



## **Northwest Center for Public Health Practice**

at the University of Washington School of Public Health and Community Medicine

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### **Transcript for the Introduction to Public Health Law module**

#### **Slide 1: Introduction**

Welcome to Public Health Law in the Age of Terrorism. My name is Pat Kuszler, I'm a law professor at the University of Washington in Seattle. And today I hope to spend a bit of time with you discussing the role of law in public health, particularly in the wake of 9/11 and the new age of terrorism.

#### **Slide 2: Objectives**

Our objectives today are first to review the sources of law that are relevant to public health to set the stage for us to begin a more complex discussion related to the jurisdictional issues. This is going to deal with taking a look at state, federal, tribal and international laws in an attempt to understand their relative positions to each another. We also hope to determine what kinds of law apply to public health threats like bioterrorism and why. Finally, we'll summarize some of the categories of terrorism and bioterrorism and begin to identify the laws of agencies that are relevant to terrorism and bioterrorism.

#### **Slide 3: What is Law? Why is it Important to Public Health?**

First of all, what is law and why is it important in public health? While there is no easy, straightforward definition in most cases, law in the global sense, is a system of rules that we a society agree to inflict upon ourselves in order to live in reasonable harmony together.

Indeed, law does serve to articulate societal policy. It provides a construct for our relationships to others and our relationship with government.

It also provides a construct for how government is set up, the various branches of government and how they interact.

One basic truism, however, is that for every law that protects us, there is a commensurate restriction on freedom. And generally the rule is that one's freedom to complete unfettered autonomy of action can't impinge upon the freedom of others. And indeed much of public health law focuses on that uneasy tension between individual rights and the role of public health.

#### **Slide 4: Five Notable Characteristics of Public Health Law**

And now let's delve a bit deeply into the characteristics of public health law and then move on to see how these sources of law impact public health law. This list of 5 characteristics was drawn from the work of Professor Larry Gostin out at Georgetown and this list pretty much comprehensively looks at the characteristics of public health law. First of all, the government does have a responsibility to ensure the health of people

and its citizenry. And its duty is to benefit that population and not impinge upon their rights. And much of public health law does indeed focus on the relationship between the state and its citizens, how much regulation can the government do to ensure the health of the people without impinging on the individual rights of its citizens. Typically, public health services are designed to improve the public health of the many rather than individual health so that it may be that something that will ultimately improve public health, say mass vaccinations, may indeed require individuals who don't want that intervention or who feel that intervention is dangerous, to be involved in the vaccination. Perhaps they will be able to opt out on medical grounds. But typically what's at issue here is the public's health rather than the health of any one individual. And to that end public health has the opportunity to coerce, it has the opportunity to use what is called state "police power" to effect compliance with public health law.

### **Slide 5: Sources of Public Health Law**

Let's first review the various sources of public health law. First of all, we have the Constitutions. We have constitutions at the federal level as well as the state law. Typically, a constitution will set forth an array of individual rights and freedoms that are protected at least to some degree from government intrusion. And indeed, one of the purposes, the major purposes of constitutions is to lay out a series of rights that belong to the citizens, to set them forth as something that are protected from government action or interference by the government. The Constitution is not really built to protect us from each other, one citizen from another, but rather to protect us from our government. And indeed certain rights and freedoms are protected more carefully by the Constitution than others.

For example, fundamental rights, those that deal with reproductive choices, those that deal with a liberty, those that deal with how we raise our children, how we practice our religion. These are fundamental rights and they are indeed very protected from government interference. In opposition to this, there are certain other things that we may call freedoms, like whether or not we can be regulated in terms of how fast we drive on the roads or whether or not we have a right to sell milk at a price that we choose to without regulation. These sort of economic, less intimate, personal rights are protected to a lesser degree from government intrusion because it is recognized that the government will need to regulate this area to provide optimal public policy.

Constitutions also spell out the powers of government and the relationships between the branches of government. This becomes increasingly important as we face challenging situations like bioterrorism.

