

Jacobson v. Massachusetts: Alternate Perspectives in 2005

Introduction

Benjamin W. Moulton, JD, MPH

Great faculty make for great institutions, so it is my pleasure to introduce today Wendy Parmet. Wendy received her BA degree with honors from Cornell. She is a graduate of Harvard Law School. She is the Matthews University Distinguished Professor of Law at Northeastern University Law School, and she has been a leading light on the issue of integrating public health law into all law school curricula. Wendy is also on the board of directors of the Public Health Law Association. It is a great pleasure to introduce her today and have her discuss the *Jacobson* case. Wendy.

The Maturation of Public Health Law

Wendy E. Parmet, JD

Thank you very much, Ben. I do not have time to thank everyone who deserves thanks, but I do need to stop for a second to thank Dr. Goodman for his fellowship in this endeavor, his enthusiasm, and his sage advice.

As Ben Moulton said, he and I come from Massachusetts, the birthplace of American public health law. Every day, I drive to work on Boylston Street. The street was named after Dr. Zabdiel Boylston. In 1721, he was the first physician in North America to practice variolation, the purposeful inoculation of healthy individuals with smallpox in order to create immunity. Boylston learned of this practice from none other than the Puritan minister, Cotton Mather, who, although his scientific credentials might be questioned given his involvement in the Salem witch trials, was very interested in science and was a regular subscriber to the philosophical transactions from London.

Boylston's introduction of variolation was met with great opposition by the physicians and selectmen of Boston. They roundly condemned the practice as dangerous and unholy. At first, the selectmen sought to prohibit the practice, then they decided to regulate it, and finally, they came to institute variolation clinics that provided the procedure free of charge to the city's poor inhabitants. Hence, it was in the forge of Boston's 18th-century battles with smallpox, and in that city's later introduction of vaccination to North America, that we can first witness the intensity of the controversies that arise over public health policies, as disease, religion, politics, fear, and passion all fuel the debate. But it was a hundred years ago, in the case of *Jacobson v. Massachusetts*, that public health law matured, and that the Supreme Court of the United States first provided a forum for and established a structure to help us resolve these tensions and dramas.

What I would like to do today in the time I have is to discuss with you some of the facts and the people behind this pivotal 1905 case as well as what the decision has come to mean in terms of the law. In the plenary session that will follow, we will hear more about the meaning of the case today and its varied interpretations.

The story actually begins Boston in 1901, the golden age of public health. The field of public health had only recently become professionalized. New laws had been enacted to provide for clean water and wholesome food. The bacteriological revolution had led to new understandings about the causes of disease, as well as of ways to prevent certain diseases. Life expectancy had climbed dramatically. But the turn of the century was also a time of change and turmoil. It was an era of rapid immigration and industrialization, an era of spiritual awakenings, perfectionist movements, such as the Temperance Movement, laissez-faire capitalism and populist revolt. This was the era of Teddy Roosevelt and William Jennings Bryan. In Massachusetts, as elsewhere, these forces clashed, sometimes over public health policy.

For a brief period, in the late nineteenth century, smallpox, the scourge of colonial times and the first infectious disease that humanity had successfully prevented through the use of law, had appeared conquered. But then it began to return. Although Massachusetts had the first childhood vaccination laws in the country and a long history of providing vaccination free of charge to the poor, by 1900, vaccination rates had begun to slip. Individuals were not being revaccinated. Immigrants were arriving in great numbers without being vaccinated. The population became susceptible. By 1901, the incidence of smallpox began to increase in Massachusetts and throughout the East Coast, as well as in Western Europe. By 1902, the situation became more ominous. In that year, there were almost 300 deaths in Massachusetts alone. These numbers were alarming to public health officials who knew what might be on the horizon, but the public, if the newspapers are to be believed, was not particularly alarmed. To the average newspaper reader, smallpox was a distant memory. The public was much more concerned about the impending arrival of a German prince to the city.

Still, public health officials sought to respond to the epidemic. According to the Boston Herald, the Boston Board of Health sent health workers and policemen to the railroad yards at night, forcibly vaccinating “Italians, negroes (sic), and other employees”. The newspaper noted that Italians kicked and screamed.

In Cambridge, after contentious political debates, the Board of Health took a different approach. Relying upon a state statute, the Board enacted an ordinance requiring all city residents who had not been vaccinated since 1897 to be vaccinated or pay a five-dollar fine. Of course, five dollars meant a lot more then than it does today. In March, the Board sent out public health doctors to demand vaccination. Unlike the doctors in Boston, however, they did not forcibly vaccinate the unvaccinated. Instead, they served people with a summons.

At least four individuals resisted in Cambridge. One was city clerk Albert Pear. Another resister was a worker in the water department named Frank Cone. The third was Paul Morse. The fourth was the Reverend Henning Jacobson.

