

Law and the Public's Health

The courts, both state and federal, have a profound influence on public health policy and practice. This installment of *Law and the Public's Health* examines the nature and power of the judiciary in the area of public health law and policy, discussing some of the landmark cases that together both define and test the limits of governmental powers and the rights of individuals and private interests.

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PUBLIC HEALTH ADVOCACY IN THE COURTS: OPPORTUNITIES FOR PUBLIC HEALTH PROFESSIONALS

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This installment of *Law and the Public's Health* considers the role of the judiciary in advancing public health goals. Typically, public health policy advocacy efforts aim to affect the regulation and legislation produced by the executive and legislative branches of federal, state, and local government bodies. But one branch of government—the judiciary—is less frequently considered as a venue, which is a missed opportunity for public health.

The goal of this article is to demonstrate the need and identify the strategies for what we call “public health advocacy in the courts,” defined as actions by public health professionals that inform and affect how courts approach matters that affect the public's health. We first review the court's traditional roles in defining and deciding public health-related matters and consider judicial actions in the areas of constitutional and administrative law, civil litigation, and criminal law. Within criminal law, we highlight the recent expansion of problem-solving courts as a new opportunity for public health professionals to engage with the criminal justice community in advancing prevention strategies to address public health issues such as substance abuse and intimate partner violence (IPV). We then discuss specific strategies by which public health professionals can engage as advocates in the criminal and civil judicial processes. We conclude by presenting public health advocacy in the courts as a natural extension of existing public health advocacy, and offer strategies for overcoming the obstacles that public health professionals may encounter when they engage in these efforts.

TRADITIONAL JUDICIAL PROCESSES

The courts have a profound effect on the public's health. Courts interpret the law and determine the constitutional limits of legislative and regulatory policies that impact the public's health. Courts also decide cases brought against people or organizations accused of damaging the public's health and consider the appropriate balance among prevention, rehabilitation, and punishment in imposing criminal sanctions.

Constitutional and administrative law

Throughout U.S. history, the courts have been instrumental in establishing the reach and boundaries of government involvement in public health. Courts interpret the meaning of statutes and regulations and also determine whether they are constitutional. Under the federal Constitution, as well as the constitutions of most states, judicial intervention occurs when a legal dispute arises, a factor that frequently can give judicial policy-making a seemingly higher profile than the process of setting standards of conduct through the legislative or administrative process. For example, a legislative body may set standards of conduct for individuals or businesses, but it falls to the courts to make the actual determination as to whether standards have been violated and sanctions will apply.

A seminal example of dispute resolution in a public health context occurred in 1905, when the U.S. Supreme Court upheld the constitutionality of a compulsory smallpox vaccination law in *Jacobson v. Massachusetts*. The *Jacobson* court relied, in part, on public health data regarding the prevalence of smallpox and the benefits of vaccination to conclude that the public's interest outweighed any one individual's desire to avoid vaccination.^{1,2} In doing so, the Court weighed the liberty interest of individuals against the government's interest in protecting public health and safety.

The judicial power to review the regulatory actions and decisions of federal or state administrative agencies (such as the U.S. Environmental Protection Agency or state departments of health) offers another example

of how the courts can influence public policy decisions that affect the public's health. For example, U.S. standards mandating air bags as standard equipment in all new cars to reduce motor vehicle-related injuries and deaths evolved over decades and only after the automobile industry challenged the power of federal regulators to set binding standards. In *Chrysler Corporation v. Department of Transportation*, a car manufacturer challenged the U.S. Department of Transportation's (DOT's) authority to issue air bag standards. A federal court ruled in favor of DOT, affirming its authority to force development and implementation of the lifesaving technology.³ Similarly, the courts may intervene to prevent backsliding by agencies that, for political or other reasons unrelated to health and safety, attempt to reduce public health standards. Thus, later when DOT attempted to rescind the standard and acted without appropriate evidence to justify the downgrading of safety protections, the U.S. Supreme Court concluded that such action was impermissible.⁴

