

# Regulating Contagion

## Pandemics and Disease in U.S. Legal History

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*Professor Bagley – Winter Term 2021*

This course explores how pandemic disease—including smallpox, yellow fever, cholera, the Spanish flu, AIDS, SARS, and (especially) COVID-19—have shaped the history and law of the United States. It will cover topics ranging from federalism to vaccine review, from international law to insurance regulation, and from constitutional law to Medicaid waivers. More generally, the course will examine what the law in a time of crisis may teach us about the rule of law in normal times.

### **Contact Information and Office Hours**

The best way to reach me is by email at [nbagley@umich.edu](mailto:nbagley@umich.edu). On Fridays from 1:30 to 3:00, I will hold drop-in office hours in my personal meeting room ([here](#)) to answer questions about the material covered in class. Everyone who joins will have simultaneous access to the Zoom meeting. Students often find it helpful to hear each other's questions and to chime in with follow-ups.

During the first two weeks of class, I will also hold informal, half-hour sessions with up to five of you at a time, also in my meeting room. The goal here isn't to talk shop, though we can do that if you like. The goal, instead, is to get to know you better and to give you a chance to ask me whatever questions come to mind, whether they're related to law school or not.

It's not obligatory, but I strongly encourage each of you to sign up [here](#) for one of these sessions. What with teaching a class about pandemics during a pandemic, it might otherwise be difficult for me to get to know you in a relaxed setting!

### **Class Meetings**

The class will meet on Mondays and Tuesdays from 8:35 to 10:00. Class attendance is mandatory, and engagement in class discussion is an essential part of this course. I expect everyone to have done the reading before class, to be ready to start on time, and to be prepared to answer questions during class. Doing so will enable vigorous and informed classroom participation—an essential part of this course.

That said, I understand that life is complicated, especially during a pandemic, and that problems may arise that prevent you from being able to participate in class. In addition, if you find a case or topic too painful or uncomfortable to discuss, you may decide to opt out of a particular discussion. In either case, if possible, please send me an email before class indicating that you would prefer not to be called on that day. You do not need to explain the reason. If you find yourself facing more significant or recurring challenges to preparation and participation, please tell me so that we can determine how best to proceed.

If you have to miss a class, please notify me in advance by email if possible. As noted below, all classes will be recorded. If you have questions after reviewing the recording, please discuss them with me during office hours.

## Reading Assignments

Assignments for each class session will be posted on Canvas. The reading for this course will differ from the usual course in two respects. First, we will be reading more narrative historical accounts, and fewer court opinions, than you may be used to. Second, in part for that reason, the readings will be relatively lengthy (though they are all very interesting). Please budget your time accordingly, especially for our Tuesday morning classes.

As you'll see, assignments for some of the later classes, especially pertaining to COVID, are still to be determined. That reflects both the fluid nature of the pandemic and my continuing effort to find the best readings to shape our discussions. I'll let you know when I update the syllabus over the course of the semester.

## Blog Posts

Each of you will sign up [here](#) for two reading assignments over the course of the term, one during the first half of the course (classes 1 through 13) and one in the second half (classes 14 through 26). No more than five students can sign up for any given class session. For your assigned class, you'll draft a blog post of between 500 and 1,000 words. The posts can take any of the following forms:

- Commentary on the reading assigned for the upcoming class, including in particular commentary that links the reading to themes that arose in prior reading assignments.
- Further discussion of a particular historical episode that especially sparked your interest, based on any additional reading you discovered about the episode.
- Evaluation of the policy implications of legal rules designed to reduce the spread or the harms of contagious disease.
- A concurring or dissenting opinion in a case assigned for the upcoming class.

The blog posts serve multiple purposes. They help me fine-tune my teaching plans, build a foundation for better in-class discussions, and provide an opportunity for you to share your views in a setting that doesn't require you to speak on camera. *The key requirement is that the blog post relate directly to the reading assigned for the following day.*

Blog posts are at 5:00pm the day before the relevant class meeting. Your entries should be posted as a reply to the appropriate thread in the "Discussions" section of the Canvas site. The blog posts will be accessible to other students in the class – but not the outside world. You are encouraged but not required to read your classmates' posts.

