

Public Health Powers During Public Health Emergencies



Lance Gable

Assistant Professor of Law

Wayne State University

Law School

Detroit, Michigan, USA

lancegable@wayne.edu

Overview



I. Defining Governance in Public Health Emergencies

II. Law and Public Health Emergencies in a Modern Context

III. Models of Governance and Public Health Emergencies

IV. Concluding Thoughts and Next Steps

Governance of public health emergencies

- Public health emergencies are a unique set of circumstances that require the use of distinct legal powers.
- The successful governance of public health emergencies requires clear laws, carefully assigned public health powers, and a coordinated governance approach.
- The exigencies of a public health emergencies likely will be easier to address with a centralized governance approach supported by law.

Law and public health emergencies

- Law is an important component of public health emergency response
- Laws create public health powers that can be used to address emergency circumstances
- Laws place direct and indirect limitations on the conduct of government and others

Law and public health emergencies

- Law has a unique role in governance
- Laws create systems and frameworks within which the government and other entities can address emergencies
- Laws establish norms of conduct and cooperation
- Factors outside of legal systems also can “govern” a public health emergency response

Defining Governance

- Two definitions
 - Governance is “the **management** of the course of events in a system.” (Burris, 2004)
 - Governance is “the range of **activities, functions,** and exercise of **control** by both public and private actors in the promotion of social, political, and economic ends.” (Lobel, 2004)

Theories of Governance



- Traditional governance: formal structures (command-and-control)
- “New governance”: less formal structures that expand the relationships between government and entities outside government
- Governmentality: government control pervades the context outside of government
- Decentralized governance: diffusion of control and responsibility

Why Study Governance?

- Broad concept that addresses the role of law in a larger system – law is one of many tools
- Globalized world has created more complex and interconnected systems and effects
- Public health consequences may be significant

Defining public health emergencies

An occurrence or imminent threat of an illness or health condition that:

(1) is believed to be caused by any of the following: (i) bioterrorism; (ii) the appearance of a novel or previously controlled or eradicated infectious agent or biological toxin; (iii) [*a natural disaster*]; (iv) [*a chemical attack or accidental release*]; or (v) [*a nuclear attack or accident*]; and

Defining public health emergencies

(2) poses a high probability of any of the following harms: (i) a large number of deaths in the affected population; (ii) a large number of serious or long-term disabilities in the affected population; or (iii) widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people in the affected population.

Source: Model State Emergency Health Powers Act

Modern context of public health emergencies

- Public health emergencies can encompass a variety of events
- Two main categories of events: infectious diseases and natural disasters
- Natural disasters:
 - Indian Ocean Tsunami (2004)
 - Hurricane Katrina (2005)
 - California Fires (2007)
- The responses to these events were handled quite differently

Modern context of public health emergencies

- Infectious diseases account for approximately 25% of all mortality worldwide
- New diseases have emerged: Over thirty new infectious diseases in the past twenty-five years
- Old diseases have returned, often in more virulent form
- Shifts in endemic disease to places previously unaffected
- Rise of antimicrobial resistance
- Potential for intentional bioterrorist attacks.
- These developments have multiple causative factors.
- Resource disparities
- Collapse of public health infrastructure

Conditions of public health emergencies

- Discrete and temporary events
- Difficult or impossible to predict
- Require rapid, and sometimes extraordinary responses
- Complex circumstances fueled by stress and panic
- Legal context changes during a public health emergency

Theories of Governance: Applied to PH Emergencies

- Traditional governance: Model State Emergency Health Powers Act
- “New governance”: International Health Regulations, private contingency planning
- Governmentality: Voluntary social distancing
- Decentralized governance: Medical Reserve Corps

Achieving good governance during public health emergencies

- Hard law v. soft law v. non-law
 - Hard law: statutes and regulations, contractual obligations
 - Soft law: policies and guidelines, international recommendations
 - Non-law: Education, social modeling, media influence, religion, individual ethical decision-making

Governance during public health emergencies

- Hard law v. soft law v. non-law
 - Hard law: MSEHPA, All-Hazards Preparedness Act
 - Soft law: National Response Framework
 - Non-law: Ethical principles; media pressure

Governance concerns during public health emergencies

- Expansion of influential actors
- Situational governance
- Intentional v. Unintentional risks to health
- Global effects
 - Global coordination
 - Global justice



Governance concerns during public health emergencies

- Expansion of influential actors
- Government sector is traditionally the main actor in public health
- Private sector and non-profit sector have increasingly large roles in health
- To what extent should the governance of public health emergencies incorporate these additional actors and how?
- The potential roles of these actors should be taken into account whenever possible

Situational governance during public health emergencies

- Should we have different models of governance for different public health emergency situations?
- For example, a pandemic will require a different response than a natural disaster
- A governance strategy must be flexible to address a variety of threats foreseen and unforeseen, but must not result in overly complex response systems

Situational governance during public health emergencies

- Should we have different models of governance for different phases of a public health emergency?
 - Planning
 - Response
 - Mitigation
 - Recovery
- Response efforts may need centralized control, while the planning, mitigation, and recovery stages may allow for greater participation by other actors

Situational governance during public health emergencies

- Intentional v. Unintentional risks to health
- Should a public health emergency that occurs by intentional means be governed differently than one caused through unintentional circumstances?
- Intentional emergencies will include a law enforcement component that may conflict with public health efforts

Global governance during public health emergencies

- Global effects
 - Global coordination: Will countries or other transnational actors work together?
 - Global justice: Will the needs of those around the world be considered and met during a public health emergency?
- Global efforts are unlikely to succeed under current governance models, but multilateral approaches may hold promise

Governance of PH Emergencies: Conclusions

- The nature of public health emergencies require that some coordinating presence be in place for effective response. The top-down model is most likely to be effective in a massive public health emergency, so long as the government agency in charge has appropriate expertise and necessary powers to effectuate rapid and beneficial response efforts.

Governance of PH Emergencies: Conclusions

- The preparedness, mitigation, and recovery aspects of planning for a public health emergency may be more conducive to decentralized or alternative approaches to governance.
- Perhaps multiple governance strategies can be employed simultaneously in an aggregative fashion. This is what is happening now without coordination.

Governance of PH Emergencies: Conclusions

- The application of governance models and laws to public health emergencies must be applied using specific examples and scenarios.
- Regardless of the model of governance used to address public health emergencies, there will be a practical need to find ways to marshal resources effectively, and also to be proactive in the detection and prevention of public health emergencies.

Governance of PH Emergencies: Conclusions

- The role of law in the governance of public health emergencies must be further explained and explored.
- Thank You!
- For more information, please contact:
Lance Gable
Wayne State University Law School,
lancegable@wayne.edu