Public Health/ Mental Health Law

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• This presentation is intended for educational purposes only. It is not designed to provide specific legal advice or counsel. You should seek professional legal advice for your specific issues.

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Overview

Civics Review
Review of Constitution & Amendments
Types of Law
Public Health Law Review
Health Privacy
Mental Competence

Capacity
Insanity
Excessive Use of Force
Civil Commitment
Forced Treatment
Right to Treatment

What is Public Health?

• “What we, as a society, do collectively to assure the conditions for people to be healthy.” IOM, 1988 *

What is Public Health Law?

• The discipline by which the state or other actors use law to change the health of a population, including *

• The study of the powers and duties of the state or other actors to assure the health of a population, and

• The limitations on the power of the state to constrain the autonomy, privacy, family, proprietary, or other legally protected interests of individuals in order to assure the health of a population, and

• The limitations on the duties of the state to assure the health of a population
Eight Types of U.S. Legal Authority

- U.S. Constitution
- Treaties • Federal statutes
- Federal regulations
- State constitutions
- State statutes
- State regulations
- Local authority
- The common law

Judges Make Law, Too

Legislature acts; president/governor approves

Other judges are obligated to follow interpretation (stare decisis)

A party is aggrieved by the statute

Judge decides case and interprets what the legislature meant by the statute

Party files suit in court

The U.S. Constitution

- Drafted 1787
- Took effect 1788
- "Supreme law of the land"
- Limited powers
- The doctrine of enumerated powers

Constitutional Rights of Individuals

- Amendments 1-10 (called the Bill of Rights) ratified in 1791
- Others rights added 1795-
  - Most relevant to public health:
    - 1st (1791) Freedom of religion and speech
    - 4th (1791) Unreasonable search and seizure
    - 5th (1791) Due process (federal); takings
    - 14th (1868) Due process; equal protection

Constitutional Safeguards

- U.S. Constitution
  - "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it" (Art 1, §9)

Constitutional Safeguards Relevant to Public Health

- 1st Amendment
  - Free Speech and Assembly
  - Freedom of Religion
- 4th Amendment
  - Unreasonable Search and Seizure
- 5th Amendment
  - Due Process (federal)
  - Equal Protection
  - Criminal Procedure
  - Property Rights - Takings
- 14th Amendment
  - Applies the Bill of Rights to the States
  - Requires Due Process
  - Expands Equal Protection
The 1st Amendment: Freedom of Religion and Speech

- “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press ...”

The 4th Amendment: Unreasonable Search and Seizure

- “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...”

4th Amendment Impact on Public Health Action

- Public Health Inspections
  - Governed by the 4th Am.
  - Unreasonable presumptively if conducted without a warrant
- Medical Testing
  - Collection and analysis of biological specimens from a person is a “search”
  - To determine if “reasonable,” courts balance public health need against privacy
  - In general, courts accept government’s assertions of need

The Tenth Amendment (1791)

- “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

The Police Power

- Natural inherent authority of the sovereign to regulate private interests for the public good
- Retained by the States, not ceded to the federal government
- Includes wide powers to:
  - Restrict a person’s personal liberty
  - Restrict a person’s ability to work
  - Seize property without compensation

Examples of the States’ Police Power

- Require a child to be vaccinated as a condition of attending school
- Involuntarily detain a person who has a communicable disease
- Search, seize, and destroy property in order to control disease spread, sometimes without compensation
- Throw up a cordon sanitaire around a city to prevent disease spread
The 14th Amendment: Due Process of Law

- “… nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Due Process of Law

- Procedural due process
  - What process is due? (notice, opportunity to be heard, counsel, right to call witnesses, right to review by a judge)
- Substantive due process - protection against interference with “liberty”
  - Example: The right to privacy

Jacobson v. Massachusetts

SUPREME COURT OF THE UNITED STATES

197 U.S. 11; S. Ct. 358; 49 L. Ed. 643; 1905 U.S. LEXIS 1232

Argued December 6, 1904
February 20, 1905

Jacobson: Key Holdings

- Police power upheld
- No absolute right to be wholly free from restraint. Restraints necessary for the common good
- Deference for legislature
- Court’s approval of public health intervention depended on:
  - Public health necessity
  - Reasonable means
  - Proportionality
  - Harm avoidance

Regulations

- “Laws” created by the executive branch of government
- Must be based on delegation of authority from legislature
- Have the full force of law
- Must be created through a statutory process
- Must not violate due process (notice, hearing)
- Violations and punishments are usually civil and can be appealed to judges

Example of a Regulatory Delegation:

42 U.S.C. § 264 (1944)

- “The Surgeon General, with the approval of the Administrator [Secretary], is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.”
The Legal Basis of Public Health Action in Emergencies

Sources of Authority for Emergency Control of Disease*

- Federal
- Commerce Clause
  - "The Congress shall have power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," Art 1, Sec 8.
- Tax and spend power
- Federal statutes
- State
- Police powers
- State statutes

Example of a State Statute

- “California Government Code Section 101040. The county health officer may take any preventive measure that may be necessary to protect and preserve the public health from any public health hazard during any 'state of war emergency,' 'state of emergency,' or 'local emergency,' as defined by Section 8558 of the Government Code, within his or her jurisdiction.”

