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Strict adherence to the broad doctrinaire enunciated by Judge Harlan in the *Siegelman* case, would impose dire difficulties upon almost every judge who would seek to interpret and apply the laws of a foreign jurisprudence which had not been proved by the parties. He would find himself in a veritable maelstrom where each side argues vehemently for a conclusion that is at complete variance with that submitted by the other. Translations differ, contentions vary, and statutes, cases and commentaries are exposed to utterly conflicting versions. The court usually cannot translate for itself and, therefore, cannot conduct its research in the foreign language. Worst of all, the legal concepts of the foreign country are often completely different from our own.

It is submitted that this is not a situation where justice can best be achieved by permitting the elimination of the requirement that foreign law be pleaded and proved like any other fact.

Judicial notice can be used to avoid the formalities of the proof, but the court should consider only those matters to which its attention has been brought by the parties.

Where any particular trial judge is sufficiently versed in foreign law to do his own research, he should lay the results of such independent research before the parties and give them an opportunity to discuss or distinguish the same before the court derives any conclusions from its independent labors.

Where an appellate court possesses facilities to find precedents of foreign law which have not been submitted to it by counsel, and which tend to indicate error on the part of the court below, it should be incumbent upon the appellate court to remand the proceedings to the trial court for further proof with respect to those newly discovered authorities, thus permitting the parties to be heard on the subject before a final decision is reached. The action of the Circuit Court in the *Usatorre* case and the New York Court of Appeals in the *Sonnesen* case conformed to this suggested procedure.

FLUORIDATION — IS IT CONSTITUTIONAL? NO

Today a new medical and legal controversy is arousing public interest—fluoridation of municipal water supplies. Addition of the fluoride ion to water in a proportion of one to one million parts has been advocated by some leading health groups¹ as a preventive of mankind's age old affliction—tooth decay.²

1. Among the organizations in support of the program are the American Medical Association, the National Research Council, the American Public Health Association, the American Dental Association, the Association of State and Territorial Health Officers and the United States Public Health Service.

2. The research on water fluoridation points up the following facts: (1) Practically all water supplies naturally contain the fluoride ion in concentrations ranging from mere traces to fifteen or more parts of fluoride per million parts of water; (2) more than three million persons in the United States live in areas where their drinking water naturally contains 1.0 or more parts per million of the fluoride ion; (3) water which contains approximately 1.0 ppm fluoride ingested in early childhood will prevent about 60-65 per cent of the dental decay which otherwise occurs among those whose drinking water is deficient in fluoride.

While pilot communities have experimented with such a procedure for the past decade, results are somewhat inconclusive.³ Generally, the program's proponents point to its effects in areas where the water in its natural state contains minute quantities of the chemical and urge speedy adoption of artificial fluoridation as a necessary health measure under the police power of the state. Opponents, pointing to the fact that fluorine is a deadly poison and as yet still relatively unsubstantiated as the salutary measure it is alleged to be, urge a cautious advance based on a "wait and see" policy. Unfortunately, neither side has been overly objective in its presentation of the issues.⁴

This protection is carried over into adult life; (4) studies made in the Midwest indicate that water which naturally contains more than 1.5 ppm of the fluoride ion causes dental fluorosis when ingested during the years of tooth development. The extent of the fluorosis is in direct proportion to the amount of fluoride in the water. The mild fluorosis which may occur at concentrations up to about 2.0 ppm of fluoride is not unsightly and frequently produces a glistening enamel; (5) the effects of ingested water borne fluorides are noted only in the teeth. No deleterious effects have been detected in other tissues or organs of the body. Studies of height and weight and bone fracture experience show no differences among those adults residing in fluoride and fluoride deficient areas. An x-ray study among children and adults who consumed water fluorides up to 3.0 ppm of fluoride showed no bone changes. *Ast*, 31 *Health News*, No. 1, p. 4, January 1954.

3. This program was initiated in New York State in the cities of Kingston and Newburgh in 1944. Dental studies made before, during and after the program's implementation "... showed that the rate of dental caries experience among 6 to 12-year-old children who drank Newburgh's fluoridated water was 47 per cent less than among children of the same age in Kingston" who had not been exposed to the fluoridated water. *Ast*, *op. cit.* *supra* note 2, at p. 5. However, a communication from Dr. John A. Furst, Chief of the Bureau of Health Service of the New York State Education Departments, indicates that "Newburgh which has fluoridated water for ten years has a larger percentage of dental defects than Kingston which is unfluoridated." This discrepancy in the finding is caused, say proponents of fluoridation, by variations in examination procedure, the "tongue and blade" method, used as a basis for the latter finding, being described as an unsuitable procedure for accurate analysis. 21 *New York State Dental Journal*, No. 3, p. 151, March 1955.

4. At a hearing on the merits of the Wier Anti-fluoridation Bill (H.R. 2341), held before the Committee on Interstate and Foreign Commerce of the House of Representatives on May 27, 1954, it is reported that one speaker, apparently against fluoridation procedure of any sort, in a hushed voice intoned "don't soak your bodies in Washington bath water, because if you do, the unalterable effects of fluoridation will come upon you. You will become violent." Another then jumped to his feet and cried "Senator Taft died after drinking this water for a year. Justice Vinson lies buried in Kentucky. Many Senators and Representatives have gone." At one point the Capitol police had to be summoned to the Committee Room to quell a disturbance. At another, many spectators and witnesses produced their own private gallon water jugs so as to avoid contamination from the Washington concocted water. Others left in a mass exodus before the hearings were completed. While proponents of the fluoridation campaign emerged with a more dignified mein, some of their articles suggest a biased attitude in allegedly objective reporting. Thus in selecting the "highlights" of this hearing, the piece is entitled "Science v. Fanaticism." It goes on to mention "the vast array of scientific talent assembled. . . ." to combat the bill. The keynote then follows: "Lined up against some of the nation's leading research scientists were the current ringleaders against the health procedure, whose irresponsible charges have circulated freely in many communities." Danziger & Claire, *Science v. Fanati-*

