Legal Considerations: Public Health and Human Rights

Developed by Amy T Campbell
Associate Dean for Law & Health Sciences and Professor of Law
UIC John Marshall Law School
Contact: campbela@uic.edu

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Foundations for Public Health Law
What is Public Health?

• ...”public health’s collective action on society’s behalf ..., a broad view of the determinants of health ..., and an emphasis on populations rather than individuals.... In addition to these characteristics, public health is unique among health-related fields for the value and emphasis it places on prevention, community health, education, and partnerships with varied organizations.” (Gostin et al, The Law and the Public’s Health: The Foundations, in Richard A. Goodman, et al ed., Law in Public Health Practice, 2007; Oxford Univ. Press, New York, NY: Ch. 1 at 26, emphasis added)
Enters Law...

A law to protect the public’s health and well-being

*Draw on **State Police Power**: 10th Amendment=reserves powers to states ... (national gov’t of limited and enumerated powers)
  
  • Through this: States have primary power to regulate HEALTH, SAFETY, WELFARE for common good = “police power”

*Role of Government to “assure the conditions for people to be healthy”
Sources of Legal Authority

- Constitutional provisions
  *esp. state/local*
- Statutes
- Regulations, rules
- Cases

*Draws from traditional fields*: torts, con law, property law, criminal law, environmental law, FDA, occupational health
What does “Public health law” look like?

**Traditional:**

- Infectious dz control – e.g., community vaccination requirements, isolation/quarantine orders, shelter in place orders, travel bans
- Environment – e.g., Clean water, air legislation
- “Product” safety (say, cars) – e.g., Seat belt laws, Speed limits
Standards of Review

When government acts:

• Rational basis, legitimate exercise of governmental authority
• Emergency? Effective? Least restrictive means?
The problem with a seesaw is you're always off balance.

... balance with:
- Constitutional Liberty Interests: Substantive due process
- Privacy
- Right of assembly
- Free exercise of religion
Other Legal Considerations

• Separation of powers

• Federalism
  • States may delegate to local authorities' power to regulate public health
    • E.g., local ordinance – SSB taxes, vaccination
  • Federal govt power to tax, spend, regulate interstate commerce, address matters of national security
    • E.g., Interstate travel: mask orders
  • Preemption

• Emergency declaration

• Employment law

• International law
Compulsory Vaccination

• Power to: *Jacobson v Massachusetts* (USSC 1905)
• Limits of: *Jew Ho v Williamson* (USSC 1900)

• Targeting:
  • How infectious? Consequences of disease?
  • School age?
  • How safe, effective the vaccine?

• Exemptions
• What of an EUA?

Health and Human Rights

The right to health means access to universal health coverage that is:
- Timely
- Good quality
- Affordable
- Acceptable
- Appropriate

#HealthforAll
Civil Rights laws in US

• From U.S. Constitution and federal laws
• Protect discrimination based on race, color, national origin (see, e.g., Civil Rights Act of 1964, Title VI); disability (see, e.g., ADA); sex (see, e.g., Civil Rights Act of 1964, Title VII) (see also section 1557 of Affordable Care Act)
• Apply during COVID-19
Pronouncements on Health as a Human Right

- **World Health Organization (WHO) Constitution** (1946): “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being” where “health” = “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”

- **Universal Declaration of Human Rights** (1948): Article 25 includes health as part of right to adequate standard of living

- **International Covenant on Economic, Social and Cultural Rights**, Article 12 (1966): reiterates right to “highest attainable standard of physical and mental health” AND obligates States to take steps for “full realization of this right” (which includes preventing/treating/controlling epidemic)
  - Reiterated in context of ending racial discrimination and discrimination against women, and advancing the rights of children and persons with disabilities, and for the protection of migrants and their families

On “right to health”

• UN sees as including freedoms and entitlements = the right to a system of health protection (i.e., health care and the underlying social determinants of health) that provides equality of opportunity for people to enjoy the highest attainable standard of health” (OHCHR, at: https://www.ohchr.org/EN/Issues/Health/Pages/AboutRightHealthandHR.aspx (accessed March 17, 2021)
  • Intentionally a broad concept.

• And this invokes a positive right, with States obligated “to take positive measures that enable and assist individuals and communities to enjoy the right to health.” (id.)

• Not expected to be 100% at the start but to “progressively realize” these goals, although at a minimum, to take concrete steps (e.g., develop national public health plan) toward full realization of right to health (id.)
US on a “right to health”

• We have NOT chosen to globally assert a “right to health” through national law or via int’l human rights agreement ... and even where might have a “right-” like law, see limited resources allocated (e.g., our un(der)funded mandates)
“...The United States does not really have a health care system, only a health insurance system. Our government champions human rights around the world, insisting that other countries protect human rights, even imposing sanctions for a failure to do so. Our government is not as robust in protecting rights at home.

The right to health care has long been recognized internationally. Ironically, the origins of this right are here in the United States. Health care was listed in the Second Bill of Rights drafted by Franklin Delano Roosevelt (FDR). Sadly, FDR’s death kept this Second Bill of Rights from being implemented. Eleanor Roosevelt, however, took his work to the United Nations (UN), where it was expanded and clarified. She became the drafting chairperson for the UN’s Universal Declaration of Human Rights (UDHR). That committee codified our human rights, including, at Article 25, the essential right to health.”

For example: ACA: "...the Leadership Conference on Civil and Human Rights and other civil and human rights organizations submitted an amicus brief to the Supreme Court addressing the ways in which a decision striking the ACA’s Medicaid expansion provision would implicate human rights norms concerning racial equality. …[M]any international bodies and UN special experts have criticized the United States for the extreme inequalities of its health care system, with particular focus on the dramatic racial disparities in health care access and outcomes. …The Leadership Conference’s amicus brief further argued that Congress was fully aware that the Medicaid expansion legislation would contribute toward reducing race-based health care disparities, a step toward fulfilling the United States’ international obligations.”

(See: M. F. Davis, Bringing it Home: Human Rights Treaties and Economic, Social, and Cultural Rights in the United States,” ABA Human Rights Magazine, April 1, 2015: 41(2) at:...
A Different conception: Solidarity

- Negative Liberty: an individual freedom from infringement on personal decisions, space
- Positive Liberty: to actualize rights, might have obligations – e.g., “free and appropriate education”

“Healthy societies need both individualism and solidarity. True liberty requires both freedom from external constraints and developed capacity to use that freedom constructively. As individuals we need to take responsibility for ourselves and, at the same time, recognize and act on our interdependence with others. The fact that fundamental values like liberty and responsibility contain antithetical meanings doesn’t represent inconsistent ethical thinking on our part. Rather, the dual meanings ask us to understand and tolerate complexity and to work constructively with moral tension—good-versus-good conflicts.” (from: JE Sabin, Individualism, Solidarity, and U.S. Health Care. AMA Journal of Ethics. May 2012. At: https://journalofethics.ama-assn.org/article/individualism-solidarity-and-us-health-care/2012-05)