

Law and the Public's Health

PUBLIC HEALTH EMERGENCIES AND LEGAL REFORM: IMPLICATIONS FOR PUBLIC HEALTH POLICY AND PRACTICE

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Following the terrorist attacks of September 11, 2001, and the intentional dispersal of anthrax spores in several states, the Centers for Disease Control and Prevention (CDC) asked the Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities to draft the Model State Emergency Health Powers Act (MSEHPA or Model Act). The Model Act was written in collaboration with members of national organizations representing governors, legislators, public health practitioners and agencies, and attorneys general. It presents a series of proposed legislative provisions for preparing for, preventing, and responding to public health emergencies due to bioterrorism or other causes.

Since its final release in December 2001, 39 state legislatures and the District of Columbia have introduced legislative bills or resolutions based in whole or part on MSEHPA. (These states are: Alabama, Arizona, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming.)

In 2003 alone, 14 states have introduced or reintroduced relevant bills (Alabama, California, Connecticut, Illinois, Massachusetts, Nevada, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Texas, and Wyoming). To date, legislative bills or resolutions in 22 states (Arizona, Delaware, Florida, Georgia, Hawaii, Maine, Maryland, Minnesota, Missouri, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Wisconsin, and Wyoming) and the District of Columbia have passed. Virtually every state and many local governments have used MSEHPA as a checklist for examining their own statutory or administrative public health powers. Its provisions have also been incorporated into a larger

project to develop a comprehensive model state public health act.

THE MODEL ACT AS A RESPONSE TO INADEQUATE EXISTING PUBLIC HEALTH LAWS

Although MSEHPA has been widely debated (see below), few disagree that current state laws often provide a weak foundation for effective public health action. The Department of Health and Human Services, the CDC, the Institute of Medicine, and the Turning Point Public Health Statute Modernization Collaborative have all recently recommended reform of public health laws for the following reasons:

- *Antiquated.* Most public health statutes have not been systematically updated since the early to mid-20th century. They may predate modern public health science and practice, as well as modern constitutional law and civil liberties.
- *Inconsistent.* Public health laws are inconsistent within states and among them. These laws vary extensively in their structure, substance, and procedures for detecting, controlling, and preventing disease. Many states' laws are built over time in response to specific diseases. The result is vast legal differences concerning similar conditions (e.g., STDs and HIV/AIDS).
- *Inadequate planning.* Many current laws fail to provide necessary planning, communication, or coordination among the various levels of government, responsible agencies, or the private sector for detecting and responding to bioterrorism or naturally occurring infectious diseases.
- *Ineffective.* Even assuming health threats are identified in a timely manner, state laws might not authorize effective responses. It may be unclear whether a state could exercise infectious disease powers (e.g., vaccination, treatment, and quarantine), destroy contaminated property, or gain access to private stockpiles of vaccines, pharmaceuticals, or hospital beds.

The Model Act rectifies these and other deficiencies in existing public health emergency laws. The Act reflects modern constitutional standards for protection of liberty and property interests. Building on provisions of existing state law, MSEHPA authorizes government to prevent and ameliorate a bioterrorism

event or other public health emergencies. Furthermore, MSEHPA is structured to safeguard personal and property interests by setting a high threshold for declaring a public health emergency, providing clear standards, requiring procedural safeguards, and by including provisions related to the right to public respect for cultural, religious, and ethnic differences.

A DEFENSE OF THE MODEL ACT

Despite its broad acceptance by law and policy makers, the Model Act has proven controversial. Its provisions (specifically concerning the use of coercive powers like quarantine and isolation) are the subjects of public debates on the appropriate balance between public good and individual rights. A minority of vocal critics claim that MSEHPA allows public health authorities to disregard civil rights under the veil of poorly defined threats to public health. They suggest that the Act provides a range of “extraordinary measures” that “radically enhance the power of the state.” Others characterize it as a “grave threat” and “treacherous government invasion” that affords state and local government “unbridled power.”

