

SOCIAL DISTANCING LAW PROJECT

LEGAL AUTHORITY IN DECLARED PUBLIC HEALTH EMERGENCY

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INTERDEPENDENCY OF LAW AND PUBLIC HEALTH

Wendy Parmet, Introduction to *Law in Public Health Practice*

“When plague threatened, law was the chief mechanism to support public health. Whether they relied on the enforcement of maritime quarantines or on the establishment of pest-houses, people have invariably depended on law’s ability to structure responses and to enforce norms in response to public health threats.”

“Indeed, in times of crisis, the most potent variable distinguishing the community that survives plague from that which does not is not the degree of scientific knowledge possessed by the community but rather the responsiveness and stability of the legal system. ”

“Thus, in the late nineteenth century, cities in the United States that had established well –organized boards of health and had granted them the requisite legal authority were far better able to endure the threats of cholera and other epidemics than were communities that lacked the legal structure to respond.”

BASIS FOR PUBLIC HEALTH AUTHORITY

FEDERAL CONSTITUTION -ENUMERATED POWERS FOR FEDERAL GOVERNMENT

- Tax and Spend for Common Defense/General Welfare
- Regulate Interstate/International Commerce

RESERVED POWERS TO SOVEREIGN STATES

“Police powers”— broad, expansive authority to protect health, safety and welfare of population

Delegation to local authorities

Individual Rights: Rights Afforded under Constitution v. State Authority

- Privacy/ Autonomy/Confidentiality – Examination, Testing, Vaccination
- Exercise of Religion – Prophylaxis against Infectious Disease; Curtailment of Religious Gatherings
- Freedom of Association – Prohibition of Public Gatherings; Curfew
- Liberty – Isolation and Quarantine
- Due Process/Procedural Protections - State Need for Summary Action

Jacobson v. Massachusetts (U.S. Supreme Court – 1905)

- Upheld exercise of police power to compel citizens to be vaccinated for smallpox
- Restriction of liberty/autonomy appropriate only when necessary to prevent avoidable harm and only when it imposes no harm
- Balance – measure must use reasonable means and be proportional to the public health problem

PUBLIC HEALTH EMERGENCY: M.G.L. c.17, s.2A

- Upon declaration by the governor that an emergency exists which is detrimental to the public health, the commissioner may, with the approval of the governor and the public health council, during such period of emergency, take such action and incur such liabilities as he may deem necessary to assure the maintenance of public health and the prevention of disease.

PUBLIC HEALTH EMERGENCY: M.G.L. c.17, s.2A

- The commissioner, with the approval of the public health council, may establish procedures to be followed during such emergency to insure the continuation of essential public health services and the enforcement of same.

Orders Under Declaration of Public Health Emergency

- Direct Order of State Commissioner or Order Authorizing Local Public Health Authority to Issue Order
- Rationale/Basis
- Authority
- Duration
- Due Process Protections
- Enforcement

POTENTIAL ORDERS

- CLOSURE OF FACILITIES
- ISOLATION AND QUARANTINE
- CLOSURE OF PUBLIC ASSEMBLIES AND PUBLIC TRANSPORTATION
- MEDICAL EVALUATION
- MASS PROPHYLAXIS

ORDER TO RESTRICT OR CLOSE PUBLIC ASSEMBLIES AND/OR PUBLIC TRANSPORTATION

- 1. ALL INDOOR GATHERINGS OF MORE THAN _____ PEOPLE ARE PROHIBITED
- 2. PUBLIC TRANSPORTATION SYSTEMS IN _____ ARE CLOSED
- 3. THIS ORDER SHALL BE ENFORCED BY STATE AND LOCAL LAW ENFORCEMENT PERSONNEL

ORDER FOR MASS PROPHYLAXIS

- ALLOWS STANDING ORDER OF STATE MEDICAL DIRECTOR TO SERVE AS PRESCRIPTION
- ANTIVIRALS DISPENSED AT PHARMACIES
- POSSIBLE MANDATORY VACCINATION (IF AVAILABLE) BY PROVIDERS IN EXPANDED SCOPE OF PRACTICE
 - EXCEPTION FOR THOSE WITH MEDICAL CONTRAINDICATION OR RELIGIOUS OBJECTION
 - POSSIBLE QUARANTINE FOR THOSE WHO OBJECT

Isolation and Quarantine

- Isolation is the separation of persons who have a specific communicable disease from those who are healthy, to stop the spread of that disease
- Quarantine is the separation and restriction of movement of persons who, while not yet ill, have been exposed to a communicable disease and therefore may become infectious and spread the disease to others

Individual Rights: Isolation and Quarantine

- Restraint of Liberty
- Clear and Convincing Basis
- No Bias/Discrimination
- Jew Ho v. Williamson (*California, 1900*): “evil eye and unequal hand”
- Due Process Protections: notice; hearing; review; acceptable conditions of confinement; availability of care

QUARANTINE: SARS EXPERIENCE IN TORONTO 2003

- 2,132 Potential Cases
- 23,000 contacts requiring Quarantine
 - 13,292 complied
 - 9,612 (reached after quarantine or could not be reached)
- Of 13,292 only 27 required formal quarantine order
- Only 1 formal appeal – withdrawn after explanation of quarantine
(NEJM 6/3/2004)

Authority v. Trust

- Law only goes so far
- Trust in public health authorities
 - Truth
 - Equity
 - Communication/transparency