



Georgetown University Law Center
Scholarship @ GEORGETOWN LAW

2002

Commentary: Public Health and Civil Liberties in an Era of Bioterrorism

Lawrence O. Gostin

Georgetown University Law Center, gostin@law.georgetown.edu

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/1808>

21 Crim. Just. Ethics 2, 74-76 (2002)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>



Part of the [Health Law and Policy Commons](#)

COMMENTARY

Public Health and Civil Liberties in an Era of Bioterrorism

LAWRENCE O. GOSTIN

Safeguarding the public's health, safety, and security took on new meaning and urgency after the attacks on the World Trade Towers in New York and the Pentagon in Washington, D.C., on September 11, 2001. The subsequent intentional dispersal of anthrax through the U.S. postal system resulted in five confirmed deaths, hundreds treated, and thousands tested. The potential for new, larger, and more sophisticated attacks have created a sense of vulnerability. National attention has urgently turned to the need to detect and react rapidly to bioterrorism as well as to naturally occurring infectious diseases.

In the aftermath of September 11, the President and the Congress began a process to strengthen the public health infrastructure. The Center for Law and the Public's Health (CLPH) at Georgetown and Johns Hopkins Universities drafted the Model State Emergency Health Powers Act (MSEHPA or the "Model Act") at the request of the Centers for Disease Control and Prevention and in collaboration with members of national organizations representing governors, legislators, attorneys general, and health commissioners. Legislative bills based on the MSEHPA have been introduced in more than thirty-five states; twenty states have

enacted a version of the Act, and additional states will be considering the Act in upcoming legislative sessions.

Despite its success in many states, the Model Act has become a lightning rod for criticism from both ends of the political spectrum. Civil libertarians object to the diminution of personal freedoms and conservatives object to the diminution of free enterprise and property rights. In short, the Model Act has galvanized public debate around the appropriate balance between personal rights and common goods. In this Commentary, I defend the Model Act, demonstrating that it appropriately creates strong public health powers, while safeguarding individual freedoms. America prizes personal liberty and free enterprise, but we also need to recapture a lost communitarian tradition that stresses the importance of health, safety, and well-being for the population.

The Inadequacy of Existing Public Health Legislation

Critics attack MSEHPA as if it had been proposed in a regulatory vacuum. Yet public health is practiced under a voluminous set of laws and regulations. The issue is not whether the Model Act provides an ideal solution to perennially complex problems, for no law can resolve all the conflicts between public health and civil liberties. Rather, the issue is whether the Model Act does a significantly better job than existing legislation. Existing state public health law is obsolete, fragmented, and inadequate; it does not support, and even thwarts, effective public health surveillance and interventions.

Public health legislation is so old that it tells the story of communicable diseases through time, with new layers of regulation with each page in history—from plague and smallpox, to tuberculosis and polio, and now HIV/AIDS and West Nile virus. Many laws have not been systematically updated since the early-to-mid-twentieth century. State laws predate modern public health science and practice, as well as advances in constitutional law and civil liberties.

Public health laws are inconsistent within states and among them. Within states, different rules apply depending on the particular disease in question. Laws are also inconsistent among states, leading to profound variation. A certain level of consistency is important in public health because infectious diseases are usually regional or national in nature, thus requiring a coordinated approach to surveillance and control.

Many current laws fail to provide necessary authority for each of the key elements for public health preparedness: planning, coordination, surveillance, management of property, and protection of persons. States have not devised clear methods of planning, communication, and coordination among the various levels of government (federal, state, tribal, and local), the responsible agencies (public health, law enforcement, and emergency management), and the private sector (food, transportation, and health care). Indeed, due to privacy concerns, many states actually proscribe ex-

Lawrence O. Gostin is Professor of Law, Georgetown University, Professor of Public Health, the Johns Hopkins University, and Director, Center for Law and the Public's Health (CDC Collaborating Center Promoting Health Through Law).

*continued on
page 74*

continued from
page 2

change of vital health information among state agencies and between other jurisdictions.

Current statutes also do not facilitate surveillance and may even prevent monitoring. For example, many states do not require timely reporting for Category A agents of bioterrorism. At the same time, states do not require, and may actually prohibit, public health agencies from monitoring data held by hospitals, managed care organizations, and pharmacies. All of these powers are vital to prevent or to react to a bioterrorism event.

Extant laws usually do provide powers over property and persons, but their scope is limited and inconsistent. There are numerous circumstances that might require management of property in a public health emergency—for example, shortages of vaccines, medicines, hospital beds, or facilities for disposal of corpses. It may even be necessary to close facilities or destroy property that is contaminated or dangerous. There similarly may be a need to exercise powers over individuals to avert a significant threat to the public's health. Vaccination, testing, physical examination, treatment, isolation, and quarantine each may help contain the spread of communicable diseases.

