

Covid, Courts, Communists and Common Sense

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Covid-19 is a serial killer. In less than two years it has taken the lives of over five million people. It preys on the vulnerable and the elderly. Seniors in long term care facilities are a favorite target.

Governments have reacted differently to the threat. Some, including China and Australia, have adopted an aggressive, no-nonsense approach, locking down major cities for months at a time. Others, including Sweden and Brazil were, at least initially, more restrained and *laissez faire*, allowing their citizens to move about freely and letting the virus run its natural course. Countries also differed in the extent to which the general public was engaged in deciding which approach to adopt. In some the public were very active; in others not at all. In China, public debate and criticism were prohibited. Decisions were made by senior members of the Communist Party from behind closed doors and policies were presented as a *fait accompli*. In Europe and the United States, members of the general public were much more vocal and outspoken. Citizens who disagreed with their governments organized large protests and demonstrations and, when they were not listened to, took their political masters to court.

Superficially the two approaches look and sound very different. Loud and boisterous in Paris and Washington; silence in Tiananmen Square in Beijing. But appearances can be deceiving. On closer inspection, the difference in how much influence the public actually has in shaping Covid policy turns out to be quite small. Shouts on the street are rarely heard in the back rooms where deals are done and are categorically out of order inside a court. When courts have the final say in deciding the best way to fight Covid-19, it is difficult for members of the public to participate in a meaningful way because the manner in which judges talk and justify their decisions effectively excludes them from the conversation. They need lawyers to

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represent them and, at least in the United States, only a handful of people are even allowed to watch the judges hear a case and render their decision. Arguments are made and judgments are written in a style and language that makes them difficult to understand except by a professional elite. Critically, they consistently fail to connect with the people who end up losing their case and who feel their concerns have been depreciated or ignored.

The ruling of the United States Supreme Court in *Jacobson v Massachusetts*,¹ that in some circumstances Governments have the authority to make vaccinations mandatory, is a case in point. The case arose at the beginning of the last century when the city of Cambridge faced a serious outbreak of smallpox. After consulting experts, the city's Board of Health came to the conclusion that all of its residents had to be vaccinated. One of them, Henning Jacobson, objected. He had an allergic reaction when he had been inoculated against the disease when he was a child, and he did not want to go through what was a very unpleasant experience a second time.

In its reasons for judgment the Court explained to Jacobson why mandatory vaccinations were necessary to stop the spread of the disease and why his past history did not justify him being given an exemption. The Court's ruling was written by John Marshall Harlan, one of the country's greatest judges who, ten years before, had stood alone in condemning the racist segregation laws that flourished in the southern states after the Civil War.² Harlan told Jacobson that although a person's liberty was the greatest of all rights it was not absolute. As examples, he cited passengers on a ship that had experienced an outbreak of an infectious disease having to be quarantined and able-bodied men being conscripted into the army in times of war.³

As a general principle, Harlan said personal liberty was subject to such reasonable restraints as were necessary to protect the health and safety and moral fabric of a community. When faced with a lethal disease like smallpox, mandating vaccinations for everyone who lived in the city was a matter of self-defence. While Harlan recognized that exemptions would have to be given when the consequences of being vaccinated could be described as "cruel and inhuman[e]," he did not think Jacobson's experience had reached that degree of harm.⁴

As reasonable as Harlan's opinion reads today, it did not put the conflict to rest at the time: it was handed down. Thousands of vaccine skeptics remained unconvinced. In fact, the Court's ruling sparked a wave of protest from vaccine skeptics and within three years, they formed an Anti-Vaccination League.⁵ Their descendants continue to object to this day. Harlan's opinion did not persuade the anti-vaccination community in part because its length and formal style meant almost nobody had the time to read it. Today, despite its obvious relevance, it garners almost no attention.

It took 28 pages for Harlan to explain himself and his judgment is filled with legal jargon and references to prior cases that make it difficult for most people to evaluate its logic. To further undermine its credibility, two of the nine judges who heard the case dissented. As poorly

1 197 US 11 (1905) [*Jacobson*].