Yet as recent as the present controversy is, it is strikingly similar to one that arose at the turn of the century when compulsory vaccination laws were being enacted throughout the country. Then, as well as now, medical opinion was sharply divided over the advisability of the proposed measures. Many objected then to the insertion within their bodies of a disease-laden virus as they do today to the intake of a toxic chemical via their drinking water. Again both groups of opponents have pointed to the possible harmful effects among those who may be unusually susceptible to inoculation and among those who may develop a dental fluorosis. Also, both measures are preventive, rather than curative in nature. Finally, it has been contended in opposition to both types of legislation that the law was discriminatory because its goal is not equally applicable to all portions of the population; children having been singled out as a special group.⁵

Thus in the courts, litigation has again ensued on analogous issues. By far the most significant objections have been constitutional in nature.⁶ Opponents of compulsory vaccination laws vigorously asserted their right to "bodily integ-

cism: A report on the Hearing of the Wier Bill to Prohibit Fluoridation, 49 *Journal of American Dental Association*, No. 1, pp. 86-89, July 1954.

5. Thus against fluoridation measures, it has been alleged that the chemical will have beneficial results only in children up to 16 years of age, yet all are coerced into drinking it. *Kraus v. Cleveland*, 116 N.E. 2d 779 (Ohio C.P. 1953), *aff'd*, 121 N.E. 2d 311 (Ohio Ct. App. 1954), *aff'd*, 163 Ohio St. 559, 127 N.E. 2d 609 (1955); *Chapman v. Shreveport*, 225 La. 859, 74 So. 2d 142, *cert. denied*, 348 U.S. 892 (1954); *Dowell v. Tulsa*, 273 P. 2d 859 (Okla. 1954). However, legislation directed primarily to school children, requiring vaccination as a condition precedent to entry into the public school system, has not been a sufficient cause for rendering the measures unconstitutional. *Viemeister v. White*, 88 App. Div. 44, 84 N.Y. Supp. 712 (2d Dep't 1903), *aff'd*, 179 N.Y. 235, 72 N.E. 97 (1904); *State ex rel. Milhoof v. Board of Education*, 76 Ohio St. 297, 81 N.E. 568 (1907); *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383 (1890).

6. Generally, the following allegations have also been made: That the resolution in issue is: (1) *ultra vires* and beyond the authority of the particular body or agency calling for its application; (2) *contra* to pure food and drug laws; and (3) a breach of contract according to the third party beneficiary doctrine. None of the above has as yet been sustained, the courts universally holding that in the absence of inescapable language to the contrary, the language of local charters and municipal franchises are deemed fulfilled if the water supply continues to be pure, wholesome and potable. Since addition of the fluoride ion has no apparent effect on the taste, color or odor of the water, the above requirement is easily met. So too where the third argument is advanced, the plaintiff, on the basis of the above explanation will continue to receive the same water in substance that he originally bargained for. Nor are such measures violative, in the eyes of the courts, of state food and drug acts where such prohibit the addition of fluorine compounds to food and drink intended for human consumption. This is so because drinking water must meet state standards, and inspection is regularly made. If fluoridated water passes state inspection, the alleged violation loses its potency. *DeAryan v. Butler*, 119 Cal. App. 2d 674, 260 P. 2d 98 (1953), *cert. denied*, 347 U.S. 1012 (1954); *Chapman v. Shreveport*, 225 La. 859, 74 So. 2d 142, *cert. denied*, 348 U.S. 892 (1954); *Kraus v. Cleveland*, 116 N.E. 2d 779 (Ohio C.P. 1953), *aff'd*, 121 N.E. 2d 311 (Ohio Ct. App. 1954), *aff'd*, 163 Ohio St. 559, 127 N.E. 2d 609 (1955); *Dowell v. Tulsa*, 273 P. 2d 859 (Okla. 1954); *Kaul v. City of Chehalis*, 45 Wash. 2d 616, 277 P. 2d 352 (1954).

city." Opponents of fluoridation assert that such municipal action amounts to "mass medication" and that such compulsory health measures, even under the guise of the police powers of the state, are violative: (1) of the fifth amendment, securing personal liberty as inalienable unless recourse is had to due process of law; and (2) of the first amendment securing the free exercise of religion; both of which are protected from state intervention by the fourteenth amendment.⁷ In the compulsory vaccination cases and the fluoridation cases, the courts have sustained the proposed health measures as within the proper exercise of the police power.

POLICE POWER AND THE STATE

The leading case on compulsory vaccination which clearly defines the existence, scope and limitation of police power in matters of public health is *Jacobson v. Massachusetts*.⁸ The principle is thus propounded: "The authority of the State to enact this statute is to be referred to what is commonly called the police power—a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description,' indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and public safety It is equally true that the State may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and public safety. The mode or manner in which those results are accomplished is within the discretion of the State, subject of course so far as Federal power is concerned, only to the condition that no rule prescribed by a State, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the General Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures."⁹

Thus the concept of the exercise of police power is clear. So too, a formula, if one be required, may be easily stated. In theory the requisites for police power legislation have been stated in various ways, for example: There must be a bonafide connection between the proposed purpose of the regulation to promote the public peace, health, welfare and the like and the active provisions of the regulation; the active measures must tend toward the accomplishment of the object for which the power is exercised; and the measures must be reason-

7. U.S. Const. amend. I (1791); U.S. Const. amend. V (1791); U.S. Const. amend. XIV (1868).

8. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

9. *Id.* at 24-25.

able, or conversely, not arbitrary and oppressive.¹⁰ The last qualification is perhaps the most concisely drawn and no doubt the most productive of litigation. Admittedly, police power in public health matters may originate in such an extreme and arbitrary manner that the courts must intervene to strike down oppressive measures.¹¹ The due process clause of the United States Constitution will then be invoked as a substantive limitation in the exercise of the police power.¹²

But when are such measures arbitrary and capricious? What is "reasonable"? This is primarily a question for legislative determination, for whatever the situation, this body must take the first steps to meet it. The courts, however, if they are going to perform their supervisory duties in such matters, cannot and should not close their eyes to the material facts in issue giving rise to the disputed legislation. For how else can measures be deemed "oppressive" or "reasonable" unless the whole problem is fully reviewed. Ultimately, despite the general presumption in favor of the constitutionality of legislation in issue, the courts in every instance must squarely meet the application of the above principles to diverse situations for obviously only in reality may such principles be adequately tested.

