Legal and Constitutional Considerations in the Time of the Coronavirus Pandemic

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As an attorney, and specifically as a matrimonial attorney, issues pertaining to the current pandemic and the government measures and regulations instituted as a result thereof, have already presented legal questions in my practice. While the government, state and federal, are instituting public health regulations, stay at home orders, and classifying essential and nonessential employment and medical procedures, we wonder and consider the authority to do so in light of civil and religious liberties.

A recent case in the U.S. Court of Appeals for the Firth Circuit has brought these issues to the forefront. Specifically, Texas classified abortion as a non-essential procedure that doctors were required to postpone during this time and we are faced with the constitutionality of such classification, which, some allege, infringes on a woman's right to access to an abortion.

In the late 1800s, states began passing laws making abortions illegal. In the 1960s and 70s, with the growth of the women's liberation movement, states began liberalizing their abortion laws. Then, a case involving a Texas anti-abortion law (which law banned abortion, except if necessary to save the woman's life) made its way to the Supreme Court, which decided in 1973, in the landmark case *Roe v. Wade*, 410 U.S. 113 (1973), that states right to regulate abortions must be limited based on an individual's right to liberty. Specifically, the court found that the mother's liberty interests outweigh the state's interest in "prenatal life" up until a certain point in the pregnancy, the point of viability, the point when a fetus could survive on its own outside of the womb. However, despite this groundbreaking decision in *Roe v. Wade*, since then thousands of laws have been

enacted in the states limiting rights to access and obtain the procedure.

Last week, Fifth Circuit ruled that Texas was allowed to prevent doctors from performing abortions because of the COVID-19 pandemic, except in very limited circumstances. Texas Governor Greg Abbot's Executive Order provides that health care professionals and facilities postpone all surgeries and procedures that are not immediately, medically necessary to correct a serious medical condition or to preserve the life of a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician.

Supreme Court Justice Elena Kagan has famously said: "The Supreme Court, of course, has the responsibility of ensuring that our government never oversteps its proper bounds or violates the rights of individuals. But the Court must also recognize the limits on itself and respect the choices made by the American people."

The question we are facing is, when can a state impose on individual liberties in favor of public welfare? In answering this question, courts naturally look to prior precedent to aid in their response.

The Court of Appeals in Texas relied on the 1905 U.S. Supreme Court case of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which permitted an individual's freedom to be subordinated to the police power of the state and common welfare. In that case, a pastor was seeking to resist a mandatory smallpox vaccination regulation enacted in 1902 under Chapter 75, §173 of the Laws of Massachusetts. The pastor in Jacobson was amongst a group that was alarmed by the discovery of the vaccination as well as the ingredients and the means of implementing it. The complainant there brought his case to the Supreme Court asserting that mandating such vaccination (or imposing a fine for those who refused it) was an "invasion of his liberty" and infringed on his 14th amendment rights under the Constitution (1789), which states in relevant part that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Massachusetts Commonwealth, c. 75, §137, stated, "the board of health of a city

or town if, in its opinion, it is necessary for the public health or safety shall require and enforce the vaccination and revaccination of all the inhabitants thereof and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit five dollars."

The Cambridge, Massachusetts Regulation of Feb. 27, 1902, stated: "Whereas, smallpox has been prevalent to some extent in the city of Cambridge and still continues to increase; and whereas it is necessary for the speedy extermination of the disease that all persons not protected by vaccination should be vaccinated, and whereas, in the opinion of the board, the public health and safety require the vaccination or revaccination of all the inhabitants of Cambridge; be it ordered, that all the inhabitants of the city who have not been successfully vaccinated since March 1, 1897, be vaccinated or revaccinated."

In a 7-2 decision delivered by Justice John Marshall Harlan, the court rejected the complainant's claims that the 14th amendment gave him a right to refuse the smallpox vaccination and found the law to be constitutional. In so doing, the Supreme Court upheld the state's right to enforce a fine against a citizen who refused the vaccination. In its decision, the Supreme Court found that the vaccination program "had a real and substantial relation to the protection of the public health and safety" and asserted that police power may overcome individual liberties in certain situations that can otherwise expose "great dangers" to the safety of the "general public." As such, the then current smallpox epidemic justified the alleged infringement on individual liberties there. Furthermore, the exercise of police power was found to be a direct measure for eradicating the epidemic and was not found to be arbitrary.

So, it seems that the Supreme Court answered our earlier question in 1905 with a two-prong test: (1) Is there a compelling state interest in an effort to protect public health and safety? (2) Is the State's police power necessary and being exercised in a reasonable and not an arbitrary manner? Others have broken this test into four elements: (1) necessity, (2) reasonable means, (3) proportionality, and (4) harm avoidance.