Public Health and Law Enforcement Goals Compared

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<td>Stop further cases of disease and outbreaks</td>
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<tr>
<td>Protect health and safety of public</td>
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<td>Build science base for future prevention</td>
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<th>Law Enforcement:</th>
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<td>Stop further crimes</td>
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<td>Protect health and safety of public</td>
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<td>Apprehend and convict criminals</td>
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Economy Act*

- 31 USC Section 1535
  - Must be appropriation available
  - Must be in best interest of the Government
  - Payment shall be prompt

Stafford Act *

Public Law 106-390

- Provides for
  - Planning
  - Preparedness
  - Grants
  - Response
Bioterrorism Legal Issues

- Collection of records and data: disease reporting, surveillance, and privacy
- Control of property
- Management of persons: quarantine, detention, and isolation
- Legal immunity
- Access to communications

Ten Great Public Health Achievements, United States, 1900-1999

- Vaccination
- Motor-vehicle safety
- Safer workplaces
- Control of infectious diseases
- Decline in deaths from coronary heart disease and stroke
- Safer and healthier foods
- Healthier mothers and babies
- Family planning
- Fluoridation of drinking water
- Recognition of tobacco use as a health hazard

Health Information Privacy Laws and Policies: Regulated Entities

- Public Health
- Researchers
- Law Enforcement
- National Security
- NGOs
- Health Providers
- Entities
- Private Industry
- Health Insurers

Health Information Privacy Laws and Policies: Types of Health Data

- Birth defects
- Medical
- Mental Health
- HIV/AIDS
- Cancer
- Public Health
- Research
- Genetic
- Health Data

Health Information Privacy Protections Vary by State

- States generally do not have comprehensive privacy and confidentiality statutes, but regulate by:
  - Source of information
  - Type of information
  - Holder of information
- Public health departments also have statutes and regulations applicable to their activities and information handling.
- 42 states have Health Information Exchange (HIE) networks that provide for electronic data-sharing; law must be in place to address this data sharing.

Health Information Privacy Laws and Policies: Common Characteristics

- Underlying all these laws are common characteristics:
  - Focus is primarily on individual (as contrasted with group) privacy protections
  - Only identifiable health data are covered (non-identifiable data do not require individual health privacy protections)
  - Consistent need to balance individual and communal interests in identifiable health data
HIPAA and the Basis for Health Information Privacy Protections

- HIPAA seeks to increase individual access to health insurance by:
  - Reducing individual health insurance costs
  - Lowering administrative claims costs
  - Efficiently transmitting electronic data under enhanced health information privacy protections that encourage people to seek health care
- HIPAA represents the first national standards for protecting health information privacy
- The HIPAA Privacy Rule is one of the regulations that implements HIPAA.
  - The Privacy Rule regulates the use and disclosure of protected health information by entities subject to the rule

HIPAA Privacy Rule: What Is Covered

"Protected Health Information (PHI)"

Individually-identifiable health information used or disclosed by a covered entity in any form, whether electronically, on paper, or orally

45 C.F.R. 160.103

HIPAA Privacy Rule: Who Is Covered

- PHI does not include:
  - Education records covered by FERPA
  - Employment records held by a covered entity in its role as employer
  - Non-identifiable health information

45 C.F.R. 160.103

HIPAA Privacy Rule: Who Is Covered

- Covered Entities (CEs):
  - Health plans
  - Health care clearinghouses
  - Health providers that conduct certain electronic transactions

45 C.F.R. 160.103

HIPAA Privacy Rule: Who Is Not Covered

- Life insurance companies
- Auto insurance companies
- Workers’ compensation carriers
- Employers
- Others who acquire, use, and disclose vast quantities of health data

45 C.F.R. 160.103
**HIPAA Privacy Rule: How PHI is Covered**

- Boundaries - setting limits on uses and disclosures
- Fair Information Practices - allowing individuals some level of access to their health data
- Accountability - making covered entities accountable for handling and abuses

**HIPAA Privacy Rule: How Uses/Disclosures Are Regulated**

- CE's may use or disclose PHI without individual's informed consent
  - For treatment, payment, or health care operations
  - Through limited data sets (which include minimal identifiable data and use requirements)
  - For exceptions specified in rule
- Otherwise, uses or disclosures of PHI require either individual opportunities to object or written authorizations

**HIPAA Privacy Rule: How Uses / Disclosures Are Regulated**

- Written authorization or opportunity to object not required for specified disclosures, including disclosures concerning:
  - Law enforcement
  - Judicial and administrative proceedings
  - Decedents
  - Health emergencies
  - Minors
  - Health research
  - Public health

**HIPAA Privacy Rule: Minimum Necessary Rule:**
- When using or disclosing PHI, a covered entity must make reasonable efforts to limit such information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request.
- Exceptions include disclosures required by law and disclosures to the individual.

