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Global Health Jurisprudence: A Time of Reckoning

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INTRODUCTION

The emergence of public health as a prominent issue in national and international politics during the past decade represents an unprecedented event. Never before have public health problems been featured so urgently and comprehensively in the political, economic, and social dynamics of domestic and world affairs. This transformation has increased attention on the role of national and international law in protecting human health. As the creation of the O'Neill Institute for National and Global Health Law and the other contributions to this Issue attest, events over the past ten years have triggered a renaissance of interest in the functions law plays in achieving public health in an increasingly globalized world.[1] This renaissance is not confined to the ivory tower but has permeated public health practice, as evidenced by the development of model laws, adoption of new statutes, attempts to improve legal preparedness for public health emergencies, and negotiation of new treaty law.

This Essay analyzes whether, in this intensified activity, we can discern deeper patterns that converge to produce an emerging global jurisprudence for public health. This global health jurisprudence has, in fact, developed sufficiently to warrant an effort to take account of its features, promise, and

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1. *See* Lawrence O. Gostin, *Public Health Law: A Renaissance*, 30 J.L. MED. & ETHICS 136 (2002).

limitations. This time of reckoning for global health jurisprudence also requires exploring forces that will determine its future contributions to public health nationally and internationally as the twenty-first century progresses.

I. JURISPRUDENCE AND PUBLIC HEALTH

The concept of "global health jurisprudence" attempts to capture how the increased use of law in public health reveals a deeper importance for law in public health endeavors within and between countries.[2] Implicit in the idea of global health jurisprudence is the principle that national and international public health activities should, wherever possible, be subject to the rule of law. The rule of law is a philosophy of governance that adherents apply to all political acts, so public health is not special as a policy area in terms of the rule of law. Arguing that public health ought to be subject to the rule of law is important but tells us little about the actual working relationship between law and public health. In addition, the impact of globalization on public health, and the increased demand for international action, takes analysis out of the traditional rule of law focus on governance within unitary states. The structure and dynamics of international law are such that the philosophy of governance captured by the rule of law concept only awkwardly applies, if it can realistically be applied at all.

Similarly, terms such as "global health law" only partially illuminate the relationship between law and public health. The diverse ways in which "global health law" is used make finding analytical clarity in this idea difficult.[3] Part of the message communicated by this concept is the global importance of law to the protection of public health, and the global scope of law's relevance to public health is indeed significant. This global scope is particularly important for

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2. DAVID P. FIDLER, INTERNATIONAL LAW AND PUBLIC HEALTH: MATERIALS ON AND ANALYSIS OF GLOBAL HEALTH JURISPRUDENCE 479 (2000).

3. Two examples illustrate how commentators often use "global health law" without providing clarity on what the concept means. John Harrington asserted:

> A global health law is developing quite different from the thin body of international treaties and agreements which minimally regulated interstate health matters. It penetrates into national and regional law. The global is present in the local of health policy. Competent health lawyers are obliged to study and comprehend this reconfiguration of their normative world.

John Harrington, Editorial, *Towards a Global Health Law*, LAW SOC. JUST. & GLOBAL DEV. (2004), *available at* http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2004_1/editorial/. A different perspective was offered by Professor R.K. Nayak, who argued that:

> The poverty-health nexus is so strong that poor health keeps the poor in absolute poverty and poverty pushes them into poor health status. To break this nexus, the world needs a "global health law" so that the essential issues and guiding principles for formulating strategies for health for all in the years to come could be evolved by the countries of the United Nations and the WHO.

R.K. Nayak, *Development of Health Legislation in Some Countries of the WHO South-East Asia Region*, REGIONAL HEALTH F., WHO SOUTH-EAST ASIA REGION, Volume 7, Number 2, 2003, at 20, 30, *available at* http://www.searo.who.int/LinkFiles/Regional_Health_Forum_rhf.pdf.

principles with universal application, such as human rights norms. Global health law also signifies that the processes through which national and international law are made involve not only traditional governmental and intergovernmental law-making bodies but also non-state actors, such as non-governmental organizations (NGOs).

The drawback of global health law as a concept is that there really is not a body of *global* health law distinct from national law and international law affecting public health in a context of globalization. This problem is familiar from attempts to locate "global law" or "world law" within changes affecting traditional sources of legal rules within countries and between them. The normative ring of such concepts exceeds the analytical utility they bring to understanding the nature of law in domestic or international politics.

More helpful perhaps is to think about the transformed relationship between law and public health through the lens of *jurisprudence*. The *New Shorter Oxford English Dictionary* defines jurisprudence in three ways,[4] and each definition proves useful in examining the relationship between national and international law and public health. The first definition of jurisprudence is "[k]nowledge of or skill in law."[5] The importance of knowledge of and skill in law has grown in the last decade in efforts to address national and international public health problems. Such knowledge and skill represent the operational side of jurisprudence where law serves practical functions in governance efforts to address policy challenges.

The second definition of jurisprudence is a "system or body of law; a legal system."[6] This definition's relevance arises when thinking about whether the intensified attention to law has produced an identifiable system or body of laws specific to public health. This aspect of jurisprudence invites examination of whether practical uses of law to address real-life problems reflect purposes, patterns, principles, and interdependencies that form a systematic framework or strategy. This Essay explores whether law's use in national and international public health contexts exhibits characteristics of a specific legal system.

The final definition of jurisprudence holds that it involves the philosophy of law.[7] Jurisprudence as the philosophy of law analyzes such questions as "what is law?" and "what is the relationship between law and morality?" Using this definition invites inquiries into the philosophy of law as created and applied for public health purposes. This aspect of jurisprudence is the most abstract, but the transformation in the role of law in national and international public health stimulates considerations about deeper conceptual currents affecting the relationship between law and public health. This Essay considers whether these inquiries shed any light on the increased importance of law to public health now and in the future.