While it is difficult to ascertain whether any given measure will be sustained or stricken, since each requirement must be passed on in the light of conditions existing at the time of its adoption, certain fundamental questions will invariably require consideration if the problem is to be answered adequately. Again, these same questions will present themselves to the courts in their judicial review.

(1) *What is the evil to be guarded against?* Much may depend on whether the spectre is a dreaded disease such as the bubonic plague, or merely a universal ailment such as the common cold; whether it is physical, mental or spiritual; whether it is contagious, transferable or not communicable at all. If it is transferable, by what means? And to what degree? Then too, are certain groups within the population more susceptible to the evil than others so that they need special protection? And, of great importance, does the situation promise to be permanent or temporary?

(2) *Is intervention of the police power necessary?* The very concept of police power has an inherent characteristic of urgency, of extreme need.¹³ Is this the situation here? Or is there another "way out."

(3) *What is the nature of the measures to be imposed?* Compulsory measures requiring affirmative action by individuals should be considered more cautiously than those requiring passive acceptance and in action the same is true insofar as the severity of the measures and their effect is concerned. Finally, it must be asked how efficient are the measures? Will they assuredly, probably or possibly meet the situation?

All these are significant questions to be answered in findings of fact. All of these will affect legislative and judicial determination. But the emphasis will

10. 62 C.J.S. §§ 147-48. See also 39 C.J.S., Health, §§ 12-14.

11. *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905).

12. *Mott*, Due Process of Law § 119 (1926).

13. *Mott*, op. cit. supra note 12, § 122.

vary. The legislatures presumably will give prior attention to the first and third questions, subordinating the second one to be more thoroughly considered subsequently if the problem is ever raised in the courts. Conversely, question number two should receive the greatest attention in litigation.

Hence, let us deal with the problem—when is the application of police power reasonable—by inquiring in kind, when is it necessary?

COMPULSORY HEALTH MEASURES AND THE POLICE POWER

(A) THE PAST

In 1905, the issue of compulsory vaccination under the police power of the state was placed before the United States Supreme Court.¹⁴ The plaintiff, an adult resident of Massachusetts, contended that he had been deprived of liberty secured by the fourteenth amendment to the United States Constitution by the passage of a compulsory vaccination law subjecting him to fine or imprisonment for his neglect or refusal to submit to such health provisions.¹⁵ Such a regulation he alleged was contra to the basic constitutional principle that every individual had the right to protect his health as he deemed best as part of his fundamental personal liberties.

In denying that the Massachusetts statute was an arbitrary and oppressive assault on his person, the Court pointed out that "the liberty secured by the Constitution of the United States to every person does not impart an absolute right in each person to be at all times and in all circumstances wholly freed from restraint. These are manifold restraints to which every person is often subjected for the common good."¹⁶ Reaffirming the principle of *Crowley v. Christiansen*,¹⁷ the Court continued that "even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will . . .

14. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Some states prior to this time held legislation providing for compulsory vaccination of school children as a condition precedent to entry into the public school system, even in the absence of a showing of an emergency, to be constitutional. *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383 (1890); *In re Walters*, 84 Hun. (N.Y.) 457 (1895). Others have declared that the existence of an emergency is immaterial in such a situation. *Viemeister v. White*, 88 App. Div. 44, 84 N.Y. Supp. 712 (2d Dep't 1903), *aff'd*, 179 N.Y. 235, 72 N.E. 97 (1904); *Bissel v. Davidson*, 65 Conn. 183, 32 Atl. 348 (1894). Arkansas stated that it would presume the existence of the emergency. *State v. Martin*, 134 Ark. 420, 204 S.W. 622 (1918). Legislation of similar nature has been applied to private as well as public schools. *Commonwealth v. Rowe*, 218 Pa. 168, 67 Atl. 56 (1907). But such extreme health measures, when the nature of the class to be protected is fully considered, are easily justified. Thus where an emergency can be shown, all courts uphold compulsory vaccination of school children. *Blue v. Beach*, 155 Ind. 121, 56 N.E. 89 (1900). Two states have held that compulsory vaccination of everyone in a given district was constitutional even though no emergency was shown. *Morris v. Columbus*, 102 Ga. 792, 30 S.E. 850 (1898); *State v. Hay*, 126 N.C. 999, 35 S.E. 459 (1900). Opposed are those who void legislation, even in regard to school children, in absence of emergency. *State ex rel. Cox v. Board of Education*, 21 Utah 401, 60 Pac. 1013 (1900). For a more complete collection of authorities, see Mott, *op. cit. supra* note 12, § 128.

15. Mass. Rev. Laws c. 75, § 137 (1894).

16. *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

17. 137 U.S. 86, 89 (1890).

It is then liberty regulated by law.' . . . Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members. It is to be observed that when the regulation in question was adopted, smallpox . . . was prevalent to some extent in the city of Cambridge and the disease was increasing. If such was the situation . . . it cannot be adjudged that the present regulation of the Board of Health was not necessary in order to protect the public health and secure the public safety."¹⁸

As if fearful of being misconstrued, the Court in the same paragraph repeats the identical subject matter in the following sentence: "Smallpox being prevalent and increasing at Cambridge, the court would usurp the function of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the State, to protect the people at large, was arbitrary and not justified by the necessities of the case. We say necessities of the case, because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all, might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, so as to authorize or compel the courts to interfere for the protection of such persons. . . . But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand."¹⁹

Once more the court in order to prevent misapprehension as to its views repeats the concept that due process is a substantive limitation on the arbitrary and capricious exercise of police power. It then concludes that, in the absence of a showing that at the time plaintiff was not a fit subject for vaccination or that such a procedure because of his then condition would cause him severe injury, the statute would be upheld and plaintiff's claim denied. The applicability of our previous methods of inquiry should be readily apparent here. Let us compare our questions with the answers.

