The Center for Law & the Public's Health
at Georgetown & Johns Hopkins Universities
CDC Collaborating Center Promoting Health through Law

CENTER INSIGHTS

Volume 2, Issue 2
Spring 2005

INSIDE THIS ISSUE:

THE 100TH ANNIVERSARY OF JACOBSON V. MASSACHUSETTS: THE ONGOING RELEVANCE OF A PUBLIC HEALTH CLASSIC

LAWRENCE O. GOSTIN AND LANCE A. GABLE

Jacobson v. Massachusetts (1905) remains one of the most famous and most consequential judicial decisions in public health a century after it was decided by the U.S. Supreme Court. *Jacobson*'s ongoing importance rests on its strong deference to the use of state police powers to regulate for the protection of public's health as well as its framework for the protection of individual liberties. Justice Harlan's opinion carefully reconciles the tension between individual interests in bodily integrity with collective interests in health and safety. Indeed, the basic tension between individual and collective interests that pervades *Jacobson* persists in our modern public health discourse and underscores the enduring relevance of the decision.

In upholding the state of Massachusetts' compulsory vaccination regulations, the Supreme Court relied on social compact theory—the idea that individual liberties may be subject to restraint for the benefit of the common good. The decision stated a clear deference to state scientific and legislative findings related to public health measures and demonstrated a strong federalist tendency, asserting the primacy of state over federal authority related to public health. A primary legacy of *Jacobson* is its defense of social welfare philosophy and police power regulation. However, Justice Harlan also invoked the theory of limited government to establish a floor of constitutional protection consisting of necessity, reasonable means, proportionality, and harm avoidance. Under this precedent, courts must defer to state laws so long as they respect these four standards. These standards, while permissive of public health intervention, nevertheless require a deliberative governmental process to safeguard liberty.

Evaluating *Jacobson* at its centennial, in light of the evolution of Supreme Court jurisprudence over the past century, the question arises, would *Jacobson* be decided the same way if it were presented to the Court today? The answer is unquestionably "yes," although the style and reasoning would differ. While the Supreme Court has recognized a constitutionally protected "liberty interest" in refusing unwanted medical treatment, it has not applied heightened scrutiny to bodily integrity; instead, the Court balances a person's liberty against state interests and usually sides with the state. In the 100 years since *Jacobson*, the case has been cited in 69 Supreme Court cases—most in support of the police power and a minority in support of individual freedom. Courts have upheld compulsory vaccination in particular on numerous occasions.

Jacobson continues to inform our understanding of the tensions between individual and common interests while providing the foundation for significant legal precedents in public health, police power regulation, state sovereignty, and individual liberties.

This article is derived from a longer discussion of the case, Lawrence O. Gostin, *Jacobson v. Massachusetts at 100 Years: Police Power and Civil Liberties in Tension*, 95 American Journal of Public Health 576 (2005).

"IT MAKES LITTLE SENSE TO EXPECT INDIVIDUALS TO BEHAVE DIFFERENTLY FROM THEIR PEERS; IT IS MORE APPROPRIATE TO SEEK A GENERAL CHANGE IN BEHAVIOURAL NORMS AND IN THE CIRCUMSTANCES WHICH FACILITATE THEIR ADOPTION."
- GEOFFREY ROSE, *THE STRATEGY OF PREVENTIVE MEDICINE* (1992).

Law and Policy to Reduce Risks Associated with Older Drivers

Jon S. Vernick, Stephen P. Teret, and Julie Samia Mair

Since the mid-1960s, the United States has experienced a dramatic decline in the rate of fatal motor vehicle crashes. In fact, per vehicle mile traveled, there were more than 70% fewer fatal crashes in 2003 than in 1966. Law – including legislation, regulation, and litigation – has made an important contribution to this public health success story. There remain, however, more than 40,000 deaths annually from motor vehicle crashes. There is clearly more that the law can do.

As the demographics of the U.S. population change in the coming decades, issues associated with older drivers are likely to become increasingly prominent. With support from the Centers for Disease Control and Prevention to the Johns Hopkins Center for Injury Research and Policy, *Center* colleagues have begun a two-year project to consider innovative ways that the law can be used to address older driver safety.

The project has two main components. To identify the broadest set of possible interventions, we are systematically collecting laws and policies regarding older drivers from other developed countries. We will organize and analyze these laws and policies, including existing evaluations of their effectiveness, to determine which (if any) might be applicable to the United States. In addition, we will specifically consider one policy that may be especially promising.

Several evaluations have suggested that gradually phasing in driving privileges for new drivers (so-called graduated driver licensing) is associated with fewer fatal crashes among the high risk group of teen drivers. We will examine the legal, ethical, and policy issues associated with a policy that might gradually reduce certain driving privileges as an older driver becomes less able to operate a vehicle safely.

