Public Health Law in a New Century
Part I: Law as a Tool to Advance the Community's Health

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Statutes, regulations, and litigation are pivotal tools for creating conditions for people to lead healthier and safer lives. Law can educate, create incentives, and deter; mandate safer product design and use of property; and alter the informational, physical, or economic environment.

This article defines public health law as the power and duty of the state to ensure conditions for people to be healthy and limitations on the state's power to constrain autonomy, privacy, liberty, and proprietary interests of individuals and businesses. The 5 essential characteristics of public health law discussed are (1) the government's responsibility to defend against health risks and promote the public's health; (2) the population-based perspective of public health, emphasizing prevention; (3) the relationship between government and the populace; (4) the mission, core functions, and services of the public health system; and (5) the power to coerce individuals, professionals, and businesses for the community's protection.

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THIS 3-PART SERIES EXPLORES THE FIELD OF PUBLIC health law in a new century. A sound public health law infrastructure is important because it establishes the powers and duties of government to prevent injury and disease and promote the population's health. The core idea I propose is that statutes, regulations, and litigation can be pivotal tools for creating the conditions for people to lead healthier and safer lives.[1-3]

Laws, like other prevention strategies, can intervene at a variety of levels. At the individual level, public health authorities educate, create incentives, deter, and punish. For example, health communication campaigns educate and persuade people to make healthier choices; taxing and spending powers discourage risk behaviors or encourage healthy activities; and police powers deter risk behaviors by imposing civil and criminal penalties. Second, public health authorities influence the agents of behavior change by requiring safer product design. For example, government regulates unsafe products directly by requiring safety features or indirectly through the tort system. Finally, the law alters the informational, physical, social, or economic environment. For example, government demands accurate labeling and instructions or restricts commercial advertising of hazardous products; enacts housing and building codes to prevent injury and disease; and regulates emissions into the environment.

In this first article, I construct a definition of public health law, borrowing from ideas in constitutional law and theories of democracy. My definition of public health law follows, and the remainder of this article offers a justification. Public health law is the study of the legal powers and duties of the state to ensure the conditions for people to be healthy (eg, to identify, prevent, and ameliorate risks to health and safety 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 protection or promotion of community health.

Through this definition, I suggest 5 essential characteristics of public health law: (1) the responsibility of government, (2) the health of populations, (3) the relationship between government and the populace, (4) services to promote the public's health, and (5) the power to coerce individuals and businesses for the community's protection.

GOVERNMENT POWER AND DUTY

What Is Public in Public Health Law

A systematic understanding of public health law requires a careful examination of what is public. A public entity acts on behalf of the people and gains its legitimacy through a political process. A characteristic form of public or state action occurs when a democratically elected government exercises powers or duties to protect and promote the population's health. Government, of course, is not solely involved in the work of public health. The private sector (eg, managed care organizations, hospitals, and pharmaceutical companies), charities, and community-based organizations are full partners.[4] Nevertheless, the government has the primary responsibility to advance the public's health because it acts on behalf of the people.

The Role of Government in the Constitutional Design

The Constitution shows that government is empowered to, and actually does, defend the common welfare. The Pre-

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amble to the Constitution reveals the influence of republican ideals that government is the wellspring of communal life and mutual security:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence [and] promote the general Welfare . . . do ordain and establish this Constitution.

The common defense and the general welfare could not have been conceived solely as physical security, for perhaps the principal threat to civil society during the generation in which the Constitution was ratified was epidemic disease.[5]

The constitutional design reveals a plain intent to vest power in government, at every level, to protect community health and safety. By its very first sentence, the Constitution provides sole legislative or policy-making authority in the Congress,[6] and the first enumerated legislative power is to provide for the common defense and general welfare of the United States.[7] The legislative role is to enact laws necessary to safeguard the population from harms and to promote health (eg, food and drug purity, occupational health and safety, and a healthy environment). The executive branch, pursuant to its constitutional obligation to "take Care that the Laws be faithfully executed," enforces and amplifies legislative health and safety standards.[8] Executive agencies at the federal, state, and local level have developed special expertise and have long-promulgated regulations to safeguard public health and safety. The judicial role is to construe the law and to ensure that legislative and executive actions are congruent with the Constitution.[9] Since the earliest times, the courts have authorized compulsion to protect the public's health. From a constitutional perspective, only government can collect taxes and expend public resources, and only government can require members of the community to submit to licensing, inspection, and regulation, which are all necessary for the preservation of the public's health.

The Responsibilities of Government in Democracies

From the founding of the republic to the present day, government has assumed responsibility for community well-being. Early in the 20th century, Tobey[10] noted that government is "organized for the express purpose, among others, of conserving the public health and cannot divest itself of this important duty."

