

*“Jacobson v. Massachusetts and Public Health Law:
Perspectives in 2005”*

Note: This teaching guide has been designed for use in schools of law. A companion guide is available for use in public health schools and programs, and in state, local and other public health practice settings.

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INTRODUCTION

Rights in Collision

In 1905, the United States Supreme Court handed down a landmark ruling on an issue of central importance then and today: the balance between the rights of individual Americans and those of society as a whole.

The specific question before the Court was whether the state of Massachusetts could compel citizens to be vaccinated against smallpox. The Court's ruling established foundational law with important implications for the protection of Americans' legal rights and, equally, for government's ability to protect all citizens against infectious disease epidemics and many other potentially catastrophic health threats.

The goal of “*Jacobson v. Massachusetts* and Public Health Law: Perspectives in 2005” is to use the 1905 ruling to explore public health and legal issues at the heart of the relationship between the citizen and society.

These issues are enduring because they arise from the fabric of American democracy and our Constitution. Understanding the Court's reasoning illuminates not only its 1905 decision but, perhaps even more important, how we address the same issues today, whether as public health practitioners and policy makers, as attorneys or judges, or as students preparing for careers in these and related professions.

The ruling was one of the Supreme Court's earliest discussions of the application of 14th Amendment protections for individual rights to public health powers. In its decision, the Court made it clear that, “according to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”¹ The ruling has remained guiding judicial precedent through the following century and has been repeatedly affirmed by the courts. While judicial doctrine and the scope of individual liberties have changed² markedly since 1905, the overarching themes of *Jacobson* still resonate today: the balance of public welfare with individual liberty, equal protection of the law, fairness, and proportionality.

ABOUT THIS RESOURCE

Origins

In 2005 – the centennial of the 1905 *Jacobson* ruling – a distinguished, multidisciplinary panel met to explore the implications of the decision for the health of the American public and for public health policy makers and practitioners at the community, state, and national levels.

¹ *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

² See, e.g. *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 504 (1965); *Boone v. Boozman*, 217 F.Supp.2d 938, 940 (E.D. Ark. 2002).

The setting for the dialogue was the fourth annual partnership conference *The Public's Health and the Law in the 21st Century* held in Atlanta, Georgia, and co-sponsored by the Public Health Law Program of the U.S. Centers for Disease Control and Prevention (CDC) and the American Society of Law, Medicine & Ethics (ASLME).

The discussion was rich and illuminating, reflecting the faculty members' diverse professional experiences in public health and law. The discussion and the panelists' presentations were recorded for translation into "*Jacobson v. Massachusetts and Public Health Law: Perspectives in 2005*"—an educational resource that can be used in schools of public health and law, and in public health agencies and other organizations as well.

Organization and Faculty

The organization and the faculty of the session were as follow:

- First, in her address "*Jacobson v. Massachusetts and the Maturation of Public Health Law*," Wendy E. Parmet, JD, Professor of Law at Northeastern University School of Law, spoke on the historical setting and the facts of the *Jacobson* case, reviewed the central legal principles and controversies, and described the implications of the ruling for the practice of public health.
- Two intentionally divergent commentaries then were given on the *Jacobson* ruling, one from the point of view of Reverend Henning Jacobson and the other from the point of view of the state of Massachusetts. The former was presented by Charity Scott, JD, Professor of Law at Georgia State University, and the latter by James G. Hodge, Jr., JD, LLM, Associate Professor at the Johns Hopkins University school of public health and Executive Director of the Center for Law and the Public's Health.
- Finally, a three-person panel discussed the *Jacobson* ruling and its contemporary implications from three differing perspectives: David E. Nahmias, JD, U.S. Attorney for the Northern District of Georgia; Alfred DeMaria, Jr., MD, State Epidemiologist for the Massachusetts Department of Public Health; and Clifford Rees, JD, former legal counsel to the New Mexico Department of Public Health and, at the time of the session, legal counsel to the New Mexico Department of Finance and Administration.
- The session moderator was Richard A. Goodman, MD, JD, MPH, Co-Director of the CDC Public Health Law Program. (Information about the program is available at <http://www.cdc.gov/phlp>.)

"*Jacobson v. Massachusetts and Public Health Law: Perspectives in 2005*" comprises the following suite of materials:

- A CD-ROM containing the 90-minute program and presentations by the six faculty members, including slide presentations by Professors Parmet, Scott and Hodge
- A curriculum guide for use in public health schools and in state, local and other public health practice settings
- A curriculum guide for use in schools of law, and
- Supporting materials, including key points distilled from the six faculty members' presentations and citations to selected reference materials.

The “*Jacobson v. Massachusetts* and Public Health Law: Perspectives in 2005” materials may be downloaded without charge from the CDC Public Health Law Program (www.cdc.gov/phlp) and also may be requested in printed form (including the CD-ROM) from the Public Health Foundation (www.phf.org) for a nominal fee. All materials are in the public domain.

This resource was created by a team with members from the CDC Public Health Law Program; the Office of Applied Public Health at the Rollins School of Public Health, Emory University; and the Northeastern University School of Law.