Yet another and important source of law are statutes and resolutions. In our case we'll look at statues and resolutions that promote public health and safety. Some of the laws that appear in this context would be environmental controls, laws for mandatory reporting of contagious diseases, helmet and seatbelt laws. These sorts of laws that may indeed infringe on one of our freedoms but indeed promote public health and safety. Other laws and statutes and regulations that we may be familiar with in public health would be issues of civil enforcement, notably, isolation and quarantine, civil detention. These of course

come into play in the context of bioterrorism should we have a need to isolate and quarantine individuals infected with a contagious disease. And indeed, civil detention comes into play in a variety of contexts in public health.

**Slide 6: Sources of Public Health Law, contd.**

Another important source of law are cases. Cases provide a check and balance on government as well as on each of us, they provide for dispute resolution, redress for harms experienced by individuals and they help flesh out the meaning, expansiveness and the limitations of the law. So for example, the cases will sort of put flesh on the bones of the law and provide us with more detail than we might otherwise have had by virtue of the statutes and regulations or perhaps with respect to a certain unique situation. Each case builds on the previous case and provides us with a body of case law that indeed provides a greater explanation of what is law in this area. We will frequently see cases in public health issues. For example, when is there a duty to disclose private medical information, if ever. And how do we decide what those sorts of unique circumstances might be. Case law has given us for instance, the ?? Doctrine, which deals with the issue of patient privacy in the mental health context. In such a context a health care provider may have the duty to disclose private medical information if indeed that information betrays the fact that the patient seeks to harm another.

We also have emergency and executive declarations. Executive orders are typically done by the chief executive officer, in the case of the federal government, the president, in the case of states, governors. And indeed we frequently see them come into play during times of disaster or times of warm danger. They are ways for an executive to make a tweak or change in the law quite quickly without going through the usual process. They are of course subject to questioning by the courts if they are unconstitutional or indeed conflict with other laws. But typically our executives have the good sense to contact their counsel and so that rarely occurs.

**Slide 7: Public Health Law: State vs. Federal**

It is important to note that federal power under the Constitution is very limited. It indeed is limited to that which is specifically delegated to the federal side of the equation in the Constitution, either implicitly or explicitly.

Public health per se is not explicitly allocated to the federal government and indeed has been traditionally policed by the state government. And indeed many things are policed by the state government because it is indeed the sort of default system in terms of anything that is dealt with by law that does not fit into the federal bundle of areas in which to legislate. The 10<sup>th</sup> amendment for example speaks at great length about the sovereignty of the states in making law in respect to their own citizens. And indeed this concept of state sovereignty is woven throughout public health.

**Slide 8: Federal Power**

Although states have typically taken control of public health, more by default than anything else, because the federal government is a government of limited powers, that is not to say that the federal government and the federal power is non-existent in public

health, not by any means. Under the Doctrine of Preemption and the Supremacy Clause we know the federal law is indeed a very powerful source of law. And typically, this source of law, as long there is some federal authority to act, is going to be considered preeminent over state and local law. The chief powers of federal government for public health purposes are the power to tax, ??? and regulate interstate tax, but these are mighty powers in the sense that we already have seen the power of spending in the context of the drinking age as I mentioned in the case of *South Dakota v. Dole*. We also have massive federal laws in respect to food, drug and cosmetics, Clean Air and other environmental acts that deal with the more federal and indeed more national issue of interstate commerce of drugs, cosmetics, foods and air.

**Slide 9: Federal Power, Contd.**

As mentioned before, the federal government has expansive authority to act in public health primarily through its power to raise revenues for public health and the power to both directly and indirectly regulate private activities that may endanger human and population health.

There are some concerns as to where federal powers may lawfully extend into the area of traditional state concerns such as public health. The case of *US v. Lopez* which dealt with the Gun-Free School Zones Act that was passed federally, this was found to be an impermissible impingement upon local authority and may indeed be a sign of less federal power. If anything however, this stands in somewhat uneasy tension with more recent events such as those resulting from bioterrorism which speak to a much greater federal and public health, especially in the context of anti-terrorism efforts.

**Slide 10: State Power**

Indeed the 10<sup>th</sup> Amendment reserves to states all powers that are not otherwise given to the federal government nor prohibited to the states by the Constitution.

That said, this 10<sup>th</sup> Amendment reservation of powers is not so complete that the federal government doesn't have a significant opportunity to regulate in states. For example, anything that affects interstate commerce. There's the case of *Dole v. South Dakota* which demonstrates that federal spending power can be exerted to foster public health and safety even though it might inhibit somewhat the exercise of state power. That particular case involved the drinking age in South Dakota.