We can see how relevant this case can become in the times ahead dealing with the COVID-19 pandemic. As stated above, the Fifth Circuit has invoked the *Jacobson* case to permit Texas to include abortion clinics in its ban on non-

essential medical services and surgeries during the current pandemic. In so doing, Texas officials rejected arguments made about abortion that were invoked in *Roe v. Wade*. Furthermore, Judge Stuart Kyle Duncan, who delivered the opinion, invoked *Jacobson* as permission to restrict constitutional rights in light of a public health emergency. However, the dissenting judges looked toward the second aspect of the decision in *Jacobson*, which involved whether the measure was arbitrary or a direct measure to combat the epidemic. In the current Texas decision, the dissent noted the distinction between this case and the 1905 public health case where the vaccine was a direct measure to combat smallpox, asserting that the restriction of abortion access has no such direct relationship with the current pandemic.

With scientists and medical professionals working on a vaccine for COVID-19 and hoping that such vaccination would be available in the next year, we are likely to see this issue relating to the vaccination come back, as it has since 1905 as well.

What we did not see in *Jacobson* was a discussion of the First Amendment (the First Amendment of the Constitution stating in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …") and religious exemptions to vaccination, which often come up as well. This may be because the court there was not ruling on a state's power to physically vaccinate a person but rather whether a state was permitted to impose a fine for failing to vaccinate. The issue of religious liberties may also present itself as it relates to the state's power to restrict access to and mandate the closure of churches and temples. This was especially relevant during the religious holidays of Passover and Easter, where people often come together and congregate to pray and celebrate.

The question that is posed relating to religious exercise is, when do government interests in protecting public welfare outweigh an individual's right to freely exercise his/her religion? The Supreme Court assesses these issues with detailed analyses on a case-by-case basis.

In 1963, the Supreme Court established a balancing test in the case *Sherbert v. Verner*, 374 U.S. 398 (1963), in order to address that issue. This case related to an employee being fired for refusing to work on the Sabbath and that employee being barred from receiving unemployment benefits are a result of her being fired for that reason. Her unemployment claim was denied because the state found

being fired for religious reasons was good cause. The Supreme Court found the denial of complainant's unemployment claim to be unconstitutional and against her right to freely excise her religion. The court there found that, in order to justify a burden on religion, the government must demonstrate a compelling public interest and demonstrate that the law in question was narrowly tailored to achieve that interest. This case/standard was invoked in 1990 when the court heard *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 US 872 (1990), relating to members of the Native American Church being fired for "misconduct" and being denied unemployment benefits because they ingested peyote, a hallucinogenic drug, for sacramental purposes as a Church ceremony. In that case, though, the court found the Free Exercise Clause permits the state to prohibit ingestion of peyote, even for religious purposes. In so holding, the court cited *Reynolds v. United States*, 98 U.S. 145 (1879), a case relating to polygamy, which states that "the Clause does not relive an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons." A major distinction between that case and *Sherbert* is that, in *Sherbert*, the conduct that prohibited the individual from receiving unemployment benefits was not prohibited by law. As such, the court stated that "we would not apply it [*Sherbert* test] to require exemptions from a generally applicable criminal law.

In a 1972 case, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Supreme Court again faced the topic of the interaction between state police power and the Free Exercise Clause of the First Amendment. There, a Wisconsin law compelling attendance by children until age 16 was being challenged by three Amish families who asserted that their religion prohibited such public education beyond eighth grade. The Supreme Court ruled in favor of the First Amendment right assertion and found that the state infringed on such rights. The court further found that the state did not provide adequate proof of the benefits of the extra few years of school, which would justify any infringement on religion. Interestingly, the court also referenced that Amish community is a successful social unit in American society, including being self-sufficient and law-abiding, and the court also noted that the Amish community, after eighth grade, continued education in the form of vocational training.

As it relates to state regulations requiring children be vaccinated in order to procure entrance into public schools, criteria vary but states generally apply a three-part test to determine when to appropriately apply such exemptions: (1) is the parent a member of a recognized religious organization; (2) has the parent demonstrated a sincere and genuine religious belief that opposes one or all of the vaccinations; and (3) the parent must sign a statement confirming they are opposed and would like to assert the exemption. Shaun McFall, Vaccination & Religious Exemption, Freedom Forum Institute (Aug. 18, 2008).

County and state courts tend to favor vaccinations for children as prescribed by the pediatrician; however, with such a new vaccine, we don't know how the courts will respond and opine on this issue. *A.C. v. D.R.*, 36 A.D. 465 (2007).

We may also see an influx of matrimonial cases to determine how to handle divorced parents with differing opinions as to how to handle this pandemic and what is in their child(ren)'s best interest. This can include disputes relating to whether or not their child(ren) should be permitted to be vaccinated under the circumstances, and also whether or not their child should be quarantined, whether custody should temporarily change, whether the regular parenting schedule should be adhered to, whether the child should still participate in traditional religious activities, and what the proper measure of social distancing.

In these uncertain times, I consider a famous quote by former First Lady Eleanor Roosevelt for guidance: "To handle yourself, use your head; to handle others, use your heart."

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