Learning Objectives

This educational resource is intended for use primarily in schools of law, in public health schools and programs, in state, local and other public health agencies, and in other settings where public health and law intersect.

“*Jacobson v. Massachusetts* and Public Health Law: Perspectives in 2005” is set against the backdrop of unfolding U.S. history and features a cast of compelling characters, including city health workers, a charismatic clergyman and his legal counsel, and Supreme Court Justice John Marshall Harlan, among others. This resource is grist for developing an understanding of the legal issues of the case and their keen relevance to the public’s health today. Further, it encourages us to probe the assumptions about rights and responsibilities that underlie today’s public health practices and to ask about the legal and ethical standards those practices should meet.

Within this framework, those who learn from this resource will be able to:

- Identify and describe civil liberties established in the U.S. Constitution, particularly in relation to public health considerations;
- Describe key factors mediating the balance between individuals’ rights and protection of the public’s health;
- Explain the Supreme Court’s approach to balancing individual rights and the common good in 1905, and the principles it laid out to protect individual rights; and
- Discuss implications of the *Jacobson* decision for contemporary public health practice and law.

USING THIS GUIDE

This guide is intended for use in schools of law. A companion teaching guide is available for use in public health schools programs and in state, local, and other public health practice settings. Instructors preparing to use this educational resource will find it helpful to consult both guides as each guide contains material (e.g., concepts, suggested discussion points, and suggested learning exercises) that instructors may integrate or borrow from in order to engage specific audiences in the most effective manner possible.

The body of the guide is the “Educational Content” section which is organized into four parts:

- A brief introduction to concepts in public health,
- A sketch of the historical context for the case,

- A concise discussion of the Court’s holding regarding the states’ police powers, followed by suggested discussion questions and exercises, and
- Brief statements on three major elements of the ruling: necessity, real and substantial relation, and interference with fundamental rights ~ each followed by suggested discussion questions and exercises.

The instructor should review this content, revise or amplify it as appropriate to the learning objectives adopted for the target audience, and use it in conjunction with the presentations and other materials contained on the “*Jacobson v. Massachusetts* and Public Health Law: Perspectives in 2005” CD-ROM.

EDUCATIONAL CONTENT

Concepts in Public Health

What is Public Health?

As an applied discipline, public health focuses on the prevention of disease, disability, and death, rather than on treatment, and on populations rather than on individuals.³ The scope of the field traditionally was defined narrowly to include only prevention of infectious diseases and interventions to assure safe food and drinking water. This was the prevailing understanding at the turn of the 20th century when the events that led to the *Jacobson* ruling took place.

In its contemporary guise, however, the field of public health is far broader. The Institute of Medicine offered perhaps the most expansive definition of public health as “...what we, as a society, do collectively to assure the conditions for people to be healthy,” capturing the contributions made by many organizations beyond government health agencies.⁴ In addition to infectious diseases, the types of health risk factors and conditions the field encompasses today include chronic diseases (now the major causes of premature death and preventable disease), injury, occupational health, exposure to toxic substances, population genomics, vital and other health statistics, and still others.

The U.S. Centers for Disease Control and Prevention is the lead federal public health agency but other agencies have significant public health roles as well, including, among others, the Food and Drug Administration, the Health Resources and Services Administration, the National Institutes of Health, the Department of Agriculture, the Environmental Protection Agency, the Consumer Product Safety Commission, and the Centers for Medicare and Medicaid Services. These agencies and their state, county, and city counterparts offer a broad array of services.

Public health practice is highly interdisciplinary at all levels. Core disciplines include epidemiology, medicine, biostatistics, health education, and law (because public health is a predominantly government undertaking and because virtually all public health interventions rely on legal authority of

³ See generally: Institute of Medicine. *The Future of the Public’s Health in the 21st Century*. Washington, DC: National Academy Press, 2003; Theodore H. Tulchinsky & Elena A. Varavikova, *The New Public Health* 55-112 (2000) (Detailed discussion of public health, its history, approach, and methods).

⁴ Institute of Medicine. *The Future of Public Health*. Washington, DC: National Academy Press, 1988.

one type of another), to name only a few, but more than one hundred disciplines have been identified as closely involved in the field.

Several recent publications offer more insight into the role and use of public health. An in-depth review of the status of the public health field in the United States is offered by the Institute of Medicine, “The Future of the Public’s Health,” published in 2003.⁵ The U.S. Department of Health and Human Services published, “Healthy People 2010” which portrays the breadth of the field and also identifies hundreds of public health goals slated for attainment by the year 2010.⁶ The role of law in public health is featured in detail in Richard A. Goodman, et. al., (eds), “Law in Public Health Practice”⁷ and Lawrence O. Gostin, “Public Health Law: Power, Duty, Restraint.”⁸

Vaccination

Vaccination is the process where an individual or host is made immune to a disease-causing pathogen by being exposed to an inactive form of the pathogen that stimulates antibodies to the pathogen. The public health or population-oriented purpose of vaccination is realized once the number of persons vaccinated reaches the level that disease transmission from person to person is effectively impeded. This immunization effect is referred to as “herd immunity.” The proportion of a given population that must be immunized to satisfy that condition varies from disease to disease.

