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Beyond the Liberal and Communitarian Impasse: A Framework and Vision for Public Health

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I. INTRODUCTION

How can our society respect liberty and privacy, among other values, and, at the same time, protect public health and security? Our aim in this Commentary is to offer a deliberative framework that transcends the impasse created by overly simplistic liberal and communitarian perspectives. This framework is designed to provide a rigorous and imaginative way to address both individual liberty and privacy, on the one hand, and public health and security, on the other. It shares the spirit that motivates, and much of the vision that inspires, Professor Lawrence Gostin's valuable description, analysis, and prescription. But it also seeks to avoid some problems that plague his approach.[1]

Our Commentary is an exercise in applied or practical political philosophy. Political philosophy, whether formal (e.g., a full-blown theory) or informal (e.g., a politically-embedded framework), provides an important foundation for and sets limits on public health law.[2] It identifies the normative values that should structure the relationship between the state and the individual, the legal powers that enable officials, within defensible limits, to address public health threats, and the processes of reflection, deliberation, and justification that should direct the exercise of the legal powers. As a normative enterprise, political philosophy shares much with both moral philosophy and social philosophy even when they address ostensibly distinct spheres of life. For instance, wherever the line is drawn between political philosophy and moral philosophy, fundamental ethical values define the appropriate relationship between the individual and the state in public health law and elsewhere. And wherever the line is

1. Even though our response concentrates on Gostin's article in this issue, Lawrence O. Gostin, *When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified?*, 55 FLA. L. REV. 1105 (2003) [hereinafter Gostin, *When Terrorism Threatens Health*], we also draw on some of his other writings. *See, e.g.*, Lawrence O. Gostin, *Public Health Law in an Age of Terrorism: Rethinking Individual Rights and Common Goods*, 21 HEALTH AFF. 79 (2002) [hereinafter Gostin, *Rethinking Individual Rights*]. *See generally* Lawrence O. Gostin, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT (2000) (providing an important backdrop for this discussion).

2. Our conception of informal political philosophy is close to what Michael Sandel calls "public philosophy," by which he means "the political theory implicit in our practice, the assumptions about citizenship and freedom that inform our public life." MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 4 (1996).

drawn between political philosophy and social philosophy, numerous social institutions, in addition to the state, play significant roles in public health. Indeed, much of the debate about public health concerns when government may justifiably coerce individuals—for instance, in mandatory quarantine—and justifiably intervene in economic institutions—for example, by confiscating property.

The immediate practical context for reflection about public health law has changed because of the threats of bioterrorism (after the terrorist attacks on the World Trade Center and Pentagon and the anthrax attacks in 2001) and of contagious diseases (after a decade of increasing concern, which was further intensified by the outbreak of Severe Acute Respiratory Syndrome (SARS) in 2003). The felt need for biopreparedness against both types of threat creates a sense of urgency in debates about whether, to what extent, and how public health laws need to change. Biopreparedness provides a test case for proposed revisions in public health laws and for different political philosophies.

Even though we will refer, in passing, to current debates about the Model State Emergency Health Preparedness Act (MSEHPA),[3] we will concentrate on political philosophy, broadly understood. However, political philosophy is not a timeless enterprise, abstracted from historical contexts, particular types of society, and structures of political life. Indeed, debates about the appropriate relationships between the government and individuals do and should reflect those realities and practical concerns about the adequacy of public health law in light of new threats to public health.

II. LIBERAL VERSUS COMMUNITARIAN POLITICAL PHILOSOPHIES

Two major perspectives dominate Gostin's discussion of political philosophy: liberalism and communitarianism. Liberalism receives more attention, in part because Gostin believes it is necessary to overcome many of its limits and deficiencies. He distinguishes libertarian and egalitarian versions of liberalism. However, in his analysis, egalitarianism receives little attention, mainly in passing and then primarily in relation to fair allocation of resources. As a result, libertarianism, which he views as "hard" liberalism, tends to represent liberalism in his analysis. Whether civil or economic in nature, libertarianism becomes the primary opponent of communitarianism. In short, even though Gostin recognizes different versions of liberalism, he mainly analyzes and attacks libertarianism. As

3. CTR. FOR LAW AND THE PUBLIC'S HEALTH, GEORGETOWN UNIV. & JOHNS HOPKINS UNIV., THE MODEL STATE EMERGENCY HEALTH POWERS ACT (Dec. 21, 2001), *at* http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf.

a result, he fails to examine adequately whether some versions of liberalism could accommodate his legitimate concerns.