**HIPAA Privacy Rule: Relation to Other Laws**

- Does the Privacy Rule supplant other laws (state constitutions, statutes, administrative laws, judicial law)?
- No, the Privacy Rule generally creates a floor of federal protections.
  - Existing state laws that provide greater health information privacy protections or do not otherwise conflict with the Rule remain in effect.

**HIPAA Privacy Rule: Addressing Violations**

- Violations or breaches of the Privacy Rule may result in:
  - Complaints filed with the Secretary of HHS
  - Ensuing investigation by the Secretary
  - Compliance reviews by the Secretary
  - Informal resolution by the Secretary whenever possible
  - Imposition of civil penalties
  - Criminal sanctions against individuals
- Civil and criminal penalties rarely have been assessed
  - HHS has focused almost exclusively on voluntary enforcement, compliance reviews, and investigations
  - HHS provides technical assistance to facilitate compliance
External Impact of the Privacy Rule on Public Health

The public health exception within the HIPAA Privacy Rule allows a covered entity to disclose PHI without individual authorization to a "public health authority" that is authorized by law to collect and receive such information for the purpose of preventing or controlling disease, injury, or disability, including...reporting of disease...and the conduct of public health surveillance...investigations, and...interventions."

What Is a Public Health Authority?

- A public health authority is an:
  - agency or authority of the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, or a person or entity acting under a grant of authority from or contract with such public agency...that is responsible for public health matters as part of its official mandate.
  - Includes:
    - Some federal agencies (e.g., CDC, FDA, NIH)
    - State or Tribal health departments
    - Contractors/others acting under authority of these agencies

Distinguishing between Public Health Practice and Public Health Research

- Distinguishing practice from research is often difficult because many public health activities are based on scientific methods similar to those used in research.
  - Covered entities may misinterpret public health practice activities as research activities, and deny public health authorities access to PHI.
  - The purpose of the activity is key:
    - Research: to contribute to generalizable knowledge
    - Practice: to prevent or control disease or injury and improve health, or to improve a public health program or service.

Examples of specific public health-based exceptions include disclosures:
- To maintain the quality, safety, or effectiveness of FDA products.
- To notify persons exposed to communicable diseases.
- Reports of child abuse or neglect.
- To prevent serious threats to persons or the public.
Mental Competence
What is it?

Definition
- A person's mental ability and choosing right from wrong and having the ability to express themselves. (Black's Law Dictionary)

Capacity
- Able to make your own decisions.
- Do not need to be good decisions.

14th Amendment
- Due Process
  - Time to correct deficit
  - Time to appeal
- 4th Amendment

Insanity Defense
- Case Review

Daniel Sickles
First use of Insanity plea in the United States
Married Teresa when he was 33 and she was 15
Killed Philip Barton Key for having an affair with Teresa
Andrew Goldstein
Pushed Kendra Webdale into path of N Train in New York
Schizophrenia
Committed to hospital 13 times
Turned away and put on waiting list

Excessive Use of Force
- Roell v. Hamilton Cty., 870 F.3d 471 (6th Cir. 2017)
  - Suffered from mental illness and subdued by 3 officers and handcuffed after being tasered 3X
  - Died in custody
  - Qualified immunity applied

Constitutional standard for release from civil commitment
- Poree v. Collins, 866 F.3d 235 (5th Cir. 2017)
- Shot 10 people and found NGRI
- Found may be held if potentially dangerousness vs actual dangerous *

John Hinckley Jr.
Stalked Jodie Foster
Attempted to assassinate President Reagan

  - Severity of the crime
  - Suspect poses an immediate threat
  - Actively resisting arrest or attempting to evade

- In the Matter of the Detention of Troy Belcher, 399 P.3d 1179 (Wash. 2017)
  - Convictions as a juvenile can be use to continued commitment proceeding
  - Completion of treatment did not preclude commitment
    Must have evidence of present serious difficulty controlling his behavior and likely to reoffend *
### Inmate to be free from deliberate indifference*

- Estate of Clark v. Walker, 865 F.3d 544 (7th Cir. 2017)
- Committed suicide 5 days after entering custody
- Known MH issues
- Screened pos for suicide risk

### Forcible administration of medication

  - Admitted for evaluation of competency
  - Not a threat
  - Staff forced him to take medication
  - Gov must show sufficient state interest in forcible medication*

### Right to treatment

- Contract right under insurance contract
- Benefit under government program
- What you want?
- What you need?

### Civil Rights Act 1964

- Title II discrimination by public accommodations such as hotels, bars, gas stations, restaurants
- Title VI discrimination under any program receiving federal funding
- Title VII employment discrimination

### Summary

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Questions
Comments

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