Health Surveillance

To interrupt the spread of contagious diseases, public health officials require information. Public health agencies conduct surveillance programs to identify the sources and spread of diseases. In this context, “surveillance” refers to the collection of information about cases of disease and also, with respect to contagious diseases, about the coverage and status of vaccination and immunization levels in a population. This information is reported by public health clinics, hospitals, and other health care providers and today is collected and analyzed by local, state, and federal health agencies. In Massachusetts at the turn of the 20th century, this information was collected by local health departments and by the state health department.

Quarantine and Isolation

Quarantine and isolation have been used throughout history in attempts to limit contagion. Quarantine refers to the separation from society of people who are believed to have been exposed to an infectious disease such as smallpox, influenza, or measles. Isolation is the separation from society of people known to have been so exposed. The colonies used both interventions before establishment of the United States and all states have had legal authority, granted in either general or specific terms, to impose quarantine and isolation under variously specified circumstances.

⁵ Institute of Medicine. *The Future of the Public’s Health in the 21st Century*. Washington, DC: National Academy Press, 2003.

⁶ Department of Health and Human Services. *Healthy People 2010*. Available at: <http://www.healthypeople.gov/Publications/>.

⁷ Goodman, RA, et al. *Law in Public Health Practice*. New York: Oxford University Press, 2003.

⁸ Gostin, LO. *Public Health Law: Power, Restraint, Duty*. Berkeley: University of California Press, 2000.

Nuisance Abatement

Just as states' police power can be applied to individuals, it also can be applied to public health threats posed by property. The police power to protect the public health also includes power over property. Nuisance abatement is an example of the use of such powers. A public nuisance is a condition that interferes with the public health and welfare or interferes with the public's ability to pursue the "normal conduct of life." These are most often associated with property: an unlicensed garbage dump, a polluting factory, and excessive noise are all examples of public nuisances. The police power grants states the power to intervene and abate such nuisances.⁹

Discussion Questions

1. Can you think of public health domains not discussed here? Is health screening of indigent children a public health function? Do zoning ordinances have public health consequences? What legal issues do health screening and land use zoning raise?
2. Should vaccination be compulsory for everyone in a locality or region when a highly contagious disease is expected to appear? Under what conditions, if any, should exceptions be made?
3. If a person refuses to be vaccinated when public health officials so recommend, what exemptions, procedures, or other steps should public health officials consider?

Historical Context of *Jacobson*

Smallpox is a dangerous and highly contagious disease known since the third century BCE. It is caused by the variola virus, and is readily transmitted between humans. Historically, smallpox epidemics swept across Europe and Asia, inflicting a mortality rate of 25 – 40% and killing millions. Smallpox had dramatic effects on civilizations and was a key factor in the near eradication of Aztecs, Incas and other native civilizations in the Americas.¹⁰ Even today smallpox has no specific treatment. The elimination of the virus as a threat to human health began with the discovery and use of vaccination in the eighteenth century and ended with declaration of the global eradication in 1979.¹¹

Vaccination was employed throughout the 19th century and had helped to reduce the incidence of smallpox in the United States by the beginning of the 20th century. As the smallpox threat declined, the number of people receiving vaccination declined and, consequently, the number susceptible to the disease increased. The drop in immunization rates and the rise of immigration led to a series of smallpox outbreaks on the East Coast in the 1890s and the number of smallpox cases in Massachusetts began to rise. The state recorded nearly 100 smallpox deaths in 1901 and nearly 300 in 1902. Faced with a growing public health problem, the Cambridge, Massachusetts, board of health adopted a regulation requiring the vaccination or revaccination of city inhabitants. The regulation exempted children who were certified unfit for vaccination. Adults who refused vaccination would be fined \$5.¹²

⁹ Restatement (Second) of Torts §821 et seq. (1979).

¹⁰ See generally, Jared Diamond, *Collapse* (2004).

¹¹ Tulchinsky & Varavikova, *supra* note 4, at 206 – 208.

¹² *Jacobson*, 197 U.S. 11, 14 (1905); See, Wendy E. Parmet, Richard Goodman, & Amy Farber, *Individual Rights versus the Public's Health – 100 Years after Jacobson v. Massachusetts*, 352 *N.Engl.J.Med.* 652 (February 17, 2005).

In 1902, Rev. Henning Jacobson refused to be vaccinated and was convicted of violating the Cambridge rule. Rev. Jacobson had several objections to vaccination. Vaccination was controversial at the time, and there was a large and organized movement of antivaccinationists, with which Rev. Jacobson apparently was associated. His central claim was that the law interfered with his rights as guaranteed under the due process provisions of the 14th Amendment to the U.S. Constitution.

In its 7-2 ruling in support of the state vaccination law, the Supreme Court found that it is within the police powers of the state to enact laws to protect the public health and safety. In upholding the Massachusetts ordinance, the Court suggested several principles that could be used in determining the constitutionality of state police powers. These include, for example, the extent to which a law is necessary and reasonable in means and effect, demonstration of a real and substantial relation to the public's health, harms caused to affected individuals, and the availability of reasonable exceptions to a given law or regulation.

