

Chapter 73

Public Health Law

Jay A. Gold, MD, JD, MPH, FCLM

The Basis of Public Health Authority
Prevention Versus Punishment
Control of the Person

Combating Unhealthful Conditions
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Of all medical specialties, that of public health is the most intertwined with the legal system. The function of public law is to place the authority of the community behind actions that are taken on behalf of the public good. As public health encompasses the health of the entire community, not merely of individuals, every public health activity must be grounded in the legal structure.

This chapter will cover the following key points:

- The legal basis of public health authority in the police power, in the Constitution, and in administrative law.
- The need and the legal authority in public health for both compulsion and the protection of individual rights.
- The legal mechanisms in public health law for the control of people's behavior.
- The legal mechanisms in public health law for the control of property.
- The law of nuisance in combating unhealthful conditions
- The law of public reporting of vital statistics and other data.
- Public health law in the aftermath of 9/11.

THE BASIS OF PUBLIC HEALTH AUTHORITY

The “police power”—the power to provide for the health, safety, and welfare of the people—is an inherent power of all nation-states. It was the main governmental activity of the colonial governments, and exercised by the states when they functioned as relatively independent countries under the Articles of Confederation. The police power was the primary power left to the states in the clause of the Constitution that reserves all unenumerated powers to the states. While the Constitution is silent on the reach of the police powers, the Supreme Court construes it very broadly.¹ The states then delegate the exercise of the police power to counties, to municipalities, and to other lower levels of government. It is the police power that forms the basis for state and local regulations such as health and sanitary codes.

The modern federal role in public health began with packaged food safety laws in 1905, was expanded with the environmental protection laws in the 1960s and 1970s, and now extends into many traditional areas of state regulation. Since the police power was reserved to the states, federal public health law is rooted in the power of Congress to “regulate

commerce . . . among the several States,”² on the taxing and spending power,³ and increasingly on the national security powers.⁴ The interstate commerce clause provides the basis for federal laws that protect the public health, from the Federal Food, Drug, and Cosmetic Act to the Americans with Disabilities Act. Congress funds at least part of most state public health programs, and uses this spending power to direct state actions through conditions on its grants. The national security powers recently have been cited as the basis of broad new protections for companies that produce agents to fight bioterrorism.⁵

Boards of health were among the earliest government agencies, and public health law is an example of classic administrative law. Administrative law provides for agency flexibility through rule-making, expert decision-making through judicial deference to agency decisions, and the authority to make policy decisions allocating scarce public resources to protect the interests of the community.⁶ Given the scientific and technical nature of the health sciences, and the continual developments in the field, it usually makes no sense for public health standards to be adopted directly into legislation. Instead, public health agencies are established with general grants of authority that enable them to take appropriate steps to protect the public health.⁷ Under these grants, agencies set technical standards through regulation, with notice to the public, opportunity for public comment, and often hearings. An agency may be given the power to pursue administrative remedies such as licensure, inspection, or abatement orders, and may be authorized to bring civil or criminal charges against violators.

Federal public health law is overseen by administrative agencies that have been established to deal with particular public health issues. Such agencies include the Department of Health and Human Services and its subdivisions, the Department of Agriculture, the Food and Drug Administration (discussed in Chapter 13), the Environmental Protection Agency, and others.

PREVENTION VERSUS PUNISHMENT

The most difficult concept in public health law is that actions taken to prevent harm in the future are constitutionally

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privileged as compared to actions taken to detect and punish crime that already has taken place. Traditional constitutional jurisprudence is concerned about the rights of the individual versus the state in the criminal law context. There is a very different jurisprudence when the rights of the individual are at issue in administrative proceedings that are not intended to imprison for punishment. For example, the Fourth Amendment's prohibition on unreasonable searches and seizures is read to require a probable cause warrant approved by judge before there can be a search for evidence to be used in a criminal prosecution. In contrast, an inspection of a private home or business to detect a public health hazard, such as an inspection for rats, requires no probable cause or judicial approval.⁸ The reason is that since the colonial period, the courts have ruled that the right of privacy must give way to the protection of society.⁹

