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BOOK REVIEW

PUBLIC HEALTH LAW: NEW CENTURY, NEW CHALLENGES, NEW ANSWERS

James G. Hodge, Jr.[†]

PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT
by Lawrence O. Gostin

*(Berkeley and New York: University of California Press
and the Milbank Memorial Fund, 2000)*
491 pp., \$60.00 (cloth), \$24.95 (paper)

WHAT IS PUBLIC HEALTH LAW? American scholars and public health practitioners have traditionally answered this question by suggesting that public health law, essentially, is the application of legal principles to public health practice. As Tobey espoused in 1926, “[p]ublic health law is that branch of jurisprudence which [applies] common and statutory law to the principles of hygiene and sanitary science.”¹ Though simplistic and somewhat narrow, this framework sufficed for public health law for decades because society’s understanding of public health was equally simplistic and narrow. Protecting public health has historically been tied to the control of communicable diseases. Tools of public health included testing, screening, sur-

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¹ JAMES A. TOBEY, *PUBLIC HEALTH LAW: A MANUAL OF LAW FOR SANITARIANS* 7 (1926).

veillance, epidemiologic investigations, quarantine, isolation, and vital statistics. Public health nurses cared for the less fortunate in the population. Public health departments provided fundamental services (e.g., vaccinations, medications, education), monitored the sanitary practices of restaurants, bars, and schools, and addressed some environmental concerns posed by industry.

Yet, public health has always involved more than communicable disease control. Having successfully addressed many threats related to communicable diseases (e.g., polio, malaria, smallpox), public health authorities branched out. Public health was no longer limited to the control of communicable disease or mere termination of harmful factors in the environment. Beyond addressing obvious causes of morbidity and mortality in the population (e.g., transmissible diseases, cancer, heart disease), public health began to further examine underlying conditions of public health importance (e.g., inadequate housing, contaminated environments, common injuries, and even social inequities).

By the late 1980's, public health had changed dramatically from its historical roots in the United States. The Institute of Medicine (IOM), in its *Future of Public Health* report, suggested in 1988 that public health included all of the things and services which it was traditionally associated, but also much more. "Public health," said the Institute, "is what we, as a society, do collectively to assure the conditions for people to be healthy."² Though exceedingly broad, the IOM's definition captured traditional notions of public health along with larger societal priorities under the penumbra of what public health is, or at least should be.

While public health practice matured greatly during the twentieth century, public health law seemed to languish behind. Previously, scholars and practitioners had attempted to carve out the field of public health law from health and environmental law generally. In so doing, public health law was constrained to those traditional and narrow notions of what the state can and cannot do to control communicable diseases, improve sanitation, prevent injuries, and address some environmental threats. Law was often viewed by public health practitioners either as

² INSTITUTE OF MEDICINE, *THE FUTURE OF PUBLIC HEALTH* 19 (1988).

irrelevant or as an obstacle to protecting public health. Public health law, as a distinct field, lacked cohesion and definition.

In his new treatise, *Public Health Law: Power, Duty, Restraint*, Lawrence O. Gostin presents a modern framework for understanding American public health law in the twenty-first century. Built on a solid foundation of prior legal and public health scholarship (much of which is attributable to Gostin), this cumulative work provides the clearest vision of public health law to date. Gostin's framework for public health law is centered on a sophisticated definition of what public health law has become in the United States:

Public health law is the study of the legal powers and duties of the state to assure the conditions for people to be healthy (e.g., to identify, prevent, and ameliorate risks to health in the population) and the limitations on the power of the state to constrain the autonomy, privacy, liberty, proprietary, or other legally protected interests of individuals for the protection or promotion of community health.³

Gostin specifically incorporates the IOM's 1988 conception of public health into a legal definition that recognizes the vital (though not exclusive) role of government to protect the public health as part of our social and constitutional contracts. This role is quintessentially governmental because its exercise may entail the use of coercive power to require individuals or business entities to act (or not act) in the interests of public health. Unlike government, the private sector is not vested with this power. Gostin culls out three additional essential characteristics of public health that help distinguish the field of public health law: (1) public health is focused on the health of populations, not necessarily the health of each individual; (2) public health is largely concerned with the relationship between government and populations; and (3) public health provides services for the benefit of populations based on scientific methodologies.

The context for public health law then is a legal framework that empowers, if not obligates, governments to protect the public health while simultaneously limiting government's power to do so. This resulting paradox is analyzed through

³ LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 4 (2000).