The Police Power in *Jacobson*

“According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.” *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

In deciding *Jacobson*, the Court had to define the scope of the police power, the authority the states hold to act on behalf of the public health and welfare. This power is retained by the states and was not surrendered to the federal government under the Constitution. It is a power that enables the state to pass “health laws of every description.”¹³ The police power is not limited so long as it does not interfere with other states and is exercised “reasonably.” Justice John Marshall Harlan, author of the *Jacobson* opinion, recognized that the states have sweeping police powers. At the same time, the Court held that a public health enactment must be necessary and reasonable in its means and effect.¹⁴

As a counterpoint, it is striking that *Jacobson* was handed down in the same term as *Lochner v. New York*, 198 U.S. 45 (1905). There the Court invalidated a state restriction on the number of hours that bakers could work. This restriction, proposed as a health and safety regulation, was challenged under the 14th Amendment as an impermissible interference with the right to contract. The Court agreed, with Harlan dissenting, and struck down the regulation. Today, *Lochner* has come to represent rigid hostility to any state interference with economic activity and has been firmly rejected in modern jurisprudence. Yet, at the time, both decisions represented the state of the law.

Suggested Discussion Questions and Exercises

1. What level of threat to the public's health should government officials be required to demonstrate to justify compulsory vaccination, quarantine, or isolation?
2. Justice Harlan limited the police power to laws that do not interfere with other states. Today, is it possible for one state's regulations not to affect other states?

¹³ *Gibbon v. Ogden*, 22 U.S. 1 (1824).

¹⁴ *Jacobson* at 29-31.

3. Review *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981). What is the relationship between the dormant commerce clause and the state police power? Was Iowa's regulation a health and safety regulation? Can you think of areas, other than the dormant commerce clause, where states' police powers may be limited by federalism principles?
4. Review and explain the contrasting *Lochner* and *Jacobson* holdings.
5. Two model public health acts have been published recently ~ the Model State Public Health Act (MSPHA)¹⁵ and the Model State Emergency Health Powers Act (MSEHPA).¹⁶ Review these models. Do their vaccination, quarantine, and nuisance provisions comply with the limits articulated in the *Jacobson* ruling? Do they constrict the definition of the police power by negative implication? Is there a danger in harmonizing public health powers across the states?

Making the Case for Public Health: Necessity

"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."

Jacobson v. Massachusetts, 197 U.S. 11, 27 (1905).

The *Jacobson* ruling made it clear that exercise of the police powers hinges on the necessity of applying those powers to protect the health of the entire community. Simply put, there must be a threat to the public health. This may seem to be stating the obvious, but the necessity for a given public health intervention can be critical to its legal validity. In *Jacobson*, the Court acknowledged the increasing prevalence of smallpox in Cambridge and took note of the legal measure ~ an ordinance ~ the Cambridge board of health issued as part of its effort to curb the epidemic. Consistent with the principles underlying the police power, the Court's finding of necessity relied upon its assessment of the threat smallpox posed to the entire community, not to the threat to a given individual. The Court found that there was a significant threat to the public's health and that the threat had been the basis for the board's action. The Court thus found that the case for necessity had been met.¹⁷

Suggested Discussion Questions and Exercises

1. Cambridge passed its vaccination regulation in response to a growing prevalence of smallpox. Should the exercise of the police power only be responsive to a threat? Can the legislature empower the public health authority to act in response to unknown threats or to threats (such as SARS in 2003) that have no known treatment?
2. If a public health authority is empowered generally to respond to threats to public health, what modern issues of procedural due process are raised that weren't present in the *Jacobson* period?
3. The Cambridge board of health included in its compulsory vaccination regulation a description of the deepening epidemic. Is such a description required? What is the responsibility of the legislature to show necessity in the enactment of a statute? Can the courts override a determination of necessity made by a legislative or executive body?

¹⁵ Model State Public Health Act, available at <http://www.publichealthlaw.net/Resources/Modellaws.htm>.

¹⁶ Model State Emergency Health Powers Act, available at <http://www.publichealthlaw.net/Resources/Modellaws.htm>.

¹⁷ *Jacobson* at 23-24.

Making the Case for Public Health: Real and Substantial Relation

“[If] there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health...has no real or substantial relation to those objects...” *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905).

The Court was unwilling to override the legislature’s determination that vaccination was an effective response to the burgeoning threat of smallpox. The Court further determined that it could only intervene if the statute in question violated the Constitution or had no real or substantial relation to the public’s health.

The Court examined the reasonableness of the statute in its effect and in its application. In *Jacobson*, the Court relied upon information that was “common knowledge” in forming its opinion. It noted the statute applied uniformly to all adults, provided exemptions for children, and understood that the statute would exempt individuals who could show a direct harm to their person.

While the courts remain deferential to the state’s police power and to public health statutes, evolution in law might alter the outcome of a case like *Jacobson* today. The health concerns at issue were vaccination and smallpox. While vaccination remains an important tool in combating infectious disease, much has changed in the law.