Nature of the ill to be avoided: Smallpox is a possibly fatal physical disease, communicable by means of spreading virus. It was present to such an extent as to evoke expressions such as "the principle of self-defense" and "paramount necessity" from the Court, which deemed it an epidemic which threatened the safety of the city, affecting all groups alike.

The necessity of the police power is clear: It takes no astute observer to recognize from this opinion the existence of the definitive line the Court was etching between individual liberty on the one side and social need on the other. Excess in either direction leads to license and oppression. Along the line lies the point of moderation and of reasonableness where the two concepts are balanced. This delicate status has been described as the "balance of conven-

18. *Jacobson v. Massachusetts*, 197 U.S. 11, 26-28 (1905).

19. *Id.* at 28-29.

ience" and thus expressed: "if the interference with private rights was but small the law would be upheld even though the corresponding benefit were not great. On the other hand, if fundamental rights of individuals were abridged or denied, the invasion could only be justified by a corresponding importance of the benefit which the public might expect from the regulation. This balance of convenience must obviously depend upon the particular circumstances surrounding the exercise of the [police] power. In normal times we have a normal balance, but in a period of great stress, when there is an emergency to be met, unusual and even arbitrary measures may be taken."²⁰

Surely in the case at bar, the "balance of convenience" requires greater stress on behalf of society and a consequent greater sacrifice of individual liberty than would be normally expected. Measures which would certainly be deemed oppressive in normal times can be justified as "reasonable" because of an epidemic of disease. In short, this emergency doctrine may be stated: "that the public necessity [is] the measure of the extent to which the government might go in making police regulations. This seems to have been one of the elements which the court had in mind in speaking of 'reasonableness' as a criterion in police power cases."²¹

20. Mott, *op. cit.* supra note 12, § 129.

21. *Ibid.*, citing *Lawton v. Steele*, 152 U.S. 133 (1894). As defined by Mott in his treatise, *Due Process of Law*, this doctrine has the following requisites: (1) great impending danger which will brook no delay; (2) a temporary situation; and (3) measures which will accomplish the ends sought. All of these must be present or else the disputed measures will be stricken as unconstitutional and others found. The above characteristics are substantially similar to those forming the "clear and present danger" test first defined by Justice Holmes in *Schenk v. United States*, 249 U.S. 47 (1919), and as explained by Justice Hanley in *State ex rel. Holcomb v. Armstrong*, 39 Wash. 2d 860, 239 P. 2d 545 (1952) (dissenting opinion). This test requires: (1) ". . . danger of some 'extremely serious' substantial evil." *State ex rel. Holcomb v. Armstrong*, supra at 869, 239 P. 2d at 551 (dissenting opinion), (citing *Bridges v. California*, 314 U.S. 252, 263 (1941)); (2) ". . . the danger must be 'clear', that is, there must be proof that the evil will almost inevitably result from the particular exercise of freedom." *State ex rel. Holcomb v. Armstrong*, supra at 869, 239 P. 2d at 551 (dissenting opinion), (citing *Whitney v. California*, 274 U.S. 357, 376 (1927)); (3) ". . . the danger must be 'present', that is, the 'degree of imminence extremely high' . . ." *State ex rel. Holcomb v. Armstrong*, supra at 869, 239 P. 2d at 551 (dissenting opinion) citing *Bridges v. California*, supra at 263; (4) "' . . . immediate and urgent. . .'" *State ex rel. Holcomb v. Armstrong*, supra at 869, 239 P.2d at 551 (dissenting opinion), (citing *Board of Education v. Barnette*, 319 U.S. 624, 633 (1943)). Up to the present date, the doctrine of the present danger test has been under consideration only in cases where rights secured by the first and fourteenth Amendments to the Federal Constitution have been allegedly violated, but never to this writer's knowledge where personal liberty secured by the fifth amendment and the fourteenth amendment have been in issue. Thus, the clear and present danger test has been applied in six classes of cases involving "constitutionality of convictions" under: (1) the federal espionage acts. *Shenck v. United States*, 249 U.S. 47 (1919); (2) state criminal syndicalism legislation. *Whitney v. California*, supra; (3) anti-insurrection acts. *Hendon v. Lowry*, 301 U.S. 242 (1937); (4) for breach of peace of common law. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); (5) for violation of picket ordinances. *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Carlson v. California*, 310 U.S. 106 (1940); (6) under city ordinances regulating public meetings or dissemination of religious

Measures to be adopted: Compulsory vaccination of all adults was required unless resulting injury, because of such procedure, could be shown. The minor discomfort and effects of vaccination are well known by all. Suffice it to say, there is temporary minor pain and some attendant soreness. The alternative is city-wide quarantine which in a situation involving a major city is impractical.

Twelve years later, the principle enunciated in *Jacobson v. Massachusetts* was extended in *Buck v. Bell*²² to uphold a Virginia statute permitting, after proper investigation according to the required procedure by the superintendent of the state institution, the sterilization of mental defectives. Plaintiff, Carrie Buck, an inmate of a state mental institution claimed that the operation of salpingectomy, ordered to be performed upon her person according to the required mode established by the authorities, violated her constitutional right of bodily integrity and was repugnant to due process. On a finding of fact that plaintiff " . . . is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization," the Supreme Court stated that it could not "say as a matter of law that the grounds do not exist, and if they exist they justify the result. . . . The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."²³

If, once again, we apply our three basic questions to the circumstances before us we see:

The nature of the ill to be avoided: While there is not at present a severe physical disease, there is present a serious mental malady, which though not contagious nor communicable in the ordinary sense of the word, may be transferred at conception to the offspring by means of infected genes.

