

Jacobson v. Massachusetts: Alternate Perspectives in 2005

Introduction

Richard A. Goodman, MD, JD, MPH

The last word on the panel before questions will be from Cliff Rees from New Mexico.

Public Health Attorney's Perspective

Clifford Rees, JD

Thanks Rick. My role is not to give you a learned discussion about the meanings of *Jacobson* because I think, number one, I am probably not qualified to top any you have already heard, but to speak as a public health lawyer for 23 years in the state public health department, about how I have actually used *Jacobson* in a couple of different settings that may or may not be relevant to what you do if you are a public health lawyer. But this is what comes up for me and this is what I would like to share with you. So, it will be personal in nature and not too personal, and there will be a little confession in here too, which you do not hear from lawyers very often either.

First of all, I did not study *Jacobson* in law school. I do not remember it being in my constitutional law class. I do not remember at my first day at the state health department in 1981, someone handing me a copy of *Jacobson* and saying, "Cliff, you got to read this and really understand this because you are going to be using this a lot as you engage in the practice of public health law." I have no recollection of it at all until fairly recently actually, and I will share with you what that is.

You know what, the great things about being a public health lawyer in a state health department and maybe one of the downsides, depending on your point view, is that you do not get to pick your clients and you do not get to pick your issues, but obviously, I stayed for 23 years so I found it worthwhile to find out what the next day would bring.

In summer of 2000, I was called in to the Secretary of Health's office and was told that I would be the point person for then Governor Johnson's public health drug policy reform package. Our now former governor had announced that he was against the war on drugs, wanted public policy changes in the way the state of New Mexico dealt with drug policy, and that I would be the one that would be drafting the legislation and testifying in the 2001 legislature about a variety of bills that the Governor's Blue Ribbon Commission had recommended. One of those bills was New Mexico's version of the Compassionate Use Medical Cannabis Act. I did not know a whole lot about it. I learned a lot fast, and I drafted a bill, and there I was in the 2001 legislative session testifying in favor of the bill. Now, as many of you know from the Raich case just last week and the previous case four years ago, the Oakland Cannabis Buyer's Club case, there are those who argued that state medical cannabis laws violate federal law, that they are in conflict with the Federal Control Substances Act, and I knew that I was going to need to counter that argument, and it was around that time that I came across the *Jacobson* case. I remember reading it in an article. I cannot say that I originally read the case. I read it in an article, and it said something that I thought "this is great to put this before a state legislature" because I know that the members of our legislature, who are by the way, citizen legislators ~ New Mexico is one of three states that does not pay anything, any salary, to our legislators. We only pay per diem and mileage when they

are doing legislative business ~ that they will like this hopefully, and what it was basically was a state's right sovereignty argument, that since 1905, Mr. Chairman, the US Supreme Court has recognized that the states play the pre-eminent role in determining public health law and protecting the public health of the citizens of its states, so the state has the option to adopt this piece of legislation should you choose to vote for it.

There were some skeptics, I will have to admit. The bill almost passed, did not quite pass, but it was a use of *Jacobson* in a very broad way in terms of the pre-eminent power of the states to determine how it is going to protect the public in terms of using its police powers. Of course, times change, governors change, and priorities change.

Fast forward to 2002, 9/11 has happened. I was called into the Secretary's office and was told that I was now the lead attorney for the Health Department on emergency preparedness issues. I was not totally unfamiliar with this because I had represented during the course of my career the Office of Epidemiology, the Infectious Diseases Bureau, the Emergency Medical Services Bureau, and I had somewhat of a background to the extent that there was any law in New Mexico about emergency preparedness law, and I was assigned to a task which was a wonderful process, I do not really have time to go into in detail, of representing the Health Department in a series of public meetings around the state of New Mexico, around emergency preparedness issues, gaps in the law, and how we could draft legislation that would protect the interests of the public but also allow the State Health Department to exercise its police power should a public health emergency arise without infringing on the police powers. Part of the process was eight public meetings around the state. Around the seventh meeting, I was looking for some way to spice up the subject a little bit, and there was a meeting at the University of New Mexico at Albuquerque in November 2002, and I decided that I would use *Jacobson* as a teaching tool. I am not a professor of law, but I think you all know in terms of public health lawyers ~ either that you work with or if you are one ~ we are teachers. We need to educate not only our clients but the public.