The use of scientific evidence has undergone a profound shift since *Jacobson*. In 1993, the Supreme Court held in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), that the test for admissibility previously articulated in *Frye v. U.S.* had been superseded by the Federal Rules of Evidence.¹⁸ In *Daubert*, the Court clarified that the courts were to be the gatekeepers for scientific evidence, ensuring “relevance” and “reliability” before admission. The Court suggested four factors to use in evaluating the reliability of evidence: testability, peer review and publication, potential error rates, and general acceptance. The Court further elaborated these standards in what has become known as the “Daubert trilogy” which today governs the admission of scientific evidence in the courts.¹⁹ Understanding the new standards for evidence is important for public health because they govern the admissibility of evidence put forward to show necessity in an exercise of the police power.²⁰

¹⁸ The test for admissibility articulated in *Frye* was “generally accepted.” With the adoption of the Federal Rules of Evidence, the Court held that *Frye* was superseded. *See, Frye v. U.S.*, 54 App.D.C. 46 (Dec. 03, 1923).

¹⁹ A complete discussion of the law of evidence and the standards for admissibility for expert testimony exceeds the scope of these materials and stands outside of constitutional law. **This is a contentious** and complex area of law and deserves careful scrutiny by the lawyer working in public health.

²⁰ If the state in *Jacobson* was operating under modern rules of evidence it would have to ensure that its evidence about the efficacy of vaccination was admissible and that evidence would be subject to evidentiary hearings that would challenge its reliability. Without strong *admissible* scientific evidence, it would be difficult to make the case for necessity.

Suggested Discussion Questions and Exercises

1. Would the Court have ruled differently in *Jacobson* had there been no exemption for children or for individuals who could demonstrate injury? Should there be such an exemption today?
2. What effect do the *Daubert* standards have on the review of a statute? Should a legislature be required to follow these or other standards or guidelines on scientific evidence in enacting a law?

Judicial Restriction of the Police Power: Interference with Fundamental Rights

“[If a statute is] beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.” *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905).

Exercise of the police power may infringe upon individual liberties. It is the role of the judiciary to determine whether or not that infringement is unconstitutional. The police power is not without a history of abuse. There have been occasions in U.S. history when the police power suppressed fundamental rights without justification. One of the earliest cases in American constitutional law, preceding *Jacobson* by almost twenty years, was *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In *Yick Wo* the Supreme Court overturned a San Francisco regulation that limited the type of buildings in which laundries could be operated, ostensibly to reduce the threat of fire and to enhance the safety and health of the workers. The regulations, however, also contained discretionary provisions that allowed for widespread discrimination against laundries owned by ethnic Chinese. The Court struck down the discretionary regulation as a violation of the 14th Amendment.

One of the most famous cases of abuse, and one which relied directly upon *Jacobson*, was *Buck v. Bell*, 274 U.S. 200 (1927). In the early 20th century, eugenics was accepted as a legitimate science to improve the species and the community by eliminating hereditary diseases. To accomplish these goals, eugenicists advocated bans on the marriage of those individuals deemed “defective” and forcible sterilization of the mentally ill, people with neurological or birth defects, and epileptics. Many states passed such laws and implemented forcible sterilization.

Carrie Buck was an eighteen-year-old woman who had been committed to the Virginia State Colony for “Epileptics and Feeble Minded.” Virginia permitted forced sterilization in laws that stated “the health of the patient and welfare of society may be promoted in certain cases by the sterilization of mental defectives.” Ms. Buck was slated for sterilization but her attorney argued that the law violated the 14th Amendment. Justice Holmes cited *Jacobson* in the majority ruling that the statute was not unconstitutional and ordered her sterilization to proceed:

“...we have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices... It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes...Three generations of imbeciles are enough.”²¹

²¹ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

In 1942, the need to protect national security was employed as a rationale for an order that the U.S. military remove all citizens of “Japanese ancestry” from their homes in many parts of the western states and confine them to concentration camps. In its ruling in the now infamous case *Korematsu v. United States*, 323 U.S. 214 (1944), the Supreme Court upheld this race-based exclusion.²²

Today *Jacobson* remains a powerful precedent for authorization of sweeping governmental powers. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), Justice Clarence Thomas cited the ruling in his dissent, arguing that the government held legitimate power to detain individuals without due process.²³

These cases provide both historic and modern examples in which public health and safety justifications have been used to discriminate and to violate individual liberties. They generally reflected great judicial deference to the state exercise of police power. However, the *Jacobson* opinion does not require courts to give such deference and it, in fact, countenanced a strong role for the judiciary:

“...the police power of a state...may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression” *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905).

Since *Jacobson*, the courts have identified many fundamental liberties protected by the constitution that warrant heightened judicial review. In particular, the Court has come to conclude that most of the individual protections provided by the Bill of Rights apply to actions of the state. Thus today, in contrast to 1905, First Amendment claims, including claims of free exercise, are recognized. In addition, the Court has recognized some liberties in relation to individual privacy and autonomy that would demand judicial oversight of the police power. For example, the Supreme Court acknowledged a right to privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965). Other recognized liberties that receive special judicial protection include: rights to marital privacy, to familial relationship, to reproductive and sexual privacy, in medical decision-making, in freedom to travel, and in voting. A number of procedural liberties also receive special protection. These include rights to notice and to a hearing where a fundamental liberty is involved.

