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Public Health Law: Power, Duty, Restraint by Lawrence O. Gostin

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BOOK REVIEW

PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT. By Lawrence O. Gostin.* Berkeley, California: University of California Press and the Milbank Memorial Fund, 2000. Pp. 518.

*Public Health Law: Power, Duty, Restraint*¹ is primarily intended as a textbook and reference on public health law for students in law, public health, and related fields. However, the new national attention to public health gives it a larger potential audience, one that may not be well-oriented to general concepts of public health. Assuming that this group includes readers of the *Kentucky Law Journal*, this review situates Gostin's work in the context of public health scholarship, practice, and legislation.

The September 11th attacks and anthrax outbreaks have catapulted public health to unprecedented prominence in U.S. civic affairs. Prior warnings about emerging global diseases, foodborne pathogens, biological warfare, and antibiotic-resistant organisms were ineffective in channeling resources to an increasingly fragmented, chronically under-funded public

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¹ LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT (2000) [hereinafter GOSTIN, PUBLIC HEALTH LAW]. For *Kentucky Law Journal* readers who are encountering Gostin's work here for the first time, it is important to note his prominence in the field of health law generally and public health law in particular. In addition to the titles listed above, he is Editor of the Journal of the American Medical Association's Health Law and Ethics section, to name but a few of his accomplishments and positions. Gostin's contributions to this Symposium are Lawrence O. Gostin, *Conceptualizing the Field After September 11th: Foreword to a Symposium on Public Health Law*, 90 KY. L.J. 791 (2002) [hereinafter Gostin, *Conceptualizing the Field*], and James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831 (2002). Gostin's interest in public health appears to have originated with his participation in the Clinton health reform task force and his service as Executive Director of the American Society of Law, Medicine and Ethics. See, e.g., Lawrence O. Gostin, *Health Care Reform in the United States—The Presidential Task Force*, 19 AM. J. L. MED. 1 (1993).

health infrastructure.² Now, the coercive potential of public health regulation, particularly in the area of bioterrorism prevention, has become a matter of extensive public debate. Gostin's persistent search for the appropriate balance between promoting the common good and protecting individual freedom of action brings *Public Health Law* squarely into the post-September 11th world.

Public health practice often means making people do things that they would not choose to do, so public health as an enterprise would be futile without the force of law. As Gostin puts it, "law is essential for creating the conditions for people to lead healthier lives."³ Attacks on the legitimacy of public health activities come from those who reflexively oppose government interventions on both the political left and right. This tension is one of the dominant themes of Gostin's work.⁴

The scope of Gostin's inquiry reflects the breadth and complexity of public health law:

Public health law is the study of the legal powers and duties of the state to assure the conditions for the 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.⁵

This definition also limits the scope and perspective of *Public Health Law*: it is about domestic, not international, public health issues, and it explores the legal basis for activities undertaken in the name of public health. Public health practitioners may be disappointed to find that it does not delve into the statutory and regulatory regimes governing public health functions. Rather, Gostin "aspire[s] to create a record of the field of public health law at the turn of the millennium,"⁶ as well as to recommend improvements.

Despite its length (328 text pages and 120 pages of footnotes) and complexity, *Public Health Law* is accessible for readers from many disciplines and at varying levels of sophistication. Twenty-six figures and eleven tables help the reader grasp complex concepts, while twenty-six

² See, e.g., LAURIE GARRETT, BETRAYAL OF TRUST: THE COLLAPSE OF GLOBAL PUBLIC HEALTH (2000) (asserting that chronic neglect of the public health infrastructure internationally poses a serious threat to U.S. health).

³ GOSTIN, PUBLIC HEALTH LAW, *supra* note 1, at 309.

⁴ See, e.g., *id.* at xix-xx (describing the themes of the book).

⁵ *Id.* at 4.

⁶ *Id.* at xxi.

historical illustrations, ranging in tone from the amusing to the poignant, enliven the text. An extensive bibliography, table of cases, and index make the volume useful as a reference, and assist the reader in navigating the subject's historical, political, scientific, and cultural crosscurrents. The book is particularly rich in historical information, reflecting the context in which public health law has developed over the centuries.