Communitarianism is a catch-all label for a wide range of positions, and Gostin does not analyze it as fully as he does liberalism, at least in its libertarian form. Indeed, communitarianism functions more as a perspective from which to view problems than as a fully-developed theory. However, Amitai Etzioni, a self-proclaimed communitarian, contends that Gostin's current approach to public health "builds on new (or responsive) communitarian thinking," even if not explicitly indicated, as the "framework" for public health.[4]

Not only is Gostin's communitarianism underdeveloped, but, at least in its current form, it is problematic in many respects. For instance, in his discussion of community, Gostin tends to view "collective interests" as mainly (though not necessarily exclusively) public health and security, and he often (but not always) sets those "collective interests" against "personal interests" in matters such as liberty. Even though we will concentrate on civil liberties in our discussion, both civil and economic liberties belong among collective interests, rather than being opposed to collective interests. Hence, it is important to underline society's interest, as a collectivity, in civil and economic liberties, not only in public health and security.

For Gostin, community is "characterized by a shared set of social bonds or a social web,"[5] a formulation that captures much that community involves. The community's "social bonds" are constituted by shared values, as well as by shared myths and narratives, which often embody these values. These values can include—and in the case of the U.S. do include—civil liberties. Civil liberties are constitutive values, as much as values of public health and security. And, as constitutive values, they both shape and express our national identity. Gostin recognizes this point when he indicates that the values of "liberty and freedom, openness and tolerance . . . are part of the national identity."[6] However, if civil liberties are values within our communal identity, within our "social bonds" and "social web," they represent important "collective interests." Such a reconceptualization leads to an important shift in perspective: Putative "trade-offs" (one of Gostin's favorite metaphors) occur not *between* individual interests and collective interests, as though only the latter constitute community, but rather *within* and *among* our social values, our "collective interests."

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4. Amitai Etzioni, *Public Health Law: A Communitarian Perspective*, 21 HEALTH AFF. 102, 102 (2002).

5. Gostin, *When Terrorism Threatens Health*, *supra* note 1, at 1155.

6. *Id.* at 1159.

Public health is both an intrinsic and an instrumental value for society; it is a good in itself and for what it enables society to do. The health of the public is a public good because it is not just the sum of individual health indices and cannot be attained through individual actions alone. (We will return later to some conceptual and normative issues in setting the boundaries and directions of public health.) In society's pursuit of this good, public policies are assessed in part according to whether they are effective and efficient means to public health. However, we also evaluate public health measures by health-independent standards, such as liberty and privacy, that also are constitutive of our society's identity.

The putative "pitched battle over civil and economic liberties in an era of bioterrorism"[7] and thus over public health law takes place, in Gostin's perspective, between liberals and communitarians—hence, the overall title for this part of our paper: "Liberal versus Communitarian Political Philosophies." However, it is important to note that the putative combatants are fighting over limited, though not insignificant, terrain. Indeed, for the most part, Gostin stresses that the liberal and communitarian perspectives actually converge. In his analysis, these perspectives accept the exercise of state power in cases of significant risk and reject it where there is no "discernible risk."[8] In fact, they "diverge" only in cases that fall in-between—cases of "enhanced risk"—where liberals would be inclined to reject state power and communitarians would be inclined to accept it.[9] Gostin's framework for "balancing" would require "hard trade-offs" between public health or security, on the one hand, and civil and economic liberties, on the other. Proponents of the primacy of each would lose something in these "trade-offs."

III. CONFLICTS AND TRADE-OFFS BETWEEN PUBLIC HEALTH AND LIBERTY

There is vigorous debate about conflicts and trade-offs between public health and liberty. While Gostin views these conflicts and trade-offs as common and even inevitable, George Annas, a lawyer and bioethicist at Boston University, views them as rare and unnecessary.[10] On the one side, for Gostin, the harmony between liberty and public health/security is

7. *Id.* at 1108.

8. *Id.* at 1109.

9. *Id.* In the last part of this Commentary, we will raise serious questions about Gostin's analysis of risk, particularly his interpretation of risk assessment in terms that appear to make it almost exclusively "scientific."

10. *See, e.g.*, George J. Annas, *Bioterrorism, Public Health, and Civil Liberties*, 346 NEW ENG. J. MED. 337 (2002) [hereinafter Annas, *Civil Liberties*]; George J. Annas, *Bioterrorism, Public Health, and Human Rights*, 21 HEALTH AFF. 94 (2002) [hereinafter Annas, *Human Rights*].

contingent—"more often than not they collide."[11] On the other side, Annas contends that "human rights and health are not inherently conflicting goals that must be traded off against each other."[12] He thus rejects the idea that "in a public health emergency, there must be a trade-off between effective public health measures and civil rights."[13] Despite its rhetorical fervor, this debate is largely misplaced; it results mainly from incomplete or unnuanced statements on both sides.