2 See *Plessy v Ferguson*, 163 US 537 (1896).

3 See *Jacobson*, *supra* note 1 at 29.

4 *Ibid* at 39.

5 For an overview, see The Harvard Law Review Association, "Toward a Twenty-First Century *Jacobson v Massachusetts*" (2008) 121 Harv L Rev 1820 at 1823-24.

as Harlan's opinion speaks to ordinary Americans, it should be noted that it is far from the worst. While its length and formality make it difficult for non-lawyers to decipher, compared to the efforts of his Canadian neighbours (with whom he summered on the St. Lawrence), it is a model of clarity and common sense.

The Supreme Court of Canada has never been asked for its opinion about compulsory vaccinations, but it has ruled that a state could administer a blood transfusion to a month-old child, over the objections of her parents.⁶ Compared to Harlan's opinion, the Canadian Court's ruling is a model of legal obfuscation. It took 124 pages for the nine judges to explain why the objections of the parents were unpersuasive. Five of them wrote separate opinions. Although they all believed that the government had the authority to order the transfusion, they could not agree why. Some claimed that the religious freedom of the parents had been infringed; others disagreed. Some said their liberty had been constrained; others thought that it was not the case. Faced with a book length judgment that is riddled with disagreements and counter arguments, it is certain that the child's parents would not have had a clear understanding of why they lost. If justice must not only be done but be seen to be done, in this case the Supreme Court of Canada failed the test.

Both Courts could have done better. The gold standard for judgments written on controversial social questions that are easily accessible to the litigants and members of the general public is *Brown v Board of Education of Topeka*.⁷ In what is regarded by many as the greatest judgment ever written, the Supreme Court of the United States explained why segregated schools violated the principle of equality in less than 4,000 words. The judgment was readable and accessible, as it was published in full in some of the country's leading newspapers.⁸ Although southern racists initially resisted the Court's ruling, over time its conclusion, that separate schools were not equal schools, was acknowledged by everyone. Even if they did not like it, White supremacists could not fight its logic.

The *Brown* judgment should be the template for how judges write all their opinions. Concise, coherent, jargon-free judgments that can be explained on Twitter should become the new normal. Indeed, that is how Thomas More, one of law's greatest advocates, thought all conflicts should be settled. In his *Utopia*,⁹ (a word he coined), disputes were resolved by judges but there were no lawyers involved. Judges listened to each of the parties tell their side of a dispute and then delivered their decisions directly to them.¹⁰

More is someone whose ideas, especially about law, deserve our attention. He rose to the pinnacle of the legal profession in Tudor England and he is the only person who has been celebrated as an icon and a saint by both Russian Communists and Roman Catholics. If a Utopian judge were asked for her opinion as to whether a state can make vaccinations compulsory for all its citizens, it is almost certain she would come to the same conclusion as Harlan but say it in a way that was easier to read. She would agree with Harlan that, in extreme circumstances,

6 See *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 122 DLR (4th) 1.

7 347 US 483 (1954).

8 See e.g., *Chicago Tribune* (18 May 1954) (page number(s) if applicable); *St. Louis Post Dispatch* (17 May 1954) (page number(s) if applicable).

9 See Thomas More, *Utopia*, translated by Paul Turner (London: Penguin, 2003).

10 *Ibid* at 87.

when all other alternatives have failed, states may require all their citizens to be vaccinated as a matter of self-defence. The logic is straightforward. The facts are a matter of record, and the law of self-defence is built on a universal principle of equality that has been recognized throughout the course of human history.