4. 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 1465 (4th ed. 1993).
5. *Id.*
6. *Id.*
7. *Id.*

II. JURISPRUDENCE AS KNOWLEDGE OF AND SKILL IN LAW: PUBLIC HEALTH'S NEED FOR THE LAWYER'S CRAFT

The intensified use of law in public health reflects a new appreciation for the importance of knowledge of and skill in law to the public health mission. Protecting public health has always required law, particularly the use of law to empower and limit governmental actors responsible for responding to disease threats. However, the escalating interest in the role of law in public health during the past decade has revealed a need in public health for knowledge of and skill in law that surpasses the experience of preceding decades. This need is part of what has driven the development of global health jurisprudence.

Many examples illustrate the heightened public health need for knowledge of and skill in law. The crafting of a global strategy for tobacco control turned to international law in the form of a new treaty, the Framework Convention on Tobacco Control (FCTC).[8] The globalization of trade and commerce heightened the importance of international trade law to public health. The attention paid to the role of law in responding to public health emergencies provides a fertile example. Strategies for responding to threats presented by biological terrorism,[9] naturally occurring infectious diseases,[10] and natural disasters[11] have prominently included legal components that reinforce public health's growing need for knowledge of and skill in law. These legal components implicate a broad, diverse, and complex range of issues that touch upon the identification of existing legal authorities, the interpretation of applicable rules, and the creation of new legal frameworks, concepts, and principles.

The incident involving extensively drug-resistant tuberculosis (XDR-TB) and a U.S. citizen in May and June 2007 provides a revealing example of the public health need for knowledge of and skill in law.[12] The public health actions undertaken to address this XDR-TB problem were permeated at every level—individual, local, state, federal, and international—by difficult and complex

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8. WHO Framework Convention on Tobacco Control, May 21, 2003, 2302 U.N.T.S. 229 [hereinafter FCTC].

9. Gene W. Matthews et al., *Legal Authorities for Interventions in Public Health Emergencies*, *in* LAW IN PUBLIC HEALTH PRACTICE 262, 262–63 (Richard A. Goodman et al. eds., 2d ed. 2007) (arguing that bioterrorism and other public health threats "underscore the importance of public health officers understanding their legal authorities").

10. World Health Org. [WHO], *Revision of the International Health Regulations*, WHA Doc. 58.3 (May 23, 2005), *available at* http://www.who.int/csr/ihr/en/index.html [hereinafter IHR 2005] (revision of the main international legal rules specifically addressing the international spread of infectious disease).

11. *See, e.g.*, Michael H. Hoffman, *What Is the Scope of International Disaster Response Law?*, *in* INTERNATIONAL DISASTER RESPONSE LAWS, PRINCIPLES AND PRACTICE: REFLECTIONS, PROSPECTS AND CHALLENGES 13, 13 (Victoria Bannon ed., 2003) (arguing that the field of international disaster response law has been neglected but increasingly requires careful consideration and systematic analysis to inform peacetime disaster response efforts).

12. *See* David P. Fidler, Lawrence O. Gostin & Howard Markel, *Through the Quarantine Looking Glass: Drug-Resistant Tuberculosis and Public Health Governance, Law, and Ethics*, 35 J.L. MED. & ETHICS (forthcoming 2007).

legal issues that required management by public health officials.[13] Some issues, such as the impact of federalism on public health responses and the need to balance public health actions and individual rights, were not novel, but the XDR-TB incident revealed the continuing challenges of taking public health actions in contexts increasingly affected by legal structures and substantive and procedural legal rules.[14]

More important than describing examples of public health's increased need for knowledge of and skill in law is exploring why this need developed during the past decade. Law's intensified prominence in public health reflects a policy and governance need for legal knowledge and skill. Understanding this need is critical to grasping the development of global health jurisprudence. In general terms, the need for law reflects the emergence of public health threats that the existing public health capacities and skill sets proved ill-equipped to handle. The inadequacies run deeper than the decay in the public health infrastructure in developed and developing countries that occurred in previous decades. The threats public health increasingly confronts forced a radical rethinking of public health strategies and, consequently, the policy and governance actions required to implement them. The new strategies typically involved more intense and higher profile involvement of national and international law.

Two examples illustrate this point. The emergence of the HIV/AIDS pandemic in the 1980s triggered a dramatic reconceptualization of how to approach this threat in the form of utilizing international human rights law as the foundation for national and global strategies. Public health leaders concluded that traditional approaches could not adequately address HIV/AIDS, so they opted for a strategy based on the international law of human rights.[15] The second example concerns the threats of biological terrorism and naturally occurring communicable diseases, which policy makers increasingly framed as threats to national and international security[16]—a process I refer to as securitization. This reconceptualization radically altered the context and manner in which

13. *See* Howard Markel, Lawrence O. Gostin & David P. Fidler, *Extensively Drug-Resistant Tuberculosis: An Isolation Order, Public Health Powers, and a Global Crisis*, 298 JAMA 83, 84–85 (2007).

14. *See id.* at 84.

15. *See, e.g.*, Jonathan M. Mann, *Human Rights and AIDS: The Future of the Pandemic*, *in* HEALTH AND HUMAN RIGHTS: A READER 216, 217 (Jonathan M. Mann et al. eds., 1999) (describing the turn towards human rights in global strategies against HIV/AIDS and observing that "for the first time in history, preventing discrimination toward those affected by an epidemic disease became an integral part of a global strategy to prevent and control an epidemic of infectious disease").

