

Jacobson v. Massachusetts: Alternate Perspectives in 2005

Introduction

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I would like to welcome you to the second part of the two-part program on the 100th anniversary of the decision of *Jacobson v. Massachusetts* by the United States Supreme Court in February 1905. I would like to thank Professor Parmet again for her excellent talk in this case and for providing background to this plenary session. I am Rick Goodman, Co-Director of the Public Health Law Program at CDC, which is part of the Office of the Chief of Public Health Practice, and I will moderate the session. In the next 90 minutes, we will have a plenary session with this aim: to examine the decision of *Jacobson* in terms of implications for the scope and limits of public health powers. We are going to do this by way of two main presentations which examine alternative aspects of the case, the decision, and its impact. The two main presentations will be followed by comments by a three-person expert panel, and the members of this panel have been given wide latitude to address implications of and considerations related to the case. We will follow all five presentations with a period of questions and comments from those of you in the audience, time permitting. We have invited the two main presenters to make their remarks within 15 minutes each.

The first presenter will be Professor Charity Scott, and she will explore the decision from the perspective of the individual, the defendant Reverend Henning Jacobson, and the individual's interests. She is a professor of health law at the Georgia State University College of Law and a graduate of the Harvard Law School, and if you will permit me, I want to do all the introductions right now so that we can flow smoothly through the session once we begin.

Professor Scott will be followed by Professor James Hodge, who is going to focus on aspects of the case and the decision with an emphasis on the state's vantage point. James is an Associate Professor at the Georgetown Law Center and is a graduate of the Chase College of Law in Kentucky.

Our three panelists will have 10 minutes each and again have been given a great deal of latitude on topics and comments which they will offer. We are honored to have with us the following: First to my immediate left is United States Attorney David Nahmias. He is the U.S. Attorney for the district in which we are sitting right now, the northern district of Georgia, and he is a graduate of Harvard Law School. Seated to his left is the only sole physician on the dais right now, Dr. Al DeMaria, who is the state epidemiologist of Massachusetts, the jurisdiction for the facts of the case. He is a graduate of the Harvard Medical School, and finally to his left is Cliff Rees is an attorney and who currently is General Counsel for the New Mexico Department of Finance and Administration and previously was General Counsel to the New Mexico Department of Health. Cliff is a graduate of Franklin Pierce Law Center in New Hampshire. Let me now invite Professor Scott to begin the session.

Plaintiff – Rev. Jacobson: Cautionary Notes on a Centennial Legacy
Charity Scott, JD

Thank you, Rick. I am going to take you through a 100-year history in 15 minutes. I am going to emphasize the balance that *Jacobson* established between individual liberty and civil rights on the one hand, and a state's police power to protect the public safety, public health, and public welfare on the other. That is the balance that *Jacobson* stands for.

We in this country ~ at least, now in the 21st century ~ tend to take our individual liberties for granted, and celebrate our Bill of Rights. And that in *Jacobson* is balanced against efforts to work in the "common good," when the needs of the many may overwhelm the rights of the individual. And I want to say at the outset that we tend to look at the individual rights in opposition to the common good – and see that was a balance that was struck in *Jacobson*. We still get caught up with that. We look at individual rights OR the common good; perhaps we should be looking more at the individual rights AND the common good.

What I am going to look at is what Justice Harlan actually said in *Jacobson*. I am going to look at the case studies in the last 100 years, just a few of them, just the highlights, at times when the balance was not struck appropriately, and I think in these cases there is general agreement on that. And if there were time, which there is not, I would give you a conclusion of the lessons learned, but I think you will be able to draw your own conclusions.

Here is what Justice Harlan said. As Professor Parmet indicated, it was framed as, on the one hand, the case of Jacobson's individual rights under the 14th amendment, the liberty right under the due process clause, but also an equal protection claim was raised. And what Harlan said was that the government interest can protect the public health even at the expense of individual liberty when a public health measure is *necessary*, not arbitrary, not oppressive, and when it is basically reasonable ~ when it bears a real or substantial relationship, it is not cruel or inhumane. Here's why the balance was tipped in favor of the public good at this time, and I apologize for you after lunch, but I did want to show you what small pox looked like back in 1900. These are pictures [photos omitted] back from 1900. It was a terrible dread disease, and basically what Justice Harlan said was, using the terms for the "common good" and the "self-defense" of the community, that the interest of the community in stopping the spread of this disease trumped Henning Jacobson's right to refuse vaccination. (Actually, he could refuse the vaccination upon payment of a five-dollar fine.)