One historical observation can set the background. The conflict between liberty and public health was common and even accentuated in public health law until the last half of the twentieth century when several major changes occurred. First came the institutionalization of rights of liberty, privacy, and due process, both generally and specifically in laws related to health care, for example, in decisions about contraception, abortion, life-sustaining treatment, and treatment of persons with mental illness. Second, the major threats from contagious diseases appeared to be under control. Third, when AIDS appeared, both the mode of transmission of HIV infection and the structure of civil liberties combined to create what has been called "AIDS exceptionalism": AIDS was generally exempted from some of the traditional public health measures, including quarantine.[14] Indeed, assertions of the harmony between rights and public health increased and intensified, and Gostin helped to craft this model of harmony.[15] As Ronald Bayer and James Colgrove, both of the Center for the History and Ethics of Public Health at Columbia University, note:

> Given the unique biological, epidemiological, and political factors that shaped the public policy discussion, it became possible to assert that there was no tension between public health and civil liberties, that policies that protected the latter would foster the former, and that policies that intruded on rights would subvert the public health.[16]

As a result, there was general rethinking and reorientation of public health.

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11. Gostin, *When Terrorism Threatens Health*, *supra* note 1, at 1108. Elsewhere Gostin offers a more qualified and nuanced statement: "although public health and civil liberties may be mutually enhancing in many instances, they sometimes come into conflict." Gostin, *Rethinking Individual Rights*, *supra* 1, at 88.

12. Annas, *Human Rights*, *supra* note 10, at 96.

13. Annas, *Civil Liberties*, *supra* note 10, at 1340.

14. Ronald Bayer, *Public Health Policy and the AIDS Epidemic: An End to HIV Exceptionalism?*, 324 NEW ENG. J. MED. 1500, 1501-02 (1991).

15. *See generally* Ronald Bayer & James Colgrove, *Bioterrorism, Public Health, and the Law*, 21 HEALTH AFF. 98 (2002).

16. *Id.*

Generally, conflicts do not emerge. Effective public health measures and civil rights can not only co-exist, but civil rights can contribute to public health. Similar points can be made about human rights.[17] Furthermore, it is often possible to find—and we will argue imperative to seek—effective public health measures that do not infringe civil rights. So, anyone who claims "there *must* be a trade-off" is mistaken if that claim denies the possibility of coherence. However, if Annas means to assert, as his language sometimes suggests, that implementing "effective public health measures" will *never* conflict with "civil rights" or that "civil rights" will *never* be an impediment to "effective public health measures," those assertions are implausible.

One of Gostin's extreme formulations is also implausible: "Although security and liberty sometimes are harmonious, more often than not they collide."[18] He must suppose that this claim is obvious because he offers no support for it; but even the nature of the claim is unclear. On the one hand, it could be an empirical claim, in which case evidence would be needed about real-life practices. On the other hand, it could be a conceptual-normative claim that conceptually or normatively collision is unavoidable. Neither claim is satisfactory. Gostin provides no evidence for the first, and the second is conceptually and normatively problematic.

Let's suppose, for instance, that a society can rationally persuade individuals or provide them with adequate incentives to choose voluntarily to exercise their liberty in certain ways that are consistent with public security. In such a case, security and liberty would be harmonious, and the harmony would have been purchased by rational persuasion or incentives, not by a coercive infringement of liberty. Not only is it difficult to interpret this situation as a collision that requires a trade-off between liberty and security, but it can even provide a model for how liberty can be consistent with public health as well as with public security.

IV. FRAMEWORK FOR DELIBERATION: BALANCING VERSUS REBUTTING PRESUMPTIONS

Because he believes we face a "dilemma," Gostin seeks a framework for "balancing" liberty and public health/security. Elsewhere he stresses that "[t]he balance between individual interests and common goods needs to be recalibrated in an age of terrorism."[19] The metaphor of balance dominates his article, but it appears in several different guises. The balance

17. *See generally* Jonathan M. Mann, *Medicine and Public Health, Ethics, and Human Rights*, HASTINGS CENTER REP., May-June 1997, at 6.

18. Gostin, *When Terrorism Threatens Health, supra* note 1, at 1107-08. *See supra* note 11 for Gostin's more careful statement.