Perhaps the most controversial examples of this distinction between punishment and prevention are the sexual predator cases, in which sexually dangerous persons are held in prison without full criminal due process rights.¹⁰ In the most recent of these cases, the Supreme Court used classic public health precedent to justify the continuing detention of the defendant.¹¹ If a court finds a rational relation between the public health measure and the means that are used to enforce it, it will uphold the constitutionality of the use of the police power unless it is a subterfuge to violate other provisions of the Constitution. Thus public health laws that singled out Chinese businesses were struck down because they violated Fourteenth Amendment equal protection guarantees,¹² and warrantless drug testing of pregnant women without their consent was struck down because the results were used to threaten criminal prosecution and not for legitimate public health purposes.¹³

The due process clause of the Fourteenth Amendment says that the state shall not deprive any person of life, liberty, or property without due process of law. This provision requires basic fairness in the procedural application of the law. Thus someone whose property has been seized as a threat to the public health has a right to a hearing to contest the seizure,¹⁴ and someone who has been quarantined may bring a writ of habeas corpus to contest the quarantine.¹⁵ The First Amendment's protection of the free exercise of religion has not prevented the government from forcing compulsory vaccination upon those who protest on religious grounds,¹⁶ but *has* been used by members of certain religions to avoid blood transfusions because this does not threaten the public's health.

CONTROL OF THE PERSON

Much of public health law seeks to affect people's behavior through the exercise of the police power. There are two traditional examples of this category of public health powers: the control of communicable disease and the protection of people who suffer from mental illness. A third example has become important in recent years: the prevention of substance abuse and the treatment and rehabilitation of substance abusers.

The classic legal actions for control of communicable disease were *quarantine*, confinement of patients until

infectiousness had passed, and *isolation*, confinement for a brief period in order to allow care and attention until other measures were needed. Such actions are less common these days, although not unheard of. Other legal powers of government continue to be relied upon, particularly compulsory examination of suspected cases and carriers, and compulsory immunization.¹⁷ In this regard, some of the most discussed issues in recent public health law have been those surrounding the AIDS epidemic: confidentiality versus the need to notify partners, mandatory versus voluntary neonatal testing, discrimination, and others. These are explored at length in Chapter 61.

State laws authorize the involuntary civil commitment of the mentally ill. The chief purpose for such commitment is where continued liberty would pose a danger either to the mentally ill person him or herself or to others. Procedural requirements for commitment under the due process clause, and the existence of a right to treatment of those who are committed, vary by state. The U.S. Supreme Court has taken a moderate position on the standard of proof for involuntary civil commitment.¹⁸

The issues of law enforcement and control of supply and demand for illicit drugs, therapeutic drugs, and alcohol have become some of the most prominent public health issues. ("Substance abuse," of course, also includes the abuse of nicotine.) Legislatures have struggled with the definition of conditions for compulsory treatment, and with methods of treatment in both residential facilities and communities. In addition, legislation is needed to allow transfer of the substance-dependent person from the criminal justice system into effective treatment programs.

The U.S. Supreme Court has upheld a data surveillance system that was set up to control both overprescribing by physicians and "doctor-shopping" by patients seeking prescription drugs, against a legal challenge based upon the right to privacy.¹⁹ It also has upheld a government testing program requiring a urinalysis test against a Fourth Amendment challenge from employees who seek transfer or promotion to certain positions.²⁰ And the courts have upheld school requirements for drug testing of students in the absence of suspicion under certain circumstances.²¹

COMBATING UNHEALTHFUL CONDITIONS

The law offers methods to eliminate conditions that have an adverse impact on public health, particularly the law of public nuisance. Nuisance abatement is a traditional public health power, allowing the state to force owners of property to cease uses of the property that threaten the health or quiet enjoyment of their neighbors. Nuisance abatement is unusual in that it also is a common law cause of action that can be brought by individuals. In the case of goods and products in commerce that threaten the public health, authorities may employ seizure, embargo, and condemnation. Seizure is the taking of goods or products from the possession of the owner. In an embargo, the goods are left with the owner but cannot be used or disposed of. After judicial

proceedings, the owner may be given the opportunity to bring the goods into compliance with the relevant standards. If the owner does not do so, or if it is impossible, the goods may be condemned and destroyed.

