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COVID-19: Are Your Constitutional Rights Quarantined Too?

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TILTING THE SCALES
BUSINESS ISSUES WITH A LEGAL SLANT

In an attempt to slow the spread of coronavirus (COVID-19), the county judge has issued a shelter-in-place order that prohibits all public gatherings. Violations are a misdemeanor punishable by a fine of \$1,000 or 180 days imprisonment. Defying the order, Reverend Elmer Gantry opens his church on Sunday morning to a smaller but still enthusiastic congregation. As the members leave at the end of the service, they are met by a sheriff's deputy, who hands each of them a ticket for violating the order. Reverend Gantry proclaims that fining people for attending church violates their constitutional right to freely exercise their religion. Will the First Amendment be their salvation?

The First Amendment's Free Exercise Clause will likely not allow members of Reverend Gantry's congregation to evade the consequences of violating the shelter-in-place order. Faced with the quick and exponential spread of COVID-19 cases, state and local governments have taken a number of drastic measures that would ordinarily be unconstitutional, such as [banning](#) any public gatherings, closing businesses, [quarantining](#) travelers from other states, and [prohibiting](#) any non-essential medical procedures. The wisdom and efficacy of those measures is heavily debated, and they have sparked protests in a number of states. But their legality is well settled.

Can Constitutional Rights Be Restricted During Public Health Emergencies?

The leading case is the U.S. Supreme Court's 1905 decision in [Jacobson v. Massachusetts](#). In that case, the City of Cambridge sought to subdue a smallpox epidemic by requiring all adults to be inoculated. Henning Jacobson refused. He was found guilty of violating the ordinance and assessed a \$5 fine. Jacobson then appealed his conviction, arguing that compulsory vaccination violated his constitutional rights.

The Supreme Court rejected Jacobson's argument, holding that the state had the power to enact reasonable regulations to protect the public's health and safety. Although each person has a constitutional right to bodily integrity that would ordinarily allow him to refuse unwanted medical treatment, the Court stated that right was not absolute. "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 is a law unto himself would soon be confronted with disorder and anarchy."

The Court also refused to second guess the city's policy choices in crafting public-health measures. Then (as now) a vocal minority believed that vaccination was ineffective and caused other diseases. But the Court stated it was not its role "to determine which of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative departments to determine in light of all the information it had or could obtain." The fact that people disagreed about vaccination was immaterial, because "there is scarcely any belief that is accepted by everyone."

What Are the Exceptions?

Jacobson allows state and local governments to reasonably restrict constitutional rights during public health emergencies. Courts will not interfere except in three circumstances:

1. The emergency measures should include exceptions for extreme cases. For example, the Court would have been receptive to Jacobson's argument if he had shown that he suffered from a medical condition that made him unfit for vaccination.
2. The courts may review a measure that has "no real or substantial relation" to protecting the public health or "is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." But, as discussed above, mere disagreement about whether the measure is wise or effective at combatting the disease is not sufficient.
3. The court may review whether the measure has been enforced in "an arbitrary, unreasonable manner." For example, a federal court in Kentucky [enjoined](#) a local order that prohibited drive-in church service on Easter, because the city permitted a host of equally dangerous (or equally harmless) activities. Drive-through restaurants and liquor stores remained open. And the court stated that, "if beer is 'essential,' so is Easter."

The states' efforts to combat the COVID-19 pandemic have also implicated one of the more controversial areas of constitutional law—the right to an abortion. Federal courts in Texas, Arkansas, Tennessee, Oklahoma and Alabama have enjoined those states' emergency orders banning non-essential medical procedures to the extent that they covered abortions. The Fifth and Eighth Circuits reinstated [Texas's](#) and [Arkansas's](#) bans, respectively. But the Sixth Circuit

refused to reinstate [Tennessee's](#). To resolve the split, the Supreme Court may step in and determine how *Jacobson* applies in the 21st century.

Tilting the Scales in Your Favor

Regardless of whether you agree with them, following the applicable shelter-in-place orders and other social-distances guidelines is the best course of action, from both a health perspective and legal perspective. Courts will likely side with the authorities attempting to combat the spread of COVID-19 unless you can show that they have overreached or they have not applied the measures equally.

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