State power as the inherent authority of the state to preserve and promote health and general welfare typically includes the authority to act for public health and indeed much of our public health law is found in the cases and law of individual states.

**Slide 11: State Power—continued**

Some of the examples of state police powers include most of the laws authorizing vaccination, isolation and quarantine. Quarantine is particularly interesting. Even though virtually all states have the laws related to quarantine, its well worth noting there's a federal power to quarantine, as well. This begins to give us an idea of what we face ahead, which is the fact that public health is truly an area of concurrent jurisdiction. State

police powers are also used to inspect commercial and residential premises, such as restaurants; abate unsanitary conditions or other health nuisances; regulation of air and surface water contaminants; and licensure of health care professionals.

**Slide 12: The Local Level**

We also don't want to neglect the local level. It's not just that state based law and indeed implement state based law, there's also a local level of government. And in many cases local governments, including counties, municipalities, and special health care districts, share public health power both through delegations of state police power, or so-called "home rule" that is designated by the state constitution of an individual state.

These exercises of local authority in the interests of public health typically cannot extend beyond limited jurisdictional boundaries or conflict with or impair federal or state law. Nevertheless, local governments have been in the past very active in terms of public health authority and often have constituted the first line of defense against a public health threat. And indeed one of the goals for the future is to allow local governments to work more cohesively together and indeed with the state so that the efforts, often well-developed efforts of local government can be used in a synergistic fashion with state and federal authorities. The role of local governments in public health is somewhat limited by federal and state laws. That said, many local governments have been very aggressive and active in dealing with crises such as, for example the HIV epidemic.

**Slide 13: Federal Imposition on State Sovereignty or Local Authority**

It's well documented that power will shift to the federal government in time of war and in times of any kind of war danger or foreign invasion. The federal government may indeed declare a state of emergency that transgresses state lines. The federal government can regulate and policy public health in any case of rebellion or invasion. And of course, and as we face sort of modern infectious disease threats, it's questionable how this concept of a rebellion or invasion might indeed be defined.

**Slide 14: Tribal Law**

I want to say a few words about tribal law. Out here in the Pacific Northwest we have numerous tribes and tribal lands. And of course the issue of tribal law is worthy of an entire course of study. But in essence, what it comes down to is that tribes are essentially sovereign nations, so long as they are recognized tribes. And their tribal law does indeed reflect the power of a sovereign nation. Particularly in areas of civil law, tribal law may typically prevail over state or even federal law. And indeed stand on its own. That said, in the context of public health, we will have jurisdictional questions arise when a public health threat crosses boundaries between tribal and state lands or tribal and federal lands. Public health frequently ends up as an area of concurrent jurisdiction either in fact or more likely as a matter of agreement between all parties. For example, if there is a public health threat on tribal lands, on a reservation, it may be that in the course of delving into the etiology of this disease or public health threat that cooperation between tribal authorities, state authorities and federal authorities is essential in order to address the public health threat. And typically the tribal authorities in charge of public health will

have an ongoing relationship going on with their neighboring ph officials at the state or federal law.

Things change however when we get into the world of criminal law, especially federal criminal law. There, tribal law takes a back seat to federal and state criminal law. And indeed tribes and tribal members are susceptible to criminal law and tribal law does not necessarily have sovereignty over the parties in such a criminal act.

### **Slide 15: International Law**

Finally there's another body of law that's worth mentioning and that is international law. This is an area in which there has been much talk and not much action in recent years. International law, is by nature, a body of law that is not called into question much in the in the United States court system. Nevertheless, there are international laws that apply, usually borne of treaties or covenants.

The good news is that very frequently countries gather together in meetings or treaty agreements to discuss issues of health, more commonly aspirational issues of health. And they produce treaties and covenants that relate to health, for example the International Covenant on Economic, Cultural and Social Rights speaks at length about the right to health. The Universal Declaration of Human Rights speaks about health issues. However, as I mentioned many of these covenants, treaties or declarations are aspirational in nature or binding only upon countries that indeed both sign onto them and subsequently ratify them in their congresses or legislatures.