Public Health Law is divided into three Parts: "Conceptual Foundations of Public Health Law," "Public Health and Civil Liberties in Conflict," and "The Future of Public Health Law." Gostin identifies five essential domains in public health law: the primacy of government, the focus on populations, the state's relationships with populations and individuals, delivery of services, and the need for coercion.⁷ In the first Part, Chapter 1 reviews each of these characteristics so as to provide the reader with theoretical tools for the complexities that follow. Chapter 2 explores the constitutional basis for public health law, while Chapter 3 sets out constitutional limits on governmental public health regulation.

The last chapter in this Part evaluates public health regulation and suggests criteria for assessing its validity. The traditional justifications for government intervention are the risk of harm to others (e.g., anti-pollution laws), protection of the incompetent (such as children), and the need to curb self-destructive behavior (e.g., seat-belt or helmet laws).⁸ In place of these a priori rationales, Gostin recommends a stepwise analysis using demonstration of risk and the effectiveness of the proposed intervention, costs in economic and individual terms, and the policy's fairness in relation to the risk posed.⁹

Part Two has the general theme of balancing civil liberties with public health objectives. Gostin begins with a chapter on the timely issue of public health information. While population-level data are critical to an effective public health policy, an ongoing national debate questions the degree to which individual data should be available to public health authorities who are, by definition, actors in the governmental sector.¹⁰ As in the case of public health regulation generally, Gostin recommends the Model Health Information Privacy Act's balancing of public and private interests as a paradigm.¹¹ Other topics assessed in this Part are health communications and freedom of expression; immunization, testing and screening; restrictions of one's physical person, such as quarantine; economic behavior; and the role of tort law in public health.

⁷ *Id.* at 4.

⁸ *Id.* at 88-92.

⁹ *Id.* at 92.

¹⁰ *Id.* at 115.

¹¹ *Id.* at 140.

Four case studies in Part Two bring the theoretical models into more concrete perspective and add to the volume's potential as a teaching text.¹² The case studies cover regulation of cigarette advertising,¹³ HIV screening of pregnant women and infants,¹⁴ the tobacco litigation that led to the national master settlement agreement,¹⁵ and tort litigation to prevent firearm injuries.¹⁶

The single chapter of the final Part begins by cataloguing the problems of "politics and money, leadership and jurisdiction, and legitimacy and trust"¹⁷ that make public health practice so difficult. The chapter then turns to its central topic, the reform of public health law. Gostin has participated in several public health law reform projects, including those of the Turning Point initiative, jointly sponsored by the Centers for Disease Control and Prevention, the Robert Wood Johnson Foundation, and the Kellogg Foundation.¹⁸

The motivation for public health law reform is the finding that public health laws are highly variable across states and tend to be accretions of varying antiquity, large portions of which may be irrelevant to contemporary public health needs or even hindrances to effective public health practice. Gostin sets forth several guiding concepts for public health law: "consistency and uniformity of approach, mission and essential functions, powers, substantive limits, procedural limits, and protection against discrimination and invasion of privacy."¹⁹

ANTI-TERRORISM MODEL LEGISLATION AS AN ILLUSTRATION OF GOSTIN'S APPROACH

The discussion in the final chapter is somewhat abstract, and the Turning Point statutory improvement initiative has not yet provided

¹² A reader accompanying the text is in press as of this book review.

¹³ GOSTIN, PUBLIC HEALTH LAW, *supra* note 1, at 167. Although presented as a case study, this section is written like a legal brief.

¹⁴ *Id.* at 199.

¹⁵ *Id.* at 290.

¹⁶ *Id.* at 297.

¹⁷ *Id.* at 310.

¹⁸ For additional information about the Turning Point initiative, see Nat'l Ass'n of County and City Health Officials, at <http://129.41.41.25/search.cfm?topicID=45&numresults=all&showabstract=yes>. For additional information on the Public Health Statute Modernization National Collaborative, see Turning Point, *Public Health Statute Modernization National Collaborative*, at http://www.hss.state.ak.us/dph/deu/turningpoint/the_collaborative.htm.

