

COVID-19 Lockdowns Are Unhelpful, Inhumane and Unconstitutional

by Jonathan D. Lubin

As early as June, 2020, CNBC's Jim Cramer was calling the lockdown recession "one of the greatest wealth transfers in history," and it was not in the right direction. As recently as mid-February, some economists were saying the number of jobs lost amid the lockdowns was nearly 10 million. At the time of writing, Congress is debating a \$2 trillion stimulus package, only two months after the government approved a nearly \$1 trillion stimulus package, and less than a year after a package that pumped \$2 trillion into the economy from government coffers, and billions of dollars in direct loans from the federal reserve. Based upon the sheer amount of money being pumped into the economy, inflation is inevitable. Gas prices, for example, are on the rise and are slated to continue their meteoric rise through the summer.

The economy is in serious trouble, despite a strong stock market. The arrival of COVID-19 in America, and the resulting lockdowns, were a massive boon to the wealthiest among us, and a terror to nearly everyone else. Mental health experts have warned the mental health implications of extended lockdowns are likely to be catastrophic. The CDC, in late 2020, warned suicidal ideation and substance abuse rates were "considerably elevated," especially among younger adults and racial and ethnic minorities.

There is, therefore, an obvious question that powerful elites in the corporate media and the political class have strenuously avoided: is all of this necessary?

The entire country locked down in one form or another in March, 2020. Most of the country remains in some form of lockdown. Florida stands out as a fascinating exception. As Justice Louis Brandeis wrote, in *New State Ice Co v. Liebmann*, 285 U.S. 262 (1932), "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." This notion, referred to as "laboratories of democracy" was on full display amid the chaos of lockdowns across the country.

By June of last year, it was clear to many the worst of what turned out to be one of two waves of COVID-19 was largely behind us. As states began to open, experts warned of an inevitable second wave. Somehow, the inevitability of that second wave was lost on those who saw rises in COVID-19 cases last fall as a failure on the part of states that had liberalized their lockdowns in the face of falling cases. Florida, in particular, earned the ire of some of the country's biggest lockdown proponents. Dr. Anthony Fauci, for example, claimed in September that Florida was "asking for trouble" by fully reopening restaurants and bars to those who wished to get out of their homes and, heaven help us, spend time with friends like normal human beings.

At the same time, Dr. Fauci lauded the lockdown efforts of Gov. Andrew Cuomo of New York, at one point joking around at a joint press conference with Gov. Cuomo about which of the two would be Al Pacino and which would be Robert De Niro. Cuomo is now famous in the Jewish community for his and New York Mayor Bill de Blasio's targeting of Brooklyn's Jewish communities for special treatment during parts of his state's lockdowns. In one such instance, New York police officers dispersed an outdoor Jewish funeral in April on the same day as New York residents elsewhere congregated openly to watch a flyover of the Thunderbirds and Blue Angels. In another such instance, Cuomo used a photo from a 2006 Chassidic gathering as evidence of Jewish recalcitrance.

Today, New York state's deaths per capita rate is the second worst in the country, behind only New Jersey. Cuomo now finds himself under fire for his policy of forcing COVID-19 patients into nursing homes. New York state's deaths per capita numbers dwarf Florida's. Florida leads both California and New York in population over 65, the most at-risk population for COVID-19. But somehow, Florida has escaped many of the negative repercussions of COVID-19 as compared to states that locked down significantly more.

This very short piece is obviously not the place for a statistical or epidemiological analysis of the effectiveness of lockdowns. Others, far more qualified than this writer, have already tackled that question. For example, an early study in *The Lancet*, entitled "A Country Level Analysis Measuring the Impact of Government Actions, Country Preparedness and

Socioeconomic Factors on COVID-19 Mortality and Related Health Outcomes” found lockdown measures were “not associated with statistically significant reductions in the number of critical cases or overall mortality.” More recently, a European Journal of Clinical Investigation piece entitled “Assessing mandatory stay-at-home and business closure effects on the spread of COVID-19” found “there is no evidence that [lockdowns] contributed substantially to bending the curve of new cases,” including in the United States.

Meanwhile, CNN has described the number of people leaving locked down states like New York and California as an “exodus.” An August NY Post article called New York City “dead forever” in large part due to the effects of the lockdown policies on what was once a center of culture and metropolitan life. Closer to home, Illinois (and Chicago in particular) continue to lose people to greener pastures at an even greater rate than usual.

The fact that Illinois, New York, and California (among many others) have suffered under draconian policies while Florida has done comparably better should create an obvious question: was all of this necessary? The jury may be out, but the evidence points more and more to an answer in the negative. A free people should have the option to live their lives as they see fit, incurring whatever risks leaving one’s house, going to a bar, or visiting a museum, may involve. A nation of sheep wait in their homes to be told when it is safe to leave (and die at the same or greater rates than those who live in freedom, as Florida’s experiment has demonstrated).

As lawyers, we have another question to answer: whether holding a state or a nation’s natural and constitutional rights in abeyance indefinitely is consistent with the constitution or our national values. It may not be more important or more urgent than the question about the efficacy of lockdowns, but it is important, nonetheless. Anyone who lived through 9/11, and who remembers life before Al Qaeda changed New York’s skyline forever, can attest to the well-known aphorism: there is nothing so permanent as a temporary government program. The power that governments appropriated for themselves after 9/11, ostensibly as a momentary security measure, they have yet to relinquish. As those who have been placed in charge of (hopefully) easing the lockdowns move the goalposts again and again (on February 21, 2021, Dr. Fauci told CNN’s Dana Bash that Americans might reach “a significant degree of normality” by the end of 2021, but then refused to define “normality”), we stand again to lose more of our freedoms not temporarily, but permanently.

And for what?! Courts that have taken up the question of appropriateness of holding fundamental rights, like the right to one’s profession, the right to a jury, and the right to assemble, in total abeyance always come back to a single Supreme Court decision: *Jacobson v. Mass.*, 197 US 11 (1905). See, for example, *In re Abbott*, 954 F.3d 772 (5 Cir., 2020). In that decision, an appeals court found “under the pressure of great dangers, constitutional rights may be reasonably restricted as the safety of the general public may demand,” including the “right to peaceably assemble, to publicly worship, to travel, and even to leave one’s home,” *Id.* at 778 citing *Jacobson*. Notably, *Jacobson*, which found the state could force individuals to be vaccinated, even against their will, was decided in 1905. Twenty-two years after that, the Supreme Court approved of forced sterilization – one of the more offensive elements America’s experimentation with eugenics – in *Buck v. Bell*, 274 US 200 (1927). Just less than forty years after *Jacobson*, the Supreme Court approved of locking Japanese Americans in concentration camps due to their national lineage in *Korematsu v. United States*, 323 US 214 (1944). *Jacobson* belongs in a category with those stains on our history, not in appellate decisions being written in the modern day.

The legal precedent of *Jacobson* belongs to a (thankfully) bygone era. In January, 2020, nearly anyone in America, if asked whether it was high time to overturn *Jacobson v. Mass.*, after being told the decision’s central holding, would have said “hell yes.” It belongs to a time when inhumane treatment at the hands of government was socially and legally acceptable. To the extent that we believe ourselves to be better than that, it is high time to revisit that precedent and overturn it. Individual natural rights should not be held in abeyance over perceived communal threats to something as vague as public health. The COVID-19 lockdowns are not evidence against that obvious conclusion. More and more, they are evidence in its favor.

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