The Legacy of *Jacobson v Massachusetts*

Manifold Restraints: Liberty, Public Health, and the Legacy of *Jacobson v Massachusetts*

James Colgrove, PhD, MPH, and Ronald Bayer, PhD

February 2005 marks the centenary of one of the most important pieces of public health jurisprudence, the US Supreme Court case of *Jacobson v Massachusetts,* which upheld the authority of states to pass compulsory vaccination laws. The Court's decision articulated the view that the freedom of the individual must sometimes be subordinated to the common welfare.

We examined the relationship between the individual and society in 20th-century public health practice and law and the ways that compulsory measures have been used to constrain personal liberty for the sake of protecting the public health. (*Am J Public Health.* 2005;95:571–576. doi:10.2105/AJPH.2004.055145)

ONE HUNDRED YEARS AGO, the US Supreme Court handed down a 7–2 decision in the case of *Jacobson v Massachusetts* that upheld the right of states to enact compulsory vaccination laws. In asserting that there are "manifold restraints to which every person is necessarily subject for the common good," the Court took a firm position on one of the most challenging constitutional dimensions of public health.[1(p26)] It also set the terms for what would eventually emerge as a core question at the heart of public health ethics.

Since the Court's decision, *Jacobson* has served as a precedent in numerous cases that have challenged vaccination laws. Majority and dissenting opinions in hundreds of other decisions have cited the case in reference to states' authority to constrain individual behavior. These cases have involved contentious health and medical issues that have ranged from fluoridation of municipal water supplies[2] to abortion[3] to the right to die.[4] Most notoriously, *Jacobson* was invoked by the Supreme Court in *Buck v Bell.* In that 1927 case, the Supreme Court upheld a Virginia forced-sterilization law on the ground that society must be protected from the burdens imposed by the progeny of "imbeciles." "The principle that sustains compulsory vaccination is broad enough to cover cutting the fallopian tubes," wrote Justice Oliver Wendell Holmes in his now infamous opinion.[5(p207)] But in spite of the problematic uses to which the decision has been put, public health law texts continue to cite the case as an example of the ways that public health practices must resolve the tensions between individual rights and the collective well-being.[6–8]

Nevertheless, it is not clear whether a case that emerged from the legal and social environment of the 19th century remains relevant for the 21st century. In this issue of the Journal, Lawrence Gostin argues for the enduring relevance of the case.[9] Wendy Mariner, George Annas, and Leonard Glantz question whether the case provides an appropriate foundation for thinking about public health in light of subsequent jurisprudence on civil liberties and due process and advances in scientific medicine.[10] Beyond the constitutional issues involved, a more fundamental philosophical disagreement remains over whether and to what extent there is an inherent tension between individual rights and the common welfare. The history of 20th-century public health presents a complicated picture of how such tension has been perceived and resolved. In the case of vaccination policy, where the threat of contagion provided a clear justification for coercion, health officials relied on persuasion for much of the century. Conversely, compulsory measures have been invoked in instances where the threat to the community was more tenuous, (e.g., laws that require the use of motorcycle helmets).

The centennial of *Jacobson* is an opportune occasion for examining how the relationship between the individual and society has been understood in public health law and practice. It also presents an opportunity to examine the social processes by which threats to the public's health are constructed. Finally, as Mariner et al. and Gostin show in this issue, it permits us to examine the willingness of courts to subject legislative and executive determinations to scrutiny and to understand the standards that have been imposed—whether deferential or skeptical—when making such judgments.

In this article, we consider the influence of *Jacobson* on vaccination programs during the 20th century. We then examine the extent to which compulsory measures have been used in health programs that involved noncon-

tagious threats, where the potential harms to the community are less clear-cut. We conclude by addressing a question that lies at the heart of *Jacobson:* Is there an inherent tension in liberal democratic societies between the rights of the individual and the claims of the collective?

THE CASE: PUBLIC HEALTH IN TRANSITION

In 1902, the Cambridge, Mass, Board of Health passed a resolution that required all citizens who had not been vaccinated during the previous 5 years to undergo the procedure or pay a fine of $5. The board did so in accordance with a state law that empowered localities to enforce general compulsory vaccination when deemed necessary for the public safety. Henning Jacobson's refusal both to be vaccinated and to pay the fine instigated a series of legal actions in the Massachusetts court system. After failing to convince the state's Supreme Judicial Court that the law was oppressive, Jacobson appealed to the US Supreme Court.