The controversy surrounding the Model Act can be explained on several bases. First, civil libertarians question the use of unchecked powers without judicial oversight. Yet, the powers in MSEHPA are circumscribed by careful criteria and procedural review. Second, some critics who challenge the Act are unaware that existing laws grant public health authorities broad discretion to deprive individuals of liberty and property in the interests of protecting the public's health. The Model Act, if anything, increases legal precision and safeguards for coercive powers. Finally, by explicitly making tradeoffs between individual freedoms and common goods, MSEHPA has become a catalyst for critiques by multifarious groups that included civil libertarians, privacy advocates, health care representatives (e.g., pharmaceuticals, managed care organizations, and hospitals), and food and transportation industries.

More specific objections to the Model Act are based on federalism, declaration of a public health emergency, economic and personal libertarianism, and governmental abuse of power:

Federalism. Critics argue that acts of terrorism are inherently federal matters, which correspondingly do not require expansion of state public health powers. The federal role in a national bioterrorism event is important. However, under our federalist system, states and localities are the repositories of public health powers in America. They would likely be the first to detect

and respond to a health emergency and would have a key role throughout.

Declaration of a public health emergency. Civil libertarians worry that a state governor might declare a public health emergency for a low-level risk, or to control diseases like HIV/AIDS or the common flu. However, MSEHPA sets a high threshold for an emergency declaration (a strong probability of a large number of deaths or serious disabilities). Furthermore, the Act specifically does not apply to endemic diseases.

Personal libertarianism. Some critics suggest that the Model Act (and existing state laws) should avoid compulsory powers (e.g., vaccination, testing, treatment, and quarantine). They promote the provision of services over the use of powers, and suggest that individuals will comply voluntarily with public health measures without having to be required to do so. MSEHPA incorporates principles of voluntarism, but also supports the state's need for a certain amount of authority to protect the public's health. Individuals whose movements pose a significant risk of harm to their communities do not have a “right” to be free of interference necessary to control the threat. Most liberal scholars still accept the harm principle—that government should retain power to prevent individuals from endangering others.

Economic libertarianism. Critics suggest that businesses should not be subjected to burdensome regulation, even in a public health emergency. Yet, if businesses are engaged in an activity that poses a health threat, government has always had the power to abate the nuisance. Government, for example, has always had the power to confiscate private property for the public good. In a bioterrorism event, the state may need to (1) garner adequate supplies of vaccines or drugs, or (2) use health care facilities for medical treatment or quarantine of persons exposed to infection.

Governmental abuse of power. Finally, some are concerned that governors and public health authorities could abuse their authority under MSEHPA. In response to this sort of general objection (which could apply to the exercise of power in any realm), MSEHPA adopts checks and balances to prevent abuses, including: (1) the governor may declare an emergency only under strict criteria and in consultation with public health experts and the community; (2) the legislature, by majority vote, can override the governor's declaration at any time; and (3) the judiciary can terminate the exercise of power if the governor or other government agents violate the standards or procedures in MSEHPA or act unconstitutionally.

The Act, moreover, respects individual rights and promotes tolerance of groups. It adheres to the civil liberties principles of significant risk, the least restrictive alternative, and humane care and treatment of people. This exceeds safeguards in many existing public health statutes, reinforcing the importance of dignity and equality in a constitutional democracy.

In summary, MSEHPA provides a modern framework for effective planning, prevention, identification, and response to emerging health threats, while guarding against the potential excesses of government power. The Model Act may not reach the perfect balance between personal freedoms and public good, but it recognizes inherent tradeoffs and seeks a fair resolution. MSEHPA thus defends personal as well as collective interests. In an era of political, social, and ethical focus on the rights of individuals above all, MSEHPA's appearance of strengthening governmental authority could predictably have resulted in turmoil and disaster. In reality, the Act serves its intended purposes as a critical tool for state public health law reform.

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