Reverend Jacobson was born in 1856 in Yllestad, Vastergotland, Sweden. He came to the United States with his family in 1879, and, along with his brother, studied for the ministry at Augustana College in Illinois. Later he studied briefly at Yale University School of Divinity. He was ordained in Kansas and was called in 1892 by the Church of Sweden Mission to help establish a congregation in Waltham and Cambridge, Massachusetts. He was married and had five children. He has been described as pious and charismatic and was deeply respected by his congregants,

although reports from that time claim that his sermons put some people to sleep. Reverend Jacobson died in 1930.

What led Jacobson and his fellow resisters to disobey what seems like such a sensible order? We have no personal written record describing Jacobson's reasons for resisting. Interestingly, he did not ask his congregation as a whole to resist. But certain factors about his life and about the well-established and broadly based anti-vaccination movement of the time suggest some possible clues as to what prompted Jacobson to resist the Cambridge Board of Health's order.

First, Jacobson came from rural Sweden, an area known as hotbed of anti-vaccinationism. Second, many anti-vaccinationists, and quite possibly the Reverend Jacobson, were motivated by their religious beliefs. They saw vaccination as ungodly and as an inappropriate interference in God's will. To them, smallpox was God's punishment for bad living. To be vaccinated was to change the natural course that God wanted for us. In addition, although Jacobson was a leader in his community, he was an immigrant. His primary language was Swedish. He was also a poor man. We have evidence that he tried to sell real estate for a time because he could not make enough money as a preacher to feed his five children. For all of these reasons, he may have felt as an outsider in Cambridge, apart from the Brahman elites, Harvard-trained officials who ordered vaccination. Finally, Jacobson claimed that he had had negative, unpleasant experiences when he was vaccinated as a young man. This recollection may not have been faulty. The serum used at that time was not always as sterile and risk-free as we would demand today. Indeed, some physicians at the time were critical of public health authorities for their refusal to be open with the community about risks of smallpox vaccination

As I mentioned earlier, this was an era of rapid immigration, industrialization, and urbanization. Government regulation was increasingly bureaucratic and professional. Opponents railed against its elitism and against what they saw as new intrusions on individual liberty. At the same time, perfectionist movements from the Temperance Movement to the Anti-Vivisectionist Movement sought to promote purity and human perfection. They saw vaccination as impure.

Whatever the mix of motives found among the anti-vaccinationists, and whatever the personal motivations of Reverend Jacobson, the four Cambridge resisters were tried and convicted before lower court in July 1902. Only one, Frank Cone, from the Water Department, had a lawyer, J. W. Pickering, a Harvard-trained, downtown lawyer who was associated with the organized anti-vaccination movement. Interestingly, Pickering's father had once represented before the United States Supreme Court a man who had been arrested for preaching on the Boston Commons. J.W. Pickering had served as co-counsel in that case.

All four of the Cambridge vaccination resisters were convicted. They appealed to the Superior Court where three of the four were again convicted. Two of the resisters, Jacobson and Pear, appealed to the State's highest court known as the Supreme Judicial Court, or SJC. They were now represented by Pickering who was later joined by Henry Ballard of Vermont.

In their briefs before the SJC, Pickering and Ballard claimed that the Cambridge ordinance violated the 14th Amendment of the Constitution. Their briefs were filled with colorful language and religious allusions. They claimed that compulsory vaccination was a "greater outrage than the scalping of a living victim by an Indian savage or the tattooing of a captive of a South Sea

Islander.” They ended their brief by proclaiming that, “here – in Massachusetts...a law compels a man to offer up his body to pollution and filth and disease; that compels him to submit to the barbarous ceremonial of blood-poisoning and virtually to say to the sick calf, ‘Thou art my savior: in thee do I trust,’ and to bear ever after on his defiled body literally and truly the MARK OF THE BEAST.”

When the Pear and Jacobson cases reached the SJC in 1903, the court was headed by the new Chief Justice, Marcus Knowlton. Justice Knowlton wrote the opinion for a unanimous court in the case that took the name *Commonwealth v. Pear*. In his opinion, Chief Justice Knowlton stressed first and foremost that the state police power could limit individual liberty when disease threatened. The court said that the rights of individuals to not only their property but their personal liberty must yield if necessary when the welfare of the whole community is at stake, as court found it to be in the case before it. Nevertheless, Justice Knowlton also went on to stress that Cambridge did not actually force anyone to be vaccinated. As Knowlton saw it, Cambridge merely gave Pear and Jacobson a choice, be vaccinated or pay five dollars.