Gostin's rich historical, ethical, and legal discussions for lay and legal readers of traditional and modern explanations for how government protects the public health. Chapter Two examines the first part of the paradox, the power of government to act. Gostin suggests that federal, state, and local governments share responsibility for protecting public health under principles of federalism, although each level of government acts pursuant to very different powers and authority. The federal government takes its authority from its enumerated powers in the Constitution, states' authorities derive from their broad police and *parens patriae* powers, and local governments owe their authority to delegated powers from states.

Chapter Three and subsequent chapters examine the legal and ethical limits of governments to interfere with a person's autonomy, privacy, liberty, or property to achieve public health benefits. These limits include (1) constitutional restrictions on government's power to act (e.g., freedoms of speech, religion, and assembly, prohibitions against unreasonable searches, due process protections, principles of equal protection, and takings provisions); (2) judicial restraints related to principles of separation of powers, federalism, and jurisprudence (explained through an excellent analysis of the foundational Supreme Court case, *Jacobson v. Massachusetts*⁴); and (3) economic, ethical, and practical limitations (addressed in Chapter 4 where Gostin proposes a systematic process to evaluate public health regulation based on numerous factors).

Beyond the first four chapters, which comprise Part One of the book and essentially create and explain the framework for public health law, Part Two (comprising Chapters 5-10) examines public health law in the context of specific conflicts between public health powers and civil liberties. Gostin examines the trade-offs between governmental regulation and personal liberties underlying legal, ethical, and political issues such as public health information privacy (Chapter 5); restrictions on commercial speech (Chapter 6); compulsory vaccinations and screening (Chapter 7); and civil confinement, mandatory treatment, and public health criminal offenses (Chapter 8).

In Chapter Nine, Gostin neatly distinguishes public health regulation relating to personal liberties as distinct from regulations involving private economic interests (e.g., contractual in-

⁴ 197 U.S. 11 (1905).

fringements, takings or use of private property). Public health objectives and economic freedoms (like personal liberties) often conflict. "When government acts for the public's health," queries Gostin, "how concerned should we be about impeding commercial opportunities?"⁵ Considering Gostin's focus on the importance of protecting the public health, a view which runs throughout the text, it follows that we should not be overly concerned. If government's reason for intervening is to avert a significant risk to the public's health, "there appears [to be] nothing in the nature of economic liberty that should prevent the state from intervening,"⁶ nor should states have to compensate individuals or business owners for regulating commercial activities which harm public health.

These and other observations reflect the need to revalue public health in society. Gostin presents a compelling case that Americans have lost perspective on the role of public health. Not having to face the threat of deadly, communicable diseases on a regular basis (as people did just fifty years ago), the population has become apathetic. Public health is invisible to many. Failing to see the need for public health regulation, people disdain governmental interference with their individual liberties or commercial interests. Yet the need for public health regulation remains. As Gostin reminds us, "[t]he field of public health is purposive and interventionist. It does not settle for existing conditions of health, but actively seeks effective techniques for identifying and reducing health threats."⁷ Provided that government retains the duty to provide for the public health, some level of personal infringement for the communal good is necessary. Interestingly, this conclusion mirrors the historical decision of the Court in *Jacobson* (which affirmed the power of government to require smallpox vaccinations).

In addition, Gostin's vision admits a new role for law in public health. Law is not merely an encumbrance or obstacle to accomplishing public health goals. Lying in the balance of government actions and limitations is public health itself. "Law is a very important, but perennially neglected, tool in furthering the public's health."⁸ This theme plays out in many of Gostin's chapters. In Chapter 10, *Tort Law and the Public's Health: In-*

⁵ GOSTIN, *supra* note 3, at 239.

⁶ *Id.* at 267.

⁷ *Id.* at 327.

⁸ *Id.*

direct Regulation, for example, he suggests there is “vast potential for using tort litigation as an effective tool to reduce the burden of injury and disease,”⁹ which he demonstrates through case studies on tobacco and gun control litigation. Though not without economic and social consequences, understanding law as a tool for improving public health outcomes raises new regulatory possibilities for the future.

For public health to succeed, it must identify and respond to existing and new threats to populational health (e.g., bioterrorism and emerging infectious diseases, environmental exposures, genetic causes of disease). In many ways, Gostin’s treatise shows us how to address existing and new public health challenges through the law. This is the immediate and lasting power of Gostin’s message that shall guide public health law this century and beyond.

⁹ *Id.* at 270.