Regretfully, there is not a huge body of international law in which nations have come together to deal with issues like as infectious diseases or intentional bioterrorism assaults. It is likely however that there's much greater interest in having such laws in the wake of the SARS epidemic. As you know, the SARS epidemic, ??? at jet speed across the globe, and it demonstrated how quickly an infectious disease will transverse through many, many countries within a very short period of time. The World Health Organization stepped up front to begin to deal with travel guidances and the like with respect to infectious diseases at the time of the SARS epidemic. And indeed they have now begun to write additional sets of international health regulations that will serve as further guidance to nations who confront an infectious disease crossing their borders and indeed becoming manifest, literally, before they know that it's in transit.

It remains to be seen, however, how eagerly these international health regulations will be embraced by member nations and indeed whether they will have the power of law. Moreover, the role of the World Health Organization remains to be fully clarified in terms of whether or not they truly will become an international arbiter of what appropriate international law might be with respect to infectious disease, be it from a natural outbreak or an intentional assault.

### **Slide 16: Terrorism: Conventional Weapons**

Many of the concerns about terrorism are based not necessarily on bio-terrorism but on other types of non-war related terrorism. Some of this uses conventional weapons to

wreak terror and intimidation on a population. Such example would be the World Trade Center bombings in the early '90s, the Oklahoma City bombings, bombings of various military installations, the USS Cole. And indeed these sorts of relatively contained events of terrorism are responded to much in the way we look at natural disaster type responses, where we first deal with it on a local level and we gradually bring in the needed forces in a more targeted fashion.

However, when we get into more discrete forms of terrorism, like bioterrorism, it gets a little bit more difficult to respond in such a contained fashion.

### **Slide 17: Terrorism: Chemical and Biological Weapons**

As we think of non-war related terrorism once we are into chemical and biological weapons we think of all sorts of modern types of bioterrorism and chemical terrorism such as the Japanese sarin gas attack in the subway system a few years ago. This sort of bespeaks a modern approach to terrorism. That said, we should not forget that bioterrorism has a long-standing history. We know that various fomites were used to contaminate food, water and air as far back as 600 BC in the Greek Civilization. The 18<sup>th</sup> century saw the use of smallpox against the Native Americans in the French and Indian War. And in 14<sup>th</sup> century Kafa (Ukraine) we saw the use of plague as a weapon, a weapon that was incorporated in corpses who had died of the disease and then were then catapulted over the city walls to essentially infect the sequestered town.

And of course as we look back in time at biological weapons, all of the wars, literally, WW1, WW2, both sides of these confrontations invested in and utilized and attempted to utilize, albeit largely unsuccessfully, biological weapons.

There's also been modern attempts at biological weapons that we know about. The same group that used the sarin gas in Tokyo had planned to use Ebola. We have at least one secondarily picked up case of bioterrorism in the United States with the salmonella poisoning by the Bhagwan Shree Rajneesh group in Oregon. In that particular case the use of salmonella was used as a bioterrorism weapon by instilling salmonella in salad bars in a couple of steakhouses in Oregon. And people became ill and they became better. But while they were ill, they were able to track that the strains of salmonella were similar. The question was where did it come from? How did it happen to end up in these salad bars. And indeed the mystery was not solved for a solid year. When by happenstance, the Bhagwan Shree Rajneesh facility was busted for something else, they found a laboratory that, lo and behold, had the same strain of salmonella. The story came out that the members of the group had sought to influence a zoning regulation and were sort of doing a test run to see if they could put voters out of commission in such a way that the vote would go their way. So after the fact it was discovered that this attempt at bioterrorism had been made but it was not brought to full fruition, apparently having been abandoned before they actually got around to a widespread use of the weapon. Botulism, ricin, plague have been among the many confiscated substances here in the US. And we can only assume that there probably are continuing efforts in other countries as well to utilize these various bioterrorism weapons.

**Slide 18: The Case for State Jurisdiction**

So as we look at terrorism and bioterrorism what is the case for state jurisdiction? Well, obviously state law is designed to address public health threats such as epidemics and disease outbreaks. So in some ways, the state police powers are ideally situated to deal with these epidemics, whether from terrorism or natural occurrences at the local level. However, they are geared toward unintended outbreaks and accidents which are not quite the same thing as an intentional infusion of a weapon into a larger area. State law does confer broad and sweeping police powers but it's not been tested against the challenge of bioterrorism, much less something that crosses state lines or is even of global proportions. State jurisdiction is of course, consistent of principles of federalism and state sovereignty. But even though those are deeply held principles of our United States culture, that does not necessarily mean that they cannot and should not give way in the case of a significant bioterrorism threat that would most likely overwhelm state borders.