16. *See, e.g.*, G. JOHN IKENBERRY & ANNE-MARIE SLAUGHTER, THE PRINCETON PROJECT ON NATIONAL SECURITY, FORGING A WORLD OF LIBERTY UNDER LAW: U.S. NATIONAL SECURITY IN THE 21ST CENTURY 51 (2006), *available at* http://www.princeton.edu/ppns/report/FinalReport.pdf (arguing that "American national security in the 21st century . . . is likely to be threatened by pathogens as much as people"); WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 47 (2006), *available at* http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf (observing that public health challenges, such as HIV/AIDS and avian influenza, are national security concerns created by globalization). For analysis of the increased use of security arguments with respect to public health, see David P. Fidler, *A Pathology of Public Health Securitism: Approaching Pandemics as Security Threats*, *in* GOVERNING

public health operated. For example, public health officials had to cooperate with security and law enforcement communities in unprecedented ways. The securitization of public health generated new legal questions,[17] stimulated the creation of new legal tools and instruments,[18] and placed traditional but infrequently confronted legal issues, such as quarantine and isolation, into a novel and urgent policy and governance context.

The scope and seriousness of emerging and reemerging disease threats also heightened the importance of legal knowledge and skill by revealing how the broader, deeper, and diverse implications of these threats triggers a cascade of consequences for societies that demand legal attention. The areas of law affected by strategies to prevent, protect against, and respond to serious public health risks are many and complex, requiring expertise across a daunting range of legal fields (for example, public health, law enforcement, emergency management, national security, trade, and commerce) in both domestic and international settings. Efforts to develop legal preparedness strategies for public health emergencies reveal, for example, a bewildering array of legal questions that include issues concerning treaty interpretation, constitutional law, statutory law, administrative law, emergency management rules, and the potential liability volunteers face when participating in health emergency response activities. The increased public health need for knowledge of and skill in law illuminates how deeply contemporary public health activities are embedded in legal structures and substantive areas of law nationally and internationally.

Public health's need to exploit legal knowledge and skill as never before does not mean, however, that such knowledge and skill will provide all the answers to public health problems. Legal knowledge and skill alone are insufficient for preventing, protecting against, and responding to disease challenges. The FCTC does not guarantee reduced tobacco consumption in developing countries. Serious tensions linger in international trade law concerning the trade-health linkage. Framing HIV/AIDS as a human rights issue has not prevented this pandemic from becoming one of humanity's worst plagues. Securitizing public health does not automatically eliminate global concerns about inequitable access to vaccines for pandemic influenza. Ensuring appropriate empowerment of, and limitations on, government quarantine and isolation authority does not guarantee effective use of these powers.

GLOBAL HEALTH: CHALLENGE, RESPONSE, INNOVATION 41–64 (Andrew F. Cooper, John J. Kirton & Ted Schrecker eds., 2007).

17. For example, should the revision of the International Health Regulations include within their scope suspected intentional uses of biological, chemical, and radiological agents? *See generally* IHR 2005, *supra* note 10.

18. The linkage of security and public health contributed to the development of the Model State Emergency Health Powers Act (2001), the federal Pandemic and All-Hazards Preparedness Act (2006), and the International Health Regulations (2005). *See* Pandemic and All-Hazards Preparedness Act, Pub. L. No. 109-417, 120 Stat. 2831 (codified as amended in scattered sections of 6, 21, 38, and 42 U.S.C.); Model State Emergency Health Powers Act (Ctr. for Law & the Pub.'s Health at Georgetown & Johns Hopkins Univs., Draft for Discussion, Dec. 21, 2001); IHR 2005, *supra* note 10.

More sobering is the realization that the increased need for knowledge of and skill in law results from threats that constitute actual and potential pandemics, crises, and catastrophes. This aspect of global health jurisprudence rises and falls in proportion to the level of danger that disease risks present nationally and globally. Neither public health officials nor lawyers can take comfort in the rising significance of legal knowledge and skill while public health both nationally and internationally is increasingly imperiled.

III. JURISPRUDENCE AS A SYSTEM OR BODY OF LAWS: PUBLIC HEALTH LAW AND GOOD GOVERNANCE

The second definition of jurisprudence focuses on the existence of a system or body of laws, or a legal system.[19] This definition encourages analysts to concentrate on whether laws on a particular subject operate as a system rather than as random, unconnected rules. Despite the long relationship between public health and national and international law, the idea that public health law constituted a distinct system or body of laws was, in the past, neither interesting nor compelling, even among those tasked with protecting public health. The increased public health need for legal knowledge and skill has changed this reality by forcing experts to think about law and public health more systematically both within and between countries. Thus, the claim that global health jurisprudence has emerged requires consideration of the extent to which the relationship between law and public health exhibits characteristics of a coherent system or body of rules.

The idea that something called "public health law" exists is not new. Efforts to delineate the elements of public health law within national legal systems date back to before World War II.[20] Similarly, although public health was obscure as a topic in international relations, the creation of international sanitary conventions indicates the development of international law on public health in the latter half of the nineteenth century. Nevertheless, the decades after World War II witnessed fading interest in how national and international law supported public health objectives. The bodies of national and international law developed before World War II not only faded from policy prominence but also stagnated in their substantive content.[21]

New national and international law developed in the post-World War II

19. NEW SHORTER OXFORD ENGLISH DICTIONARY, *supra* note 4, at 1465.

20. *See, e.g.*, JAMES A. TOBEY, PUBLIC HEALTH LAW (2d ed. 1939).

21. Domestically, experts noted that state public health laws adopted before World War II were not often comprehensively kept up to date in the decades thereafter. *See* Lawrence O. Gostin, Scott Burris & Zita Lazzarini, *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 101–18 (1999). Internationally, a good example is how the WHO and its Member States allowed the International Health Regulations, originally adopted as the International Sanitary Regulations in 1951, to become ineffective as a practical matter and to fail to reflect the changing nature of the threats posed by the globalization of infectious disease risks. *See generally* David P. Fidler, *From International Sanitary Conventions to Global Health Security: The New International Health Regulations*, 4 CHINESE J. INT'L L. 325 (2005).

period to protect population health from pollution,[22] but these rules fueled the emergence of the new field of environmental law rather than rejuvenating the body of public health law.[23] Similarly, traditional public health law largely failed to keep pace with changes in science, epidemiology, information technologies, and conceptions of civil and political rights. Public health's increasing reliance on law over the past decade has revealed a body of national and international law ill-equipped to handle many emerging communicable and non-communicable threats to population health.