For any new policy, we recognize the need to balance important concerns regarding the mobility and independence of older Americans with the safety of both older drivers and those they encounter on the road. We hope that this project will provide policy-makers with new options to further improve the safety of America's roads.

There remain more than 40,000 deaths annually from motor vehicle crashes.

Defining the Right to Health: The Road Ahead

Lesley Stone

Since at least the Universal Declaration of Human Rights in 1948, the notion that every person has the right to health has been widely recognized by the world community. Yet, as discussed at the recent conference, *Lessons Learned from Rights Based Approaches to Health* at the Institute of Human Rights at Emory University, little has been done to ensure the consistent realization of the right for many populations.

The conference described many examples of the ways in which the right to health has not been fulfilled. Mary Robinson, former U.N. High Commissioner for Human Rights, noted that while the tragic tsunami of 2004 claimed more than 200,000 lives, the "silent tsunamis" of malnutrition, AIDS, malaria, and other infectious diseases kill even more each month. In his keynote address, President Jimmy Carter noted that the biggest hurdle to health is the growing chasm between the wealthy nations and the poor. In the midst of such alarming truths, one may question whether the human rights framework can add to the quest for better public health.

Yet, the conference also explored this question. The work of Paul Hunt, the U.N. Special Rapporteur on the right to health, is exemplary. Appointing an energetic Special Rapporteur on the right to health has increased the visibility of the right, and therefore the likelihood that governments will take it seriously when formulating policy.

Several other conference participants presented work on monitoring mechanisms designed to measure the implementation of the right to health in a nation using various types of indicators. A concept of the right to health that includes a mechanism to systematically analyze its fulfillment will further increase government accountability. While the right to health remains more difficult to characterize than some civil and political rights jurists have spent more time considering, great strides are being made toward its definition and public health will benefit.

PUBLICATIONS

Scott Burris

Scott Burris et al., *Shanghai Plans Response to AIDS*, 365 LANCET 1524 (2005).

Scott Burris et al., *Doing A Lot (But Not Enough) With a Little: An Empirical Picture of the EEOC's Charge Processing System*, *in* EEOC LITIGATION AND CHARGE RESOLUTION (Donald Livingston, ed.) (BNA 2005).

Lawrence O. Gostin

Lawrence O. Gostin, Judith Areen, Patricia A. King, Steven Goldberg, Peter Jacobson, LAW, SCIENCE AND MEDICINE 3rd ed. (New York: Foundation Press, 2005).

Lawrence O. Gostin, *Fast and Supersized: Is the Answer Diet by Fiat?*, 35 HASTINGS CENTER REPORT 11 (March-April 2005).

Lawrence O. Gostin, *Law and the Public's Health*, 21 ISSUES IN SCIENCE AND TECHNOLOGY 71 (Spring 2005).

Lawrence O. Gostin, *Ethics, the Constitution, and the Dying Process: The Case of Theresa Marie Schiavo,* 293 JAMA 2403 (2005).

James G. Hodge, Jr.

James G. Hodge, Jr., *An Enhanced Approach to Distinguishing Public Health Practice and Human Subjects Research*, 33 J.L. MED. & ETHICS 125 (2005).

James G. Hodge, Jr. and Lawrence O. Gostin, *Improving Education in Public Health Law Through the Turning Point Model State Public Health Act*, 6 TRANSFORMATIONS 8 (2005).

James G. Hodge, Jr. and Lawrence O. Gostin, *Confidentiality, in* THE OXFORD TEXTBOOK OF CLINICAL RESEARCH ETHICS (Ezekiel Emanuel, ed.) (London: Oxford University Press, 2005) (forthcoming).

James G. Hodge, Jr., Lance A. Gable, Jon S. Vernick, and Stephen P. Teret, *Emergency System for Advanced Registration of Volunteer Health Professionals (ESAR-VHP): Legal and Regulatory Issues and Solutions, Health Resources and Services Administration (HRSA) (*Washington, DC 2005), available at http://www.publichealthlaw.net/Research/Affprojects.htm.

James G. Hodge, Jr. and Jessica O'Connell, *West Nile Virus: Legal Responses That Further Environmental Health,* J.ENVIRONMENTAL HEALTH (July 2005) (forthcoming).

Lesley Stone

Lesley Stone, Lawrence O. Gostin, and James G. Hodge, Jr., *The Model State Emergency Health Powers Act: A Tool for Public Health Preparedness, IN* CONTROVERSIES IN SCIENCE AND TECHNOLOGY: FROM MAIZE TO MENOPAUSE (Daniel Lee Kleinman et al., eds.) (University of Wisconsin Press 2005).