19. Gostin, *Rethinking Individual Rights, supra* note 1, at 81.

or balancing may be mechanical (recalibration of the balance), aesthetic ("appropriate balance"), economic (a "trade-off"), or pragmatic ("successful balancing"). And this process of balancing, which seeks "a careful balance,"[20] occurs within and is structured by another metaphor: that of "framework."

A. *Principles or Processes*

A tension may exist between two different conceptions of a framework for balancing: such a framework may be "principled" or it may focus more on "process." Using different language, we might characterize these two conceptions as normative and procedural. Gostin's conception of a framework includes both principled analysis and process. In some places, he identifies his goal as to find "a *principled* framework for balancing individual and collective interests,"[21] or, stated differently, to find "a *principled* basis for liberty-limiting public health interventions."[22] Clearly in these passages Gostin emphasizes an intellectual framework that can structure deliberation about "hard trade-offs." In other places, however, his conception of a "framework" focuses more on processes: "Society's preferred values will become transparent in the political process."[23] Furthermore, his sketch of the "Elements of the Framework" includes "the democratic process, checks and balances, clear criteria for decisionmaking, and judicial procedures designed to control the abuse of power by governmental agencies."[24] Nevertheless, Gostin apparently does not intend to reduce his framework to political processes; among these several elements, "clear criteria for decisionmaking" represents principled analysis.[25] Finally, Gostin leaves undeveloped and unclear the exact relationship between the two conceptions of balancing: Is balancing primarily a matter of principled reasoning or of political processes? If both, exactly how are the two related?

More attention to "principled" balancing is necessary in part because Gostin holds that no *a priori* reason exists for selecting one balance over another, for preferring either liberty or public health, at least in an intermediate situation of moderate risk. He contends that it is time to consider, or reconsider, the balance between these values because of the level of risk to public health and security that the United States now confronts. Hence, it is incumbent on him to follow through with his

20. Gostin, *When Terrorism Threatens Health*, *supra* note 1, at 1159.
21. *Id.* at 1108 (emphasis added).
22. *Id.* at 1158 (emphasis added).
23. *Id.* at 1160.
24. *Id.* at 1161.
25. *Id.* at 1165.

"principled" analysis since he insists that his framework will provide such an analysis.[26]

B. *Resolving Dilemmas*

According to Gostin, we face a "dilemma" because two important values, liberty and public health, come into conflict and require attention.[27] His framework attempts to take both values "seriously" and to resolve the dilemma by balancing them because we lack an *a priori* way to adjudicate the conflict. However, the framework he proposes provides less structure than he supposes and leaves too much room for subjectivity, even if it is expressed through democratic mechanisms. For these and other reasons, we need a more adequate principled (and also process-oriented) framework for addressing these social values if in fact they conflict.

In a dilemma, real or apparent, two dimensions of values require attention. One is their range or scope, the other their weight or strength. Reasoning through value conflicts requires attention to both dimensions, but Gostin directly addresses only the dimension of weight or strength. He tends to neglect the dimension of range or scope, even though it may be implicit at points. In a conflict of values, it may be possible to specify one value, by restricting its range or scope, so that it does not conflict with the other.[28] For instance, if the range or scope of the value or principle of liberty could be restricted, then it might not directly conflict with some public health measures. It may be useful to specify liberties, rather than considering liberty in an unspecified way, and this may avert some potential conflicts or, at a minimum, indicate more precisely the "trade-offs" involved. Not all liberties are the same. Philosopher Ronald Dworkin distinguishes "liberty as license," an indiscriminate concept, from "liberty as independence," a more discriminate concept that reflects a person's status as independent and equal.[29] Laws against violence, and perhaps against creating substantial risks to the public's health, would violate liberty as license but not liberty as independence.[30] By contrast, paternalistic laws violate liberty as independence and thus are insulting

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26. The closest Gostin comes to providing the promised framework is in his analysis of risk, which we will examine and critique later in this Commentary.

27. Gostin, *When Terrorism Threatens Health, supra* note 1, at 1108.

28. For a major proposal of specification as a way to address moral problems, see Henry S. Richardson, *Specifying, Balancing, and Interpreting Bioethical Principles*, 25 J. MED. & PHIL. 285 (2000); Henry S. Richardson, *Specifying Norms as a Way to Resolve Concrete Ethical Problems*, 19 PHIL. & PUB. AFF. 279 (1990).

29. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 262-63 (1977).

30. *Id.* at 263.

and demeaning.[31] However, even if such specification is helpful—and we believe it often is—it will not eliminate all potential and actual conflicts.