On February 20, 1905, the Supreme Court handed down a 7–2 decision in favor of Massachusetts.[1] Writing for the majority, Justice John Marshall Harlan declared that the authority to compel vaccination fell within the "police powers" of state and local governments to guard the community's health, welfare, safety, and morals. While the high court had never attempted to define the limits of police powers, Harlan contended it had recognized the authority of states to enact "health laws of every description" to guard the common good in whatever way the citizens, through their elected representatives, thought appropriate.[1(p25)] States also could legitimately impose quarantines or penalties (such as fines) on those who refused to cooperate with such laws.

Turning to the central question of whether the statute violated Jacobson's liberty, Harlan offered an unequivocal vision of the role the individual within society:

"[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy."[1(p26)]

The compulsory vaccination law, Harlan said, was consistent with what the Massachusetts constitution had laid out as "a fundamental principle of the social compact that the whole people covenants with each citizen and each citizen with the whole people."[1(p27)]

The court's decision in *Jacobson* was consistent with a broad pattern of 19th-century laws and regulations that curtailed individual freedoms in order to foster a well-ordered society.[11] As sanitary reformers in newly established city and state health departments sought to remedy the unhealthy conditions produced by a rapidly urbanizing society during the second half of the century, they exercised broad powers when abating nuisances and controlling the spread of contagion through compulsory measures, such as isolation and quarantine.[12] By the time the US Supreme Court ruled on the issue of vaccination, lower courts around the country had handed down dozens of decisions on the legitimacy of compulsory vaccination. The majority of these rulings upheld the right of the state to require the procedure.[13,14]

During the 19th century, the grave threat that contagious diseases posed to the community provided a justification for the exercise of compulsory public health powers. But *Jacobson* came at a pivotal moment when both the mission and the methods of public health were shifting. As the most terrifying contagions of the 19th century, such as smallpox and cholera, receded from view, public health lost much of the urgency that had provided the warrant for use of coercive measures. As Wendy Parmet noted, endemic and chronic conditions "did not present the overriding necessity which traditionally justified public health actions. They were simply part of the hazards of life. As such, they provoked less terror and thereby were less apt to arouse support for public health intervention."[15 (p500)]

THE RISE OF PERSUASION

During the first years of the 20th century, health education began to supplant compulsion as the central approach to public health. This new orientation grew out of the Progressive Era belief that education could serve as a force for moral uplift and social melioration, especially when it was offered to the working and lower classes and the immigrant poor by elite reformers. Public health leaders during this period explicitly characterized the new methods of persuasion as a repudiation of the coercive tactics of previous generations and as an American innovation that reflected the country's traditions of liberty and freedom from government restraint.[16,17]

What is therefore most striking about *Jacobson* from a historical perspective is that the Court gave an imprimatur to an authority that was rarely invoked during the decades after the ruling was handed down. This is not to say that the use of compulsory measures vanished from either the rhetoric or the practice of public health. The danger of smallpox, although much diminished, continued to provide the justification for compulsion. In the 1922 case of *Zucht v King,* the Court extended compulsory vaccination to children who attended school (a point that was not explicitly addressed in *Jacobson).*[18] Quarantines were still enforced against contagions such as scarlet fever and polio, even as health departments distributed pamphlets to teach people how to avoid these illnesses.[19] Coercion remained as a resource for public health practitioners and was more likely to be exercised against lower class or politically marginalized citizens, such as prostitutes who were

quarantined during World War I to prevent the spread of syphilis.[20] But the trend in public health practice during the 20th century was in the opposite direction from the coercive path toward which *Jacobson* had pointed. Coercion became figurative and metaphorical and was expressed through advertisements that characterized the failure to follow expert hygienic advice as morally culpable or criminal behavior.[21]