¹⁹ GOSTIN, PUBLIC HEALTH LAW, *supra* note 1, at 310; *see id.* at 316-26.

concrete examples. The Model Public Health Privacy Act developed by Gostin and colleagues in the late 1990s addresses one specific concern in the balancing of public and private interests, but its scope is not broad enough to give the reader a case study or illustration of the principles in the final chapter. For a better example of the interplay of Gostin's guiding principles, as well as an interesting glimpse into the effect of dramatic events on values and priorities,²⁰ we can turn to the October 23, 2001 publication of the Model State Emergency Health Powers Act.²¹

The Act addresses such diverse topics as the definition and detection of public health emergencies,²² special powers over property and persons,²³ planning,²⁴ and public information.²⁵ Because all states have some form of emergency powers legislation on the books already, specific statutory examples illustrate many of the provisions. Sections that draw on Kentucky law include section 303(c), addressing identification material for emergency public health personnel;²⁶ and section 404(d), allowing the state to compel cooperation of businesses or facilities that deal with corpses.²⁷ An example of a careful balancing of the exigencies of crisis and fundamental human values appears in section 103(b), in which one of the Act's purposes is stated as being "[t]o facilitate the early detection of a health emergency, and allow for immediate investigation of such an emergency by granting access to individuals' health information under specified circumstances," and section 506, addressing access and disclosure of patient records.²⁸ Nevertheless, the Act has been attacked by some advocates as an exces-

²⁰ See Gostin, *Conceptualizing the Field*, *supra* note 1; Hodge & Gostin, *supra* note 1.

²¹ MODEL STATE EMERGENCY HEALTH POWERS ACT, available at <http://www.publichealthlaw.net/Resources/Modellaws.htm> [hereinafter MODEL ACT]. The Act is a collaborative initiative of the Center for Law and the Public's Health at Georgetown and Johns Hopkins University, the Nat'l Governors' Ass'n, the Nat'l Conference of State Legislatures, the Nat'l Ass'n of Attorneys General, the Ass'n of State and Territorial Health Officials, and the Nat'l Ass'n of City and County Health Officers. *Id.*

²² *Id.* at arts. II-III.

²³ *Id.* at arts. IV-V.

²⁴ *Id.* at art. VII.

²⁵ *Id.* at art. VI.

²⁶ See KY. REV. STAT. ANN. [hereinafter K.R.S.] § 39A.050(2)(d) (LEXIS through 2001 Sess.), cited in Model Public Health Emergency Powers Act, *supra* note 21.

²⁷ See K.R.S. § 39F.020(4), cited in MODEL ACT, *supra* note 21.

²⁸ MODEL ACT, *supra* note 21, §§ 103(c) and 506.

sive intrusion into personal liberties,²⁹ and by others as unnecessarily rigid.³⁰

Enactment of detailed model legislation creating uniform statutory structures across all states is not the only approach to assuring adequate public health emergency powers. Traditionally, public health legislation has been broadly drafted, and the detailed guidance for local practitioners has been embodied in regulation rather than statute. While Gostin advocates greater consistency, detail, and civil rights protections, public health practitioners may prefer the flexibility of broad grants of authority and regulations that are more readily modified than statutes.

CONCLUSION

Public Health Law: Power, Duty, Restraint will undoubtedly be an important text and reference, although practitioners may find its attention to issues of individual rights out of proportion to the collective needs of the post-September 11th environment. Indeed, Gostin himself notes that when confronted with a genuine public health emergency, he revisited and revised his own core principles in this regard.³¹ Public health law has only recently emerged as a distinct field of scholarly inquiry, and its further evolution will doubtless be the subject of future investigation.

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²⁹ See, e.g., Bernadette Tansey, *Health Bill Endangers Civil Rights*, S.F. CHRON., Nov. 25, 2001, available at <http://commondreams.org/headlines01/1125-01.htm>.

³⁰ See, e.g., Katharine C. Rathbun & Edward P. Richards, *Review of the Model State Health Emergency Powers Act*, at <http://biotech.law.umkc.edu/blaw/Bioterror.htm>.

³¹ Gostin, *Conceptualizing the Field*, *supra* note 1.

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