Jon Vernick

Nancy L. Lewin, Jon S. Vernick, Peter L. Beilenson, Julie S. Mair, Melisa Lindamood, Stephen P. Teret, and Daniel W. Webster, *The Baltimore Youth Ammunition Initiative: A Model Application of Local Public Health Authority in Preventing Gun Violence.,* 95 AM. J. PUBLIC HEALTH 762 (May 2005).

ZONING AND OBESITY

JULIE SAMIA MAIR AND STEPHEN P. TERET

Obesity is a significant public health problem in the United States in both children and adults. Nearly two-thirds of U.S. adults ages 20 or older are either overweight or obese. Since the 1970's, the prevalence of obesity in children ages 2-5 and adolescents ages 12-19 has more than doubled, and in children ages 6-11, it has more than tripled. It is estimated that approximately 9 million U.S. children over 6 years old are obese. Obesity is a risk factor for many chronic conditions such as diabetes, stroke, heart disease, high blood pressure, and certain cancers. In adults alone, overweight and obesity cost between $98 billion and $129 billion each year in national health care expenditures.

In very simple terms, obesity is caused by consuming too many calories and expending too few. Laws that encourage exercise by, for example, creating biking paths or green space, can alter the energy balance between the consumption and expenditure of calories. Likewise, the law can be used to encourage healthy eating habits altering the energy balance as well.

With support from the Centers for Disease Control and Prevention, *Center* colleagues are working on a monograph and a City Planner's Guide examining how zoning laws can encourage the availability of nutritious food and limit the proliferation of food that can be harmful. We ask and attempt to answer the following three questions:

- What is the supporting scientific evidence for zoning laws that address fast food outlets?
- Have such zoning laws been enacted by municipalities and what are the bases of such laws?
- Have the courts upheld zoning laws that address fast food outlets?

The more lengthy monograph also discusses zoning and its traditional focus on protecting the public's health. The research suggests that zoning can become an effective tool for addressing obesity in the United States.

This publication is prepared by the *Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities*. Issues are available at www.publichealthlaw.net. The contributing authors present their individual views in *Center Insights* articles, which do not necessarily reflect the views of the programs or organizations with which the authors are affiliated.

Center Collaborates with CSTE To Prepare New Report on the Distinctions Between Public Health Practice and Research

James G. Hodge, Jr.

Center colleagues collaborated with the Council of State and Territorial Epidemiologists (CSTE) on the comprehensive publication, *Public Health Practice vs. Research: A Report for Public Health Practitioners Including Cases and Guidance for Making Distinctions*. After months of research and consensus building with advisors led by CSTE's John Middaugh, MD, the report was drafted by the *Center's* Executive Director, James G. Hodge, Jr., with Lawrence O. Gostin, Director, and members of CSTE's committee (including Scott Burris, Associate Director). The report provides guidance on the distinctions between public health practice and human subjects research for public health officials, researchers, institutional review board (IRB) members, and their staffs.

Drawing distinctions between public health practice and human subjects research is complicated by numerous approaches based in law, ethics, and policy that are used in governmental, private sector, and scholarly settings. Collectively, these approaches tend to muddle distinctions. Clearer guidance may help ensure IRB reviews are performed only when needed, limit mistreatment of human subjects or privacy infringements, and reduce burdens on IRBs and public health practitioners.

The report draws on existing research, concepts, criteria, and cases where public health practitioners and IRBs attempt to make these critical distinctions. It examines legal definitions and frameworks underlying human subjects research and public health practice, including (1) constitutional and other legal principles authorizing public health practice, (2) human subjects research requirements under the federal Common Rule, and (3) the HIPAA Privacy Rule.

A two-stage framework (including a checklist) is proposed for classifying these activities. The first stage presents key assumptions and foundations of public health practice and research to distinguish activities in relatively easy cases. A second stage introduces enhanced principles of guidance for more complicated scenarios.

The report is available online at http://www.cste.org/pdffiles/newpdffiles/CSTEPHResRptHodgeFinal.5.24.04.pdf). Additional analysis by James Hodge is available in the Journal of Law, Medicine, and Ethics (see Publications, page 3).

The WHA approved the revised IHR at its annual meeting on May 23, 2005.

Update on the Revision of the International Health Regulations

David P. Fidler

The Secretariat of the World Health Organization (WHO) recently presented to the World Health Assembly (WHA) for adoption a final text of the revised International Health Regulations (IHR), completed by the Intergovernmental Working Group on May 14, 2005. This development marks a historic milestone in the IHR revision process, which began in 1995. The WHA approved the revised IHR on May 23, 2005, during its annual meeting.