When diphtheria immunization, the next to be widely administered, was introduced during the 1920s, health officials generally opted for persuasive means rather than law enforcement to achieve high levels of acceptance. In contrast to the extensive legal activity that followed the introduction of smallpox vaccination, only a handful of states made diphtheria immunization compulsory during the 2 decades after its use became widespread.[22]

By the mid-20th century, chronic illnesses, such as cancer and heart disease, had supplanted infectious disease as the leading causes of morbidity and mortality. But the epidemiological transition does not fully account for the reliance on persuasion, because health officials opted for persuasion even when there was an urgent infectious-disease threat. The polio vaccine is a good example. Polio provoked a fear that was far out of proportion with the burden of morbidity and mortality it imposed. The disease provoked this extreme anxiety in part because it was so anomalous against the overall trend of declining infectious disease.[23] But in the years that followed the vaccine's licensing in 1955, health officials around the country relied on persuasion to achieve widespread public use, and only a minority of states passed laws that mandated the vaccine for school entry. Senior managers with the National Foundation for Infantile Paralysis, the charitable organization that was instrumental in developing and distributing the vaccine, believed that compulsory laws were wrong in principal.[24] In 1965, the New York City health commissioner opposed a measure that would have made polio vaccination mandatory. He wrote to a state legislator, "[W]e do not like to legislate the things which can be obtained without legislation," and he explained that the city had achieved high rates of acceptance without the use of legal coercion.[25]

The sea change in compulsory vaccination came during the late 1960s, when the Centers for Disease Control and Prevention (CDC) was leading a nationwide effort to eradicate measles. In 1968, just half the states had a law that required 1 or more vaccinations for school entry. By 1981, all 50 states had made vaccination against measles and most other vaccine-preventable illnesses mandatory for school entry.[26] Support for these laws was buttressed by empirical evidence that showed a strong correlation between the presence of laws and the lower rates of measles. But even then, the use of coercion was framed as hortatory. A CDC official who supported the laws said, "[S]ome additional stimulus is often needed to provoke action on the part of a basically interested person who has many other concerns competing for attention." In this view, the laws served as a "means of bringing to individuals' attention the continuing publicly perceived need for immunization."[27(p695)]

THE LIMITS OF PERSUASION IN THE NEW PUBLIC HEALTH

As personal behavior became a more prominent explanation for patterns of morbidity and mortality during the last decades of the 20th century, the tension between the individual and the collective well-being was recast. The threat to the community became the feckless behavior of individuals whose "lifestyle choices" cost society money in health care and lost productivity. Widely cited government reports, including Marc Lalonde's *New Perspective on the Health of Canadians*[28] in 1974 and the 1979 *Healthy People*[29] in the United States, reflected an increasing attention to the aggregate costs of individual behaviors. In 1977, John Knowles wrote, "If no one smoked cigarettes, or consumed alcohol and everyone exercised regularly . . . the savings to the country [would involve] billions of dollars, a vast reduction in human misery, and an attendant marked improvement in the quality of life."[30(p75)]

As the purview of public health expanded to new behavioral domains, the field confronted deeply entrenched social arrangements, and nowhere was this more evident than in the area of illicit drug use. From the first decades of the 20th century, a strict prohibitionist perspective dominated policy in the United States.[31] Efforts by health officials to break the influence of this tradition incorporated many of the same restrictive aspects that had characterized the criminal law approach: compulsory treatment, typically in closed wards, was offered as an alternative to imprisonment. Even the famously liberal Supreme Court Justice William O. Douglas wrote in 1962, "The general health and welfare [may] require that [adults] be dealt with by compulsory treatment involving quarantine, confinement or sequestration."[32(p666)] Although the scope and the extent of treatment for drug use expanded, it was clear by century's end that public health remained little more than a handmaiden to criminal law.