The Model State Emergency Health Powers Act

The Model Act is structured to reflect five basic public health functions to be facilitated by law: preparedness, surveillance, management of property, protection of persons, and public information and communication.¹ The preparedness and surveillance functions take effect immediately upon passage of the Model Act. However, the compulsory powers over property and persons take effect only once the Governor has declared a "Public Health Emergency," defined to include only the most serious threats to the public's health.

The Act facilitates systematic planning for a public health emergency, including coordination of services; procurement of vaccines and pharmaceuticals; housing, feeding, and caring for affected popula-

tions (with respect for their physical, cultural, and social needs); and vaccination and treatment of individuals. The Act provides authority for surveillance of health threats and the power to follow a developing public health emergency. For example, the Act requires prompt reporting by health care providers, pharmacists, veterinarians, and laboratories. MSEHPA also provides for the exchange of relevant data among lead agencies such as public health, emergency management, and public safety.

MSEHPA provides comprehensive powers to manage property and protect persons in order to safeguard the public's health and security. Public health authorities may close, decontaminate, or procure facilities and materials to respond to a public health emergency, safely dispose of infectious waste, and obtain and deploy health care supplies. Similarly, the Model Act permits public health authorities the following powers to examine or test as necessary to diagnose or treat illness; to vaccinate or treat in order to prevent or ameliorate an infectious disease; and to isolate or quarantine to prevent or limit the transmission of a contagious disease.

Finally, MSEHPA provides for a set of post-declaration powers and duties to ensure appropriate public information and communication. The public health authority must provide to the public information regarding the emergency, including protective measures to be taken and information regarding access to mental health support. One of the lessons learned from the anthrax outbreak was that government messages to the public were confusing and lacked authenticity.

A Defense of the Model Act

There have been several specific objections to the Model Act. Detractors argue the following points: *federalism*—federal, not state, law is implicated in a health crisis; *emergency declarations*—the scope of a "public health emergency" is overly broad; *abuse of power*—governors and public health officials will act without sufficient justification; *personal libertarianism*—compulsory powers over non-adherent individuals are rarely, or never, necessary; *economic libertarianism*—regu-

lation of businesses is unfair and counterproductive; and *safeguards of persons and property*—there are inadequate procedural and substantive protections for individuals and businesses.

Federalism. Critics argue that acts of terrorism are inherently federal matters, and so there is no need for expansion of state public health powers. It is certainly true that federal authority is important in responding to catastrophic public health events. Bioterrorism may trigger national security concerns, require investigation of federal offenses, and affect large geographic regions. However, the assertion of federal jurisdiction does not obviate the need for adequate state power. States and localities have been the primary bulwark of public health in America. From a constitutional perspective, states exercise plenary "police powers" for the public's health and security. States and localities probably would be the first to detect and respond to a health emergency and would have a key role throughout. This requires states to have effective, modern statutory powers that enable them to work alongside federal agencies.

Declaration of a Public Health Emergency. Critics express concern that the Model Act could be triggered too easily, creating a threat to civil liberties. Community-based organizations object to the idea that a governor might declare a public health emergency for an endemic disease such as HIV/AIDS or influenza, but the Act specifically prohibits this. Civil libertarians express concerns that a governor could declare an emergency for theoretical or low-level risk. However, the drafters of the Act set demanding conditions for a governor's declaration. An emergency may be declared only in the event of bioterrorism or a naturally occurring epidemic that poses a high probability of a large number of deaths or serious disabilities. Indeed, the drafters rejected arguments from high-level government officials to set a lower threshold for an emergency declaration.

Governmental Abuse of Power. Critics argue that governors and public health authorities would abuse their authority and exercise powers without justification. This kind of generalized argument could be used to refute the exercise of

compulsory power in *any* realm because executive branch officials may overreach their authority. However, such general objections have never been a reason to deny government the power to avert threats to health, safety, and security. The answer to such general objections is to introduce into the law careful safeguards to prevent officials from acting outside the scope of their authority. The Model Act builds in effective protections against governmental abuse. It adopts the doctrine of separation of powers, so that no branch wields unchecked authority: (1) the Governor may declare an emergency only under strict criteria and with careful consultation; (2) the legislature, by majority vote, can override the Governor's declaration; and (3) the judiciary can terminate the exercise of power. No law can guarantee that the powers it confers will not be abused. But MSEHPA counterbalances executive power by providing a strong role for the legislature and judiciary.

