

# Legal Crises in Public Health

## Public Health and the Law

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Since the onset of modern legal conceptions of “public health emergencies” (PHEs) in 2001, government officials at all levels have demonstrated a propensity to declare PHEs in response to a multitude of scenarios (e.g., emerging infectious diseases, natural disasters, terrorism events). Many of these declarations are justified by the circumstances, others perhaps less so. Yet, in addition to the rise of formal PHE declarations, officials, academics, media, and others are increasingly labeling multiple types of threats to human health. Pursuant to a “crisis du jour” mentality, Americans are deluged with an unending series of identified public health threats including diseases, conditions, acts, and behaviors.

Against this barrage of exigencies one might perceive that primary health hazards stem largely from rapidly escalating conditions or events. Perceptions, however, do not match reality. Significantly greater risks to health arise from long-standing, entrenched causes. Like climbing ivies, these threats creep along year after year posing substantial societal harms while eluding meaningful law and policy responses centered on assuring the public’s health.

### Genesis of the Modern Public Health Emergency

The legal premise of PHEs as a distinct type of threat emerged from the aftermath of the terrorist attacks and anthrax exposures in 2001.<sup>1</sup> The specter of bioterrorism led government officials to retool their antiquated, generic emergency powers to include a bevy of more precise public health authorities. The Model State Emer-

gency Health Powers Act (MSEHPA), finalized in December 2001, was passed by dozens of state, tribal, and local governments over multiple years.<sup>2</sup> Under definitional criteria in MSEHPA, a PHE may be declared in response to an act of bioterrorism, emerging infectious disease, or other threat posing a “high probability” of a significant number of deaths, disabilities, or future harms to health.

PHEs have since been declared in response to multifarious conditions, including contagious diseases like H1N1 (2009),<sup>3</sup> Ebola virus (2014),<sup>4</sup> and Zika virus (2016).<sup>5</sup> Warranted declarations authorize and facilitate advanced surveillance, treatment, and social distancing measures to quell emerging threats. PHEs have also been appropriately declared in response to natural disasters impacting human lives such as hurricanes Katrina (2005), Sandy (2012), and Harvey (2017).<sup>6</sup> Yet, the legal boundaries of PHE declarations have been stretched to include many other conditions, including water contamination, asbestos releases, domestic violence, food insecurity, homelessness, opioid use, vaping, and even temporary shortages of medical cannabis.<sup>7</sup>

### American Public Health “Crises”

Coexistent with the expansion of formally declared PHEs is a national propensity to cloak just about any health hazard in emergency terms. Increasingly government officials, academics, media, and others are defining and classifying varied public health threats as “crises,” “tragedies,” “emerging threats,” “catastrophes,” and “epidemics” (see Table 1. Select Examples of Public Health “Crises”

### About This Column

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Table 1

**Select Examples of Public Health “Crises” in the Media (from 2015-2019)**

Chronic Conditions	Communicable Diseases	Reproductive Health	Substances	Mental Health	Environmental Concerns	Others
Diabetes	Annual flu	Maternal mortality	E-cigarettes/ vaping	Anxiety	Water contaminants	Gun violence
Chronic pain	Tuberculosis	Abortion	Alcohol	Suicide	Air pollution	Homelessness
Osteoporosis	HIV/AIDS	Partner violence	Controlled substances	Lack of sleep	Climate change	Racism
Obesity	Vaccine access/ injuries	Harassment	Marijuana	Loneliness	Antibiotic resistance	Immigration
Food allergies	STIs	Pornography	Addiction	Trauma	Heat islands	2020 census
Alzheimer’s disease	Child illnesses	Neonatal conditions	Opioids	ADHD	Unsanitary city conditions	Elder abuse
Dementia	Insect-borne diseases	Microaggressions		Depression	Wildfires	Video gaming
				Physician burnout		Noise pollution
						Skin bleaching

in the Media). The scope of conditions attracting eye-catching labels ranges from chronic/communicable conditions to racial concerns. While some of these topics might also justify formal emergency declarations initially or later, most would not under current legal standards. This is especially true concerning more sensational “crises” such as microaggression (2015),<sup>8</sup> decreased sperm counts (2017),<sup>9</sup> video game addiction (2018),<sup>10</sup> and skin bleaching (2018).<sup>11</sup>

Communicable and chronic conditions are often framed ambiguously as emergencies. Infectious diseases like measles and mumps are consistently characterized as crises as they emerge as outbreaks in under-immunized locales. Preventable conditions including diabetes and obesity are cast as serious threats given their enormous costs and disproportionate impacts.<sup>12</sup> Politically-sensitive reproductive health topics, including restrictive abortion access, under-reported acts of intimate partner violence, and spikes in maternal mortality rates, are apt to be labeled as health threats. Government officials in more than a dozen states have characterized pornography and its links to violence as a public health crisis, leading some opponents to allege “complete fear-mongering.”<sup>13</sup>

High on the list of public health catastrophes are polysubstance addictions, abuses, and correlated overdose deaths. Prevalence of pre-

scription and illicit opioids is rightfully deemed an epidemic but is also juxtaposed against efforts to limit opioid prescriptions for millions suffering from a “crisis” of chronic pain.<sup>14</sup> Marijuana and nicotine consumption (including youth vaping and e-cigarette use) have been deemed emergencies as deaths due to associated cancers and other diseases rise. Decades of over-prescribing and misuse of antibiotics have led to a crisis of resistant strains of bacteria infecting thousands of Americans annually.<sup>15</sup>