Necessity of police power in intervention: While there is no evidence of a present danger, it may be contended that the Court, fearful of the increasing percentage of mental incompetents within our population and the increase via subsequent generations of defective offspring, deemed this to be an emergency

or political literature upon the public streets. *Schneider v. State*, 303 U.S. 147 (1939). "It appears that this test is becoming the principal technique in determining the propriety of governmentally-imposed restrictions upon free speech, free press, and free assembly, as well as other civil rights which have speech or press as an integral ingredient." 27 Iowa L. Rev. 467, 472 (1942). There is no reason why the application of this test to the present circumstances would not be greatly beneficial to the analysis of the constitutional question here involved. Indeed both the "emergency doctrine" and the "clear and present danger" test are strikingly similar to the essential requisite expressed in key dicta in the *Jacobson* case: "[I]t is equally true that in every well-ordered society charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraints, to be enforced by reasonable regulations, as the safety of the general public may demand." 197 U.S. 11, 29 (1905). It is immediately apparent that whatever descriptive phrase is used, "great danger" has been the common element required for the invocation of police power in matters affecting personal rights.

22. 274 U.S. 200 (1927).

23. *Id.* at 207.

situation. Here, however, "the turning point is the degree of the social danger from the transmission of feeble-mindedness to posterity."²⁴

Measures to be adopted: Performance of surgery whereby an opening is made in the abdominal cavity and the fallopian tubes are cut. Sterility then results.

On the basis of such a comparison, the principle of *Jacobson v. Massachusetts* is applicable. There are disquieting difficulties, however, which are hard to reconcile with the spirit of the rule. For example, vaccination is a relatively minor assault on the person. The experience, while productive of some temporary discomfort, is by no means permanently injurious to the person. On the contrary, it aids the body in the manufacture of an antidote to a disease. On the other hand, the operation of salpingectomy is a major surgical operation resulting in the removal of the reproductive organs. The effect is permanent. The victim can never conceive even if her incompetency is cured. Consider also that while both maladies, physical and mental, were deemed by the courts as communicable, the latter can hardly be classified as contagious.

Finally, strong doubt arises on the factual presence of an emergency. True, some alarm may be perceived at the probable increase of incompetents in this country which in the future will require institutionalizing, but to justify statutory mutilation based on such forward thinking as an "emergency" is to deprive that word of its forceful meaning. For example, today the road network in the United States is barely sufficient. In ten years, if present automobile production continues and if the network is not expanded, it will be woefully inadequate. While prompt and efficient action is needed, the situation can hardly be classified as an emergency or a state of present danger. Nor is there the same necessity for such drastic health precautions in the two situations. The alternative to compulsory vaccination is city-wide quarantine measures, obviously impractical. The alternative to compulsory sterilization is to continue the person in custody until a cure is found.

But it is to avoid this continued incarceration that the health measures are justified here. Apparently then, if a patient is not addicted to violent or injurious acts either to others or himself, removal of this possible transferable deficiency qualifies him for a return to society. Accordingly, one may perhaps accept salpingectomy as a voluntary measure that is provided as a condition precedent to release and requested by a patient's immediate family. But there is no choice here. Apparently, the state finds the onus of continually supporting these unfortunates too heavy. Thus we have an economic problem. Is this consideration then to be equated to the alleged "matters of public health" which justify the intervention of police power?

Hence from the original proposition calling for community self-defense based on paramount necessity as found in *Jacobson v. Massachusetts*, we have the liberal application to a modern day exigency in *Buck v. Bell*.²⁵

24. Shartel, *Sterilization of Mental Defectives*, 24 Mich. L. Rev. 1, 18 (1925).

25. This trend toward liberalization, manifested in the late twenties and continued down to the present day, lends itself to speculative inquiry in regard to two modern situations. The first concerns the distribution of the Salk polio vaccine. So far, attempted implementation of the program has resulted in limited acceptance. Engel, *The Salk Vaccine, What Caused the Mess*, Harper's Magazine, August 1955, p. 27. If a portion of the population

(B) THE PRESENT

Since 1953, major decisions have been published in support of legislation providing for fluoridation procedure. So far, the United States Supreme Court has not ruled on the matter, but perhaps significantly, has twice denied certiorari.²⁶

The first of these reported cases is *DeAryan v. Butler*.²⁷ There, plaintiff, in a representative capacity as taxpayer and elector, sought to enjoin municipal authorities from adding fluoride compound to the city water supply. Plaintiff appealed his non-suit by the trial court to the California District Court of Appeals alleging that the resolution was violative of the fifth amendment securing the right to life and liberty, the first amendment securing the right to the free exercise of religious freedom and from deprivation by state action under the fourteenth amendment. On review of the evidence, the court found in answer to these allegations that the water would continue to be pure, wholesome, and not dangerous to life and health. The resolution then was not such an unreasonable exercise of the municipal power.

In an answer to plaintiff's contention that his constitutional rights under the fourteenth amendment had been violated, the court after citing *Jacobson v.*

continues to refuse to have anything to do with such a program, the police power of the state may then be invoked. Will the principles sufficient to justify compulsory vaccination against smallpox and enforced sterilization of mental defectives support compulsory implementation of the Salk polio vaccine if the need arises? Since the former health measures have been supported by the courts, there is little reason to believe that compulsory vaccination against polio would not be; the overall similarity to compulsory anti-smallpox measures is almost over-powering. It is true that argument may be made that in the latter instance an emergency was present, but the concept of "necessity" sufficient to support the ruling in *Buck v. Bell* probably will be fatal to the force of this argument. The second situation is analogous to the ones previously seen but presents a scene more fantastic than any court, even as recently as a decade ago, could have anticipated. Figures released by the Atomic Energy Commission in February, 1955, revealed that the fallout from a hydrogen bomb explosion sends a shower of radioactive dust over an area up to 220 miles long and as much as 20 miles wide. *Time*, Feb. 28, 1955, p. 10, col. 2. "One substance found in nuclear fallout is strontium-90, which, when taken into the body in dangerous amounts, causes deterioration of the bones. Its effects could reach people years after the blast, if it fell on soil where food was later grown for animals used for milk or meat." *Time*, supra at col. 3. The full effects of atomic warfare may not be felt for centuries but geneticists have voiced fears, "that any appreciable increase [in the earth's level of radioactivity] will raise the mutation rate in all the earth's creatures, from plants to man. The mutations (changes, mostly damaging, in the heredity-carrying genes) will reduce fertility, cause miscarriages, stillbirths, and the birth of imperfect individuals." *Time*, Nov. 22, 1954 at 81, col. 1. The doctrine in *Buck v. Bell* now comes home to roost with a vengeance. If such a tragic period arrives, compulsory sterilization may well be justified under the emergency doctrine. But how many people will be required to undergo these measures—2 percent, 10 percent, 30 percent, 80 percent? The state, clearly, will not be able to institutionalize all these potential parents; ironically, will it be able to stand the expense of compulsory surgery?