The revised IHR represent a radical change from the existing IHR, which were first adopted in 1951, and from the international legal approach to infectious disease control that has prevailed since the mid-19th century.

The revised IHR create an international legal regime for identifying and responding to public health emergencies of international concern, which includes serious risks caused by communicable and non-communicable disease agents. In addition to expanding the scope of the regime, the revised IHR transform the nature of notification requirements to the WHO, empower the WHO to utilize non-governmental sources of information, and grant the WHO the authority to issue recommendations to guide responses to public health emergencies of international concern.

The final text of the revised IHR can be found at http://www.who.int/gb/ebwha/pdf_files/WHA58/A58_4-en.pdf. A press release regarding their adoption is available at http://www.who.int/mediacentre/news/releases/2005/pr_wha03/en/index.html. Future *Center* activities will address the implications of the adopted IHR for the United States and the international community.

We're On the Web
www.publichealthlaw.net

CENTER ANNOUNCEMENTS

Center Director **Lawrence Gostin** has been named Associate Dean (Research and Academic Programs) with responsibility for faculty scholarship, academic programs, and innovation at Georgetown University Law Center (effective July 1, 2005).

Lesley Stone has been selected as a Zuckerman Fellow in the Master of Public Administration program at Harvard University's Kennedy School of Government for 2005-2006.

Lawrence Gostin has been named to chair the Institute of Medicine, Committee on Ethical Considerations for Revisions to DHHS Regulations for Protection of Prisoners Involved in Research. January 2005 – March 2006.

The Institute of Medicine Committee on Genomics and the Public's Health in the 21st Century, chaired by **Lawrence Gostin**, has issued its report. The report can be found at http://www.iom.edu/report.asp?id=26117.

The *Center* is co-sponsoring the conference event, "Preparing for the Inevitable: Bioterrorism and Emerging Infectious Diseases," on Capitol Hill on June 9, 2005. Featured speakers include Senators Clinton and Burr, and Representative Cox. **James Hodge**, *Center* Executive Director, will participate on a panel on preparedness and response.

SPEAKING ENGAGEMENTS (SELECT)

James Hodge presented "HIPAA Privacy Rule and the Public's Health," for CDC's Public Health Informatics Lecture on February 25, 2005.

James Hodge lectured on "Neuroscience and the Law: Explorations in Criminal Culpability," for the Program in Ethics of Brain Sciences, Johns Hopkins Berman Bioethics Institute on April 13, 2005.

Lesley Stone presented a five hour workshop on Ethics and Human Rights at the Institute of Human Rights at Emory University's conference, Lessons Learned from Human Rights Based Approaches to Health on April 16, 2005.

James Hodge spoke on "Genetics, Public Health and Privacy," at the Big Brother in the Information Age Symposium at Harvard Law School on April 21, 2005.

A consortium of Universities and the Ministry of Health in New Zealand is launching a new initiative on public health law. The consortium members plan to develop course work on public health law, form an alliance in the Pacific Region, and reform New Zealand's Public Health Act. **Lawrence Gostin** gave a lecture tour and met with the Minister in April to kick off the national program.

Lectures included:

University of Auckland and Ministry of Health, "Contemporary Issues in Public Health Law," Keynote Address, April 21, 2005.

New Zealand Centre for Public Law, Victoria

University of Wellington, "Biosecurity: From SARS and Influenza to Bioterrorism," Public Lecture, April 26, 2005.

University of Otago, "Genomics in Public Health," Dunedin, April 28, 2005.

POSTION ANNOUNCEMENT

Georgetown University Law Center, and the *Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities*, are seeking qualified candidates for a fellowship in bioterrorism law and policy and public health law. Full-time candidates will be based at Georgetown University Law Center and work with faculty and students at Georgetown and Johns Hopkins on a two-year project. The project involves analyzing the federal framework for response to a high consequence public health event. Candidates must have their J.D. degree, and exceptional academic credentials, including publication and strong research interests and knowledge or experience in public health law and ethics. Candidates with an M.P.H. degree or public health experience may be preferred.

Application by July 15, 2005, should be made by letter, with accompanying resume, writing sample, official law school transcript, and public health school transcript (if applicable). For further information or to apply, please write, call or email: Professor Lawrence Gostin, Director, *Center for Law and the Public's Health*, Georgetown University Law Center, 600 New Jersey Ave, NW, Washington, DC 20001; (202) 662-9373; gostin@law.georgetown.edu.

Editor
Lesley Stone

Assistant Editor
Stephen Barbour

Subscription Information:

www.publichealthlaw.net