The key issue is to understand the relationship between a fundamental liberty and an exercise of the police power, not the court’s role in the process. The interaction between a fundamental liberty and the police power is difficult because it asks the judiciary to draw lines and to balance the collective interest with the liberties of the individual. Some argue there is a fundamental and irreconcilable tension between individual liberties and the police power and that it is the role of the courts to balance between the two. This perspective tends to be oppositional and absolute. Other scholars have suggested that the exercise of the police power and individual liberties are not always in tension, and there are many times where the goals of the community are the same as the individual’s or where the former do not infringe on an individual’s liberty. While there are no hard and fast rules for this balance, some general themes have moved to the fore both in the scholarly literature and in case law.²⁴

²² While it appeared defensible at the time, the United States has acknowledged the indefensibility of these actions in its formal apology in the Civil Liberties Act of 1988. See, U.S.C. app §1989a et seq. (2001).

²³ *Hamdi*, 542 U.S. 507, 590-91(2004). (J. Thomas dissenting).

²⁴ See generally, Wendy E. Parmet, *Liberalism, Communitarianism, and Public Health: Comments on Lawrence O. Gostin’s Lecture*, 55 Fla.L.Rev. 1221 (2003); Lawrence O. Gostin, *When Terrorism Threatens Health:*

First, there is consensus that conflicts can be minimized by applying modern rules of procedural due process and particularized assessments. When the state infringes upon the liberty of a citizen, that citizen must have a right to a hearing and some due process. Observing this right can be essential in minimizing conflict and tension. The Massachusetts regulation in *Jacobson* provided for exemptions and process.

Second, the proposed public health regulation must employ the least restrictive means possible. For example, in New York City, persons with active tuberculosis who refuse to complete the prescribed therapy can be subjected to “directly observed therapy” or DOT. DOT requires the individual to be supervised in taking medication. This doesn’t necessarily require confinement. A patient who complies with the DOT regimen may remain free of confinement. DOT is constructed around least restrictive means and particularized assessments by the public health authority. It would not be permissible simply to quarantine all patients undergoing DOT.²⁵

Third, trust and publicity play an important role in minimizing conflict. In addition to using the police powers, public health also relies on public trust and on public education for the effectiveness of public health measures. Many practitioners and scholars suggest that a commitment to building communities, fostering trust and promoting transparency is essential to the effective use of the police power.

Suggested Discussion Questions and Exercises

1. In addition to the examples given above, can you think of cases in which individuals’ constitutional rights have been infringed on pretextual grounds?
2. Carrie Buck was not a carrier of a contagious disease that would be dangerous to others. What was the nature of her offense to society as identified by the Court? Given that the eugenics movement was premised on a widely accepted science at the time, should the Court have reviewed its validity? Can the courts be expected to be umpires of rapidly evolving science?
3. Review decisions by the supreme court of your state and identify rulings that reflect tensions between individual rights and the state’s police power. What standards did the court apply in forming its decisions? Has your state’s supreme court ever cited *Jacobson* in a ruling?
4. How can individual liberties be best protected in the context of a new, rapidly spreading infectious disease that public health officials believe requires mass vaccination and quarantine?

How Far are Limitations on Personal and Economic Liberties Justified?, 55 Fla.L.Rev. 1105 (2003); George J. Annas, *Puppy Love: Bioterrorism, Civil Rights, and Public Health*, 55 Fla.L.Rev. 1171 (2003); James F. Childress & Ruth Gaare Burnheim, *Beyond the Liberal and Communitarian Impasse: A Framework and Vision for Public Health*, 55 Fla.L.Rev. 1191 (2003); Wendy E. Parmet, *Informed Consent and Public Health: Are They Compatible When it Comes to Vaccines?*, 8 J.Hlth.Care.Law & Pol’y 71 (2005).

²⁵ See, *Best v. St. Vincents Hospital et al.*, No. 03 Cv. 0365 (RMB)(JCF), 2003 U.S. Dist. LEXIS 11354 (S.D.N.Y., July 2, 2003), *adopted by*, 2003 U.S. Dist. LEXIS 13188 (S.D.N.Y., July 30, 2003).

Supporting Materials

Faculty Presentations - Key Points

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

Wendy E. Parmet, JD, Professor of Law, Northeastern University School of Law

“*Jacobson v. Massachusetts*: Alternative Perspectives in 2005”

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

and

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

“Commentaries”

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

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

and

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

Annotated References

Faculty Presentations – Key Points

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

Wendy E. Parmet, JD, Professor of Law, Northeastern University School of Law

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 the practice from the Puritan minister Cotton Mather 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 wide scale 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 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 board of health dispatched teams of physicians and police officers to vaccinate, by force if necessary, and concentrated their efforts on neighborhoods of immigrants and ethnic minorities. Resort to force, however, evaded the rule of law and was counterproductive, possibly fueling the community’s resistance to vaccination. In contrast, the notice and fining mechanisms provided by the Cambridge board of health and 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, LLM, 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 Dept 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.