Hence, it is justifiable to devote primary (though not exclusive) attention to the weight or strength of different values that may conflict. As Gostin notes: "The dilemma requires understanding the *strength* of each set of interests, recognizing the critical choices, and making the trade-offs knowingly in advance of a public health emergency."[32]

C. *Absolutist, Presumptivist, and Contextualist Approaches*

There are at least three possible ways to interpret the weight or strength of values: absolutist, presumptivist, or contextualist. Even though these terms are not wholly precise or fully satisfactory, they highlight the main features of these different interpretations.[33] An *absolutist* interpretation of the stringency of a particular value asserts its dominance against all or some competitors. Hence, a value could be absolute (1) against all other values or (2) only against certain values. The first version of absolutism is highly implausible because it is easy to imagine a scenario in which we would believe, quite justifiably, that the value in question, e.g. liberty, should yield to some other value, which trumps it in that case. The second version of absolutism holds that the value in question defeats certain, but not all, values; this version often proposes a lexical or ranked order of values. Even if initially plausible—and certainly more plausible than the first version—this second version also runs aground on counterexamples. Either of these two versions of absolutism would be subject to Gostin's legitimate attack against *a priori* views about the relationship of liberty and public health. An *a priori* framework that provides a rank ordering of values is unable to address real-world complexities, whether the framework asserts "never trade off liberty for public health" or "public health always trumps liberty." It fails whether it is extreme libertarian or extreme communitarian. But if it fails, we are left with two alternative ways to interpret the weight or strength of liberty and public health: contextualist and presumptivist. While Gostin defends the former, we argue that the latter is more defensible and illuminating.

The *contextualist* approach, which occupies the other end of the spectrum from the absolutist framework, assigns no weights in advance to values but simply balances all of them in the context. The context determines which of these equal values should be emphasized. The problem is that the "balancing" metaphor leaves decision-making more

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31. *Id.*

32. Gostin, *When Terrorism Threatens Health*, *supra* note 1, at 1108 (emphasis added).

33. For a related set of categories, see James F. Childress, *Principlism*, *in* 3 ENCYCLOPEDIA OF ETHICS 1377, 1378-79 (Lawrence C. Becker & Charlotte B. Becker eds., Routledge 2001).

intuitive than it needs to be. Even though Gostin's goal is to develop a structure of reasoning, the principled part of his framework relies on his analysis of different types of risk (to which we will return later) and on the "convergence" between communitarian and liberal (libertarian) perspectives for two of those types of situation of risk: one where public health wins at the expense of liberty and the other where liberty (as well as equality) wins but at no loss to public health. Because the community often triumphs in any real conflict between the individual and the community, we may need to put more initial weight on the liberty end of the scale, at least to the extent of putting the burden of proof on those who would argue for infringing liberty; that is what our moral-social-political tradition often does, at least within certain settings. And a purely contextualist approach fails to capture this important presumption.

A *presumptivist* framework avoids the problems of both absolutist and purely contextualist approaches.[34] Because our framework is emphatically non-absolutist—either liberty or public health can take priority in some cases—it is closer to a contextualist approach but departs from it in two significant ways. First, without accepting an *a priori* or final rank order, it admits starting points, initial tentative weights, burdens of proof, or heuristics—there are several different ways to state the tentative priority of liberty over coercion in public health measures. These presumptions emerge from a society's core values, as expressed and embodied in its constitution, laws, policies, and practices, as well as its myths and stories. Gostin recognizes the central place of liberty in America's *de facto* political philosophy: "American society prizes liberty and freedom, openness and tolerance; these values are part of the national identity . . . ."[35] However, in his zeal to keep them from becoming "inviolable tenets" that cannot be "balanced against equally valid values of population health and safety,"[36] he fails to understand them as

34. Richard Gaskins examines the role of presumptions and burdens of proof:

> The legal term burden of proof captures this loosely connected set of reasoning strategies, which seem to turn up in nearly every field of inquiry. Their common thread is the need to structure vast areas of indeterminancy—in plainer language, ignorance—that confronts organized inquiry, not only in practical endeavors like law, but in scientific investigation, moral reasoning, and philosophical thinking. In response to social crises, procedures modeled on judicial practice intrude into the domains of traditional authority (reborn in the adversarial discipline of applied ethics) and scientific method.

RICHARD H. GASKINS, BURDENS OF PROOF IN MODERN DISCORSE 20 (1992).

35. Gostin, *When Terrorism Threatens Health, supra* note 1, at 1159.

36. *Id.*

presumptions that do and should structure the selection of public health *means* or *measures* in a non-absolute and rebuttable manner.

