RESPONSE

ELEVATING PUBLIC HEALTH AND OTHER LONG-TERM INTERESTS IN GOVERNMENT POLICYMAKING[†]

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In *Interagency Dynamics in Matters of Health and Immigration*, Medha D. Makhlouf uses three case studies involving shared authority of the Department of Health and Human Services and the Department of Homeland Security to illustrate how practical, legal, and political dynamics operate to give immigration enforcement precedence over public health concerns.[1] Makhlouf demonstrates that the examined agency interactions resulted in a failure to ensure that unaccompanied immigrant children received safe and appropriate placements;[2] singled-out certain asylum seekers for exclusion at the border during the pandemic;[3] and excluded Deferred Action for Childhood Arrivals ("DACA") beneficiaries from publicly funded health insurance, including benefits under the Affordable Care Act.[4] The article then applies theories of agency coordination in shared regulatory space from the administrative law literature to explain that while overlapping, shared, and competing agency authority may identify important policy goals, this aspiration for coordination often falls short or is not honored at times of perceived urgency or crisis.[5] Makhlouf then argues that the potential for interagency coordination to value public health goals, and possibly to improve policy outcomes, should cause policymakers to value public health at the center of decision-making in the immigration context.[6]

Giving greater priority to public health goals will require political leaders and agency policymakers to gain a deeper understanding of the consequences of

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[1] Medha D. Makhlouf, *Interagency Dynamics in Matters of Health and Immigration*, 103 B.U. L. REV. 1095, 1109-33 (2023).

[2] *Id.* at 1109-16.

[3] *Id.* at 1116-26.

[4] *Id.* at 1126-33.

[5] *Id.* at 1133-39.

[6] *Id.* at 1139-62.

disregarding public health in immigration enforcement and in other policy arenas. Existing structural arrangements have limited ability to ensure effective incorporation of interrelated policy goals in implementing policy without changing the orientation of decision-makers.[7] To accomplish such a change is a difficult lift in a political system in which two- and four-year election cycles create incentives for giving priority to policies that seem to respond to urgent or crisis situations and that lend themselves to quotable rhetoric and slogans at the expense of pursuing more effective and sustained interventions that could possibly reduce the likelihood, or impact, of the next crisis. Further exacerbating the difficulty is the dispersal of power among three branches of government. As Makhlouf observes, Congress delegates authority for implementing aspects of policy to multiple agencies, but oversight of coordination often is lacking.[8] Further, control of Congress and the Executive may reside in different political parties that have competing or conflicting agendas—complicating the signals to agencies about policy priorities. Within the Executive branch, political leadership starting with the President and filtering through the Cabinet Secretaries and other appointees transmits a hierarchy of policy objectives.

Makhlouf's analysis illustrates a key feature and tension of the political system in the United States—the ability of short-term interests and crisis intervention to crowd out long-term investments necessary to achieve more lasting and sustained goals. This analysis could apply equally to areas such as education, criminal justice, disaster preparedness, environmental protection, and workplace safety. If anything, Makhlouf's article highlights how, even among substantive areas in which the public and policymakers often arrive at a consensus to use government authority to act, the disregard for health considerations in immigration policy is particularly pronounced. Immigrants and people entering the immigration enforcement system are the quintessential vulnerable population with marginalized political power.

In addition to contributing informative case studies to the administrative law literature, Makhlouf's article echoes themes in the public health law literature. For example, Wendy Parmet's comprehensive survey of the importance of public health as a component of the common good made the argument that American Law ought "to recognize the centrality of public health to and within the law".[9] Parmet focused on the tension between enforcing public health measures and individual rights, but a central foundation of her argument is that "the American polity has always presumed that public health protection is both an appropriate and an important goal, if not duty, of government."[10] Indeed, as she notes, "the protection of public health remains vital to ensuring that individuals and communities are healthy enough to participate in civil life and

[7] *Id.* at 1139-54.

[8] *Id.* at 1104-09.

[9] WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 1 (2009).

[10] *Id.*

pursue their own life's goals."[11] Securing this primacy for public health remains elusive.

The argument for elevating consideration of public health concerns in policymaking is compelling on a practical level. Despite the recent backsliding,[12] life expectancy in the United States increased by thirty years between 1900 and 2000.[13] Health care for individuals accounts for some of that increase, but more than eighty percent of the gain is due to public health interventions.[14] According to the Centers for Disease Control and Prevention, the ten great public health achievements of the 20th century were 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, and recognition of tobacco use as a health hazard.[15] Obviously, some items on the list—such as maternal and infant health, control of infectious diseases, and reduction in fatalities due to heart disease and stroke—involve a combination of public health policies and access to individual treatment, but the larger point is that making gains in life expectancy and in overall population health would be impossible by relying exclusively on treatments administered to individual patients. Other public health interventions playing a role include control of diseased animals, setting standards for drinking water and air quality, and encouraging healthy behaviors. These interventions largely go unnoticed in daily life unless and until a crisis arises. The public expectation is that public health resources will be applied when a pandemic like the COVID-19 pandemic arises or the failure of public water distribution systems makes water for drinking and bathing unhealthy or unavailable.[16]

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[11] *Id.*

[12] *See, e.g.*, Anne Case & Angus Deaton, *Accounting for the Widening Mortality Gap Between American Adults with and Without a BA*, BROOKINGS (Sept. 27, 2023), https://www.brookings.edu/articles/accounting-for-the-widening-mortality-gap-between-american-adults-with-and-without-a-ba/ [https://perma.cc/F8P8-VVLR].