Exacerbating this reality was the fact that national and international law on public health consisted of a hodge-podge of legal issues that defied rationalization into a coherent legal topic. The sheer breadth of how public health affects societies magnified this diluting effect. In this respect, public health law suffered in comparison to the way health care law developed in the post-World War II period. The complexity of legal issues touched by public health combined with the lack of policy and governance interest in population health to frustrate formulation of ways to conceive of public health law as a distinct system or body of rules.

The renaissance of interest in national and international law on public health that began in the latter half of the 1990s sparked efforts to think about public health law as a system or body of rules that stands on its own and deserves recognition as a legal discipline in its own right.[24] These efforts not only described the complexity of public health's interconnections with many areas of law but also tried to identify features of these interactions that give public health law nationally and internationally particular purposes, patterns, characteristics, and problems.

The starting point for this aspect of global health jurisprudence is the focus of public health law on the protection of population health. The depth of the obscurity and neglect into which public health had fallen in the post-World War II period was revealed in widespread misperceptions about population health as

22. *See* PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 25–26 (2d ed. 2003) (noting that three of the four periods in the development of international law on the environment occurred after 1945); Angela Logomasini, Competitive Enter. Inst., *Environmentalism's Legal Legacy*, ISSUE ANALYSIS, Jul. 17, 2007, at 5, *available at* http://www.cei.org/pdf/6052.pdf (noting that environmental laws began to be enacted in the United States in the 1960s and eventually exploded in number in the 1970s).

23. The rise to prominence of environmental law nationally and internationally occurred during the same post-World War II period that witnessed the stagnation and neglect of public health law. Commenting on the neglect of public health law, Wendy Parmet argued that "[a] hundred years ago, the relationship between the two fields [public health and law] was readily apparent . . . . In the last half-century, law has forsaken its traditional appreciation of public health." Wendy E. Parmet, *Introduction: The Interdependency of Law and Public Health*, *in* LAW IN PUBLIC HEALTH PRACTICE xxvii, xxxiv–xxxv (Richard A. Goodman et al. eds., 2d ed. 2007).

24. *See, e.g.*, LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT (2002).

a governance responsibility and the role of law in bearing that responsibility.[25] The objective of protecting population health drives the policy and governance functions law must serve in this policy area. These functions are surveillance of disease risks and governmental intervention to prevent, protect against, and respond to such risks. Given that experts consider the protection of population health to be a public good, surveillance and interventions are predominantly government responsibilities. Thus, a critical feature of public health law involves empowering public authorities to carry out surveillance and intervention actions.

Engaging in surveillance and intervention to protect population health requires action to flow through two filters that shape the body of public health law. The first filter is epidemiology.[26] How national and international law support surveillance and intervention should be informed by scientific evidence generated by epidemiology and its medical and scientific inputs. The second filter involves the basic legal frameworks that allocate jurisdiction over the powers required to engage in surveillance and intervention. For national law, the main framework is constitutional law, which typically allocates public health powers among national and sub-national levels of government. In international relations, international law provides the allocation framework, especially the principle of sovereignty. The allocation of jurisdiction for the exercise of public health powers also establishes structural legal limits on surveillance and intervention actions.

Within the structural allocations produced by constitutional law and international law, public health law facilitates surveillance and intervention through substantive legal instruments, such as statutes and treaties. These legal instruments provide more substantive guidance, which governments and intergovernmental actors require to fulfill their allocated responsibilities for protecting population health. Generally speaking, the substantive legal instruments establish parameters for surveillance and intervention activities and involve authority to act in specified ways and/or limits on the exercise of such authority.

The need to empower and to limit governmental and intergovernmental entities highlights the constant challenge in public health law of balancing the protection of population health and the achievement of other policy objectives, interests, or values. Two perennial areas in which public health law has faced balancing involve economic activity and individual rights and liberties. The balancing task is not unique to public health law, but, in terms of forming a system or body of law, how public health law manages this balancing challenge forms a key part of its jurisprudence.

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25. *See* LAURIE GARRETT, BETRAYAL OF TRUST: THE COLLAPSE OF GLOBAL PUBLIC HEALTH 8 (2000) (discussing how public health in the United States "had become—incorrectly—synonymous with medicine for poor people").

26. Epidemiology involves the study of "the incidence and transmission of disease in populations, esp[ecially] with the aim of controlling it." NEW SHORTER OXFORD ENGLISH DICTIONARY, *supra* note 4, at 836.

The first principle that should be applied in the balancing procedure is to ensure that the public health action has an epidemiological and scientific basis. This principle resonates with the use of epidemiology as a filter for public health authority, but public health law nationally and internationally calls for specific resort to epidemiology and science in cases of a perceived clash or tension between public health and another policy objective. The importance of this scientific basis provides the foundation for encouraging the harmonization of laws on accepted scientific understandings of threats to health.

After epidemiological scrutiny, the public health measure in question should be evaluated under the principle of non-discrimination and the "least restrictive measure" test. Public health law does not permit the discriminatory application of scientifically grounded public health measures. Such discrimination violates individual rights and dignity while not achieving the public health objective sought. In addition, public health law requires that public health measures that interfere with the pursuit or enjoyment of other objectives do so in a manner that minimizes such interference while not compromising the legitimate effort to protect population health. This "least restrictive measure" test exists to ensure that the balancing of public health and other objectives is closely calibrated in the body of public health law.

Space constraints prevent sketching a more comprehensive picture of the features that demonstrate that national and international law on public health form a distinct system or body of rules. What I provided above supports the argument that global health jurisprudence has emerged and has become increasingly grooved in national and international policy and governance contexts. Again, this argument does not claim that governments consistently or faithfully follow the tenets of this aspect of global health jurisprudence. These tenets form, however, a jurisprudential template against which many aspects of national and international action on public health are, and will increasingly be, measured.