Individual civil lawsuits

Courts also resolve disputes between private parties, including individuals, corporations, and other groups that bear on the public's health. For example, lawsuits against the makers of potentially dangerous products (e.g., tobacco, firearms, and motor vehicles) can compensate injured parties and force changes in product design and marketing practices.^{5,6} Even the threat of litigation can provide an economic incentive for individuals and corporations to reduce public health risks.^{7,8} But traditional product liability litigation is not always successful. Courts may not always be sympathetic to plaintiffs' arguments that a product should have been designed or marketed more safely, and manufacturers do not always respond to lawsuits in ways that promote safety. Nevertheless, product liability remains a potent tool for improving the public's health.⁹

Cities and states have also brought lawsuits against the tobacco industry,¹⁰ firearm industry,¹¹ and other industries¹²—often at the urging of public health professionals—to vindicate the interests of the population living in those areas. These lawsuits have sought to recover health-related expenses incurred by the jurisdiction and to force changes in industry products and practices. Some of the lawsuits have argued that the industries created a public nuisance by placing the health of the community at risk.

Class action lawsuits

Class action lawsuits occur when a small number of people represent the interests of a much larger

group with a common concern. A number of lawsuits against the tobacco industry have been brought as class actions. In these cases, several ill smokers (or their representatives, if they were deceased) sued the industry on behalf of a much larger group of smokers; in one Florida-based case, the class included all ill Florida smokers.¹³ The large damages often associated with class action lawsuits are a powerful incentive for industry reform. Monetary damages can include compensation to plaintiffs for the harms they suffered, as well as punitive damages intended to punish the defendant for particularly bad conduct.

Criminal liability

While civil litigation provides several examples of the court's long-standing influence on public health policy decisions, areas of criminal law also offer opportunities to advocate for public health approaches in the courts. The orientation of the criminal justice system toward punishment in part reflects a deliberate strategy to deter future crimes. The option of sentencing individuals who are found guilty of certain crimes (e.g., substance abuse) to treatment, in addition to or in lieu of traditional punishment, is a strategy that overlaps with public health approaches to the problem.

In particular, the emergence of specialized "problem-solving courts" in the last two decades has highlighted the interests shared by the courts and public health on certain issues. Problem-solving courts generally attempt to address the underlying factors that bring people to court with the primary goal of preventing future criminal behavior or civil liability. Generally, these courts use their authority to motivate offenders into treatment and then track their progress over time.¹⁴ Problem-solving courts employ basic public health principles by including a therapeutic approach to individuals who are at high risk of reoffending.

Although modern problem-solving courts are related to juvenile courts that first began operating at the turn of the 20th century,¹⁵ legal observers trace the origins of today's problem-solving court to 1989, when Miami officials established the first drug treatment court.¹⁴ Drug treatment courts include drug treatment as part of sentencing and mandate offenders to meet treatment goals or risk incarceration.¹⁶ With 2,018 drug treatment courts operating in the U.S. as of February 2009,¹⁷ they are now a widely adopted form of problem-solving court. Evaluations suggest that drug treatment courts increase exposure to and retention in drug treatment programs,^{18,19} but the evidence is less clear about drug treatment courts' impact on criminal recidivism and relapse.¹⁸⁻²⁰

Problem-solving courts are also currently used in other areas where criminal law and public health issues overlap, such as IPV and drunk driving. IPV courts, like drug treatment courts, seek to consolidate dedicated judges, prosecutors, defense counsel, and community resources into a system that considers the mental health and social aspects of IPV during sentencing. Evaluation results for IPV courts are promising: batterers sentenced through problem-solving courts are less likely to reoffend compared with those sentenced through traditional criminal courts.²¹ Driving-under-the-influence (DUI) courts—courts specializing in DUI cases—have also become a highly utilized form of problem-solving courts. As of 2007, more than 80 DUI courts were operating in the U.S. as well as approximately 250 hybrid drug courts that also hear DUI cases.²² Researchers are beginning to evaluate DUI courts, but one of the first studies did not detect an effect on recidivism.²³

AN EVOLVING ROLE FOR PREVENTION: PUBLIC HEALTH ADVOCATES AND THE COURTS

In addition to actually initiating a case, public health professionals can use a number of other strategies to advance public health goals and principles within the courts. Many of these strategies are already widely used by an array of stakeholders, including those who advocate positions in opposition to public health interests.

