, 2011, <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a601177.html>

[15]*Ibid*

[16] Parker, Amy A. et. al, "Implications of a 2005 Measles Outbreak in Indiana for Sustained Elimination of Measles in the United States", *New England Journal of Medicine*, vol. 335, 3 August 2006, pgs. 447-455

^[17]*ibid*

^[18] "History and Epidemiology of Global Smallpox Eradication." Slideshow, Center for Disease Control. December 22, 2003. <http://www.bt.cdc.gov/agent/smallpox/training/overview/pdf/eradicationhistory.pdf>



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