Why is it that a political or governmental entity possesses principal responsibility to protect and promote public health? Theories of democracy and political communities help to explain the primacy of government in matters of public health. Walzer[11] has articulated an essential truth about the nature of political communities: "Membership is important because of what the members of a political community owe to one another . . . and the first thing they owe is the communal provision of security and welfare."

A political community stresses a shared bond among members and an organized society safeguards the common goods of health, welfare, and security, while members subordinate themselves to the welfare of the community as a whole.[12] Public health can be achieved only through collective action, not individual endeavor. Acting alone, individuals cannot ensure even minimum levels of health. Individuals may procure personal medical services and many of the necessities of living, such as purchasing a home, clothing, food, and the services of a physician. Yet, no single individual, or group of individuals, can ensure the health of the community. Meaningful protection and assurance of the population's health require communal effort. The community as a whole has a stake in environmental protection, sanitation, clean air and surface water, uncontaminated food and drinking water, safe roads and products, and control of infectious disease. Each of these collective goods, and many more, are essential conditions for health. Yet, these goods can be secured only through organized action on behalf of the public.

Moreover, the population, or electorate, legitimizes systematic community activity for the public's health. Public health activities in a democracy cannot be organized, funded, or implemented without the assent of the people. It is the public that bands together to achieve social goods that could not be secured absent collective action. And it is the public that legitimizes government action for the common welfare. Elected officials are at least putatively committed to securing the public's health; and constituents are committed to bear the necessary burdens. Consequently, the communal efforts of the body politic to protect and promote the population's health represent a central tenet of what we call public health law.

Public health takes on a special meaning and importance in political communities. Health is indispensable not only to individuals, but to the community as a whole. The benefits of health to each individual are indisputable.[13] Health is necessary for much of the joy, creativity, and productivity that each person derives from life. Perhaps not as obvious, however, health is also essential for communities. Without minimum levels of health, populations cannot fully engage in the social interactions of a community, participate in the political process, generate wealth and ensure economic prosperity, and provide for common defense and security. Public health, then, becomes a transcendent value because a fundamental level of human functioning is a prerequisite for engaging in activities that are critical to communities.

I do not mean to suggest that the political commitment to public health must be absolute. What constitutes enough public health? What kinds of services are necessary? How will they be paid for and distributed? These remain contentious political questions. Democratic government will never devote unlimited resources to public health. Core public health functions compete for scarce resources with other demands for services, and resources are allocated through a prescribed political process. In this sense, a healthy republic is not achieved solely by a strong sense of communal welfare, but also a vigorous democratic discussion about the population's health.

THE POPULATION-BASED PERSPECTIVE

The crux of public health, as I have sought to demonstrate, refers to a governmental entity that harbors the power and responsibility to ensure community well-being. Public health, however, also focuses on persons or groups that stake a claim to health protection or promotion.[14,15] Scholars who have compared public health with medicine note that, generally, public health focuses on the health of populations, while medicine focuses on the health of individuals.[16]

Public health is organized to provide an aggregate benefit to the mental and physical health of all the people in a given community. Classic definitions of public health emphasize this population-based perspective:

> As one of the objects of the police power of the state, the 'public health' means the prevailingly healthful or sanitary condition of the general body of people or the community in mass, and the absence of any general or widespread disease or cause of mortality.[17]

Consequently, while the art or science of medicine seeks to identify and ameliorate ill health in the patient, public health seeks to improve the health of the population.[18]

Admittedly, it is not easy to separate individual and population-based health interventions. A direct relationship exists between the health of each individual and the health of the community at large. After all, the well-being of the whole may be accomplished by little more than ensuring the health of each individual. Despite the lack of clarity, strong arguments exist, which are based on theory and practice, that the quintessential feature of public health is its concentration on communal well-being, and that this feature separates public health from medicine. The organized community activity known as public health is conceptually designed to benefit the whole population. If political communities form for the communal provision of security and welfare, it is the community, not individuals, that stakes a claim to disease prevention and health promotion. Public health services are those shared by all members of the community, organized and supported by, and for the benefit of, the people.

The focus on populations, rather than individual patients, is grounded not only in theory, but by the methods of scientific inquiry in public health. The analytical methods and objectives of the primary sciences of public health of epidemiology and biostatistics are directed toward understanding risk, injury, and disease within populations. Epidemiology, literally translated from the Greek, is the study (logos) of what is among (epi) the people (demos). Epidemiology examines the frequencies and distributions of disease in the population.[19] The advantage of a population strategy is that it seeks to eliminate the underlying causes of injury and disease among populations.