Expert witnesses

As experts in a relevant field, public health professionals can influence judicial decision-making by serving as expert witnesses. An expert witness in litigation is a person “qualified as an expert by knowledge, skill, experience, training, or education” to help a judge and/or jury “understand the evidence or determine a fact in issue.”^{24,25} The judge determines whether testimony or evidence from an expert witness is reliable and relevant to the case before it can be admitted.²⁵ Once an expert’s testimony is deemed admissible, the expert may express his or her opinions about the facts of the case or provide more general information from his or her field of expertise.²⁶ Public health experts have informed decisions on many topics, including medical liability,²⁷ tobacco,²⁸ and environmental hazards.²⁹ In addition to testifying in court, expert witnesses often produce summary reports of relevant literature and provide information in pretrial depositions. Serving as an expert witness is time-intensive, but can profoundly

affect how the court rules on matters central to the public’s health.²⁸

Amicus curiae briefs

Public health interests can be expressed to the court by the parties to the case or through an *amicus curiae* (friend of the court) brief. An *amicus* brief is a mechanism by which a nonparty to a lawsuit can communicate information and/or argue a position about the matter before the court. In a recent class action lawsuit against the tobacco industry, a coalition of organizations including the American Public Health Association, the American Medical Association, and the American Academy of Pediatrics filed an *amicus* brief³⁰ describing the public health impact of tobacco and the potential benefits of litigation. By filing this brief, the coalition assured that its perspective would be presented to the court. In a case involving a Washington, D.C., law restricting access to handguns that was recently heard by the Supreme Court, more than 50 different organizations filed *amicus* briefs. Although the court is not required to respond directly to *amicus* briefs, they can be influential,³¹ as evidenced by the fact that courts often reference information contained in *amicus* briefs in their opinions.

Educating the judiciary

When presiding over cases involving public health research and principles of population-based health, familiarity with epidemiology and the public health approach to disease and injury can increase the likelihood that the judge’s ruling accurately reflects a public health approach to the issue. However, public health is not a standard component of legal education. To bridge the gap that exists between some judges and the public health issues that underlie cases they hear, public health advocates could offer short training courses on various public health topics.

Public health advocates could also create targeted educational offerings as part of continuing legal education seminars and other educational programs that judges regularly attend. From an advocacy perspective, this type of venue may be especially attractive, as it offers unparalleled access and the opportunity to advocate for a particular perspective.³² In its most controversial form, judicial education is offered through expenses-paid seminars, often to vacation destinations. Between 1992 and 2001, 1,094 federal judges participated in more than 7,300 privately funded educational seminars.³³ In some instances, judges attending privately funded judicial education programs later presided over

cases in which the corporate funders were litigants.^{33,34} Recognizing this as an issue affecting judicial credibility, the Judicial Conference of the United States (the policy-making body tasked with the administration of the U.S. courts) recently examined judicial attendance at nongovernment-sponsored educational programs. As of January 1, 2007, privately funded programs that reimburse or directly pay judges' expenses exceeding \$305 are required to disclose their sources of funding to the Administrative Office of the U.S. Courts.³⁵

Public interest groups have begun to engage in advocacy through judicial education. For example, the National Judicial Institute on Domestic Violence is a judicial education program jointly funded by the Family Violence Prevention Fund, the National Council of Juvenile and Family Court Judges, and the U.S. Department of Justice Office of Violence Against Women. The Institute educates judges about issues related to violence against women and children, and how the justice system can intervene to prevent domestic violence.³⁶

In addition to seminars and lectures, academic law journals (including publications known as law reviews sponsored by schools of law) are also information sources for judges. Focusing on current legal issues and emerging legal theories, these publications can be ideal venues for public health professionals to communicate ideas to judges and legal scholars. Rather than limiting scholarly publication to biomedical or other scientific journals, public health professionals can also submit articles to law reviews, which provide an opportunity for them to educate judges in a forum with which the judges are more familiar.

Influencing the judicial selection process

One of the most controversial strategies used by some interest groups to influence the judicial system involves the judicial nomination, appointment, or confirmation processes. In the U.S., all federal judges—not only Supreme Court justices—are nominated by the President and confirmed by the Senate. At the state level, some judges are elected while others are appointed by state governors. Some advocacy organizations attempt to influence these processes by voicing their support of or opposition to judicial candidates and nominees directly through lobbying, testimony, and personal communication, or indirectly through the media.³⁷ Public health professionals and organizations can monitor the judicial selection process, assess whether nominees would likely promote the interests of population health, and decide whether further advocacy efforts are needed. If appropriate, public health groups can also partner with other organizations that may have more

experience with influencing judicial selection to add a public health perspective to the process.