[13] *Mortality in the United States: Past, Present, and Future*, PENN WHARTON: BUDGET MODEL (June 27, 2016), https://budgetmodel.wharton.upenn.edu/issues/2016/1/25/mortality-in-the-united-states-past-present-and-future [https://perma.cc/TKX7-Q2VZ].

[14] BRIETTA R. CLARK, ERIN C. FUSE BROWN, ROBERT GATTER, ELIZABETH Y. MCCUSKEY & ELIZABETH PENDO, HEALTH LAW: CASES, MATERIALS AND PROBLEMS 1477 (9th ed. 2022).

[15] *Id.* (citing CTRS. FOR DISEASE CONTROL & PREVENTION, MORBIDITY AND MORTALITY WEEKLY REPORT: TEN GREAT PUBLIC HEALTH ACHIEVEMENTS –UNITED STATES, 1900-1999, at 241 (1999)).

[16] *See id.* at 1478; Melissa Denchak, *Flint Water Crisis: Everything You Need To Know*, NRDC (Nov. 8, 2018), https://www.nrdc.org/stories/flint-water-crisis-everything-you-need-know [https://perma.cc/FEJ9-SBBX] (documenting health impacts of change in the source for the public water system in cost-saving effort); *Mississippi City's Water Problems Stem from Generations of Neglect*, S. POVERTY L. CTR. (June 28, 2023), https://www.splcenter.org

Preparedness for a pandemic requires investment in public health infrastructure including personnel to conduct research on emerging contagions, develop vaccines and treatments responsive to particular infectious diseases, educate the public, engage in appropriate surveillance, collect data and analyze it, test for diseases, and engage in monitoring for adherence to public health measures. Waiting until the pandemic is evident to everyone is not effective in preventing death and illness and will take too long to gain traction. Similarly, compromising the quality of a public water system to save money in the short term is not cost effective in relation to the lifetime burden of illness and disability due to unsafe water. Failure to maintain infrastructure for water distribution results in significant disruption in economic productivity on aspects of daily living along with other health consequences.

In the immigration examples Makhlouf addresses in detail, these cost-benefit tradeoffs are present, but also implicated is the hierarchy of policy areas hardwired into the thinking of the public and policymakers. Public health concerns took a back seat to several other policy goals in the immigration examples.[17] Control and management of the nation's borders aligns with the preeminence given to national security in law and policy.[18] Similarly, draconian approaches to immigration enforcement respond to public fears about entry of persons without documentation. Finally, denial of access to financial support for certain public health insurance programs reflected the exaggerated concerns about undeserving individuals taking advantage of public programs.[19] These priorities seem more urgent and routinely take precedence over concerns such as protecting the physical and mental health of children separated from their parents upon entry into the United States and the inability of the DACA recipients to gain access to health insurance.[20] Indeed, in the case of the denial of entry of asylum seekers, public health concerns were used as cover for turning away people arriving at the border.[21] Makhlouf documents the consequences of

/news/2023/06/28/timeline-jackson-mississippi-water-problems [https://perma.cc/Z5JJ-2MMU] ("On Aug. 29, 2022, the largest water treatment plant in Jackson, Mississippi, failed—leaving 160,000 people, along with hospitals, fire stations and schools, without safe drinking water. In many cases, these communities had no water service at all. The catastrophe in the state's capital, where 80% of residents are Black and about 25% live in poverty, was not the result of a natural disaster but rather generations of neglect by white politicians and policymakers.").

[17] Makhlouf, *supra* note 1, at 1109-33.

[18] *See generally, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[19] Renée M. Landers, *Buffering Against Vicissitudes: The Role of Social Insurance in the COVID-19 Pandemic and in Maintaining Economic Stability*, 49 GA. J. INT'L & COMPAR. L. 505, 514-17 (2021) (discussing parsimonious attitudes toward public assistance programs in American law).

[20] Makhlouf, *supra* note 1, at 1109-16, 1126-33.

[21] *Id.* at 1116-26.

giving effect to this hierarchy of policy priorities. The government expenditures to remedy the effects of these policies, the trauma and health burdens inflicted on immigrant children and others seeking entry, and the harm to the reputation of the United States for valuing health are substantial.[22]

While the Preamble to the Constitution announces promoting the general welfare along with providing for common defense as a goal of the document establishing the government, consensus has been lacking since the beginning on how vigorously the government should pursue public health and related goals.[23] In times of palpable crises affecting public health, temporary support for interventions can be mustered. Absent obvious dangers like a life-threatening pandemic or a collapse of critical public health infrastructure, the consensus dissolves and public health recedes from the public consciousness as an essential priority. Makhlouf's analysis examines the weaknesses of statutory and regulatory structures designed to embed public health into decision-making in immigration.[24] The examples also demonstrate that the people operating the structures and determining policy, and their priorities and political goals, can undermine and circumvent well-intentioned structures.[25]

[22] *Id.* at 1133-39.

[23] Landers, *supra* note 19, at 514.

[24] Makhlouf, *supra* note 1, at 1133-39.

[25] *Id.* at 1109-33.