When public health did assume a central and defining role, the relationship between individual rights and society's claims was a complicated one. Emblematic was the issue of whether motorcyclists should be compelled to wear helmets to limit the severity of accident-related injuries. In 1967, the federal government threatened to withhold a portion of highway safety funds from states that did not enact compulsory helmet statutes. During the next 9 years, all but California complied, and the use of helmets became nearly universal. Deaths from motorcycle accidents showed a significant decline. However, many motorcyclists viewed mandatory helmet laws as an unacceptable violation of their civil liberties, as an intrusion upon

their autonomy, and as an example of unjustifiable paternalism, and they filed lawsuits in state after state that challenged the constitutionality of these statutes. Only in Illinois did the court hold that mandatory helmet laws were unconstitutional. In one case that went before the US Supreme Court, the nation's highest tribunal refused to overturn a US District Court's ruling that government could legitimately compel the use of helmets.[33]

In their decisions, the courts tended to avoid justifications that suggested paternalism. Rather, they sought to demonstrate that the social impact of private behavior provided ample warrant for legislative action. Typical was the language used by a US District Court in Massachusetts: "From the moment of injury, society picks the person up off the highway; delivers him to a municipal hospital and municipal doctors; provides him with unemployment compensation if, after recovery, he cannot replace his lost job, and if the injury causes permanent disability, may assume the responsibility for his and his family's continued subsistence. We do not understand a state of mind that permits [a] plaintiff to think that only he himself is concerned."[34(p278)] Thus, the harm to others that justified the use of coercion was not the spread of a deadly virus but the imposition of financial burdens on the public purse.

The issue that emerged from the helmet controversy resurfaced when battles were waged over whether drivers and front-seat occupants of automobiles should be compelled to use seat belts. Public education campaigns that encouraged the use of seat belts were by any standard a failure—a 1983 study reported that fewer than 10 percent of drivers used seat belts. States began to adopt laws that required seat belt use, and by 1990, 34 states had done so. By 2003, 20 states had laws that permitted the police to stop motorists solely for driving unbelted. Another 29 states permitted police to issue citations only after stopping motorists for other violations.[35]

As was true in the arguments for motorcycle helmet laws, great emphasis was placed on the extent to which such measures were necessitated by the need to protect others: those who might be injured when unbelted drivers lost control of their cars, and the public at large because of the costs associated with vehicular accidents. To opponents of seat belt laws, the claims of third-party harms were little more than a subterfuge for rank paternalism. In his review of the controversy, Howard Leichter cited the voice of dissent: "Where do we stop? Where do we draw the line between the nanny state and the freedom of the individual to make sensible decisions?"[36(p202)]

Finally, during the 1990s there was an unmistakable turn toward the use of coercive legislation when the campaign against the vast problem of tobacco-related morbidity and mortality was escalating. Public health advocates pressured to ban all, or nearly all, cigarette advertisements. When faced with opposition rooted in constitutional concerns about First Amendment freedoms, they settled on measures that could protect children from manipulation.[37] More dramatic were ordinances and regulations designed to restrict smoking in public settings. Justified as a way of protecting nonsmoking third parties from environmental tobacco smoke, such enactments had their greatest impact on smokers themselves who faced more and more impediments to the use of tobacco.[38]

Just as an unvaccinated individual threatened others by spreading contagion, so did the smoker endanger the public health by spreading environmental tobacco smoke and by setting a bad example for impressionable youth who might adopt the habit. Perhaps the most interesting aspect of the turn to coercion in the context of tobacco control is the potential effect of restrictive ordinances on the process of denormalizing smoking. From this perspective, the ultimate impact of law will be the transformation of popular culture, and we may witness the complex interplay between persuasion and coercion in public health.

AIDS: TOWARD A NEW CONCEPTION OF PUBLIC HEALTH?

Ironically, it was the AIDS epidemic that provided the most fundamental reconceptualization of the relationship between public health and the claims of individual rights. Much has been written about HIV exceptionalism and emergence in the 1980s of a public health approach to AIDS that eschewed coercion as futile, potentially counterproductive, and violative of individual rights.[39] The emphasis on education and voluntary measures could, in a conventional sense, be understood as entailing a particular answer to the question posed by *Jacobson:* How far should the state go in limiting liberty when faced with a potential threat to the common good? But something much more fundamental and radical occurred. In the context of the AIDS debate, it became common for advocates on behalf of people with HIV to declare that there was no tension between civil liberties and public health and that measures that restricted civil liberties inevitably were injurious to the public health itself.