26. *DeAryan v. Butler*, 119 Cal. App. 2d 674, 260 P. 2d 98 (1953), cert. denied, 347 U.S. 1012 (1954); *Chapman v. Shreveport*, 225 La. 359, 74 So. 2d 142, cert. denied, 348 U.S. 892 (1954).

27. 119 Cal. App. 2d 674, 260 P. 2d 98 (1953).

Massachusetts declared that exercise of police power in matters of public health must be based on "a reasonable determination, not an abuse of discretion, and must not infringe the rights secured by the Constitution."²⁸ It then concluded that the only remaining issue was whether the resolution amounted to an invasion of rights secured by law. In determining that this was not the case, the court declared that "the United States Supreme Court, in establishing and clarifying the Constitutional right of religious and other freedoms, has distinguished between the direct compulsions imposed upon individuals, with penalties for violations, and those which are indirect or reasonably incidental to a furnished service or facility."²⁹ Since plaintiff's grievance was in the latter category, he being compelled to drink the water only in lieu of further expense and inconvenience in acquiring an adequate substitute, his petition was denied.

This decision was followed in *Kraus v. Cleveland*.³⁰ As in the previous case, plaintiff, a taxpayer, sought an injunction to prevent the City of Cleveland from expending funds for fluoridation of the city water supply. The trial court dismissed the petition and this ruling was affirmed on appeal. Once again, the constitutionality of the measures was assailed as compulsory and oppressive in that in effect all inhabitants would be directly forced to drink the water without any opportunity to exercise a free choice in the matter; that only children under twelve would benefit and that freedom of religion was being interfered with. In rejecting these contentions, the appellate court asserted that "we are unable to say . . . that the legislation adopted, purporting to have been enacted to protect the public health, has no real or substantial relationship to that object, or was, *beyond all question*, a plain and palpable invasion of rights secured by the fundamental law."³¹

The plaintiff, in *Chapman v. Shreveport*,³² originally met with greater success than his predecessors, when the lower court issued a preliminary injunction forbidding the city from proceeding with plans for fluoridation of the water supply on grounds that this was a matter of private, not public health; that there was no grant of power, express or implied, to fluoridate the water; and that no such right could be vested in the municipality under the police power.

On appeal, however, this decision was reversed.³³ Rejecting the notion that prevention of tooth decay was not a public health issue, the court declared, "dental caries is one of the most serious health problems in the City of Shreveport, and in the nation as well. The fact that it is not a communicable disease and one that can cause an epidemic does not detract from its seriousness as affecting the health and well-being of the community. The plan for fluoridation, therefore, bears a reasonable relation to the general welfare and the general

28. *Id.* at 682, 260 P. 2d at 102.

29. *Id.* at 682, 260 P. 2d at 103.

30. 121 N.E. 2d 311 (Ohio Ct. App. 1954), affirming, 116 N.E. 2d 779 (Ohio C.P. 1953), *aff'd*, 163 Ohio St. 559, 127 N.E. 2d 609 (1955).

31. 121 N.E. 2d 311, 315 (Ohio Ct. App. 1954), *aff'd*, 163 Ohio St. 559, 127 N.E. 2d 609 (1955).

32. No. 116,282, 1st Dist. Ct. La., *rev'd*, 225 La. 859, 74 So. 2d 142, *cert. denied*, 348 U.S. 892 (1954).

33. 225 La. 859, 74 So. 2d 142, *cert. denied*, 348 U.S. 892 (1954).

health of the community, and is a valid exercise of the [police power] if it is not arbitrary or unreasonable."³⁴

In dispelling either of the above possibilities, the court decided there was no evidence that the proposed measures were harmful. On the contrary, there was substantial evidence that water containing fluorine naturally was beneficial, hence inclusion of such a chemical by artificial means was not "medication" in the accepted sense of the word "but was adding to it one of the mineral properties found naturally in water in some sections of the country."³⁵ Nor were they arbitrary because fluoridation is preventive in character, since there was no direct compulsion to drink the water, merely an indirect pressure due to the inconvenience and expense of procuring an adequate substitute. The measures are not even arbitrary because only one class may benefit since it is obvious that in time, as the children reached maturity, all would eventually benefit. Hence once again, judicial interference was not warranted.