In general, where there is a public health emergency, officials have broad power to act quickly by issuing an administrative order or by asking the court for an injunction to stop the threat. In the absence of an emergency, the proposed actions of health officials may be contested in court before they are implemented, but the courts will uphold even the closing of businesses if they believe the public health is at stake.²² If actions in abatement of a public nuisance are upheld by the court, the government need not compensate the owner for loss of property.

Courts may order a variety of remedies in nuisance cases:

- *Damages* are awarded primarily to plaintiffs in private nuisance cases.
- *Land use remedies* require a defendant either to shut down in that particular location or, in a private nuisance suit, to buy out the plaintiff.
- *Technological remedies* require a defendant to install the best control technology and to operate it at maximum efficiency.
- *Operational controls* require that the defendant act differently—with greater skill or care, in a different manner, or at a different time.

GATHERING DATA

The requirements for reporting health information are an important part of public health law. Health care workers are required to report certain data to local or state officials, and all states by voluntary agreement send these statistics to the National Center for Health Statistics of the Centers for Disease Control and Prevention. The information whose reporting is required includes vital statistics (births and death certification, the latter with cause of death), communicable diseases, child abuse, gunshot wounds, and other matters that may vary by state. Such matters are not considered a confidential part of the physician–patient relationship, and those who make these reports are immune from such liability as might arise from them.

PUBLIC HEALTH LAW AFTER 9/11

In the aftermath of the events of September 11, 2001, certain aspects of public health law have taken prominence,

particularly the law of mass immunization and other defenses against bioterrorism. These aspects of public health law are discussed in detail in Chapter 74. In response to the issues surrounding 9/11, Lawrence O. Gostin and colleagues offered the Model State Emergency Health Powers Act²³ in order to modernize state public health laws to deal with the present crisis. The Model Act has been the subject of considerable controversy,²⁴ and in 2005 related emergency powers laws did not appreciably facilitate emergency preparedness for Hurricane Katrina and its aftermath.

Endnotes

1. See, e.g., *Holmes v. Jennison*, 39 U.S. (7 How) 283, 340–41 (1840).
2. United States Constitution, Article I, Section 8, Clause 3.
3. United States Constitution, Article I, Section 8, Clause 1.
4. Dycus et al., *National Security Law*, 3d ed. (New York: Aspen, 2003).
5. PL 108-276, the Project BioShield Act of 2004.
6. E.P. Richards, *Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Persons*, 16 *Hast. Const. L. Q.* 320 (1989).
7. *City of New York v. New St. Mark's Baths*, 130 Misc. 2d 911, 497 N.Y.S. 2d 979 (1986).
8. *Camara v. Municipal Court City and County*, 387 U.S. 523 (1967); *See v. Seattle*, 387 U.S. 541 (1967).
9. *Frank v. Maryland*, 359 U.S. 360 (1959).
10. *Allen v. Illinois*, 478 U.S. 364 (1986).
11. *Kansas v. Hendricks*, 521 U.S. 346 (1997).
12. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
13. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).
14. *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908).
15. *Pauline Varholy v. Rex Sweat*, 15 So. 2d 267, 153 Fla. 571 (1943).
16. *Prince v. Commonwealth*, 321 U.S. 158 (1943).
17. *Jacobson v. Massachusetts*, 197 U.S. 11 (1904).
18. *Addington v. Texas*, 441 U.S. 418 (1979).
19. *Whalen v. Roe*, 429 U.S. 589 (1977).
20. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).
21. *Board of Education v. Earls*, 122 S.Ct. 2559 (2002); *Vernonia School Dist. v. Acton*, 515 U.S. 646 (1995).
22. *Grossman v. Baumgartner*, 271 N.Y.S. 2d 195 (N.Y. 1966).
23. 288 J.A.M.A. 622–28 (2002).
24. See, e.g., E.P. Richards et al., *Review of the Model State Emergency Health Powers Act*, 10 *Legal Medicine Perspectives* 3–5 (2002).