Personal Libertarianism. Critics suggest that the Model Act should not confer compulsory power at all, strenuously objecting to vaccination, testing, medical treatment, isolation, and quarantine. Commentators reason that services are more important than power; individuals will comply voluntarily; and that tradeoffs between civil rights and public health are not necessary. These arguments are misplaced. First, although the provision of services may be more important than the exercise of power, the state undoubtedly needs a certain amount of authority to prevent individuals from endangering others. It is only common sense, for example, that a person who has been exposed to an infectious disease should be required to undergo testing or medical examination and, if infectious, to be vaccinated, treated, or isolated. Second, although most people will comply willingly because it is in their own interest and/or desirable for the common welfare, not everyone will comply. The weight of history shows that, in relation to epidemics, some people do not act in accordance with public health advice. Finally, although public health and civil liberties may be mutually enhancing in many instances, they sometimes come into conflict. When government acts to

preserve the public's health, it can interfere with personal rights (for example, autonomy, privacy, and liberty). Individuals whose movements pose a significant risk of harm to their communities do not have a "right" to be free of the interference necessary to control the threat. There simply is no basis for this argument in constitutional law, and perhaps little more in political philosophy.

Economic Libertarianism. Businesses complain that MSEHPA interferes with free enterprise. Economic stakeholders including the food, transportation, pharmaceutical, and health care industries have lobbied CLPH faculty and state legislators. These groups argue that under the Act they may have to share data with government, abate nuisances, destroy property, and provide goods and services without their express agreement. But all of these powers have been exercised historically and comply with constitutional and ethical norms. If businesses possess hazardous property (for example, a rug contaminated with smallpox) or engage in unsafe activities (for example, refusal to close a restaurant after possible cases of food-borne illness), government must have the power to destroy the property or abate the nuisance. Those who believe in the unfettered entrepreneur may not agree with health regulations, but they are necessary to ensure that business activities do not endanger the public. Government also must have the power to confiscate private property to use for the public good. In the event of bioterrorism, for example, it may be necessary for government to have adequate supplies of vaccines or pharmaceuticals or to use health care facilities for medical treatment or quarantine. Under the Act, businesses would be compensated if government used the property for a public purpose (a "taking"), but not if it destroyed property or abated a nuisance to avert a health threat. This comports with the extant constitutional jurisprudence of the U.S. Supreme Court. If the government were forced to compensate for all diminution of proprietary interests, it would significantly chill public health regulation.

Safeguards of Persons and Property. The real basis for debate over public health legis-

lation should not be that powers are given, because it is clear that governmental power is sometimes necessary. The better question is whether the powers are hedged with appropriate safeguards. The core of the debate ought to be whether MSEHPA appropriately protects freedoms by providing clear and demanding criteria for the exercise of power and fair procedures for decision making. It is in this context that the attacks on the Act are particularly exasperating because critics rarely suggest that it fails to provide crisp standards and procedural due process. Nor do they effectively compare the safeguards in the Model Act to those in extant public health legislation. Compulsory powers over individuals (for example, testing, physical examination, treatment, and isolation) and businesses (for example, nuisance abatements and seizure or destruction of property) already exist in state public health law. MSEHPA, therefore, does not contain new, radical powers. Most tellingly, the Model Act contains much better safeguards of individual and economic liberty than appear in communicable disease statutes enacted in the early-to-mid-twentieth century. Unlike older statutes, MSEHPA provides clear and objective criteria for the exercise of powers, rigorous procedural due process, respect for religious and cultural differences, and a new set of entitlements for those made subject to compulsory powers (for example, health care, clothing, and humane conditions).

In summary, MSEHPA provides a modern framework for effective identification and response to emerging health threats, while demonstrating respect for individuals and toleration of groups. Indeed, the CLPH agreed to draft the law only because a much more draconian approach might have been taken by the federal government and the states if acting on their own and responding to public fears and misapprehensions.

Rethinking the Public Good

American values at the turn of the twenty-first century could fairly be characterized as individualistic. Until recently there was a distinct orientation toward personal and proprietary freedoms and against a substantial government presence in so-

cial and economic life. The attacks on the World Trade Center and the Pentagon and the anthrax outbreaks reawakened the political community to the importance of public health. Historians will look back and ask whether September 11, 2001, was a fleeting scare with temporary solutions or whether it was a transforming event.

There are good reasons for believing that resource allocations, ethical values, and law should develop to reflect the critical importance of the health, security,

and well-being of the populace. It is not that individual freedoms are unimportant. To the contrary, personal liberty allows people the right of self-determination to make judgments about how to live their lives and pursue their dreams. Without a certain level of health, safety, and security, however, people can neither have well-being nor can they meaningfully exercise their autonomy and participate in social and political life.