What I particularly want to note, because I think it is important as we review the 100-year history, is that what Harlan really stood for in this opinion was great deference to the state's determination of what is indeed in the common good. He says "a common belief, like common knowledge, does not require evidence to establish its existence." He basically took judicial notice that vaccination was generally assumed to be a good thing for the public. He did not require that to be proved, and he said: "[F]or what the people believe is for the common welfare must be accepted as tending to promote the common welfare, *whether it does in fact or not.*"

So, what I am going to look at is this: while Harlan's opinion stands for faith that the state would do the correct balance, that in fact the state would undertake, or government would undertake, to act for the common good and for the self-defense of the community and infringe individual liberty

not too much but only when necessary, I am going to review those cases where, with 20/20 hindsight, we generally agree that the determinations of the common good have been patently wrong, and that the public health measures that were undertaken have been unnecessary, arbitrary, and unreasonable.

I want to begin with the cases back in 1900 with the immigration cases. There was a lot of discrimination in this country against immigrant groups on both the East coast and West coast, and in fact, a lot of the immigration laws and a lot of the public health measures have had a disproportionate impact on minority groups and immigrants. In particular, on the East coast, there was discrimination against Southern and Eastern Europeans that we saw through Ellis Island, and on the West coast against Chinese and other Asian immigrants.

. . . . [Photos also omitted.] I do want to begin on the West coast where there was considerable discrimination against Chinese immigrants. What you see in this picture here is Uncle Sam kicking out the Chinese. There was in this case, *Yick Wo v. Hopkins*, (it is, in a way, a public health measure or public safety measure) a San Francisco ordinance that there could be no wood laundries without permission. You could not operate a laundry in a wooden building without permission, and at that time, there were 322 laundries in the city, 300 of which were wooden ones, and the Chinese owned most of those. It came to pass that when the Chinese applied for permission to operate their wooden laundries, most of them were denied. When the Caucasians came to apply for permission to operate their wooden laundries, they were all granted.

This case back in 1886 was really one of the first ones to look at the equal protection clause, the right under the 14th Amendment for equal protection, and the court at that time said: “The conclusion cannot be resisted that no reason for [this ordinance existed] except hostility to the race and nationality to which the petitioners belong.” And in particular note, in particular language, that has since been often quoted by the Supreme Court, that “the law itself may be fair on its face” [no wooden laundries, a fire hazard] “and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.” This is an incredibly important decision establishing that principle.

I want to introduce you to the quarantine in San Francisco in 1900. This is the *USS Omaha* warship that was used to quarantine Chinese immigrants. This is it docked near Angel Island [Photos also omitted.] What happened in 1900 was there was a threat of bubonic plague. A few cases may have been detected within the Chinatown District, and one morning, the Chinese in that District ~ about a 12- to 15-block area ~ woke up to find themselves cordoned into a quarantine, cordoned into their Chinatown District. Now what is interesting about this health measure was that it applied only to the Chinese who were living in that District, about 10,000 of them. There were Caucasian-owned houses with Caucasians living in them within the District. Those folks were free to leave; the Chinese were not. In a case challenging that quarantine restriction, the court found no problem with saying this is another application of the “evil eye” and “unequal hand” and did in fact say that the perception here that the public good would be advanced by this kind of a discriminatory measure was patently untrue.

Now I take you to World War I. There was a big public health campaign, “Fit to Fight” they called it, against venereal disease, and we see here a poster saying, “You kept fit and defeated the Hun. Now, come back to a clean America, Stamp out venereal diseases!” [Photos also omitted.] In order to keep our troops clean and fit to fight, we had to root out the cause of venereal disease, and what was the cause of venereal disease?.... Women were considered to be the cause of venereal disease. There was a public health physician at the time who said, and I am no epidemiologist, but I did ask an epidemiologist about this ~ if this made sense: “Ninety percent of infections are due to women, and 10 are due to men.” I mean ~ okay. He also said in justifying mass detentions of women thought to have venereal disease that “one woman will infect 10 men for every one woman that one man will infect.” It was not just the epidemiological basis but the financial basis that also justified mass detentions of women perceived to be, or thought to be, potentially infected with venereal disease during World War II. There was another quote that if we could only detain about 15,000 of them, we could save the military \$12 million. There was no thought, if you will, to how we can contain it from the men’s side, only how we could contain it from the women’s side. And so in 1918, President Wilson allocated \$250,000, and Congress subsequently allocated a million dollars, for the building of detention centers for these women,. And by 1920, 18,000 women had been committed to these facilities that were receiving federal funds. And throughout the war in all facilities, approximately 30,000 women had been detained for the common good. We are not talking due process hearings here ~ they were detained and kept. Alan Brandt calls this “one of the most concerted attacks on civil liberties in the name of public health in American history.”

