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COMMENTARY

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The Conflict of Public Health Law and Civil Liberties: The Role of Research Data and First Amendment Law

As Coronavirus disease 2019 (COVID-19) swept across the United States, public health authorities attempted to contain the spread of the disease by various mandates and quarantine restrictions. These recommendations frequently conflicted with ordinary and expected liberties we have all come to accept as part of an open and free society. Questions and legal challenges have arisen over the last year, some of which still need to be answered by both State and Federal Constitutional Law. While the legal standards used to address these conflicts are well-established, it remains to be seen if a new balance between individual rights and public safety will be struck.

THE HISTORY OF PUBLIC HEALTH LAW

The States have the obligation and legal authority to maintain public health and safety. However, a state cannot make a law that violates or supersedes the United States Constitution. One of the first public health cases that was decided in Federal Court involved vaccination for bubonic plague in San Francisco (Wong Wai v. Williamson 103F.1 [N.D. Cal 1900]). The court recognized the authority of the city to make and enforce regulations for the public health, but found the limitation of the ordinance to Chinese residents in a certain part of the San Francisco was flawed, because a Chinese person was no more susceptible to bubonic plague than any other race. The available health data did not establish a unique vulnerability that would justify the ordinance. Some authorities have treated this as an early application of the 14th Amendment, but it turned on the findings of infectivity among groups.

Jacobson v. Massachusetts, Supreme Court of the United States 1905 (197 U.S 11, 25 S. Ct, 358) is the most-often cited case establishing the authority and limitations of public health agencies; it was decided over 100 years ago. Mr. Jacobson opposed receiving a vaccination against smallpox, claiming he had a basic right "to care for what is done to his body." He maintained that Massachusetts was, therefore, violating his personal liberty. The Court ruled that a liberty interest in the Constitution was not absolute but rather "...liberty regulated by law." The Massachusetts legislature had used selected research data at hand to ensure the public health, and to control the smallpox pandemic. The Court found that "...the legislature...was not unaware of...opposing theories [suggesting some hazards of the vaccine, but] was compelled, of necessity, to choose between them."[1-3]

CURRENT STATE AND FEDERAL PUBLIC HEALTH LAW STATUTES

Most states have statutes empowering state public health law agencies, statutes that have developed slowly over the past century since *Jacobson v. Massachusetts*. The role of medical and epidemiological evidence has been used in much the same way as the Court did in 1905, leaving the decision of which evidence to apply to the Legislature of the individual state. Most of the state statutory law changed little over the last century, other than some modernization in recent years. However, the fear of bioterrorism, which became more evident after the attacks of September 11, 2001, drove reform.

In response, The Model State Emergency Health Powers Act was written in the early months of 2002, and has been partially adopted by several states since that time.[4,5] The Public Health Service Act and The Stafford Act were enacted in 2018 by the Federal government with the expectation that the powers in the 2 Acts were important but would not be necessary in the near future.

However, merely 2 years later, in response to the rapid spread of the COVID-19 virus from China, the President declared a national emergency in March of 2020, which activated the Stafford Act. The Public Health Service Act was used to limit international travel, and to authorize the

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Federal Emergency Management Agency to coordinate efforts to curb the pandemic. The Federal laws surrounding the efforts to limit the effect of the COVID-19 virus were complex and had not been previously tested.

The various states, in an attempt to use the best evidence available to prevent the spread of COVID-19, adopted a myriad of directives and mandates, often in coordination with the advice of the CDC. Over this last year, we know some of those efforts were successful and some were not. It is an understatement to say that the international response has not been uniform, nor has it always been rational, based on the known research data of the COVID virus infectivity and risk. Hopefully, as more time passes, the science and not the politics will prevail.[6]

"When Will the Chaos End?" was the question asked by Alpert.[7] If history is repeated, and the Spanish Flu epidemic of 1918 and the Black Death pandemic of the 13th and 14th centuries are examples, the COVID-19 pandemic will end when there is an effective and safe vaccine that is used by most people.[8] Until then, we are faced with both inexact and erroneous data on how to best control the spread of COVID.

RECENT SUPREME COURT DECISIONS

The Supreme Court has handed down 2 important decisions concerning First Amendment rights in conflict with public health law. Both decisions turn on the currently *imprecise* scientific knowledge of the number of individuals that can safely be in the same room at one time, and the types of group activity that might be more likely to spread the COVID-19 virus.[9,10] Both cases involved restrictions limiting the number of individuals who could self-assemble.

The most recent case involved a pastor and his congregation who attempted to conduct an in-home Bible study and prayer service. While the State regulation at issue did not distinguish between the purpose of the group or the place of the gathering, the restriction necessarily limited a religious activity to a small number of worshipers. Therefore, the Freedom of Exercise clause under the First Amendment was triggered. That, in turn, required the application of what is legally called the Strict Review Standard. In order to satisfy the Strict Review Standard, the State must show that the regulation was narrowly crafted to protect the public and to apply to all like activities, and not just to other similar activities. Importantly, this particular regulation exempted other public gatherings, such as hair salons, retail stores, and movie theaters from the same limitations. To show that the regulation had a permitted application under the First Amendment, the State had to prove "that the religious exercise at issue [was] more dangerous than those [allowed] activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious activities too." In order to justify singling out the church service at issue, the State had to show that a home-based religious activity was more dangerous than the allowed secular activities. Because the State could not do so, the regulation was unevenly applied to impair the church service, and was thus struck down. The Court allowed the State to adopt the scientific data it would use for the prohibition, even if it meant ignoring any opposing research data, but the application of the restriction used had to be consistent. Compared with *Jacobson,* the legal standard for the use of scientific data in public health law has not changed in over 100 years.

The COVID-19 pandemic has changed our view of personal and public interactions, what is safe and what is a risk. It will remain to be seen if we regain our sense of openness and camaraderie. There are a large number of state and federal cases pending that may set the public health boundaries for the future.

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