I used *Jacobson* and I asked two questions. First of all, I explained the facts. Most people of course had never heard of it and did not know what it is about, and I asked two questions. First question was, imagine that you are a Supreme Court justice in 1904 and 1905, you have just heard the facts in this case from both sides, how would you vote if you were a Supreme Court justice? It was about a fifty-fifty split. Before I told them, answered the question that was asked earlier - what was the actual vote, I then asked how do you think the Supreme Court actually voted? People really were not sure. They really did not know and were surprised when I told them that it was a 7 to 2 vote. It was a good teaching tool. Now, again, I did not get into the level of detail that we have talked about today, but people understood it. They understood what it was about in a very general way.

The third and final example, was something I was reminded of last week. I was talking to a former client of mine who is now the Director of the Institute for Public Health at the University of New Mexico. We were talking about getting public health law more into the curriculum for the Masters of Public Health Program in New Mexico, which is done through the School of Medicine, and we were talking about police powers of the state and *Jacobson* and what I was going to be doing today, and he said "Cliff, you know that reminds me of something. When I became the Public Health Division Director at the Health Department while you were there, I looked at the Public Health Act, our day-to-day powers that the State Health Department uses to protect the public, and I was

amazed at how much power I had as the Public Health Division Director. I could not believe it.” I just pointed out to him that many of those powers are word for word from the original 1919 New Mexico Law that created the first State Health Department in New Mexico, seven years after statehood, and of course, in the immediate aftermath of the Spanish flu. “... And do you remember, I was about to go to the Secretary’s office with a proposal based on my incredible powers as a the Public Health Division Director, and the proposal was that it demonstrate scientifically that cigarettes are a public health hazard to the children of the state of New Mexico and all other children, and I want to draft a public order that will pull all tobacco products off the shelves of every retail store in New Mexico.” (Audience Applause) Well, here is where your public health lawyer hopefully will step in, and I said something along the lines of “Well, Bill let’s talk about this. Before we do this, let’s talk about this.” I was not waving a copy of *Jacobson v. Massachusetts* in his face, but I think that is part of the legacy of *Jacobson v. Massachusetts*, perhaps the easier legacy to remember, to take away, is to remember that the public health police powers does have its limits, like it or not, and that we as public health lawyers need to be prepared to explain that to our clients, and then, of course, fashion a way that we can do other things that may reach that goal ultimately but not put us in a situation where we are going to be liable legally.

There were a couple of other points that I was going to make, but I see I have about one minute, so let me just raise them very, very quickly, hopefully as a segue into the Q&A. Some have been touched upon, but as a 21st century public health lawyer, there were couple of things that struck me rereading *Jacobson* and talking to some of the folks on the panel before today.

The freedom of religion argument. He was minister; sort of summarily dismissed in the case. Of course, we know that the First Amendment Law has evolved greatly since 1905, but what if this case was being decided today and if *Jacobson* had been able to put on proof about more obviously, deeply held religious beliefs. Two, the medical necessity defense that was raised in the first medical cannabis case that the Supreme Court heard in 2001, basically, “I had to break the law to save my life and to protect my health.” The Supreme Court rejected that as it applied to the Cannabis Buyer’s Club but did not address it as it might apply to patients.

Three ~ someone raised the *Mugfords*, the two people from Boston, the father and daughter, who were companion cases in the supreme judicial court to *Jacobson*, raises the whole issue of school vaccination, immunization, minors, the *parens patriae* powers of the state, to step in the shoes of parents and protect the health of children. And then finally, of course, emergency preparedness, and there had also been a lot time and attention on – and some say too much. Look at the remedy that the Massachusetts statute and the Cambridge ordinance offered, a \$5 fine, which in those days apparently was worth \$100, a significant amount of money. Look at the remedies that were proposed in the Model State Health Emergency Power’s Act that James Hodge and his colleagues adopted, and we have adopted a modified version of that in New Mexico. Our remedies now are not fines in terms of public health compliance but things like isolation and quarantine. Is that good or bad? We can talk about that, and I am going to end with that and turn the microphone to Rick. Thank you very much.

Richard A. Goodman, MD, JD, MPH

Thanks again to the presenters and to the panelists for your comments.