Second, and closely connected to the first point, our framework relies on more than metaphorical balancing. It provides what Gostin's framework seeks but largely fails to deliver (other than in the analysis of risk): a structured, indeed, principled process of reasoning and deliberation. It could be called a framework of presumption/rebuttal, influenced by both rhetoric and legal reasoning; it could also be called constrained or restricted balancing, because the process of balancing occurs within certain constraints or restrictions and, as we will emphasize later, within the context of a set of relationships.[37]

V. JUSTIFYING LIBERTY-LIMITING PUBLIC HEALTH MEASURES

A. *Justificatory Conditions*

If there is a presumption in our *de facto* political philosophy in favor of liberty or privacy in the selection of public health measures, then our moral discourse about laws, policies, practices, and particular decisions should start with these presumptions. However, presumptions can be rebutted, and it also is important to identify rebuttal conditions—what we will call justificatory conditions—that indicate when the presumption can be rebutted, i.e., where coercive measures are justified.[38] We will illustrate these justificatory conditions by reference to one liberty-limiting intervention: forcible quarantine. Even Annas concedes that "[of] course there are extreme circumstances under which isolation or quarantine can be employed."[39]

1. Effectiveness

Will infringing liberty probably protect public health? If there is no evidence that a quarantine, for example, would be an effective public health measure, then it would be a mistake to impose the quarantine. Indeed, forcible quarantine under those circumstances would not only be unwise, it would also be ethically unjustified. The intervention must have a reasonable prospect of success. Even though this first question is an obvious one, its answers may not be clear-cut. Certitude is not required, only a reasonable probability of effectiveness.

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37. For constrained or restricted balancing, see TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 19-20 (5th ed. 2001).

38. For a similar set of justificatory conditions, see James F. Childress et al., *Public Health Ethics: Mapping the Terrain*, 30 J.L., MED. & ETHICS 170, 173 (2002).

39. Annas, *Human Rights*, *supra* note 10, at 96.

2. Necessity

In some situations, forcible quarantine could be effective but unnecessary. In some—perhaps most—situations, we may be able to secure voluntary compliance without force or the threat of force. Part of the logic of presumptive values—such as respecting liberty—is that they require us to seek alternatives before we can justifiably override them. Other things being equal, a policy that secures voluntary compliance should have priority over one that relies on the threat of force (however much force needs to be, and should be available as, a back-up).

Consider, for instance, different strategies to ensure that persons with tuberculosis (TB) will complete their treatment until cured, in order to reduce the likelihood of long-term risks to others, particularly from multi-drug resistant TB. Other things being equal, the persuasion of, or the provision of financial or other incentives to, persons with TB to complete their treatment until cured should have priority over forcibly detaining them in order to ensure their completion of treatment. In short, proponents of forcible strategies bear the moral burden of proof. They must have a good-faith belief, for which they can give supportable reasons, that a coercive approach is necessary. It is not always necessary to try and fail various alternatives in order to establish necessity. A reasonable, well-grounded belief that the alternatives will not work may be sufficient, especially in a crisis.

3. Least restrictive or intrusive means

Even if forcible quarantine would satisfy the first two conditions, public health agents should still seek to minimize infringements of liberty. They should seek the least restrictive and least intrusive alternatives. The condition of least restrictive or intrusive means could be viewed as a corollary of necessity—coercive measures should be necessary in degree as well as in kind—but it is also useful to treat this condition as a specific requirement.

Similarly, this condition may also be implicit in Gostin's general limitation on interventions: they must be "well-targeted" interventions.[40] And he specifically notes that "the framework could adopt the modern concept of 'shielding'—the governmental duty to engage the community in voluntary measures of self-protection as a 'less restrictive alternative' to compulsion."[41] Nevertheless, this specific justificatory condition needs more explicit attention and explication.

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40. Gostin, *When Terrorism Threatens Health*, *supra* note 1, at 1138.
41. *Id.* at 1161.