The development of this jurisprudential template does not imply that its application produces unambiguous and non-controversial results. To the contrary, the balancing of public health and other objectives has become more controversial and difficult as the protection of population health has increased in policy and governance importance. This increased significance tends to support political determinations that other objectives should be subordinate to public health, particularly in the face of dangerous threats to population health. These determinations stimulate resistance, particularly with respect to public health infringements on economic interests and individual rights and liberties. Push-back creates increased pressures on the task of balancing, raising the political stakes for when and how the jurisprudential template applies. However, the template itself contains its own balancing mechanism: the burden to justify public health actions is significant, but deference to legitimate public health measures exists in proportion to the severity of the threat in question.

Public health law exhibits other features that support the argument that it

forms a system or body of rules. One important feature involves the increased understanding of the interdependence of national and international law on public health problems. The early history of the development of public health law involved both national law and international law, but the interface between the two levels of law was not robust. The globalization of public health in the 1990s produced the need for national and international law on public health problems to work synergistically in a growing number of areas. The basic idea was that action only at either the national or international legal level would not be adequate to handle globalization's impact on the threats posed by pathogens, pollutants, products, and people.

Strategies to combat the pandemic of tobacco-related diseases provide a good example of the emphasis on the interdependency of national and international law on public health. National and international public health actors had long supported various changes in national law to reduce tobacco consumption, but, in the mid-1990s, the World Health Organization (WHO) recognized that national legal action alone was not enough to mitigate the threat from tobacco faced by many nations. The result was the FCTC, a seminal treaty on the tobacco threat that provided an international framework to support more vigorous national legal action within countries, and supplemented such action with intensified and harmonized global efforts.[27] Legally, the combination of national and international law on tobacco control works as an interdependent body or system of rules intended to provide stronger governance against this threat to population health. The strategy that informed the FCTC has influenced thinking about other globalized non-communicable disease threats, such as alcohol consumption and obesity.[28]

A final feature supporting the claim that public health law constitutes a system or body of rules involves efforts made to integrate multiple policy objectives into legal reform initiatives. Integration efforts recognize the wide-ranging impact that public health has on societies, and efforts to use the interdependence of national and international law for the protection of population health reflect this broader perspective on the importance of public health. Perhaps the best example of this trend is the revised International Health Regulations adopted in May 2005 (IHR 2005), which entered into force in June 2007.[29] Rather than continue the limited objective of balancing trade and public health pursued by earlier manifestations of the IHR, the IHR 2005 connected

27. *See* FCTC, *supra* note 8.

28. *See, e.g.*, Richard A. Daynard, *Lessons from Tobacco Control for the Obesity Control Movement*, 24 J. PUB. HEALTH POL'Y 291, 292–93 (2003) (discussing whether the FCTC provides a good model for global efforts at addressing the obesity problem); Don Zeigler, *USA: Alcohol Control Movement Follows FCTC Lead*, 16 TOBACCO CONTROL 4, 4 (2007) (noting policy statement from the American Public Health Association "calling for an international alcohol treaty modeled on the Framework Convention on Tobacco Control").

29. IHR 2005, *supra* note 10.

public health to national and international security,[30] economic interests,[31] development concerns,[32] and the protection of human rights.[33] The policy purposes served by the IHR 2005 help make the protection of population health an independent marker of good national and global governance. This status reinforces both the reality of and the need for public health law as a system or body of rules, and thus, the continued development of global health jurisprudence in this respect.

IV. JURISPRUDENCE AS THE PHILOSOPHY OF LAW: WHY PUBLIC HEALTH LAW?

The last definition of jurisprudence focuses on the philosophy of law, a field of inquiry that explores the essence of law as a political and social phenomenon. In sketching global health jurisprudence, this definition encourages us to think about the philosophy of public health law. What is the essence of this body of law that has, in recent years, been increasingly in demand? This question is not as far-reaching as questions about the nature of law, but this aspect of jurisprudence invites consideration of more philosophical issues not elucidated by describing the practical need for law in public health or the political importance of the body of rules supporting the protection of population health.

The philosophy of public health law is, in fact, an amalgam of the philosophy of public health and the philosophy of law. Why, philosophically, is public health important, and why is law an appropriate mechanism for advancing the importance of public health? These questions reveal a vast analytical and normative landscape far beyond the scope of this Essay's space limitations. However, a few observations are in order to support the claim that global health jurisprudence has emerged in the sense of each meaning of the concept of jurisprudence.

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30. *Id.* art. 7 (requiring States Parties to notify the WHO of any unexpected or unusual public health event, regardless of its origin or source, that may constitute a public health emergency of international concern). The IHR 2005 applies, therefore, to the intentional release of biological, chemical, and radionuclear agents, events that constitute threats to national and international security. For analysis of this provision, see Fidler, *supra* note 21, at 365–67.

31. IHR 2005, *supra* note 10, art. 2 (providing that the purpose and scope of the IHR 2005 "are to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade"); *id.* art. 17 (requiring the WHO Director-General to consider what health measures are the least restrictive of international traffic and trade when issuing temporary and standing recommendations); *id.* art. 43(1) (requiring that additional health measures applied by States Parties that otherwise are prohibited by the IHR 2005 to be not more restrictive of international traffic and trade than reasonably available alternatives that would achieve the level of health protection sought).

32. *Id.* annex 1 (requiring States Parties to develop minimum core capacities for public health surveillance and response). *See* The Secretary-General, *Report of the Secretary-General, In Larger Freedom: Towards Development, Security, and Human Rights for All*, ¶¶ 63–64, 67, U.N. Doc. A/59/2005 (Mar. 21, 2005) (arguing that strengthening infectious disease surveillance and response capacities and increasing research on the health needs of the poor was critical to expanding freedom from want).