## Grading

Grades will be determined by contributions to written and in-class discussions and by the final exam. The final exam will be an open-book take-home exam, and is currently scheduled for April 27.

## Zoom Logistics

*Joining the class meeting.* You can find the Zoom link on the Canvas site for the course by clicking on “Zoom” in the menu on the left side of the screen. I will open the meeting about 10 minutes before each class is scheduled to begin. Please connect to the Zoom meeting a couple of minutes early so that you have time to address any technical issues that may arise and so that we can start class on time.

*Video.* Zoom will ask for permission to access the video camera on your device. **Please grant permission and then leave your video camera on during our class sessions.** Keeping your video on helps to build community and encourages engagement; you should think of this much like attending class in person. You are welcome to use a virtual background if you prefer, so long as the image you choose is not distracting. You may turn off your video if you need to, but please do so for as short a time as possible. If keeping your video on during class poses a problem for you for technical or other reasons, please tell me or reach out to the Office of Student Life ([lawstudentlife@umich.edu](mailto:lawstudentlife@umich.edu), 734-764-0516).

*Audio.* Your microphone will be muted on entry. Please keep it muted unless I ask you to unmute.

*Programming your name.* Please make sure that your first and last name are fully spelled out in your display name. You can change it by hovering over your name and clicking “Rename.”

*Raising your hand.* During class, please indicate that you have a question by using the “raise hand” feature, located under the “Participants” tab. Please note that I will often hold questions until an appropriate time to make sure that we can cover the material assigned for that day. In addition, because I aim to distribute class-participation time as evenly as possible among all students, I may not call on you each time you raise your hand. But I do want to answer your questions, so jot them down as they arise so that you don’t forget them. If we don’t get to your question in class, we can discuss it after class or during office hours.

*Recordings.* I will record every class and post it on Canvas. These recordings are for internal use only by students enrolled in the course to help manage technical problems and other challenges associated with the pandemic. Please do not publicly post or otherwise share our class recordings with anyone outside of class. Please respect the privacy of your fellow students and do not record classes yourself using Zoom or any other software.

*Technical help.* If you are unfamiliar with Zoom or would like a refresher, please watch [this short video](#) about what happens when you join a Zoom meeting and then read [this tutorial](#) about how to use the Attendee Controls in a Zoom Meeting. If you have technical problems with Zoom, you should email the AV department at the law school at [LawITStudentSupport@umich.edu](mailto:LawITStudentSupport@umich.edu).

## Disability Accommodations

The University of Michigan is committed to providing equal opportunity for participation in all programs, services, and activities. Requests for accommodations by students with disabilities may be made by contacting the University’s Services for Students with Disabilities (SSD) Office by email at [ssdoffice@umich.edu](mailto:ssdoffice@umich.edu) or by phone at 734-763-3000. Once your eligibility for an accommodation has been determined, SSD will contact Assistant Dean Lindsey Stetson at the Law School’s Office of Student Life ([lawstudentlife@umich.edu](mailto:lawstudentlife@umich.edu), 734-764-0516) with a

recommendation, and she will work with you and SSD to finalize and facilitate your accommodations. For more information about this process, please feel welcome to contact Dean Stetson.

### **Mental Health Resources**

The Law School has a designated counselor, Reena Sheth ([rpssheth@umich.edu](mailto:rpssheth@umich.edu)), who is available to students for outreach, consultation, and individual therapy. The University has additional resources available to meet students' needs. For urgent and crisis resources after business hours, call 734-765-8312. You can learn more about available counseling services and find information about how to schedule an appointment with a counselor on the law school's mental health resources website.

## **Introduction and Contact**

January 19

- Andrew Sullivan, *How Plagues Have Changed the Course of World History*, New York Magazine.
- Charles C. Mann, *1491* (p. 110-151).