*Dowell v. Tulsa*³⁶ is perhaps the most revealing of the cases. An action to enjoin proposed fluoridation of municipal water supplies was instituted by plaintiff-taxpayer. Unsuccessful in the trial court, plaintiff appealed on grounds substantially the same as in the previous cases. The result was the same. In refuting plaintiff's allegation that fluoridation procedure was not reasonably necessary, the court in what is probably the key statement to present judicial thought on the subject declared, "we think the weight of well-reasoned modern precedent sustains the right of municipalities to adopt such reasonable and undiscriminating measures to improve their water supplies as *are necessary* to protect and improve the public health, even though *no epidemic is imminent and no contagious disease or virus is directly involved*. . . . Where such necessity is established, the Courts, especially in recent years, have adopted a liberal view of the health measures promulgated. . . ."³⁷

The same view is echoed in even more definitive terms in *Kaul v. City of Chehalis*.³⁸ Appellant as taxpayer of the City of Chehalis sought to enjoin the respondent from fluoridating the city water supply pursuant to an ordinance adopted by the city commissioner. In rejecting counsel's argument, the court states: "[the cases cited by appellant] are based upon the theory of 'the pressure of great danger.' From cases of this type, appellant argues, that since the instant case involves a noncontagious disease, which does not present a grave and immediate danger to the public, an extension of the police power to the situation results in an invasion of his constitutional rights. This conclusion depends on a refinement we are unwilling to make. Protection of public health includes protection from the introduction or spread of both contagious and noncontagious diseases. . . . *We find nothing in this jurisdiction which limits the police power, exercised in the realm of public health, solely to the control of contagious diseases as distinguished from non-contagious diseases*. Further,

34. Id. at 861, 74 So. 2d at 145-46.

35. Id. at 862, 74 So. 2d at 146.

36. 273 P. 2d 859 (Okla. 1954).

37. Id. at 862 (Emphasis added.)

38. 45 Wash. 2d 616, 277 P. 2d 352 (1954).

under the police power, a health measure may be an *effective* public measure *without the existence of some immediate, public necessity.*"³⁹

Dismissing the allegation that the municipal regulation was violative of plaintiff's constitutional rights the court decreed: "We fail to see, however, where any right of appellant, guaranteed by the constitution, has been invaded. The instant situation is vastly different from one where appellant is required to take affirmative action and is subject to punishment for failure to act. The ordinance . . . does not compel him to do anything; it subjects him to no penalty. Liberty implies absence of arbitrary restraint. It does not necessarily imply immunity from *reasonable* regulations imposed on the interest of the community."⁴⁰

Thus, on the critical issue of fluoridation, runs the trend today. But while the proponents of fluoridation have had the best of it so far, it is interesting to note their ill-humor when approached by the popular slogans in opposition to their campaign. Thus descriptive phrases have drawn rebuke, even from the courts, but perhaps not so surprisingly, no valid rebuttal. For example, let us consider the phrase "compulsory mass medication". While perhaps an over simplification, it is yet accurate. In *Chapman v. Shreveport*, the court adopted the argument of a witness that "the addition of fluoride to the water was not *medicating* it in the generally accepted sense, but was *adding to it* one of the mineral properties found naturally in water in *some* sections of the country."⁴¹ Equally convincing is the answer found in *Kaul v. City of Chehalis* where it is stated that, ". . . neither the alliterative term 'compulsory mass medication' nor reference to the fluoridated water as a 'concoction' describes the situation before us; nor does the possible opprobrium, which may flow from their use, overcome the police power."⁴²

As mentioned earlier, the two major objections have been constitutional in nature, namely that state and its political subdivisions were violating the fourteenth amendment to the Constitution by attempting to regulate personal liberty of individuals in matters of private health and by attempting to regulate the free exercise of religion by compelling consumers to drink altered water. That the proposed fluoridation measures are compulsory is seldom denied. In a few instances, the suggestion is made that the objector refrain from drinking water from the municipal water supply and procure a substitute such as bottled water.⁴³ Generally, however, the courts admit there is present some degree of duress but carefully distinguish between situations where the objector is required to take affirmative action and is subject to punishment for failure to act and situations, such as the present one, where the compulsion is indirect and "reasonably incidental to a furnished service or facility."⁴⁴ Hence we see that the defenders of individual liberty faced with this dichotomy and unable

39. Id. at 623, 277 P. 2d at 356 (Emphasis added.)

40. Id. at 621, 277 P. 2d at 355. (Emphasis added.)

41. 225 La. 859, 861, 74 So. 2d 142, 146 (1954) (Emphasis added.)

42. 45 Wash. 2d 616, 624, 277 P. 2d 352, 357 (1954).

43. *DeAryan v. Butler*, 119 Cal. App. 2d 674, 260 P. 2d 98 (1953); *Kaul v. City of Chehalis*, 45 Wash. 2d 616, 277 P. 2d 352 (1954).

44. Cf. *Kaul v. City of Chehalis*, 45 Wash. 2d 616, 622, 277 P. 2d 352, 355 (1954).

to overcome it, must yield. With the trend toward liberalization of the emergency doctrine, their position today is precarious indeed, for even taken in the proper context, dicta in *Kaul v. City of Chehalis* that ". . . under the police power, a health regulation may be an effective public measure, without the existence of some immediate public necessity"⁴⁵ is disturbing in its broad language. It is but a step in answer to those urging religious beliefs to define the limits of religious freedom. "Thus the amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society'. . . There can be no question, therefore, that a person is free to hold whatever belief his conscience dictates, but when he translates his belief into action he may be required to conform to reasonable regulations which are applicable to all persons and are designed to accomplish a permissible objective."⁴⁶

With these answers to the above two constitutional objections in mind, let us superimpose our question sheet over the characteristics of the fluoridation issue.

Nature of the evil to be avoided: A physical ailment which, according to varying factors, may affect the health of the body materially or not at all; an ailment which is wide-spread and extremely unpopular but not contagious nor transferable in any sense of the word; an ailment which has been an "age-old affliction of man" and promises to continue as such forever.

Need for police power intervention: Eradication of tooth decay is highly desirable and without doubt would be a boon to society. Fluoridation, as a means of achieving this result, promises to be "an effective public health measure *without* the existence of some *immediate, public necessity*."⁴⁷

Type of measures to be employed: Addition of a fluoride ion to municipal water supplies is demanded so that consumers who are dependent on this public utility will, like it or not, experience a chemical reaction which will harden their teeth and reduce their susceptibility to tooth decay.