**Slide 19: The Case for Federal Jurisdiction**

The case for federal jurisdiction is considerably more well-developed. First of all, bioterrorism is frequently a national threat. It frequently will involve disruption of interstate commerce. It's going to spread quickly without regard to state or indeed or any other sorts of lines of demarcation such as tribal borders. With state law varying among the 50 plus jurisdictions, and 50 sets of leaders and 50 sets of bureaucracy and organization it makes sense that this muddled 50 plus jurisdiction issue could indeed be a barrier to an effective approach to deal with the bioterrorist threat.

[slide 20: Interactive Scenario #1]

**Slide 21: Federal Statutes**

There are a variety of federal statutes that deal with bioterrorism and terrorism. And indeed some of them have already begun to demonstrate their power in the courts. As we take a look at some of the big weapons in the fight against bioterrorism we see that we have a couple of major antiterrorism acts as well as of course the USA PATRIOT act. As we take a look at the Biological Weapons and Antiterrorism Act of 1989 which was amended and expanded upon in 2002, we see that this particular act is very, very broad indeed. It states that whoever knowingly develops, produces, stockpiles, transfers, acquires, retains or possesses any biological agent, toxin or delivery system for a use as a weapon or knowingly assists a foreign state or any organization to do so, or attempts, threatens or conspires to do the same shall be fined under this title, or imprisoned for life or any term of years, or both. It specifically provides for extraterritorial federal jurisdiction over any offense committed under this section by or against a national of the United States. This has been utilized in several cases including one in which a gentleman ordered vials of bubonic plague to allegedly protect himself against an invasion from Iraq. This fellow was met at the door by the FBI and was indeed was prosecuted under this statute.

**Slide 22: Federal Statutes, Cont'd.**

The Anti-Terrorism and Effective Death Penalty Act of 1996 is similarly broad. It addresses offenses against a national of the US or within the US who without lawful authority uses, threatens, attempts, or conspires to use a weapon of mass destruction, including any biological agent, toxin or vector. If the perpetrator uses such a weapon against a national of the US, regardless of whether the national is inside or outside the United States or any person within the US where there is an effect on interstate or foreign commerce or if there's a threat that it would have affected interstate or foreign commerce. So you can see that this is also a very broad act. This is the law that was used to prosecute John Philip Walker Lind, the so-called American Taliban soldier. And indeed, this too, has a substantial penalty tied to it, including if indeed there has been a death that has resulted, punishment by death or life imprisonment. In addition to John Philip Walker Lindh, we've had other prosecutions utilizing this law. For example, there was a group of folks down in Texas who were seeking to re-establish Texas as an independent republic, named somewhat comically, Republic of Texas, ROT. Indeed they were in the process of stalking a judge and threatened to attack her using rabies or botulinum Toxin. This threat was transmitted via email, crossing state boundaries, and therefore, fell squarely into the threat provisions of this act and these gentlemen were indeed convicted.

**Slide 23: Federal Statutes, Cont'd.**

Finally, we have the USA PATRIOT Act. Many of you may not realize that USA PATRIOT is an acronym standing for Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism. This act is a far-reaching statute the full understanding of which is still in evolution. It created a crime of domestic terrorism that encompasses acts dangerous to human life that are violations of the criminal law if they appear to be intended to influence the policy of a government by intimidation or coercion within the territorial jurisdiction of the United States. It has provided for tremendous sharing of information between domestic and foreign intelligence, disclosure of grand jury and other proceedings that were previously not acceptable. It has provided sweeping authority to detain immigrants regardless of their legal status, whenever there are any reasonable grounds to believe that the non-citizen is engaged in terrorist activity. And there's mandatory detention while the authorities figure it all out. There is a provision for sneak-and-peak searches, internet email tracing, and a variety of foreign intelligence surveillances without significant probable cause.