Court monitoring

Court monitoring is a strategy used by victim advocacy organizations that brings trained volunteers into the courtroom to observe and record information about the processes and outcomes of specific cases, such as DUI cases. Information collected by court monitors offers a descriptive picture of case processes and dispositions, and can be used to inform an organization's policy agenda and advocate for systemic reform.

Proponents of this strategy assert that by demonstrating community interest in an issue before the court, the judicial system will be more vested in assuring cases are handled fairly and with the goal of deterring future dangerous behavior. For example, some DUI court monitoring programs look for inconsistencies in how courts handle DUI cases and for high administrative dismissal rates. Both of these indicators may send a message to the larger community that DUI cases are a low priority for the courts and that punishment for such offenses is less than certain, compromising any deterrent effect that would otherwise result. If court monitoring can affect systemic change and lead to greater consistency in case processing, drinking and driving may be perceived as a more risky undertaking and one in which fewer people are willing to engage.

Evaluations of court monitoring programs are few and dated, although one evaluation of a Mothers Against Drunk Driving court monitoring program in two states is currently underway.³⁸ Of the three completed evaluations, two demonstrated a positive association between monitored drinking and driving cases and harsher sentences.^{39,40}

DISCUSSION

Public health advocacy in the courts provides opportunities to advance public health goals by shaping the paradigm in which the judicial system operates and by affecting the ways that judges think about their cases. With the emergence and growth of problem-solving courts, the judiciary is already incorporating aspects of a public health approach into its decision-making. By working collaboratively with courts, public health professionals can use advocacy in the courtroom to further ensure that judges understand and apply public health principles.

Failure to take advantage of these opportunities to engage the judiciary may actually threaten public health goals. For example, relegating sentencing policies that reflect a public health approach to legal

professionals with no formal public health training may lead to sentencing decisions that do not represent current, state-of-the-art public health knowledge. Without participation from public health professionals, problem-solving courts may not achieve their potential, and the scarce resources available to both the courts and public health to address the same issues may be used toward uncoordinated, duplicative, or ineffective initiatives.

In considering whether public health professionals should engage in the advocacy we propose, the fact that interest groups opposed to public health interests already do engage in these advocacy strategies is important. Given the resources that antiregulatory interests devote to judicial education, for example, the need for a public health presence to balance the information supply is critical. Interest groups' engagement in judicial selection is another example whereby public health perspectives may be inadequately represented. If other interest groups are engaging the judicial system while public health professionals fail to do so, decisions affecting public health issues may be made without needed input from the public health community.

Limitations

Although public health advocacy in the courtroom can be a valuable tool for advancing public health goals, these strategies have some inherent limitations. First, these strategies can be resource-intensive for public health professionals. The potentially high cost of legal fees makes some of these strategies, such as litigation, infeasible for some public health organizations. Other strategies, such as court monitoring, may require more personnel than many organizations can afford or care to divert from other work.

Additionally, some of these strategies might require a greater level of legal expertise and knowledge of the judiciary than many public health individuals and organizations currently possess. Thus, for public health advocacy in the courts to become a mainstream strategy within our field, more public health professionals will need legal training, new partnerships between legal experts and public health professionals will need to develop, and public health organizations will need to build their capacity for working in legal settings.

CONCLUSIONS

Despite these limitations, public health advocacy in the courts can and should be an important tool for advancing public health goals. One way in which public health professionals may overcome challenges associated with these strategies is to partner with organiza-

tions already engaging in advocacy in the courts. Public health professionals can complement existing efforts (e.g., those led by lawyers, victim advocates, or service providers) by providing a population-level perspective, lending their expertise in epidemiology and evaluation sciences, and keeping the initiatives informed of up-to-date public health knowledge. Likewise, collaborating organizations can provide public health professionals with the legal knowledge and entrée they need to be effective advocates in this arena. In some instances, these collaborations may be new; in others, potential collaborators may exist within organizations with which public health professionals currently partner. For example, a local nonprofit that serves victims of IPV (a common collaborator for public health researchers and practitioners working in IPV) may also be managing a court advocacy project.

Given the potential for the judiciary to positively impact the public's health, and the increase in preventive approaches to justice on some matters before the courts, the strategies outlined in this article should be part of the future of public health.

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