After losing the case, Jacobson alone appealed to the Supreme Court, which, in 1902 and in contrast to today, was obliged to hear the case. On appeal, Jacobson was no longer represented by Pickering. Instead, Jacobson was represented by the far more prominent, even more colorful, George Fred Williams. Williams was a former congressman from Massachusetts. He was a three-time loser for the governorship of the state and a close associate and friend of William Jennings Bryan. Williams was also a mugwump, one of the members of the Massachusetts Republican Party that had switched and became a Democrat. He was a populist, hence his friendship with Bryan. He wanted government to own the railroads and the utilities. He also railed against elites and the forces of capital as well as immigrants. Later, when Bryan finally became Woodrow Wilson’s Secretary of State in 1916, Williams was made ambassador to Greece where he was implicated in a plot to make himself king of Albania.

Williams’ brief to the Supreme Court was more lawyerly than Pickering’s, containing less colorful language. For the most part, Williams focused on the still developing body of Fourteenth Amendment law. Williams wrote that the vaccination law of Massachusetts violated the fundamental right to liberty as guaranteed to English-speaking peoples, from Magna Carta through the Constitution. In doing so, Williams brought to infectious disease law and to claims about government efforts to control an individual’s body the language of natural rights and the libertarianism and laissez-faire ideology that had been increasingly used by the courts in the prior decades as businesses were challenging new regulations. This body of law provided a new way of thinking about exercises of the police power. It offered a template for viewing the Constitution as protecting natural rights and setting a limit on what states can do.

The Supreme Court decided the case 7-2 in an opinion written by Justice John Marshall Harlan. A former slave owner and Union supporter, Harlan was appointed to the Supreme Court in 1877 where he quickly stood out as a supporter of the Reconstruction Amendments. Indeed, he is probably most famous for his dissent in *Plessy v. Ferguson* in which he claimed that the Constitution was colorblind. Although Harlan lacked the intellectual rigor and modernity of the younger justice Oliver Wendell Holmes who had recently joined him on the Court, Harlan shared with Holmes a certain realism that included a disdain for formalism and abstract doctrines. His opinions are remarkable not only for their eloquence but for their common sense and their

willingness, as displayed in his dissent as in *Plessy*, to consider what was happening in the real world. Moreover, in contrast to many of his fellow justices, Harlan was a frequent critic of judicial supremacy. He believed courts should give deference to the political bodies. This pragmatism and willingness to leave questions of policy to the political branches of government is evident in his opinion in *Jacobson*, an opinion that is notable for its eloquence and its protean nature, and as we shall see in the plenary, is capable of many interpretations.

A few points about the opinion deserve special emphasis. First, while quickly rejecting Williams' contention that Jacobson had a claim under the preamble of the Constitution, Harlan went on to treat Jacobson's Fourteenth Amendment claim as not only colorable but as worthy of serious consideration. Thus, Harlan accepted that the Constitution imposes limits on the police power and that federal courts could review state exercises of the police power under that amendment. This was an enormously important conclusion. Moreover, by recognizing that the Fourteenth Amendment applied to Jacobson's interest in controlling his own body, an interest that would later be called an interest in his personhood, Harlan paved the way for modern constitutional cases about the right to privacy. It is therefore not surprising that *Jacobson* is cited in cases from *Roe v. Wade* to *Cruzan v. Director, Missouri Department of Health*.

Although Harlan accepted that the 14th amendment set limits on the state's ability to infringe upon an individual's ability to control his or her own body, Harlan did not see individual rights as absolute or as existing prior to the state. To the contrary, he saw liberty as emanating from civil society. To Harlan, it is only with law and with protection for the common good that individuals can exercise their liberty. Moreover, Harlan accepted that the common good applies to the right of society to protect itself from epidemics and that it was not the role of the Court to second guess the means chosen by the legislature. Rather, as long as there was some reasonable basis for the state's action, provided in the *Jacobson* case by the existence of smallpox and the commonly held understanding that vaccination prevented its occurrence, courts should defer to boards of health. Hence, we see in *Jacobson* the roots of contemporary administrative law, albeit an administrative law that is far more deferential and far less demanding about the empirical justifications of an agency's action than we see typically the case today.

Despite his emphasis on the right of the state to protect the common good and the deference to be given to boards of health, Harlan also suggested that there might be some constitutionally-imposed exceptions to that deference. Most importantly, in dicta, Harlan mused that the Constitution might demand another outcome if the application of the state's statute to Reverend Jacobson would be cruel and inhumane. In other words, if Jacobson had presented individualized evidence that pointed not to the general dangers or ineffectiveness of vaccination, but to particular risks to him, the Constitution may have demanded that the state recognize an individual exemption.

Jacobson's legacy ...