## **Smallpox**

January 25

- Elizabeth Tandy, *Local Quarantine and Inoculation for Smallpox in the American Colonies*, Am. J. Pub. Health.
- Elizabeth Fenn, *Pox Americana* (p. 80-103, 126-34).

## **Yellow Fever**

January 26

- John Duffy, *The Sanitarians* (p. 34-50).
- Kathryn Olivarius, *Immunity, Capital, and Power in Antebellum New Orleans* (from p. 432).

## **Cholera**

February 1

- Charles E. Rosenberg, *The Cholera Epidemic of 1832 in New York City*, Bulletin of the History of Medicine.
- Charles E. Rosenberg, *The Cholera Years* (p. 185-93, 201-12).
- *Van Wormer v. Mayor of Albany* (1836).

## **The Police Power**

February 2

- William J. Novak, *The People's Welfare* (p. 191-217).
- *Morgan's S.S. Co. v. Louisiana Board of Health* (1886).

## **Plague**

February 9

- Howard Markel, *When Germs Travel* (p. 49-77).
- *Jew Ho v. Williamson* (1900).

## **Smallpox Redux**

February 15

- Michael Willrich, *The Least Vaccinated of Any Civilized Country*, Journal of Policy History.
- *Jacobson v. Massachusetts* (1905).

## **Typhoid**

February 16

- George Soper, *The Curious Career of Typhoid Mary*, The Bulletin.
- Judith Walzer Leavitt, *Gendered Expectations: Women and Early Twentieth-Century Public Health*, from *Women and Health in America*.
- *Barmore v. Robinson* (1922).

## **Spanish Flu**

February 22

- Gina Kolata, *Flu* (p. 3-21).
- John M. Barry, *The Great Influenza* (p. 197-209, 220-227).
- Catharine Arnold, *Pandemic 1918* (p. 163-68).
- Governor Sleeper's Executive Order of October 19, 1918, Detroit Free Press.
- Influenza Encyclopedia on Detroit, Michigan.
- Articles from the Los Angeles Times on dispute with Jehovah's Witnesses.

## **Malaria**

February 23

- Sonia Shah, *The Fever* (p. 177-91).
- Polly J. Price, *Federalization of the Mosquito*, Emory Law Journal.

## **1976 Swine Flu**

March 1

- Richard E. Neustadt & Harvey V. Fineberg, *The Swine Flu Affair* (1978).
- Congressional Research Service, *The PREP Act and COVID-19: Limiting Liability for Medical Countermeasures* (2020).

## **AIDS: Early Responses and the Gay Community**

March 2

- Randy Shilts, *And the Band Played On* (p. 18-21, 154, 209-210, 295-96, 303-07, 314-18, 413-18, 430-432, 436-438, 440-43, 445-447, 453-455, 463-465, 469-470, 481-482, 489-491, 498-99, 531-534).
- *City of New York v. New Saint Mark's Baths* (1986).

## **AIDS: Disability Discrimination**

March 8

- *Bragdon v. Abbott* (1998).
- *Doe v. Mutual of Omaha* (1999).

## **AIDS: Activism and the Food and Drug Administration**

March 9

- Lewis A. Grossman, *AIDS Activists, FDA Regulation, and the Amendment of America's Drug Constitution*, *American Journal of Law and Medicine*.
- Optional but highly recommended: watch the documentary *How to Survive a Plague*.

## **AIDS: Legal Responsibility**

March 15

- *John B. v. Superior Court* (2006).
- Zita Lazzarini, Sarah Bray, and Scott Burris, *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, *Journal of Law, Medicine, and Ethics*.

## **SARS**

March 16

- David Quammen, *Spillover* (p. 167-192, 206-208).
- Katarina Tomasevski, *World Health Organization*.
- Kristina Daugirdas, *SARS Narrative*.
- Flowchart of the International Health Regulations.