Annotated References

Cases

- Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064 (1886).
Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358 (1905).
Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539 (1905).
Buck v. Bell, 274 U.S. 200, 47 S. Ct. 584 (1927).
Korematsu v. United States, 323 U.S. 214, 65 S. Ct. 193 (1944).
Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 101 S.Ct. 1309 (1981).
Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
General Electric Co. v. Joiner, 522 U.S. 136 (1997).
Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167 (1999).
Hamdi v. Rumsfeld, 542 U.S. 507, 124 S.Ct. 2633 (2004).

Journal Articles

- George J. Annas, "Puppy Love: Bioterrorism, Civil Rights, and Public Health," 55 Fla. L. Rev. 1171 (December 2003).

This commentary is a sharp critique of prevailing doctrines of emergency legal preparedness and of proposed new public health statutes. Professor Annas suggests that the government's response to perceived threats from terrorism is exaggerated and lacking in firm scientific basis. He sees new public health statutes as a serious erosion of civil liberties and suggests that public health preparedness need not require the violation of human rights and is not in conflict with civil liberties.

- James F. Childress & Ruth Gaare Bernheim, "Beyond the Liberal and Communitarian Impasse: A Framework and Vision for Public Health," 55 Fla. L. Rev. 1191 (December 2003).

This commentary seeks to find a middle ground between Annas' and Gostin's positions. The article suggests that a more sophisticated legal philosophy and political science is required. A proposed framework for evaluating any proposed public health regulation that would curtail civil liberties is suggested.

- Colgrove, J., & Bayer, R. (2005). Manifold restraints: Liberty, public health, and the legacy of *Jacobson v. Massachusetts*. *American Journal of Public Health*, 95(4), 571-576.

An examination of the relationship between the individual and society in 20th Century public health practices including the use of law and other compulsory measures to constrain personal liberty for the sake of protecting the public health. It highlights the varied tools employed by public health professionals (laws, persuasive campaigns, financial incentives or disincentives, etc) and the rationale and relative success for using those tools. It highlights the relevance of *Jacobson* to more contemporary public health issues such as motorcycle helmet laws and HIV/AIDS.

Goodman, R.A., Lazzarini, Z., Moulton, A.D., Burris, S., Elster, N.R., Locke, P.A., & Gostin, L.O. (2002). Other branches of science are necessary to form a lawyer: Teaching public health law in law school. *Journal of Law, Medicine & Ethics*, 30(2), 298-301.

A commentary on the value of public health law and the importance of a more substantive integration between law, science and public health as an interdisciplinary approach to addressing some of today's most compelling challenges. Highlights the benefits of incorporating public health coursework in legal curricula as well as recommendations for next steps.

Gostin, L.O. (2005). *Jacobson v Massachusetts* at 100 years: Police power and civil liberties in tension. *American Journal of Public Health*, 95(4), 576-580.

A succinct overview of the *Jacobson* case including an examination of the 4-point balancing test presented by the court (necessity; reasonable means; proportionality; and harm avoidance), the number of U.S. Supreme Court decisions citing *Jacobson* since 1905, the historical context for the development of police powers and social compact theory, and commentary on the enduring meaning (or lack thereof) of the *Jacobson* case today.

Lawrence O. Gostin, "When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified?", 55 Fla. L. Rev. 1105 (December 2003).

Public health and civil liberties are described as being in conflict. Professor Gostin discusses terrorism threats and new public health law responses. Suggests a framework for evaluating state claims about public health and mitigating the conflict with individual liberties.

Gostin, L.O. (2002). The Model State Emergency Health Powers Act: planning for and response to bioterrorism and naturally occurring infectious diseases. *Journal of the American Medical Association*, 288(5), 622-8.

This article reviews the origins and provisions of the draft model state emergency health powers act prepared in December 2001 by the Center for Law and the Public's Health.

Mariner, W.K., Annas, G.J., & Glantz, L.H. (2005). *Jacobson v Massachusetts*: It's not your great-great-grandfather's public health law. *American Journal of Public Health*, 95(4), 581-590.

A pointed summary of the *Jacobson* case, its historical context and the meaning of the decision as well as a thorough discussion of the evolution of the individual liberty and public health issues over the last century up to present-day issues such as SARS, bioterrorist attacks, HIV and wartime detainment.

Mensah, G.A., Goodman, R.A., Zaza, S., Moulton, A.D., Kocher, P.L., Dietz, W.H., Pechacek, T.F., & Marks, J.S. (2004). Law as a tool for preventing chronic diseases: Expanding the spectrum of effective public health strategies. *Preventing Chronic Disease – Public Health Research, Practice, and Policy*, 1(2), 1-6.

An overview of the role that law has played in public health interventions. Provides a conceptual legal framework and an account of varied legal tools, remedies, and mechanisms

available to public health practitioners and policy makers for achieving public health goals. It also examines law as a tool for expanding strategies for preventing and controlling chronic diseases.

D. Michaels & C. Monforton, "Manufacturing Uncertainty: Contested Science and the Protection of the Public's Health and Environment" 95 A. J. Pub. Health S39 (2005).