I am going to show you several more concerted attacks on civil liberties in American history. You take your pick as to which one you think is the most concerted one.

Eugenics. This was alluded to in Professor Parmet’s talk. Eugenics was a very enthusiastic movement in the early part of the 20th century. It took the position that, and mostly scientists and physicians were among the biggest enthusiasts, social inadequacies were inherited traits. Social inadequacy ~ being things like pauperism, feeble mindedness, alcoholism, prostitution, criminality, degeneracy ~ all of that was inherited. And what I particularly like was the comment by one person at the time that if you have two shiftless parents, then all of the children will inherit the shiftlessness trait ~ consider, those among you parents, if you think that that might be the case. As evidence of this public health measure, there were state fairs supporting the eugenics movement, and this provided “fitter family” contests in which they measured the fitness of various families who came forward to be measured for fitness.. . . . [photos also omitted.] This was during the 1920s. This was all going around as a public health measure.

Eugenics really supported a couple of public health strategies for the common good, the first being an immigration strategy. Again, the public perceived that its genetic pool was being polluted by the immigration of massive numbers of Southern and Eastern Europeans. And in the 1920s, the *Immigration Restriction Act* attempted to restrict numbers from countries where more socially inadequate immigrants were considered to be coming from. It [eugenics] also supported the public health measure of sterilization on the grounds that “society pays a high price for the birth of ‘defective individuals’” and that “a sterilization could save thousands of dollars” for the government.

Professor Parmet alluded to the case of Carrie Buck. I want to give you a few more details about that case. Aubrey Strode [photos also omitted] wrote the 1924 Virginia Sterilization Statute,

which, in its preamble, said “heredity plays an important part in the transmission of insanity, idiocy, imbecility, epilepsy, and crime.” And Carrie Buck was selected as the test case for the law’s description as a “probable potential parent of socially inadequate offspring” who, too, was going to be up for sterilization. Why was she a “potential parent of socially inadequate offspring”? Well, because her mother was already classed as feeble-minded and was a resident in a colony for the feeble-minded. And she had had a daughter out of wedlock and that daughter, by the way about seven months old, was determined to be feeble-minded. What better test case for sterilization?

And as you know, Justice Oliver Wendell Holmes did in fact find that there was no violation of individual rights. This was a law, if you cannot get a better example that was designed to promote the public good. Why? Because as he said, “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...three generations of imbeciles are enough.” And there [photos omitted] you have the three generations that he was referring to, the dot dot is where *Jacobson* comes in, because what he used the *Jacobson* cite for was to say: The “[p]rinciple that sustains compulsory vaccination is broad enough to cover the cutting of fallopian tubes.”

Post-script: over 60,000 Americans were sterilized under 33 state statutes. This is no aberration, this case of Carrie Buck. This was a widespread public health measure considered for the public good. We now look back and think, how could they have thought that? But it was so well entrenched as a scientific matter that people did not question it at the time. But there have been apologies since, not only in Virginia where Carrie Buck resided, but in four other states to date as well.

I know the Tuskegee Syphilis Study is well known to all of you in the room, but I do want to just pause briefly over it because it, too, was a public health measure ~ taken under the auspices of the US Public Health Service. And Dr. Clark ~ Dr. Taliaferro Clark ~ was the head of the US Public Service at the very beginning of the study. The study was started and was conceived somewhat benignly. It was originally intended simply to go see the prevalence in Macon County, Alabama of syphilis and then after a few months, to provide treatment, although they did run out of money for the treatment, but at the initial part of the study, they signed up 400 African-American men, largely sharecroppers, and 200 controls, 400 who had been infected. And they told them that they had bad blood and that they would be receiving treatment for it. They did not tell them they had syphilis, and they did not tell them most specifically, a year into the study, that in fact funds had run out for treatment. They would get no treatment.

And Raymond Vonderlehr, who succeeded Dr. Clark, was the one who decided that in order to get consent ~ their consent ~ to continue in this study that had now morphed into a study of the natural history of untreated syphilis, he gained consent of the subjects for the spinal tap that he gave them by calling it “special free treatment” In reality, the spinal taps, which were painful lumbar punctures, were simply diagnostic tests for neurosyphilis that they would use to compare when the subjects died and went to autopsy. He said in his letter to them, “Remember this is your last chance for special free treatment.”