The foundational article by McGinnis and Foege[20] examines the leading causes of death in the United States, revealing different forms of thinking in medicine and public health. Medical explanations of death point to discrete pathophysiological conditions, such as cancer, heart disease, and pulmonary disease. Public health explanations, instead, examine the root causes of disease. When seen in this way, the leading causes of death are environmental, social, and behavioral factors, such as smoking, alcohol and drug use, diet and activity patterns, sexual behavior, toxic agents, firearms, and motor vehicles. The vast preponderance of government expenditures is devoted to medical treatment of diseases ultimately recorded on death certificates as the nation's leading killers. Only a small fraction is directed to control the root determinants of death and disability.

The concentration on aggregate health effects in populations helps to construct a thoughtful definition of public health, which I incorporate into my broader definition of public health law. Definitions of public health vary widely, ranging from the utopian conception of the World Health Organization of an ideal state of physical and mental health to a more concrete listing of public health practices. The Institute of Medicine proposed one of the most influential contemporary definitions: "Public health is what we, as a society, do collectively to assure the conditions for people to be healthy."[21] The emphasis on cooperative and mutually shared responsibility (ie, we, as a society) reinforces that people form political communities precisely because the collective entity can best protect and promote the population's health. What do communities do to preserve health? Notably, communal responsibilities are intended to "assure the conditions for people to be healthy."[21] These conditions of health include a variety of behavioral, economic, and environmental interventions to reduce the burden of injury and disease in populations. Finally, the definition emphasizes public sector responsibility to engage in organized and sustained efforts to safeguard communal health.

THE RELATIONSHIP BETWEEN THE PEOPLE AND THE STATE

Public health law studies the relationship between the state and the community at large. Public health is interested in organized community efforts to improve the health of populations. Accordingly, public health law observes collective action—principally by government through federal, state, and local health agencies—and its effects on various populations. For example, government, acting on behalf of the community, protects people from defective products, unsafe workplaces, and poor-quality health care services.

Public health law similarly examines the benefits and burdens placed by government on legally protected interests. As government acts to promote or protect public health, it may enhance or diminish individual interests in autonomy, liberty, privacy, or property. Thus, public health law considers how government acts, or fails to act, to address the major health problems facing large populations (eg, tobacco use, drug or alcohol dependency, communicable diseases, injuries, violence, and occupational or environmental risks). And, when government acts, or fails to act, public health law studies the effects on personal and organizational interests. For example, restraint on advertising curtails free speech, closure of bathhouses cur-

tails free association, reporting curtails privacy, quarantines curtail liberty, and inspections or licenses curtail proprietary interests.

The questions that are important in public health law are: What is the health status of the population (gathered through surveillance)? What broad societal measures can prevent injury and disease and promote the public's health? And what detrimental effects will government action have on personal and proprietary interests?

THE SERVICES OF THE PUBLIC HEALTH SYSTEM

If government has the primary responsibility to ensure the conditions of health for populations, then what public health activities best ensure health, and what organizational arrangements are necessary to provide these services? The answer to these questions not only informs traditional methods for population-based health improvement but, more importantly, the critical differences between medical and public health services.[22]

The literature is replete with attempts to identify the mission of public health, classify core functions, and set national standards for essential services.[23] The mission of public health is broad, encompassing systematic efforts to promote physical and mental health, and prevent disease, injury, and disability. The core functions of public health agencies are those fundamental activities carried out to protect the population's health: assessment by evaluating community health needs; policy development by developing public health policies informed through scientific knowledge; and assurance by ensuring a competent workforce and providing the services necessary for community health.

Essential public health services monitor community health status and investigate health risks; inform, educate, and empower people about health; mobilize community partnerships; enforce laws and regulations; link people to needed personal health services; and pursue innovative solutions to health problems.[24,25] The mission, functions, and services of public health demonstrate the breadth of public health activities.

ROLE OF COERCION AND INDIVIDUAL RIGHTS

I have suggested that public health law is concerned with governmental responsibilities to the community; the population's well-being; the relationship between the state and the community at large; and a broad range of services designed to identify, prevent, and ameliorate health threats within society. These ideas encompass what can be regarded as public and what constitutes health within a community. Although it may not be obvious, I am also suggesting that coercion should be part of a thoughtful understanding of public health law.