Argues how opponents to public health and safety regulations take advantage of legal procedures to "manufacture uncertainty" about the scientific bases of regulations. Argues for tighter evaluation of scientific evidence and discusses modern legal doctrines and their effect on effective public health regulation.

Morbidity & Mortality Weekly Report (1999). Ten Great Public Health Accomplishments ~ United States, 1900-1999. Volume 48, Number 12. Centers for Disease Control & Prevention.

A series of articles that present an overview of ten areas in which the health of Americans made especially significant gains in the 20th century and that review the population-based, preventative interventions that made them possible.

Moulton, A.D., Gottfried, R.N., Goodman, R.A., Murphy, A.M., & Rawson, R.D. (2003). What is public health legal preparedness? *Journal of Law, Medicine & Ethics*, 31(4), 1-12.

Outlines the essential role that law plays in public health and the importance of public health legal preparedness to ensure that the public health system is ready to deal with terrorism and other potentially catastrophic health effects. Defines basic concepts in public health and law, initiatives and a framework to improve public health preparedness, benchmarks and standards, and calls for action to strengthen public health legal preparedness.

Wendy E. Parmet, "Liberalism, Communitarianism, and Public Health: Comments on Lawrence O. Gostin's Lecture," 55 Fla. L. Rev. 1221 (December 2003).

The author critiques Gostin's approach, arguing for a more sophisticated political science in evaluating legal preparedness. The commentary also argues for more empirical analysis to determine the true nature of threats and for a more cautious approach to coercive measures that would harm populations.

Parmet, W.E., Goodman, R.A., & Farber, A. (2005). Individual rights versus the public's health ~ 100 years after *Jacobson v. Massachusetts*. *New England Journal of Medicine*, 352(7), 652-654.

A succinct summary of the *Jacobson* case including key players, historical context, role of public health, role of law and the judiciary, and the context this decision has set for the continuing debate over the relationship between liberty and public health.

Wendy E. Parmet, "Informed Consent and Public Health: Are they Compatible When it Comes to Vaccines?," 8 J. Health Care L. & Pol'y 71 (2005).

Provides an example of civil liberties working in cooperation with public health to achieve public health goals. Parmet argues that public health vaccination campaigns are not

incompatible with doctrines of informed consent. In fact, respect for informed consent will promote public health goals.

Books

Margaret Berger, *The Supreme Court Trilogy on the Admissibility of Expert Testimony*, in Reference Manual on Scientific Evidence (2d ed., Federal Judicial Center, ed. 2000).

Provides a short summary of the trilogy of cases that govern the admissibility of expert testimony under the Federal Rules of Evidence. This is a good starting point for learning more about these cases and the law of evidence.

D. Coggon, Geoffrey Rose, DJP Barker, *Epidemiology for the Uninitiated* (4th ed. 1997).

A short handbook on epidemiology that is indispensable for those without training in public health. Provides a basic overview of the fundamental concepts of epidemiology and gives the tools necessary to read epidemiological reports and studies.

Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* (2000).

This is a popular and widely read work on public health law. Provides a basic theoretical overview of the subject with detailed discussions of various public health programs and legal doctrines. This work is often a starting point for further study in public health law.

Frank P. Grad, *The Public Health Law Manual* (3d. ed. 2005).

Provides an “in the trenches” description of public health law. This manual is specifically geared to the public health officer and seeks to provide the basic legal tools he/she needs to work effectively. Provides less theoretical legal discussions and instead focuses on the explication of legal doctrine in public health.

Michael D. Green, D. Mical Freedman, & Leon Gordis, *Reference Guide on Epidemiology*, in Reference Manual on Scientific Evidence (2nd ed., Federal Judicial Center, ed. 2000).

This guide was written specifically for lawyers and seeks to explain the basic concepts behind epidemiology in terms most relevant for lawyers. It thus focuses on error in epidemiological studies and an analysis of causation in epidemiology as compared to legal causation.

Health and Human Rights (Jonathan Mann, Sofia Gruskin, Michael Grodin, George Annas, eds. Routledge 1999).

This book explores the relationship between health and human rights. It examines the importance of human rights to human health and explores the relationships between the two.

Institute of Medicine. *The Future of the Public's Health*. Washington, DC: The National Academies Press; 2003.

A comprehensive assessment of the U.S. public health system and set of recommendations to strengthen it, including reconsideration of its legal bases.

Law in Public Health Practice (Richard A. Goodman, Mark A. Rothstein, et al. eds. 2003).

This is also a popular work on public health law. An anthology composed of chapters written by leading legal scholars, public health practitioners, and attorneys and it discusses the field of public health law in detail and is specifically focused on the legal basis for public health practice. This work is also a starting point for further study in public health law.

Public Health Law and Ethics (L. Gostin ed. 2002).

This anthology provides a general overview of many of the ethical issues that often arise in public health practice and in law. A good source of some of the “difficult cases” in public health law and an exploration of their possible resolution.

Theodore H. Tulchinsky & Elena A. Varavikova, *The New Public Health* (2000).

This is an excellent introductory textbook on public health. It is especially suited for lawyers and other professionals not trained in public health. It provides general, yet detailed, discussions of the history and practice of public health.