My purpose is not to determine which is the more fundamental interest: per-

sonal liberty or health and security. Rather, my purpose is to illustrate that all these interests are important to human flourishing. The Model State Emergency Health Powers Act was designed to defend personal as well as collective interests. But in a country so tied to rights rhetoric on both sides of the political spectrum, any proposal that has the appearance of strengthening governmental authority is bound to travel in tumultuous political waters.

NOTES

[This Commentary is based on: Gostin, *Public Health Law in an Age of Terrorism: Re-thinking Individual Rights and Common Goods*, HEALTH AFF. (forthcoming 2003); Gostin, Sapsin,

Teret, et al, *The Model State Emergency Health Powers Act: Planning and Response to Bioterrorism and Naturally Occurring Infectious Diseases*, 288 JAMA 622-28 (2002). See also,

L.O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT (2000).]

1 See <http://www.publichealthlaw.net>.

Publications Received

Jeannine Bell, *Policing Hatred: Law Enforcement, Civil Rights, and Hate Crime*. (New York, NY: New York University Press, 2002) vii + 227 pp.

Mike Brogden, Preeti Nijhar, *Crime, Abuse, and the Elderly*. (Devon, UK: Willan Publishing, 2000) vii + 191 pp.

Roger Hopkins Burke, *An Introduction to Criminological Theory*. (Devon, UK: Willan Publishing, 2001) v + 287 pp.

Cathleen Burnett, *Justice Denied: Clemency Appeals in Death Penalty Cases*. (Boston, MA: Northeastern University Press, 2002) ix + 251 pp.

Cynthia L. Cates, Wayne V. McIntosh, *Law and the Web of Society*. (Washington, D.C.: Georgetown University Press, 2001) xv + 237 pp.

John L. Coleman, *Police Assessment Testing: An Assessment Center Handbook for Law Enforcement Personnel, Third Edition*. (Springfield, IL: Charles C. Thomas Publishers, Ltd., 2002) vii + 202 pp.

Michael Davis, *Profession, Code and Ethics*. (Burlington, VT: Ashgate Publishing Company, 2002) ix + 255 pp.

Markus Dirk Dubber, *Victims in the War on Crime: The Use and Abuse of Victims'*

Rights. (New York, NY: New York University Press, 2002) ix + 399 pp.

John F. Galliher, Larry W. Koch, David Patrick Keys & Teresa J. Guess, *America without the Death Penalty: States Leading the Way*. (Boston, MA: Northeastern University Press, 2002) i + 280 pp.

Bernard E. Harcourt, *Illusion of Order: The False Promise of Broken Windows Policing*. (Cambridge, MA: Harvard University Press, 2001) vii + 294 pp.

David A Harris, *Profiles in Justice: Why Racial Profiling Cannot Work*. (New York, NY: New York Press, 2002) vii + 276 pp.

Whitney S. Hibbard, Raymond W. Worring & Richard Brennan, *Psychic Criminology: A Guide for Using Psychics in Investigations, Second Edition*. (Springfield, IL: Charles C Thomas Publishers Ltd., 2002) vii + 149 pp.

Warren D. Holmes, *Criminal Interrogation: A Modern Format for Interrogating Criminal Suspects Based on the Intellectual Approach*. (Springfield, IL: Charles C. Publishers Ltd., 2002) vii + 149 pp.

Stephen Kershner, *Desert, Retribution, and Torture*. (Lanham, MD: University Press of America, 2001) v + 202 pp.

Don Lewis, *The Police Officer in the Courtroom: How to Avoid the Pitfalls of Cross-Examination Through the Proper Preparation and Presentation of Investigative Reports, In-Court Testimony, and Evidence*. (Springfield, IL: Charles C. Thomas Publishers Ltd., 2001) vii + 214 pp.

John M. Madonna Jr. & Richard E. Kelly, *Treating Police Stress: The Work and the Words of Peer Counselors*. (Springfield, IL: Charles C. Thomas Publishers Ltd., 2002) xx + 251 pp.

Joan R. Mars, *Deadly Force, Colonialism, and the Rule of Law: Police Violence in Guyana*. (Westport, CT: Greenwood Press, 2002) xix + 200 pp.

Roslyn Muraskin & Matthew Muraskin, *Morality and The Law*. (Upper Saddle River, NJ: Prentice Hall, 2001) v + 159 pp.

Austin Sarat, *Law, Violence, and the Possibility of Justice*. (Princeton: Princeton University Press, 2001) 181 pp.

Robert Tillman, *Global Pirates: Fraud in the Offshore Insurance Industry*. (Boston, MA: Northeastern University Press, 2002) 174 pp.