In the last 100 years, *Jacobson* has been cited frequently by the Supreme Court and the lower courts. Interestingly, it was first cited and relied upon in the infamous case of *Lochner v. New York* where the Supreme Court struck down a New York law establishing maximum hours for bakeshop workers, a law that the state claimed was designed to protect the health of the workers and the consumers of their products. The majority of the Supreme Court found that the law was not a true public health law, but instead a labor law that exceeded the scope of the state's police power. Not surprisingly, Justice Harlan disagreed. As in *Jacobson*, he wanted to defer to the state's

assessment and accept its contention that the law was designed to protect public health. And once again, he argued that the state could limit an individual's right in order to protect public health.

Almost one hundred years later, *Jacobson* was cited by Justice Thomas in his dissent to the Supreme Court's finding that federal courts had jurisdiction over claims brought by alleged enemy combatants who are being held without trial. To Justice Thomas, *Jacobson* stood for the state's right to deprive someone of liberty in the name of the common good. But, perhaps the most infamous citation of *Jacobson* was penned by none other than Justice Holmes. Twelve years after *Jacobson*, in his majority decision in *Buck v. Bell*, Justice Holmes relied on *Jacobson* to affirm the constitutionality of a state law permitting the coerced sterilization of so-called idiots and imbeciles. In probably the most infamous and clearly the least learned line Justice Holmes ever wrote, he said, "The principle that sustains compulsory vaccination is broad enough to cover cutting the fallopian tubes, *Jacobson v. Massachusetts*, 197 U.S. 11. Three generations of imbeciles are enough." Subsequent research has shown that the woman who was sterilized by the state, Carrie Buck, was not mentally retarded. She was just a poor, abused girl.

Among the mix of vaccination cases, abortion cases, and conscientious objection cases relying upon *Jacobson* (and *Jacobson* was cited frequently in cases during World War II and the Vietnam War denying objections to the draft) it is impossible to find a single, narrow legal rule emanating from the case. There are, however, some important lessons to be learned from the case and its story. The first is probably the most important: that the exercise of the police power resides under the rule of law. Yes, Justice Harlan tells us, the police power is powerful. Yes, Harlan says, liberty must yield to the common good. But as Harlan teaches, all of that happens under and within the scope of our Constitution. Protection of the common good does not justify the raw assertion of power.

Second, the case reminds us that our system of judicial review provides us with a means for resolving difficult disputes about the exercise of public health powers. The doors of the courts are open to oversee the exercise of discretion by boards of health. Moreover, courts provide a forum for debating and analyzing whether actions taken in the name of health are justified.

The case offers other lessons, also. One is that context matters. The stories of Reverend Jacobson, George Fred Williams and J. W. Pickering are important not just because they were colorful characters but because it is these people, their lives, the era in which they lived, and ultimately their stories that helped to shape the law just as those here today, and those who work in public health law, will help to interpret and to determine the legacy of *Jacobson*.

Another lesson of the case is that resistance and resisters deserve respect. It is easy for those who work in public health law and public health to dismiss resisters as noncompliant individuals, as cranks and crackpots, who do not know any better. Public health does itself no service if it takes that attitude. The Reverend Jacobson was a very educated and learned man, and his positions were principled and deeply held. Moreover, public health supporters in 1902 did their cause no great service by overselling the efficacy and downplaying the risks of vaccination. Lack of transparency only breeds distrust and resistance.

The story of *Jacobson* reminds us that we need to understand, engage with, listen to and speak respectfully with those who resist. Sometimes, as in *Buck v. Bell*, resisters are proven by history to

be correct. Even if they are not, public health efforts are enhanced by engaging in that dialog. And thanks to *Jacobson*, we know that the Constitution provides us with a structure for that dialog. Hence *Jacobson* makes clear that public health law is neither a simple tool to be used by the state, nor a burden that the state must overcome. It is rather a forum and means for determining how to proceed and for ensuring accountability to the community at risk.

In conclusion, let me cite two quotations. The first is from Oliver Wendell Holmes, who despite his errant ways in *Buck v. Bell*, was nevertheless one of the nation's great justices. Before he became a judge, when he held the far more important job of law professor, he offered a quote that has stood the test of time and resonates with the story of *Jacobson* and more generally public health law. He stated, the "life of the law has not been logic, it has been experience." In this field more than any other, we need to remember that point.

The second quote comes from that great jurist Mother Goose who said "All the king's horses and all the king's men could not put Humpty Dumpty back together again." Now, in this conference on public health law, we may think that she was speaking about virtues of prevention, including vaccination, and perhaps she was. But she was also speaking about the limits of the king's power and the fact that all of the force the king could muster could not solve the problem the society faced. *Jacobson v. Massachusetts* provides us with an alternative model. While the case affirms that public health lawyers and public health officials can call upon power, the king's horses and king's men, it also provides them with the opportunity to avoid relying upon force alone and to act instead within the rule of law. I hope we recall Mother Goose's advice.