4. Proportionality

If specific quarantine measures probably would be effective, are necessary, and are the least restrictive or intrusive measures available, they then might be considered proportionate. Indeed, some analysts would fold the two previous justificatory conditions under this broader conception of proportionality. For instance, a report on ethics and SARS explicates the ethical value of "proportionality" in just such a way in its examination of quarantine measures:

> When protecting many from harm is ethically necessary, and when the use of public health powers to achieve those goals can be justified, authorities must also protect individuals from needless coercion. Restrictions of liberty must be relevant, legitimate and necessary. They must be exercised by people with legitimate authority, and those people should use the least restrictive methods that are reasonably available. Such restrictions should be applied without discrimination.[42]

By contrast, we treat proportionality as a separate conception, because it involves balancing broader considerations. Even if we satisfy all the conditions already identified, we still have to ask whether the probable benefits (in risk reduction) outweigh the relevant liberty interests, or, stated differently, whether they are sufficient to rebut the presumption in favor of liberty (i.e., freedom from governmental coercion). We also have to determine whether the probable overall (long-term as well as short-term) effects of the coercive measures would be more positive than negative.

5. Impartiality

The explication of "proportionality" in the report "Ethics and SARS: Learning Lessons from the Toronto Experience" includes the requirement that restrictions of liberty be "applied without discrimination."[43] In our judgment, impartiality also is better understood as a separate and important justificatory condition. Coercive public health measures, such as quarantine, should be imposed impartially, thereby satisfying basic standards of fairness.[44] One meaning of impartiality is that morally

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42. UNIV. OF TORONTO JOINT CENTRE FOR BIOETHICS, ETHICS AND SARS: LEARNING LESSONS FROM THE TORONTO EXPERIENCE (Aug. 13, 2003), *available at* http://www.utoronto.ca/jcb/SARS_workingpaper.asp.

43. *Id.*

44. *See generally* BRIAN BARRY, JUSTICE AS IMPARTIALITY (1995).

irrelevant information about any affected party must not shape the policy or its application. This condition might seem so obvious that its statement is unnecessary. However, in many outbreaks of infectious disease in the past, victims have been blamed along with others in some broad category, such as race, ethnic background, socio-economic class, or location. As a result, both individual victims and their associated groups have often been stigmatized and subjected to various forms of discrimination. In the 2003 SARS outbreak, stigmatization and discrimination occurred in various settings.[45]

Discrimination, in violation of the requirements of impartiality, may occur at different levels: the formulation of the policy itself; the implementation or application of the policy, especially if there is room for discretionary judgments; and actions by non-governmental agents, such as individuals in their private capacities. The first two concern the policy and its execution, while the last may require corrective or remedial public actions.

Since the burdens of coercive public health measures themselves may not be—indeed, probably cannot be—distributed equally, it is important that they be distributed impartially in accord with standards of fairness. In addition, it is important that the community consider how to make the burdens more equal, for instance, possibly by compensating individuals for the extra burdens they have to bear.[46] Finally, impartiality, or, more broadly, fairness, is also important in justifying hard allocation decisions, such as triage following a bioterrorist attack.[47]

6. Public justification.

When societies confront tragic choices, where fundamental socio-cultural values are at stake, they should attempt to make decisions "in ways that preserve the moral foundations of social collaboration."[48] In a democratic political order, justification to the public is indispensable. (Later we will elaborate this point and make a stronger argument about public participation in setting the policies.) Public justification is needed both of the law that authorizes coercive public health measures and of officials' decisions to implement those measures in particular circumstances. Hence, proponents and agents of forcible quarantine need to defend it in light of the justificatory conditions we have identified. It is

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45. *E.g.*, Justin Schram, *Personal Views: How Popular Perceptions of Risk from SARS Are Fermenting Discrimination*, 326 BRIT. MED. J. 939 (2003) (describing discrimination against Asian persons in Toronto).

46. Etzioni, *supra* note 4, at 104.

47. *See* James F. Childress, *Triage in Response to a Bioterrorist Attack*, *in* IN THE WAKE OF TERROR: MEDICINE AND MORALITY IN A TIME OF CRISIS 77 (Jonathan D. Moreno ed., 2003).

48. GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 18 (1978).

not sufficient to say, "The law permits this action." It also is important to say, "We are choosing to impose quarantine because . . . ." Accountability to the public requires reasons, explanations, and justifications for practices of quarantine. All participants in the society are stakeholders who are entitled to such reasons because they have a stake in the values, like liberty and privacy, that are displayed, embodied, and, sometimes, overridden.