33. *See* Fidler, *supra* note 21, at 368 (listing the IHR 2005's provisions that are relevant to the protection of human rights).

In terms of the philosophy of public health, the increased need for law in public health activities and the existence of a system or body of public health law both derive from the transformation of public health. Once an obscure, neglected policy concern, public health has since become a prominent issue on national and international agendas involving the provision of security, pursuit of economic interests, progress on development, and promotion of human dignity. The rise of public health in national and global affairs seems to give the protection of population health some kind of meta-importance in human affairs. The interest global health has received of late from governments, international organizations, NGOs, and individual issue entrepreneurs lends support to the emergence of population health as a potentially defining issue of our times. Some experts have even argued that the issue of global health has the potential to transform the nature of foreign policy and international relations.[34]

Skepticism exists, of course, about the implications of global health's current prominence, but the debate emphasizes the need to explore the practical and philosophical aspects of the rise of public health in national and world affairs. A key reason behind public health's emergence is that, presently, public health enjoys high levels of attention from the perspectives of both material interests and normative values. With public health considered important for national security and as an instrument of social justice, the protection of population health has experienced a convergence in the pursuit of material interests and normative values unprecedented in the history of this policy area. This convergence has fueled the explosion of activity, initiatives, and new resources that public health globally has experienced in the past decade.

This explosion has contributed to public health's increased need for national and international legal activity and the solidification of public health law as a distinct system or body of rules. Countries concerned about public health threats harming their security and economic interests have responded with national legal reform and by supporting the development of new international law on public health.[35] Legal activity has also benefited from the normative energy connected with the goal of improving population health, especially with respect to the linkage of public health with human rights and social justice. In terms of the philosophy of law, characteristics of positivist/utilitarian and normative/deontological thinking are present in the manner in which law has been used for public health purposes domestically and globally.

The convergence of material interests and normative values has produced so much activity that commentators worry that efforts underway may not produce sustainable progress and may, in some situations, actually make things worse.[36]

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34. *See, e.g.*, Richard Horton, *Health as an Instrument of Foreign Policy*, 369 LANCET 806, 807 (2007) (arguing that health "moves foreign policy away from a debate about national interests to one about global altruism" and establishes a "revolutionary agenda").

35. *See, e.g.*, Pandemic and All-Hazards Preparedness Act, Pub. L. No. 109-417, 120 Stat. 2831 (codified as amended in scattered sections of 6, 21, 38, and 42 U.S.C.); IHR 2005, *supra* note 10.

36. *See* Laurie Garrett, *The Challenge of Global Health*, FOREIGN AFF., Jan./Feb. 2007, at 14, 14.

This dynamic has produced what elsewhere I called the tragedies of the global health commons, where we find overexploitation and under exploitation in terms of public health activity in a context where such activities occur without over arching governance guidance.[37] These problems have led to calls for new governance "architecture" for global health.[38] Sometimes these calls come in the form of advocacy for a comprehensive or framework treaty on global health, but the argument more often appears in general support for development of new global health governance architecture.

Apart from treaty proposals (which are not themselves uniformly clear in what they advocate), arguments for new governance architecture provide few, if any, details about what is needed to get beyond the tragedies of the global health commons. What exactly does this new architecture require, and how is it materially different from what presently exists? Whatever it entails, this new architecture has to support significantly improved national and global capabilities to undertake the functions of surveillance and intervention. While important, calls for more money or more intensified international cooperation are not alternative governance blueprints to the status quo but, without more details, are really just advocacy for more of the same. Similarly, taking international legal obligations that already exist in multiple treaties and adopting them in yet another treaty is not a new governance strategy. The question of reforming the nature of global health governance reveals a fissure in the convergence between material interests and normative values that creates concerns for the future of global health jurisprudence, and I return to these concerns in this Essay's final Part.

The frequency with which the metaphor of architecture has been used, however, raises questions about the role of national and international law on public health in this endeavor. On the one hand, the call for new governance architecture seems to recognize the increased need for public health law nationally and internationally because law is the primary basis on which governance structures are built within and among countries. On the other hand, the call for new architecture also appears to assert that the existing body of public health law is not sufficient, and may, in fact, be part of the problem, especially in the international realm. In this vein, many initiatives on global health governance, such as the Global Fund to Fight AIDS, Tuberculosis, and Malaria, the International Finance Facility for Immunization, UNITAID, and advance purchase commitment mechanisms, do not function through traditional international legal instruments, such as a treaty, or under the auspices of international health organizations, such as the WHO.

The increasing presence of "governance without treaties" should, however,

37. David P. Fidler, *Reflections on the Revolution in Health and Foreign Policy*, BULL. WORLD HEALTH ORG., Mar. 2007, at 243, 244.

38. On these calls, see David P. Fidler, *Architecture Amidst Anarchy: Global Health's Quest for Governance*, GLOBAL HEALTH GOVERNANCE, Jan. 2007, *available at* http://diplomacy.shu.edu/academics/global_health/journal/PDF/Fidler-article.pdf.

be kept in perspective in terms of the philosophy of public health law. The initiatives mentioned above are all efforts to raise funds to address pressing public health problems around the world. The effective expenditure of funds raised by these new financing mechanisms depends, at the end of the day, on the fulfillment of the core functions of public health—surveillance and intervention—both nationally and internationally. The fulfillment of these functions requires the appropriate allocation of public authority through law combined with the willingness and ability to build the capacity necessary to sustain these functions over time in an increasingly globalized environment. Whether material interests or normative values have the upper hand in the dynamics of domestic and global public health, law remains a reservoir on which governments, international organizations, and non-state actors can and must draw in confronting threats to population health. The hard question is not whether law is practically or philosophically important to public health but whether the political conditions in which the body of public health law and its supporting philosophy must operate are conducive to governance progress in the protection of population health.