Three facts are critical: Covid-19 is a serial killer; unvaccinated people have much higher rates of hospitalization when they are infected; and, variants have proven to be much more infectious and spread the disease more easily. Together these three facts mean that, regardless of their intentions, anyone who refuses to be vaccinated may become a lethal threat to their neighbours and co-workers and to others who require medical treatment because of an emergency or condition over which they have no control. In effect, legions of vaccine skeptics serve as the virus' militia. The facts of the case speak for themselves, and so does the law. As Harlan explained, the law that governs relations between vaccinated and unvaccinated people is the law of self-defence. The right to protect oneself against potentially lethal attacks has been part of the law all through recorded history. In every country in the world, the law recognizes that each of us has the right to ward off threats and attacks to our personal safety and well-being. In a world that includes Covid-19, this means that vaccinated people have a right to defend themselves against vaccine opponents who pose a threat to their health and well-being. They have a right to fight back. The law authorizes them to neutralize the threat.

The right of self-defence is not, however, an absolute, unfettered right. It is not a license for a person who is attacked to retaliate with unlimited force. The law requires defenders to respond in a manner that is roughly the same as the assault they are trying to repel. Women who are groped can strike back with a knee to the groin, but they cannot pull the trigger. When a person asserts a right to self-defence, the law requires them to use the least amount of force that will keep them safe. They must try more moderate and measured tactics before they pull out the heavy weapons.

The same logic applies during a pandemic. Before making vaccinations compulsory, governments must try vaccine passports and more targeted mandates at work, in schools, spas, restaurants, and arenas. Quarantining people in their homes is another less drastic alternative to stabbing them with a needle. If excluding vaccine skeptics from the places their threat is the greatest and/or confining them in their homes is just as effective as mandatory vaccines in containing the virus, they are strategies governments must try first.

As a practical matter, however, it seems inevitable that there will be times when less invasive tactics do not do the trick; when states decide they must make vaccinations compulsory. Harlan thought the city of Cambridge had reached that point in fighting the outbreak of smallpox it confronted in 1902. In the last months of 2021, the Chancellor of Austria came to the same conclusion.¹¹ The country had achieved the dubious distinction of having the lowest vaccination rates and highest infection rates in Europe.¹² At that point, the government concluded that mandatory vaccinations were necessary to defeat the virus. Even when compulsory vaccinations seem like the only solution, some skeptics will still object on the ground

11 "Austria to go into full lockdown as Covid surges", *BBC News* (19 November 2021), online: <www.bbc.com/news/world-europe-59343650> [perma.cc/A6A5-ZPHR].

12 "Covid: Austria introduces lockdown for unvaccinated", *BBC News* (15 November 2021), online: <www.bbc.com/news/world-europe-59283128> [perma.cc/YYC9-6SU7].

that the current vaccines are not always effective and, in some cases, may produce dangerous side effects including strokes, blood clotting, and damage to the nervous system. In the face of such serious risks, vaccine skeptics say they have the right to resist it being injected into their bodies.

When vaccine skeptics defend their position in this way, the question of whether a state can force people to be vaccinated comes down to a clash or collision of rights. Both vaccine advocates and skeptics claim sovereignty over their bodies. Both insist they have the right to live their lives without being assaulted. A Utopian judge who was trying to channel the spirit of its creator in deciding whose rights should prevail would be naturally drawn to the wisdom of Aristotle and Cicero. Both are among law's galaxy of super stars; certainly, unanimous first ballot picks for law's Hall of Fame.

More was an admirer of both. Cicero appealed to More because of his belief that law is made up of universal principles of right and wrong that should be learned as part of everyone's general education. To a person who rose to become Henry the 8th's Chancellor, Aristotle's message, that law and justice are synonymous and that principles of equality are at the core of both, would have struck a special chord. One way a Utopian judge might give expression to the ideas of Cicero and Aristotle would be to encourage both vaccine advocates and skeptics to make use of the scales of justice to resolve their dispute. The idea would be to balance the right of skeptics to control what goes into their bodies against the lives of those who will be threatened if significant numbers of people remain unvaccinated.

Balancing is part of our genetic code and the scales of justice, the universal symbol of law, are as old as recorded history. They first appear in the tombs of kings and queens and power elites of ancient Egypt. They are usually depicted in the hands of Ma'at, the Goddess of truth, justice, and harmony, who uses them to discover the weight of a dead person's soul. To operationalize the scales of justice you need a standard or a benchmark to tell you how much something weighs. In Ma'at's case, to determine the weight of a person's spiritual being, she used a feather. Souls that were lighter than the feather would rise to heaven.