The dimensions of the change are best viewed by the shift that occurred in the human rights discourse on public health. The Universal Declaration of Human Rights provides the conventional formulation: "The just requirements of morality, public order and the general welfare" could provide a warrant for limiting civil and political rights.[40(Article 29)] This perspective was given full voice by Lawrence Gostin and Zita Lazzarini in their book, *Human Rights and Public Health in the AIDS Pandemic.*[41]

"An expansive view of human rights shows their integral role in safeguarding public health. However, human rights and public health concerns are not always in harmony. International codes do not view all human rights as absolute, and they recognize the possibility of the

derogation of rights in limited circumstances, particularly to safeguard public health. For example, governments may justifiably force individuals to be vaccinated to protect the health of the community. Conflicts between human rights and human health are inevitable, and it is important to understand that trade-offs between rights and health may be necessary."[41(xiv)]

By contrast, Jonathan Mann, whose work on AIDS did so much to transform the understanding of the relationship between health and human rights, rejected the claim of an inevitable tension. A United Nations report that bore his imprint asserted, "Public health interests do not conflict with human rights. On the contrary, it has been recognized that when human rights are protected, fewer people become infected."[42(pp37)]

The clash between the 2 perspectives was given full expression during the first years of the 21st century, when the CDC commissioned Gostin and his colleagues at the Georgetown Center for Law and the Public's Health to draft model legislation designed to meet the potential threat of bioterrorism or a natural disaster.[43] For Gostin, who was following the spirit of *Jacobson,* the challenge was to craft an act that properly identified those instances when a threat to the public health warranted a restriction by the state on individual liberty. Gostin believed the protections he proposed were more extensive than those that existed in prevailing law. Many disagreed, however, and saw the model act as a recipe for coercion. But there was no question that—no matter how protective of the rights of individuals—the statute embraced the philosophy that "there are manifold restraints to which every person is necessarily subject for the common good." George Annas, who gave voice to the concerns of civil liberties advocates, was among the fiercest opponents of the proposed model act: "We do not have to sacrifice civil liberties for an effective public health response to a bioterrorist attack."[44(p1341)]

W(H)ITHER JACOBSON?

Here is the challenge we face on the 100th anniversary of *Jacobson.* If we accept the conventional position that there is an inherent tension between civil liberties and public health and that the struggle to reconcile them is the most significant challenge of law and ethics, then *Jacobson* remains vital and relevant. But if the very foundation of the conventional conception of public health is mistaken, and if the tension it seeks to resolve is a false tension, then *Jacobson* no longer provides a basis for addressing the central dilemmas of protecting the people's health.

Those who have sought to overturn the received wisdom of a century have launched a potent ideological challenge. We do not believe, however, that they have made the case for consigning *Jacobson* to the dustbin of history. We think it is crucial to acknowledge that tensions exist between collective good and individual rights precisely because such rights are always vulnerable to erosion. This is especially true in the case of paternalistic measures, which may have their own moral justification but are typically put forth in the name of preventing third-party harms. It also is worth recalling that assertions about the absence of a tension between collective interests and individual rights have been the standard fare of those who would eviscerate individual rights.

The worldwide outbreak of severe acute respiratory syndrome in 2003 showed us how the actions of individuals may threaten, even unwittingly, the safety of the community. Public health officials struggled to determine how extensive quarantines should be in the face of a deadly outbreak characterized by many uncertainties about the nature of its transmission. How, without facing the questions posed by *Jacobson,* could the authorities have proceeded? Only by acknowledging and confronting the tensions so forcefully laid bare by *Jacobson*—even if we resolve those tensions in a way very different from what was done 100 years ago—can a clear understanding about the potential costs of public health policy emerge. Only then can the ceaseless struggle to define policies that are both effective and just be engaged with all of the seriousness to which they rightfully have claimed. ■

About the Authors

James Colgrove and Ronald Bayer are with the Center for the History and Ethics of Public Health, Department of Sociomedical Sciences, Mailman School of Public Health, Columbia University, New York, NY.

Requests for reprints should be sent to James Colgrove, PhD, MPH, Mailman School of Public Health, Columbia University, 722 W 168th St, 9th Fl, New York, NY 10032 (e-mail: jc988@columbia.edu).

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Contributors

Both authors conceptualized and wrote the article.

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