V. THE FUTURE OF GLOBAL HEALTH JURISPRUDENCE: GLOBAL HEALTH DIPLOMACY IN OPEN-SOURCE ANARCHY

Demonstrating that global health jurisprudence operates in the contemporary protection of population health exposes significant transformations in public health politics nationally and internationally. As noted above, some analysts sense in these transformations the emergence of public health as an endeavor capable of altering the nature of international relations.[39] Noting that the present dramatically breaks with the past encourages inquiries into the prospects for the future, and, to complete our reckoning on global health jurisprudence, some thoughts on what may lie ahead are appropriate. For me, the most salient issue is whether the conditions that stimulated all aspects of global health jurisprudence will continue. Exploring this issue highlights the fissure in the convergence of material interests and normative values witnessed in global health today, and this fissure focuses thinking on the future prospects for global health jurisprudence in global health diplomacy.

The ferment in public health nationally and globally can obscure historical perspective on public health's importance in domestic and world affairs. Those who argue that public health has become something of a governance lodestar for twenty-first century humanity believe that public health's political promi-

39. *See supra* note 34 and accompanying text. *See also* Thomas E. Novotny & Vincanne Adams, *Global Health Diplomacy: A Call for a New Field of Teaching and Research*, SAN FRANCISCO MEDICINE, March 2007, at 22, 23 (claiming that "[e]ffective health interventions can serve as a diplomatic tool to reduce violence, inequality, and conflict, no matter how large or small the intervention" and that health diplomacy "can help create political will for social and democratic reform, especially in the postconflict environment . . . [and] can promote political solutions as a truly collaborative global effort").

nence has become permanent.[40] History tells us that, for most of humanity's existence, societies experienced life and death, war and peace without the foggiest notion of what we now understand as public health and public health law. The idea that public health and its corresponding jurisprudence are somehow central to the essence of the human condition does not, therefore, have much historical backing. The heightened sensibilities that now exist on population health's importance to humankind are very recent, really only having globally arisen in the past ten to fifteen years. This observation leads to the question why these sensibilities arose at this particular moment in history.

This question stimulates many possible lines of inquiry but no easy answers, whatever analytical path is selected. I will focus on changes in the condition of anarchy in which states and non-state actors interact with each other in international relations. In the study of international relations, the term anarchy describes a political environment characterized by the absence of any common, superior authority. International relations transpire in a condition of anarchy. The nature of, and the possibilities within, this condition of anarchy has been grist for the mill of both real-world diplomacy and the academic study of international relations. The emergence of global health jurisprudence coincides with significant changes in the condition of anarchy and the dynamics of diplomacy that occurred with the end of the Cold War. These changes created the conditions within which public health concerns could find political and diplomatic traction and become more prominent issues in world affairs.

Understanding these changes requires grasping the relationship between material interests (power) and normative values (ideas) in how world politics operates. This relationship connects to the convergence between material interests and normative values that fueled the rise of global health's diplomatic prominence in the past decade. International relations theory has explored whether power or ideas determine the nature of global affairs, and the debate has tended to be polarized. Comparing the post-Cold War period with the Cold

40. This theme appears in the growing literature on health and foreign policy. For example, a group of foreign ministers from seven countries contrasted the limited foreign policy relevance of public health of the past with the contemporary context, which exhibits characteristics that reveal a transformation in the political importance of health:

> During the late 19th and early 20th centuries, health and foreign policy were linked by quarantine restrictions to prevent the spread of disease from country to country. International agreements were designed to help avoid the consequences of trade disruptions. The early 21st century, however, has seen an unprecedented convergence of global health and foreign policy. Health is deeply interconnected with the environment, trade, economic growth, social development, national security, and human rights and dignity. In a globalised and interdependent world, the state of global health has a profound impact on all nations—developed and developing. Ensuring public health on a global scale is of benefit to all countries. Powerful synergies arise when national interest coincides with the need for concerted regional and global action.

Celso Amorim et al., *Oslo Ministerial Declaration—Global Health: A Pressing Foreign Policy Issue of Our Time*, 369 LANCET 1373, 1373 (2007).

War era (and earlier historical times) suggests that the relationship between power and ideas in international relations changes according to specific variables. In short, anarchy is not static with respect to how power and ideas interact to influence the behavior of states and non-state actors. How the relationship between power and ideas unfolds in diplomatic activity affects the prominence or neglect of various policy areas, including public health.

In contrast to the rigid, bipolar international system of the Cold War, commentators have noted how, in the post-Cold War period, non-state actors have grown in importance and influence.[41] Experts on global health have frequently argued that a defining characteristic of the globalization of public health is the increased prominence of non-state actors, especially NGOs.[42] These observations reveal that anarchy changed from being a closed system dominated by the great powers to a more open system in which state and non-state actors participate in and affect world politics. In other words, anarchy has become "open source" and accessible to both state and non-state actors in ways not witnessed in previous historical eras. Whether anarchy is a closed, state-centric system or open source affects the relationship between power and ideas in global diplomatic activity.

The rise of global health to political prominence, and the importance of this development for global health jurisprudence, is a by-product of a particular combination of power and ideas in the post-Cold War period. To understand this combination, we can think of the condition of anarchy as a kind of market for power and ideas. Different market structures produce different relationships between power and ideas. The state-centric approach to anarchy resembles an oligopolistic market in which a small number of great powers determine the supply and demand for power and ideas. Great powers dominate this oligopolistic anarchy because they have achieved economies of scale in the production of material capabilities, particularly military power, that render them relatively invulnerable to competition from weaker states and non-state actors.

As state-centric theories of international relations argue, great power competition focuses on material power, and this competition stifles innovation in normative ideas because states filter everything through the prism of the balance of material power. The relationship between power and ideas in this type of anarchy is inelastic. In other words, the ebb and flow of ideas have little to no impact on the political attitudes of states in their competition for material power.