Now the USA PATRIOT Act has been barraged with a variety of lawsuits, including a number brought by the detainees of Guantanamo Bay. Last spring, the Supreme Court declared that these individuals being held without any access to attorneys and any recognizable due process that this activity violated the Constitution. And indeed bits and pieces of this act were then overturned by the Supreme Court. More recently we had an appeals court hold that the provision that allowed sharing of certain previously private information was also a violation of Constitutional rights. So it is likely that bits and pieces of this will be picked off by the courts during its life as a law. Most of USA PATRIOT Act is scheduled to sunset in the December of 2005. It remains to be seen whether Congress will indeed reinstitute the PATRIOT ACT, albeit with the provisions

that have been overturned excluded or whether it will decide to allow it to sunset and write something else that is more in keeping with recent court decisions. There is also percolating through the legislative system, a PATRIOT 2, which apparently has even more far-reaching powers. It still remains in discussion and has not become law or even come close to becoming law yet.

**Slide 24: Federal Agencies: FBI & FEMA**

Whenever one of these federal laws is broken we are in the territory of federal criminal law. When you have a federal criminal law that will typically bring in not only the FBI but federal jurisdiction. In the case of a criminal law, the violation of a criminal law will also overwhelm any sort of a tribal law if the incident occurs on tribal lands. Typically, tribal authorities retain jurisdiction with respect to civil activities but not with respect to criminal. So the FBI will provide a leadership role in managing a crisis in the time of terrorism whether it's biological or conventional or chemical. And indeed its local and federal coordinating groups will work with both the local and regional public health officials and of course, liaison with the CDC.

After the fact, FEMA, the Federal Emergency Management Authority will sort of perform a leadership role with respect to managing consequences of an attack just as they do now with respect to hurricanes, etc. And typically the FBI and FEMA will work in coordination.

**Slide 25: Federal Agencies: CDC**

There are a variety of federal agencies that come into play as we think about bioterrorism. One of course is the CDC. The CDC's role is actually quite limited in scope. It does recognize the sovereignty of states in the regulation of public health and that they have emergency powers. Frequently the CDC will be called in when there has not been a federal law broken, a criminal law broken, but rather when there has just been a natural outbreak. And indeed the CDC has encouraged local authorities to engage voluntarily with the CDC in both infectious disease outbreaks and any sort of a bioterrorism incident.

42 USC 243 provides a general grant to the CDC to enforce federal quarantine regulations when there is a threat of interstate transmission. However, generally speaking, the CDC is going to act in concert with, and subservient to the FBI in terms of its coordinating role in such events.

**Slide 26: Role of the Military**

Typically the military will not be called to act domestically. The Posse Comitatus Act of 1878 prohibits the use of the military domestically. There are, however, some exceptions to Posse Comitatus. The president has some constitutionally granted emergency authority powers to respond to an insurrection and to protect federal property and operations. And there are some statutory exceptions where there's a national emergency involving a civil disturbance and rebellion that make it impractical to enforce law, particularly federal law; and anytime insurrection or violence imperils a state's ability to protect citizens, in which a state is unable to adequately protect citizens' rights.

[slide 27: Interactive Scenario # 2]

**Slide 28: Federal-State-Local Collaboration**

Perhaps never before has there been such a pressing case for federal, state and even local collaboration in the context of infectious disease not only in terms of natural outbreaks but of course, anything that results from a terrorist act. Obviously when a disease outbreak occurs in the case of bioterrorism we have a federal crime involved and therefore, you have the full panoply of federal powers including the FBI and the various criminal investigational skills in concert with epidemiologic investigation both at the local and the national CDC level.

Typically in such cases the criminal investigation is going to require some deference from state public health authorities but a pre-planned sharing of data and a plan for coordination is imperative to control and contain the threat.

**Slide 32: Summary**

In summary, as public health professionals seek to meet the challenges of bioterrorism, a greater understanding and knowledge of the role and power of law is essential.

Obviously, here we are facing a panoply of laws coming together as never before in the world of public health. As our disease threats have become more global in nature so indeed must our response become more global in nature. Indeed public health is a common denominator across many different sources of law, at many different levels, including federal, state, local international and one of course would have to say, tribal.

And although there are numerous sources and levels of law it is public health officials who are present in all of the various executive agencies under federal, state, local and international authorities. And they are ideally positioned to configure a modern method of communicating and collaborating in a way that has never been tried or implemented before but certainly will have to be implemented as we face the challenges of the future.