At best, the analysis is disquieting. Note how in the first category the element calling for state and municipal intervention has undergone a substantial change. At first, epidemic of smallpox justified the invasion of police power. It was subsequently justified because of the danger to the community arising from transmission of mental incompetency by mental defectives to their offspring. Now it is justified because the community, as a whole, has a toothache. By this "watering" process, the original principle relating to compulsory health measures has lost its vigor; even its life. The turning point in the procedure is the attempted identification of the concepts "necessity" and "desirability." Thus, by analogy, if compulsory health measures are justified where there is a serious disease, it is justified where there is a susceptibility to tooth decay. If justified when epidemics threaten to depopulate a city, it is justifiable in relation to an ailment that is individually universal though not contagious. If justified under

45. *Id.* at 623, 277 P. 2d at 356.

46. *Rescue Army v. Municipal Court*, 28 Cal. 2d 460, 470, 171 P. 2d 8, 15 (1946), citing with approval, *Cantwell v. Connecticut*, 310 U.S. 296, 304-05 (1940).

47. 45 Wash. 2d 616, 623, 277 P. 2d 352, 356 (1954) (Emphasis added.)

the pressure of great danger, it is justified when the present health of the community is not all it might be and hence might be improved. Once this identification, under "necessity," occurs, the applicability of the emergency doctrine is clear. Once adopted, the essential qualifications of this doctrine are then declared immaterial and the limitations, inherent in its initial pronouncement, avoided.

A similar substitution of concepts occurs in the second category relating to the necessity for police power intervention. Of old, police power has contained the inherent characteristic of "need for immediate action." The force to be met and stopped was customarily a temporary one. It arose quickly and vanished in the same way, as for instance, an epidemic, war, conflagration, flood, etc. If the situation promised to be a permanent one, methods other than police power would have to be found.⁴⁸ Apparently not so today. The important consideration seems to be—will the methods work? If efficient, regardless of the duration of time required to meet the problem, the police power may be imposed to provide them.

If we combine the results of this dilution process, we may perceive that the requisite of "reasonableness" relating to imposition of measures under police power means not, as formerly, that the measures be founded on immediate danger of some sort, but that the result be desirable and the means efficient. Even abandoning the argument that to define what is "desirable" is much more nebulous (and hence much more conducive to abuse) than is the recognition of factors constituting an emergency, the other objection remains, i.e., is there no further limitation on efficiency? One need not be a seer to observe that if efficiency is to be the measure of police power, there is logically no limit to the infinite variety of alleged health measures that may be fostered on a hapless public by over-solicitous state and municipal agencies, for "what future proposals may be made to treat noncontagious diseases by adding ingredients to our water supply, or food, or air, only time will tell."⁴⁹ If you then abandon the notion that true public necessity or honest social need is not a potent *real* limitation on the imposition of police power, then the day of the magic elixir is here. A cure-all now lies in our water faucets.

Nor has the answer given by the courts to those urging freedom to determine their own health measures been very consoling. The attempted limitation on police power, distinguishing between legislation which requires affirmative action under fear of penalty as opposed to legislation requiring little more than inertia from the petitioner, does not close this modern "Pandora's box." For while no one would seriously suggest that the community be assembled at periodic intervals *en masse* to receive its prescribed dosage of headache powders, cold tablets and various allergy remedies, there is no compelling reason under present decisions why such antidotes might not be disbursed in the common water beds. "What the residents of Chehalis could not be compelled to do one by one, it is now sought to compel them to do *en masse*; a treatment to which they individ-

48. Mott, *op. cit.* supra note 12, § 129.

49. Kaul v. City of Chehalis, 45 Wash. 2d 616, 632, 277 P. 2d 352, 365 (1954) (dissenting opinion).

ually could not be compelled to submit is here sought to be applied by more subtle but no less compulsory means. This smacks more of the police state than of the police power."⁵⁰

Analysis too of the distinction relating to legislation curtailing not the absolute freedom to believe but the qualified freedom to act according to belief drawn by the courts in answer to those urging freedom of religion indicates that such a principle is sound. Thus, in short, one may believe whatever he chooses but his outward manifestations in carrying out such beliefs must remain subjected to regulation for protection of society. This principle is understandable, particularly where, as in the case of contagion, the free exercise of religion would endanger the safety of the community, or as sometimes happens, offend common decency and morality. But its application under this set of circumstances is unwarranted. The free exercise of religion requested by the objector here is that in the future as in the past, he be furnished drinking water of the same quality, without additional inconvenience, from the municipal water supply systems which he helps to support by his taxes. The "religious action" he seeks is to be left undisturbed. Ironically, the right of inaction is now denied him because such a request amounts to the exercise of religious practices which may be regulated by the state.

Further, this type of state interference is rendered more oppressive when it is recalled that it is the "free exercise of religion" that is secured under the first amendment. For how can a government effectively prohibit freedom of belief? History has revealed that even totalitarian governments have been unsuccessful in such an attempt to quench the mind. Since this result is impossible to achieve, there is no need for court intervention to quell or curtail mere religious beliefs. Finally as a practical measure, it would be well to recall that some of the greatest crimes ever perpetrated have been done in the name of humanity. As history shows, "desirability," "social improvement" and "efficiency," while praiseworthy concepts in themselves, may be distorted into gross abuses on a helpless populace.

The third aspect of the situation, namely the nature of remedies to be employed, relates particularly to the latter portion of the expression—"mass medication." The courts have unequivocally denied that fluoridation of water constitutes the practice of medicine, likening the procedure to chlorination of water. Distinctions between the two, attempted by counsel, have been cavalierly rejected as immaterial and ridiculous;—cavalierly because a finding of fact in *Kaul v. City of Chehalis* is illustrative of the basic difference between the two procedures which the courts have refused to acknowledge. The evidence is that "chlorine is added to water to affect either bacteria or plant life in the water, while fluoride has no effect upon the water or upon plant life in the water but remains free in the water and is artificially added solely for the effect it has on the *individual drinking the water*."⁵¹ Continued intake of the fluoride ion will result in a coating upon the teeth which will serve as a shield against the bacteria which cause tooth decay. The conclusion seems inescapable that

50. *Id.* at 623, 277 P. 2d 361 (dissenting opinion).

51. *Id.* at 626, 277 P. 2d at 353 (Emphasis added.)