John Heller took over the reins of the VD section of the Public Health Service during the war, and what is interesting is that he just did not have problems with not obtaining informed consent.

At a time when penicillin was freely available, the Public Health Service told the folks who were continuing the study not to allow these men who are in the study to be treated. This was to be a study of the course of untreated syphilis, and so they deliberately withheld penicillin at a time when it was readily available, and not only readily available, there was a huge public health measure in order to provide this kind of treatment. Not only did this case go on during a time when penicillin was widely available, it went on in the midst of the Nuremberg trials where, you know, there was much discussion of the unethics ~ the lack of ethics ~ of medical treatment experiments. But that did not faze those who were conducting the study. As you know, there have since been apologies for this study. President Clinton said it was “deeply, profoundly, and morally wrong.” It was shameful, and apologies were issued. Herman Shaw was one of the members who was still living at the time.

My last example is World War II, and I want to talk about the mass internment of 120,000 people of Japanese ancestry. I realize that this is a national security issue ~ not per se a public health issue ~ but I do want to raise it for a couple of reasons, not the least of which is that the legal framework, the legal balances, are frequently the same: individual rights versus the perceived common welfare, the perceived common good in a time of crisis.

As you know or many of you know, many Japanese ~ those of Japanese ancestry on the West coast ~ were rounded up pretty summarily after Pearl Harbor and deported to internment camps all throughout the West coast where they were forced to live for a number of years during the wartime era. Well, I want to raise with you the case of Fred Korematsu, because his case went to the Supreme Court. Fred was a young man who was a welder. This was his family business in the nursery business [photos omitted]. His family was deported to one of these camps [photos omitted], and he refused to go. He was subsequently arrested and convicted of violation of the executive order that demanded his going to the detention center.

In that case, the majority opinion found that although there was no question that he was a loyal citizen of this country ~ nobody questioned that ~ nevertheless, there was no violation of his constitutional rights. And they said, in the majority opinion: “To cast this case into the outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue.” That is, the equal protection challenge that was mounted was said “merely” to confuse the issue. A strong dissent by Justice Robert Jackson said basically, “Look, this was wrong.” It was as clearly racially motivated as the cases back from 1900, the Chinese in California. “Once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, . . . [t]he principle then lies around like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.” And Justice Jackson’s words really have been sort of fulfilled because, in 1988, Congress passed a law basically apologizing for the massive deprivation of individual rights during this internment, and President Clinton gave Korematsu a Presidential Medal of Freedom.

Korematsu, [photos omitted] I want to bring it up and I will conclude with this. ~ Korematsu wrote the brief in the [recent] *Hamdi* case, which is one of the enemy combatant detention cases, and basically, he said, “Look, you are doing it all over again. You are detaining these alleged enemy combatants without due process. That is what happened to me. You should not do it here.” He said: “History teaches ~ [and this is a quick history lesson] ~ that, in time of war, [or, let us say, in time of public health crisis,] we have often sacrificed fundamental freedoms *unnecessarily*. The

Executive and Legislative branches, reflecting public opinion formed in the heat of the moment, frequently have overestimated the need to restrict civil liberties and failed to consider alternative ways to protect the national security. Courts, which are not immune to the demands of public opinion, have too often deferred to exaggerated claims of military necessity [sometimes as in the past examples, fill in “public health”, “common good”] and failed to insist that measures curtailing constitutional rights be carefully justified and narrowly tailored.” So *Hamdi*, like *Jacobson*, balanced individual rights on the one hand against government interests, whether national security as opposed to public health. The balance is the same. Held: detainees were entitled to constitutional due process. The majority said: “It is during our most challenging and uncertain moments that our nation’s commitment to due process is most severely tested, and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.” And as Professor Parmet pointed out, the irony is in Justice Clarence Thomas’s dissent in *Hamdi*, where he thought that the detentions without due process were appropriate, he cited *Jacobson* in support of the proposition for “upholding legislated mass vaccinations’ and he said the case stood for “approving forced quarantines of Americans *even if they show no signs of illness.*” Now, I do not think the case actually said that, but the case can lie around, as Justice Jackson said in his *Korematsu* dissent, like a loaded weapon, waiting to be fired inappropriately.

[Photos and slides omitted]