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41. *See* DANIEL W. DREZNER, ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES 4 (2007) (noting that "theorists argue that globalization empowers a web of non-state actors, including multinational corporations, nongovernmental organizations (NGOs), and transnational activist networks").

42. Kent Buse, Nick Drager, Suzanne Fustukian & Kelley Lee, *Globalisation and Health Policy: Trends and Opportunities*, *in* HEALTH POLICY IN A GLOBALISING WORLD 251, 261–62 (Kelley Lee, Kent Buse & Suzanne Fustukian eds., 2002) (noting that experts have identified "a marked ascendance of private (for profit) sector actors in health policy in recent decades" and "that civil society actors have also gained greater prominence over health policy in recent decades").

The sharper the struggle for material power among states becomes, the less room ideas have for influencing behavior in anarchy.

Moving from an inelastic to a more elastic relationship between power and ideas in anarchy requires greatly reduced competition among states for power and/or the development of non-state actors which possess greater material capabilities. The post-Cold War period has seen the collapse of the Soviet Union significantly reduce competition for power among states, and technological and other developments that have allowed non-state actors to increase their material capabilities for engaging in world affairs. These transformations have produced open-source anarchy and a more elastic relationship between power and ideas in global politics. In other words, in an elastic relationship, changes in material capabilities of state and non-state actors, and changes in the world of ideas, have more impact on each other than in the closed, state-centric system that prevailed during the Cold War.

Global health jurisprudence is, therefore, the beneficiary of an elastic relationship between power and ideas flowing from the emergence of open-source anarchy in world affairs. The convergence of material interests and normative values witnessed in global health in the past ten years reflects this new elasticity in anarchy. Interest in global health diplomacy and its continued evolution also draws on these deeper, underlying changes in the nature of anarchy. This approach helps explain the traction gained by new governance strategies, such as global health security, which combines an appeal to material interests with a reconceptualization of what security means to societies. The interdependence between international and national law emphasized by global health jurisprudence tends to be more robust when law supports governance actions that integrate power and ideas in a coherent and sustainable manner.

These observations identify key questions for the future of global health jurisprudence. First, will anarchy remain open-source, or will it return to a closed, state-centric condition? The return of serious and potentially violent conflict among great powers would move anarchy back into the condition where the relationship between power and ideas is inelastic, and public health as a policy area would increasingly be vetted through a narrowing prism of material power. In short, global health diplomacy will become subsumed in balance-of-power politics. Concerns about China, Russia, India, and Iran emerging as strategic geo-political rivals of the United States indicate that a return to balance-of-power politics in international relations is not incredible.

Second, if open-source anarchy continues to characterize world affairs, will it remain conducive to the convergence of material interests and normative values currently stimulating unprecedented activity in global health? The danger in this scenario is that states and non-state actors continue to fail to build sufficient public health capacities nationally and globally to support what the convergence of interests and values recommends. Although significant problems and gaps exist, the body of public health law is better established than the underlying

capabilities of states, international organizations, and non-state actors to undertake the responsibilities and actions public health law supports.

For example, the IHR 2005's radical transformation of international law addressing serious public health threats will have no impact if developed and developing countries continue to have public health capabilities that are insufficient to handle the demands the IHR 2005 makes on them. The same fate awaits the FCTC unless national governments take tobacco control more seriously as a material and moral responsibility. Rejuvenation of the human right to health will stagnate if those countries that support this right remain indifferent to the public health and health care structures and resources needed to fulfill the right. Efforts to improve legal preparedness at local and national levels for public health emergencies will founder on the lack of governmental and non-governmental capabilities to prevent, protect against, and respond to such emergencies.

Global health jurisprudence helps us understand how law relates to the protection of public health nationally and globally. In essence, law is about structuring political power and authority to achieve social ends and about designing the processes through which such power and authority is exercised. Law does not, by itself, create material capacity to engage in scientifically grounded surveillance and intervention activities. We know the consequences of legal principles promulgated in an environment of insufficient public health capacity because we have watched the devastation of the HIV/AIDS pandemic grow while in possession of sophisticated human rights strategies and principles designed to stem this tragedy. Global health jurisprudence cannot thrive in the real world on ideas alone.

This capacity crisis is, unfortunately, wedging its way into the fissure between material interests and normative values in global health jurisprudence, threatening to rend this convergence asunder as the severity of public health threats mounts. The capacity crisis stimulates calls for new global health governance architecture, and designing a strategy to address this crisis requires countries to prioritize their public health needs and the resources they have to address them. The pressure to prioritize tends to mean that governments place their interests above altruistic ideals of health for all. The more serious the public health threats are to a state's material interests, the more those interests determine how it approaches global health diplomacy. Eventually, the convergence of interests and values cannot hold, and the divergence of interests returns with a vengeance. This scenario is what played out in Indonesia's decision in 2007 to withhold avian flu virus samples, thus jeopardizing global surveillance, until the WHO and developed countries responded to its national interest in having capability to manufacture influenza vaccine.[43]

43. *Indonesia, Baxter Sign Pact on Bird Flu Vaccine*, REUTERS, Feb. 7, 2007, *available at* http://www.alertnet.org/thenews/newsdesk/JAK76679.htm (reporting on Indonesia's decision to withhold avian flu samples); WHO, *Pandemic Influenza Preparedness: Sharing of Influenza Viruses and Access*

As the Indonesia crisis and its tentative resolution suggest, reshaping the architecture for global health governance cannot avoid the global public health capacity deficit, but grasping that nettle seriously risks fragmenting the convergence between power and ideas that has elevated global health politically and stimulated the full emergence of global health jurisprudence. Global health jurisprudence's time of reckoning with the forces that shape its substance and fate has really only just begun.

to Vaccines and Other Benefits, WHA Doc. 60.28 (May 23, 2007) (outlining strategy to facilitate virus sharing and more equitable access to influenza vaccine).