In the secular world in which we live, the standard that is used to operationalize the scales of justice is the principle of proportionality. Proportionality is another very old idea that goes back at least as far as ancient Greece. For generations the Greeks spotted the symmetry of proportionality in every dimension of the physical world that surrounded them. Mathematicians used the idea of proportionality in their study of astronomy, music (harmonic scales), architecture, and art (the golden mean). For Aristotle, proportionality was a principle of justice that was at the centre of both public and private law.¹³ Today it is sometimes referred to as the ultimate rule of law.

In cases like these, when there is a conflict of rights, proportionality instructs judges to find in favour of the person who will suffer the most if they lose the case. It turns on what proportion of their lives will be adversely affected by the decision. The idea is to validate policies that keep losses to a minimum. Understood in this way, proportionality would present a Utopian judge with a very striking image: scales of justice that are tilted dramatically in one direction. On the one side are the tombstones of the people who will die if significant num-

13 Aristotle, *Nicomachean Ethics* (place of publication: publisher, year) Book V.

bers of the general public remained unvaccinated. On the other side, if skeptics are vaccinated against their will, the worst that can happen is that a handful of them may have to endure a period of pain and suffering and maybe even permanent injuries including damage to their heart or nervous system. In all of these cases, unlike Covid-19's victims, they will wake up to new tomorrows.

The imbalance is striking; certain death of many weighed against the very small chance of an exceedingly small number of people having to endure severe consequences.¹⁴ In rare cases, the balance may tip in the skeptic's favour and exceptions may have to be made. A person may suffer from a medical condition that makes it more likely they will have what Harlan called a "cruel or inhumane" reaction to the vaccine. In most cases, however, when they are placed on the scales of justice, the lives of Covid victims will outweigh the pain and suffering of their sceptical neighbours. In crafting his opinion, a Utopian judge would simply need to document the imbalance of the competing interests of vaccinated and unvaccinated people. Nothing more needs to be added. The picture is worth a thousand words, the imbalance impossible not to see. There may be people who do not like it, but it is not because they can refute its logic.

Explaining when and why vaccination mandates are legal in less than 2000 words could mark a watershed in the history of law. Like *Brown*, it could become a seminal case that ushers in a new era in the way judges interact with the people who solicit their opinions. Clear, concise, and comprehensible judgments from the courts could be another silver lining of Covid-19. In the same way the virus has spawned new vaccines and technologies, it could be the catalyst for replacing the "artificial reason" of the law with plain, old-fashioned common sense.¹⁵ Resolving disputes and disagreements on an overarching principle of balance and moderation would change the whole tone of social and political conversation. It would put an end to our fixation on ourselves and our rights. When proportionality is recognized as the ultimate rule of law, arguments about definitions and the boundaries of rights add nothing to the analysis. Instead of everyone clamoring for their rights, balancing would ensure fulfilling our duty not to harm others would become everyone's first priority. Doing our duty before demanding our rights would become the new normal.

Sadly, we live in a world in which there is next to no chance Utopian judgments will be written in the near future. It is no more likely that American and Canadian judges will start writing their opinions so that they will be read by members of the general public than Xi Jinping will welcome protests in Tiananmen Square. Neither party, court nor Communist, has shown any inclination to rethink official orthodoxy. More would be disappointed. His dedication to the law was unqualified. He relinquished his position as the King's Chancellor and ultimately gave his life for the law. Lawmakers and legal elites, who are unwilling to allow meaningful engagement by the public and insist on retaining exclusive control over the formulation and administration of the law, fall far short of his example.

14 See World Health Organization, "Vaccine efficacy, effectiveness and protection", (14 July 2021), online: <www.who.int/news-room/feature-stories/detail/vaccine-efficacy-effectiveness-and-protection> [perma.cc/FP5B-FLLF].

15 See *Prohibitions del Roy*, [1607] 12 Co Rep 63, 77 ER 1342.