## **Ebola**

March 22

- Laurie Garrett, *Ebola's Lessons*, Foreign Affairs.
- *Hickox v. Christie* (D.N.J. 2016).
- Brief description of Public Health Services Act's quarantine rules.

## **Zika**

March 23

- Donald McNeil, *Zika* (p. 13-16, 51-56, 133-57).
- Laurie Garrett, *Springtime in D.C. Means Mosquitoes – and Zika*, Foreign Affairs.
- Maryn McKenna, *Why the Menace of Mosquitoes Will Only Get Worse*, New York Times Magazine.

## **COVID-19: State Emergency Powers**

March 29

- John Fabian Witt, *American Contagions* (p. 107-21).
- Jonathan Mahler, *A Governor on Her Own, With Everything at Stake*, N.Y. Times Magazine.
- Executive Order 2020-21 (March 2020).
- Excerpt of Emergency Management Act.
- Excerpt of Emergency Powers of the Governor Act.

## **COVID-19: Legal Challenges to State Emergency Powers**

March 30

- *LIFT v. Whitmer* (6th Cir. 2020).
- *CH Royal Oak v. Whitmer* (W.D. Mich. 2020).
- *Castillo v. Whitmer* (6th Cir. 2020).
- Wudan Yan & Ann Babe, *What Should the U.S. Learn from South Korea's Covid-19 Success?*, Undark.



## **COVID-19: The Institutional Setting**

*April 5*

- John Fabian Witt, *American Contagions* (p. 121-37).
- Excerpt of *Wilson v. Williams* (6th Cir. 2020).
- William Gardner, David States, and Nicholas Bagley, *The Coronavirus and the Risks to the Elderly in Long-Term Care*, *Journal of Aging and Social Policy*.
- Center for Health and Research Transformation, *Keeping Nursing Home Residents Safe* (p. 4-13).
- Robin Erb and Jonathan Oosting, *In tense hearing, Whitmer official defends MI COVID Nursing Home Strategy*, *The Bridge*.

## **COVID-19: Emergency Powers and the Separation of Powers**

*April 6*

- *In re Certified Questions* (Mich. Sup. Ct. 2020).
- Nicholas Bagley, *A Warning from Michigan*, *The Atlantic*.
- Excerpt of the Public Health Code.
- Michigan Department of Health and Human Services, Oct. 29 Epidemic Order.

## **COVID-19: Emergency Powers and Religious Exercise**

*April 12*

- *Tandon v. Newsom* (2021).

## **COVID-19: Federal Emergency Powers**

*April 13*

- Excerpt of the Stafford Act and Governor Whitmer's press release.
- 42 U.S.C. 264 & 265.
- President Trump, Proclamation 9984, January 31, 2020.
- *Terkel v. CDC* (2021).

## **COVID-19: FDA Review of Tests, Therapies, and Vaccines.**

*April 19*

- Excerpt from the BioShield Act.
- Shawn Boburg et al., *Inside the Coronavirus Testing Failure*, Wash. Post, April 3, 2020.
- Lindsey R. Baden et al., *The FDA and the Importance of Trust*, New England Journal of Medicine.
- Michael Mina et al., *Rethinking Covid-19 Test Sensitivity*, New England Journal of Medicine.
- Robert Wachter & Ashish Jha, *It's time to consider delaying the second dose of coronavirus vaccine*, Wash. Post, Jan. 3, 2021.
- Dan Diamond, *Fauci: U.S. must stick with two-shot strategy for Pfizer-BioNTech, Moderna vaccines*, Wash. Post, Mar. 1, 2021.

## **The Next Pandemic**

*April 21*

- Excerpt from Council on Foreign Relations, *Improving Pandemic Preparedness: Lessons from COVID-19*.
- Thomas Bollyky, *Coronavirus Is Spreading Because Humans Are Healthier*, The Atlantic.
- Excerpt of O'Neill Report (2016).
- Nicholas Bagley & Kevin Outterson, *We Will Miss Antibiotics When They Are Gone*, N.Y. Times.