Government can do much to promote public health and safety that does not require the exercise of compulsory powers (eg, health education campaigns, counseling, and voluntary testing). Yet, government is authorized to require conformance with publicly established standards of conduct. Governments are formed not only to attend to the general needs of its constituents, but to insist, through force of law if necessary, that individuals and businesses act in ways that do not place others at unreasonable risk of harm. To defend the common welfare, political communities assert their collective power to tax, inspect, license, regulate, and coerce. Of course, different ideas exist about what compulsory measures may, or may not, be necessary to safeguard the public's health. Reconciling divergent interests about the desirability of coercion in any given situation (should government resort to force, what kind, and under what circumstances) is an issue for political (and sometimes judicial) resolution.

Protecting and preserving community health is not possible without the constraint of a wide range of private activities. Private actors, whether individuals, groups, or corporate entities, have incentives to engage in behaviors that are personally profitable or pleasurable, but may threaten other individuals or groups. Individuals with sexually transmitted diseases derive satisfaction from sexual relationships; industry finds it profitable to produce goods without considering broader social or environmental costs; and manufacturers find it economical to offer products without the highest available safety or hygiene standards. In each instance, individuals or organizations act rationally for their own interests, but their actions may adversely affect communal health and safety. Absent a governmental authority and willingness to coerce, these threats to public health and safety could not easily be reduced.

Perhaps because engaging in risk behavior may promote personal or economic interests, individuals and businesses frequently oppose government regulation. Resistance is often based on philosophical grounds of autonomy and freedom from government restraint or taxation. Claims of liberty and self-determination are used particularly to justify so-called self-regarding behavior that primarily affects the health of the individual such as driving without a seatbelt or a motorcycle helmet. These arguments are also voiced with respect to behavior that threatens others, such as sex or needle-sharing[26] or the closure of bathhouses.[27]

More often, however, resistance to regulation ostensibly is based on factual disputes about the degree of risk or the perceived social or economic value of the activity itself. Tobacco executives long denied the association between smoking and cancer; the dairy industry denied the relationship between contaminated milk and tuberculosis; automobile manufacturers denied the benefits of seatbelts, and later, airbags. In each case, a government entity inspected the product, regulated manufacturing, and required disclosure of risks.

Even when it accepts the scientific evidence about risk, industry often asserts that the economic benefits militate against government control. Entrepreneurs tend to accept as a matter of faith that governmental health and safety standards retard economic development and should be avoided.

Moreover, in political arenas, they contest these standards in the name of economic and personal liberty, holding out government taxation, bureaucracy, and regulation as inherently oppressive and unjust.[28]

Debates such as these should take place within a democratic society. My intention is not to say whether, in any particular case, government control is desirable. Yet, governments of all description have historically used force to benefit communal health; compulsion is sometimes necessary to avert obvious social risks, such as unsafe pharmaceuticals, unhygienic restaurants, or the unqualified practice of medicine. The study of coercive powers of the state is a staple of what we call public health law. Charles V. Chapin, one of the most prominent sanitarians from the Progressive Era, reached a core understanding of public health law, which is that the state, in the exercise of its police powers, sets boundaries over the behavior of individuals that pose risks to the public[29]:

> Sanitarians work toward the ideal that all people will in time know what healthful living is, and that they will in time reach that moral plane when they will practice what they know. However, law is still necessary. People have an inclination toward acts which are not for their neighbors' good. In our complicated civilization, many restrictions must be placed on individual conduct so that we may live happily and healthfully one with another.

Public health historically has constrained the rights of individuals and businesses to protect community interests in health.[30] Whether through reporting requirements affecting privacy, mandatory screening affecting autonomy, environmental standards affecting property, industrial regulation affecting economic freedom, or isolation and quarantine affecting liberty, public health has not shied from controlling private action for the aggregate good.

Public health authorities are empowered to restrict human freedoms and rights to achieve a collective good, but they must act in a manner consistent with constitutional constraints on state action. The inherent prerogative of the state to protect and promote the public health, safety, and welfare (known as the police powers) is limited by individual rights to autonomy, liberty, property, and other legally protected interests. Achieving a just balance between the powers and duties of the state to defend and advance the public health and the constitutionally protected rights of individuals and businesses poses an enduring problem for public health law.

TRADEOFFS BETWEEN THE COMMON GOOD AND PRIVATE INTERESTS

The definition that I have proposed and defended does not perceive the field of public health law narrowly as a complex set of technical rules buried within state health codes. Rather, public health law should be seen broadly as the authority and responsibility of government to ensure the conditions for the population's health. The study of the field requires a detailed understanding of the legal tools available to prevent injury and disease and promote the public's health. At the same time, it requires respect for the rights of persons and their property as well as fair and equal treatment of all groups in society. These complex tradeoffs between the common good and private interests pose enticing intellectual challenges, both theoretical and essential to the body politic. In part 2 of this series, I will examine the sources of public health powers and the limits on those powers.

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