Disasters and Disease: The Public Health Law During States of Emergency

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One of the harshest effects that a disaster, natural or otherwise, can have on the millions of Americans who are not directly or proximally affected is the unsettling reminder of how indiscriminately precarious and contingent life in modern America can still be. Images of the thousands of homeless survivors of hurricane Katrina as they wade through contaminated flood waters, in search of missing loved ones or higher ground, are just that sort of stark reminder.

Some would say that it is a sign of progress that these images are so profoundly shocking to our American sensibilities. "These are not images we are used to seeing coming from what was once our fun and vibrant city," a tear-stained resident of New Orleans said in a live interview. But life has not always been as easy in America as a city named "The Big Easy" might lead one to believe. One would hardly need to remind early settlers of the French port of Louisiana of the harshness of life because menace was a way of life for them. In an era before the germ theory of disease – and the resulting antiseptics, better environmental hygiene and antibiotics, the slightest infection or outbreak often signaled the end for such settlers and their loved ones. Hospitals were scarce and often deadlier than no treatment. Doctors were, despite their best efforts and great bedside manner, still mostly helpless in the face of acute injury and disease. And there was no way of knowing when anyone sat in the path of a deadly hurricane.

For those of us who live in one of the most technologically and scientifically advanced nations on Earth, the exigencies of the past are largely unknown. The fact that we are blissfully unaware of the myriad ways in which we could swiftly and mercilessly meet our end is largely a testament to the efficacy of our public health law. The Institute of Medicine defined "public health" as "what we, as a society, do collectively to assure the conditions for people to be healthy."[1] It is partly because of the public health law that many of the most pernicious diseases of the past are unknown today.

Although it is debatable whether the Constitution of the United States places any affirmative duty on the government to protect individuals from harm or to promote the public health, every state and the federal government is empowered to pass laws and regulations to protect public health and safety. Such laws include both those designed to prevent or curb the spread of infectious diseases, control dangerous substances that prevent a threat to public health, and maintain records and statistics necessary for better health plan implementation, and those that plan systematic health care services. State and federal governments promulgate these laws through a variety of mechanisms, including their power to tax and spend (e.g., the taxpayer-funded Federal Emergency Management Agency (FEMA) and state emergency relief agencies), indirect regulations (e.g., federal

[1] INSTITUTE OF MEDICINE, THE FUTURE OF PUBLIC HEALTH (1988).

and state building codes in coastal areas or flood plains) and direct regulations (statutory law).

For example, in order to contribute to the protection of public health, physicians must satisfy requirements concerning record keeping and reporting of information concerning their patients, especially those who die from or have a contagious disease. Under certain state statutes, various professionals – physicians, dentists, veterinarians and local school authorities – must report persons known to have or suspected of having a communicable disease such as botulism, diphtheria, polio, cholera, plague, smallpox or yellow fever. In order to avert an epidemic, physicians must immediately report such cases to their state's health department. Certain communicable diseases may be required to be reported by name, address, age, sex and race/ethnicity. Still other statutes mandate reporting of tuberculosis, cancer control, epilepsy, exposure to rabies, gunshot wounds, spinal cord injuries and birth defects.[2] All of these, and myriad other public health laws, are designed to further a healthy environment for the population and prevent disease.

However, while prevention is extremely important, how well do public health laws in the United States address public health emergencies brought about by catastrophic events? In the influential Institute of Medicine study quoted above, it was found that state and federal public health laws, while integral to the high standards of health that are observed in our country, were inadequate and outdated.[3] The report thus recommended that "states [should] review their public health statutes and make revisions necessary to accomplish […] two objectives: [1] clearly delineate the basic authority and responsibility entrusted to public health agencies, boards, and officials at the state and local levels and the relationship between them; and [2] support a set of modern disease control measures that address contemporary health problems such as AIDS, cancer, and heart disease."[4]

Shortly after this seminal report that, famously, indicated that America's public health law was "in disarray,"[5] local, state and federal agencies and policymakers began to respond. The 1990s saw national public health leadership institutes open their doors as well as the Management Academy for Public Health, the Health Alert Network and centers for public health preparedness.[6]

However, while these revisions and additions to the public health law were, for the most part, beneficial and welcome, issues of implementation, efficacy and bureaucracy continue to be problematic.[7] In addition, when there are large areas that natural disasters such as a hurricane like Katrina are likely to leave devastated, the cross-jurisdictional complexity that makes it so difficult to understand and implement laws can stand in the way of the swift and decisive action necessary for emergencies.

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[2] *See, e.g.*, TEX. HEALTH & SAFETY CODE §§ 13, 81, 82, and 826 for public health reporting requirements.
[3] *Id* at 146.
[4] *Id*.
[5] *Id* at 19.
[6] Anthony D. Moulton, Richard N. Gottfried, Richard A. Goodman, Anne M. Murphy, & Raymond D. Rawson, *What is Public Health Legal Preparedness?* 31 J.L. MED. & ETHICS 672, 673 (2003).
[7] *Id*.

Another potential legal issue that arises after a large-scale disaster results from the fact that public health law is mainly concerned with prevention rather than treatment and the general population rather than the individual. Public health laws thus often clash with personal freedoms or interests. We see this every day in things ranging from mandatory vaccination laws to the fluoridation of our water supplies. When a public health emergency is declared, the government may further curtail certain freedoms in furtherance of the public health. For example, states and the federal government have certain isolation and quarantine powers (without the safeguards of due process) in the event of a public health emergency. Also, questions of informational privacy in the chaos of emergency loom large for those concerned about a government overstepping its bounds. In general, however, the rationale for public health measures – including reporting requirements, record keeping and prevention efforts – is obvious and easy to understand, especially in times of emergency when the status quo protected by these laws and regulations is disrupted by natural disasters like hurricane Katrina.

America has begun in earnest to become more prepared for catastrophic events in the wake of the terrorist attacks on September 11, 2001, and the following anthrax incidents. Realization of how ill-prepared America is for large-scale public health disasters prompted the Centers for Disease Control and Prevention (CDC) to draft a model state emergency health powers act[8] and fund the first nationwide initiative for public health law preparedness for disasters.[9] And yet, while much has been done in the intervening years, the work is far from complete. Unfortunately, it is largely in reviewing the findings after disasters like that of Katrina that governments begin to better understand the weaknesses of public health law and emergency response laws.

September 2005

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[8] Johns Hopkins University Bloomberg School of Public Health, Center for Law and the Public's Health, *Draft Model State Emergency Health Powers Act, available at* http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf (last visited Sept. 1, 2005).

[9] INSTITUTE OF MEDICINE, *supra* note 2, at 676.