

Public Health Decision-making

Can I? Must I? Should I?

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Using law to protect the public's health

CAN I?

Legal question: Do I have authority?

MUST I?

Legal question: Does law leave me no choice?

SHOULD I?

Policy question: How should I exercise my discretion?

Using law to protect the public's health

CAN I?

Power

MUST I?

Duty

**SHOULD
I?**

Discretion

[for health officials] “I” = “You”

Can I? General Powers

- » Powers necessary and appropriate to perform their duties
- » Promote and safeguard the public health
- » Prolong life
- » Prevent and control health hazards
- » Prevent and control the spread of disease
- » Provide expertise and education regarding health

Can I? Specific Powers and Specific Threats



- Food establishments
- Methamphetamine labs
- Clean indoor air (smoking)
- Body art facilities
- Public swimming pools
- Communicable diseases

Can I? Limitations

Broad & Flexible Powers: Any legal limits?

Police Powers $\neq$ Police State

Jurisdictional

Separation (branches)

Territorial

Allocation (levels)

Statutory

Assignment (agencies)

Pre-emption

Broad & Flexible Powers: Any legal limits?

Government has awesome powers
AND MAJOR **RESPONSIBILITIES**

Constitutional

Liberty

Due Process

Protection Against Search & Seizure

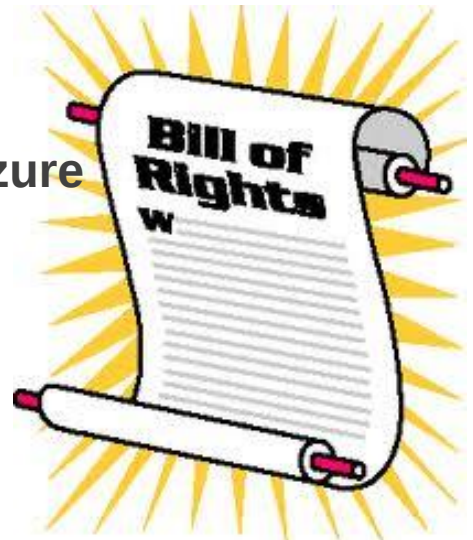
Equal Protection

Right to Privacy

Freedom of Association

Freedom of Religion

Just Compensation



Can I? Limits on limits

Public Good vs. Individual Quarantine, Isolation, & Immunization

The liberty secured by the Constitution on the United States to every person within its jurisdiction does not import an absolute right to each person to be, at all times and in all circumstances, wholly freed from restraint.

There are manifold restraints to which every person is necessarily subject for the common good.

Jacobson v Massachusetts, 197 US 11 (1905)

Caution

Jacobson vs Massachusetts

Caution, as noted by the Court:

“The police power of a State, whether exercised by the legislature, or by a local body acting under its authority, may be exerted in such circumstances or by regulations so **arbitrary and **oppressive** in particular cases as to justify the interference of the courts to prevent wrong and oppression.”**

Must I? Am I mandated to take action?
Am I mandated to take a particular action?

Mandatory functions

»Mandated by law

»Mandated by funding source (\$ with strings)

Discretionary functions

»Involves exercise of judgment or discretion

For mandatory duties, often an agency has a great deal of discretion in determining **how** to fulfill its obligation

What is duty?

- » **Legal duty** – obligation created by law (compare to moral duty)
- » **Right** – To have duty, means someone has a right. To whom is the duty owed? How is right enforced?
- » **Public duty doctrine a/k/a no public duty doctrine**
- » **Govt action vs. govt failure to act or failure to warn**
- » **Exceptions:** Special relationship, State-created danger

Must I?

Mandatory + Discretion

Statutory powers and responsibilities

The Department of Public Health **shall**:

- Promote and safeguard the public health
- Prolong life
- Prevent and control health hazards
- Prevent and control the spread of disease

Must I? All or nothing?

Youngberg v. Romeo

"[I]t is conceded by petitioners that a duty to provide certain services and care does exist, although even then a State necessarily has considerable discretion in determining the nature and scope of its responsibilities.... Nor must a State choose between attacking every aspect of a problem or not attacking the problem at all."

457 U.S. at 457 U. S. 317 (1982)

Must I?