Perceived mental health tragedies heighten awareness for hidden conditions like dementia, loneliness,<sup>16</sup> and childhood trauma,<sup>17</sup> linked to adverse health outcomes such as decreased resistance to infection, cognitive decline, and disease susceptibility. Dramatically increasing suicide rates have been called a “neglected”<sup>18</sup> and “unseen”<sup>19</sup> epidemic affecting public health<sup>20</sup> and national security.<sup>21</sup> While physician burnout threatens doctor-patient relationships and delivery of health care,<sup>22</sup> a co-existing primary-care shortage “crisis” flows from millions of Americans lacking proper access.<sup>23</sup>

Environmental concerns stoked by climate change implicate disease, unsanitary conditions, poor air quality, and food insecurity, consequently lending to classifications such as “major emergency”<sup>24</sup> and “catastrophe.”<sup>25</sup> Novel health concerns under-

lying systemic racism contribute to a health disparity “crisis.”<sup>26</sup> Even proposed census citizenship questions are deemed a public health threat to the extent select communities may decline to respond resulting in inaccurate or incomplete population health data.<sup>27</sup>

### Palpable Threats to the Public’s Health

Lost in the forest of public health crises and catastrophes is the disconnect between perceived, fast-moving health perils and often overlooked, entrenched threats that pose more substantial societal harms. Over two-thirds of American adults are overweight or obese.<sup>28</sup> Hundreds of thousands have terminal cancers or heart disease, many from tobacco use.<sup>29</sup> Alcoholism rates among Americans have climbed recently along with opioid misuse.<sup>30</sup> Alzheimer’s disease and dementia rates are on the rise, affecting millions of Americans.<sup>31</sup> Tens of thousands will die this year from vehicular collisions. These conditions may be known by Americans as substantial killers, but also viewed as intractable, even unsolvable. As illustrated in select examples below, some of the greatest public health threats persist despite proven legal interventions that could be taken to address them.

*Infectious diseases.* Nearly two decades after achieving measles eradication, incredibly the U.S. risks los-

ing that status in 2019<sup>32</sup> due largely to the spread of anti-vaccination sentiments via social and news media.<sup>33</sup> Globally, vaccines prevent over 3 million deaths annually and even more lives could be saved through enhanced immunizations.<sup>34</sup> Instead, declining vaccination rates are diminishing herd immunity against a host of debilitating, life-threatening conditions (e.g., mumps, rubella, polio, influenza). In 2017-2018 alone, over 100,000 U.S. children did not receive *any* of the Centers for Disease Control and Prevention's recommended childhood vaccines.<sup>35</sup> The modern "tragedy of the commons" is that Americans are at enhanced risk of infectious diseases due largely to their misperceptions of harms from vaccines themselves.

*Hazardous environments.* Places where we live, work, and play are often quiet causes of excess morbidity and mortality. Each year, air pollution from factories, vehicles, and farming costs over 100,000 American lives — and \$886 billion in additional health impacts.<sup>36</sup> Half a million kids have elevated blood lead levels from exposure through paint and pipes in their homes.<sup>37</sup> Toxic food environments, where calorie dense, inexpensive foods far outnumber nutritious options, contribute to the raging obesity epidemic and escalated rates of heart disease, stroke, diabetes, and cancer.<sup>38</sup>

*Gun violence.* A seemingly constant series of mass shootings devastate many U.S. communities, yet represent only a fraction of the harms of gun violence. In 2017, there were nearly 40,000 U.S. gun deaths — more than any other year recorded in U.S. history.<sup>39</sup> Two-thirds of these deaths were by suicide. The national gun suicide rate grew 19% between 2007-2016.<sup>40</sup> Most gun homicides occur in urban areas with high segregation and poverty. According to data from 2013-2017, African Americans are 10 times more likely to be victims of gun homicides than Caucasian Americans. In 2017, firearms killed more African American children and teens than any other cause.<sup>41</sup>

### Refocusing Law and Policy Responses

Shifting the national foci from attention-grabbing "public health crises" to sustained causes of excess morbidity and mortality is complicated. Individuals are naturally attracted to news or warnings of immediate harms or perceived threats irrespective of their likelihood or significance. Politicians are apt to employ "quick fixes" to quell identified risks to gain temporary favor among constituents. Consequently, long-standing threats to health — cancers, heart disease, diabetes, obesity, injuries, "consumable vices"<sup>42</sup> — inch along, year after year, causing substantial disabilities and shortening lives. Reversing a trend of lowered life expectancies for the current generation of Americans justifies a series of law and policy objectives designed to:

- look well beyond short-term determinations of public health crises. Crises labels may raise the public's threat awareness, but should not create an agenda for a national public health system;
- retool PHE legal classifications to assure actual declarations are meaningful and justified. Declarations are legitimated by the responsible and balanced use of public health powers to address emerging risks to health, and not through their misapplication to sensationalized identification of exigencies;
- assess and remedy the underlying social determinants of health. Sophisticated health systems should devote considerably greater resources upfront to address the root causes of poor health outcomes, instead of waiting to treat their manifestations;
- commit to principles of health justice to fairly allocate limited public health resources across populations without biases lending to inequities; and
- prioritize public health prevention as a panacea to engrained causes of excess morbidity and mortality. Within the realm of PHEs, pre-

paredness is viewed as equally critical as real-time responses to obviate risks to populations. Preparedness in response to long-standing health risks is all about prevention. Extant public health legal tools (e.g., surveillance, screening, testing, education, vaccination, health education) can be wielded to effectuate purposeful modern prevention strategies. What is needed is the national foresight and commitment to fund and utilize these tools efficaciously.

#### Note

The authors have no conflicts to disclose.

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