Selective Enforcement

- **Generally**, government officials such as police officers, prosecutors, or regulators exercise enforcement discretion, i.e. they have the power to choose whether or how to punish a person who has violated the law.
- **However**, the biased use of enforcement discretion, such as that based on racial prejudice or corruption, is usually considered a legal abuse and a threat to the rule of law.

Based on discretionary power

Should I?

Must be used reasonably, impartially.

Policy considerations:

» **Resources** » **Impact** » **Population health**
» **Feasibility** » **Priorities** **vs. private disputes**

Uniformity, consistency, and proportionality

Strength of evidence, strength of legal authority

Public opinion

Politics – relevant?

Doing “nothing” is doing “something” (risk assessment)

**Making
choices
vs. abusing
discretion**

Consider facts, principles, and law

Be able to articulate basis for decision

**Show that you considered/weighed
alternatives**

Does decision make sense?

Is it reasonable?

vs.

Decisions that are “arbitrary” and “capricious”

**Repeat: Doing nothing is doing something –
make sure doing nothing is a conscious
choice**

**Arbitrary - not considered, ignores the facts,
whimsical**

Capricious - impulsive and unpredictable

Making choices vs. abusing discretion continued

Example of a state statute defining arbitrary and capricious

Fla. Stat. § 120.57 (2009)§ 120.57.

“Additional procedures for particular cases

(1)ADDITIONAL PROCEDURES APPLICABLE TO
HEARINGS INVOLVING DISPUTED ISSUES OF
MATERIAL FACT.“

(2)***

d. Is not arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;****”

Building support /Reducing exposure

- » Engagement (community, other govt entities)
- » Transparency
- » Risk communication
- » Documentation – facts known at the time of decision and basis for decision
 - Avoid second guessing based on hindsight
 - Practical challenges:

How/where to document? Group decisions, evolving, iterative (not like a doctor making notes in patient's medical record of options considered and basis for choice)

Public Health Decision-Making Tool

Situation - What are the facts? What is the threat?

Consequences - What are the consequences?

Likelihood - What are the chances of occurrence?

Mitigation - How can the threat be addressed?

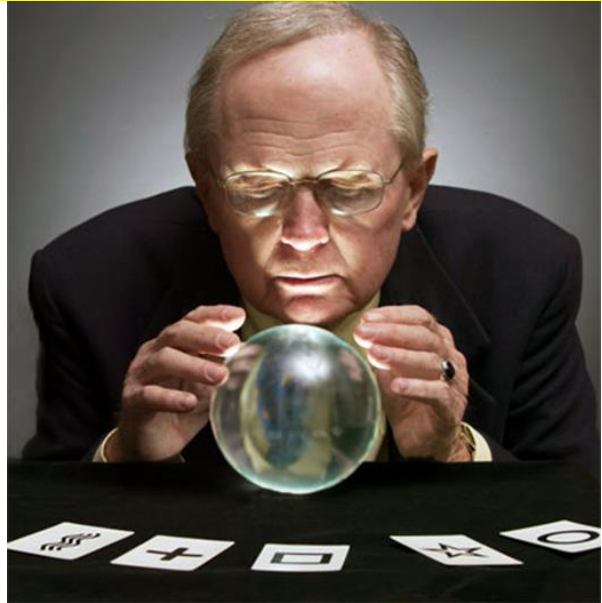
Certainty - Should you take action now? Should you wait?

Communication - What do you communicate to the public and when do you communicate it?

https://www.networkforphl.org/_asset/49l35q/PH-Decision-Making-Tool.docx

Hindsight is 20/20

It's easy to know the right thing to do after something has happened, but it's hard to predict the future.



... If only it were this easy

When things go south . . .

Responsibility, Liability, Accountability

Civil justice system

Wrong against an individual

Determines “liability” for harm

Individual initiates and controls key aspects

Burden of proof –
preponderance of the evidence

Intention not always required
(e.g. negligence)

Payment of damages

Criminal justice system

Wrong against the state

Determines “guilt or innocence”

Prosecutor initiates and controls key aspects

Burden of proof – beyond a reasonable doubt

Intent to cause harm or reckless disregard

Punishment might include jail

Thank you!

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public health
I  **LAWYERS**