Hence, transparency is crucial, before, during, and after the crisis, for at least two reasons. First, transparency respects individuals as members of a particular political community. Offering reasons and involving them are ways to recognize their dignity. Second, their cooperation is or will be needed, and voluntary cooperation presupposes trust. In the *Matrix Reloaded*, one of the councilors, played by Cornell West, an African-American philosopher at Princeton University, says "comprehension is not requisite to cooperation." However, in a democratic society, understanding is vitally important for voluntary cooperation, which should be our goal. As George Annas writes, "Ultimately, public health must rely not on force but on persuasion, and not on blind trust but on trust based on transparency, accountability, democracy, and human rights."[49]

B. *Concerns About Justificatory Conditions and the Relevance of Voluntariness*

Some communitarians believe that (at least some) efforts to erect tests or criteria—our presumptions and rebuttal or justificatory conditions—are problematic. Reluctant proponents of public health, in Etzioni's words, "demand that any diminution of rights, as they define them, must pass numerous tests to show that there is indeed a need to so act" for the public health.[50] Or, as Gostin himself notes, some liberals, who admit that the harm principle, drawn from John Stuart Mill, can justify coercive interventions on behalf of public health in some circumstances, nonetheless insist "that any diminution of individual rights must be so encumbered with demanding standards and rigorous process that it effectively thwarts the exercise of power."[51]

Despite such concerns and warnings, Etzioni proceeds to develop criteria from a third perspective, between libertarians and totalitarian communitarians. This third position holds "that individual rights and social responsibilities, liberty and the common good, have equal standing; that neither should be assumed *a priori* to trump the other; and that we need to seek a carefully crafted balance between these two core values."[52] From

49. Annas, *Human Rights*, *supra* note 10, at 97.
50. Etzioni, *supra* note 4, at 102.
51. Gostin, *When Terrorism Threatens Health*, *supra* note 1, at 1144.
52. Etzioni, *supra* note 4, at 102 (emphasis added).

this perspective, Etzioni proposes three criteria for a recalibrated balance that involves overriding liberty in some contexts: "(1) that a clear and present danger exist . . . ; (2) that voluntary measures be embraced, if possible; and (3) if not, that the intrusion be minimal . . . ."[53] While also noting the need for "clear criteria for decisionmaking,"[54] Gostin's article in this journal does not provide them. However, as Etzioni also notes, versions of these criteria, particularly his first and third criteria, appear in Gostin's analyses in other places.[55]

Nevertheless, Etzioni worries that Gostin's framework, in part as embodied in the MSEHPA, fails adequately to recognize the primacy of voluntariness in the selection of means:

> [Gostin] does not examine the question of whether people can be convinced to voluntarily undertake whatever steps are needed. In many areas concerning public health, such as vaccinations, we rely almost completely on voluntary compliance. With proper public education, most people might well understand that following an attack with smallpox, a disease in which symptoms appear before one is contagious, if they voluntarily would move to a sequestered area for about two weeks, they might well spare their loved ones contamination and possibly death.[56]

Critics might respond by arguing that attention to voluntariness is not really feasible in the context of biopreparedness. They might contend that our justificatory conditions of necessity and least restrictive and intrusive alternative can appropriately function only in situations that involve relatively small numbers of individuals with more or less clearly defined and understood contagious diseases. But the kind of planning that is required now must address scenarios with large numbers of victims, each potentially a threat to others, of contagious diseases that are difficult to identify at the outset, that are poorly understood, and that may lack effective prophylactic and therapeutic responses. In addition, it may be necessary as in the case of SARS to isolate or quarantine whole buildings, such as an apartment building in Hong Kong and hospitals and other health care facilities in several different locations, including Toronto.

Nevertheless, even in the face of such scenarios, voluntariness remains relevant. Not only does it serve as a presumption in particular situations, but it also serves as an ideal in formulating public policies. And as an ideal

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53. *Id.* at 103.
54. Gostin, *When Terrorism Threatens Health*, *supra* note 1, at 1161.
55. Etzioni, *supra* note 4, at 103.
56. *Id.*

it can guide not only public health legislation but also the development of other policies that must be implemented to give priority to voluntariness over coercion. Finally, laws and other policies related to biopreparedness not only specify obligations (and rights) and their enforcement, they are also inevitably communicative and symbolic in nature.

C. *Imposing Community and Expressing Community*

We can develop this point by distinguishing imposing community from expressing community.[57] In *imposing* community, a society demands and enforces individuals' responsibilities to the community. For instance, in the extreme case, forcible quarantine may be viewed as a governmental order for public benefit that is imposed on recalcitrant individuals who respond only to coercive actions or threats. By contrast, in *expressing* community, a society extends solidarity to its individual members. In doing so, it may say to those whose quarantine is important to protect the public health: "We know what a burden quarantine will be for you and your family. However, it is important for the public's health, and we will do all we can to provide what you and your family need." Depending on whether it is imposing community or expressing community, a society would act quite differently toward the staff of a hospital that has experienced an outbreak of a serious communicable disease and now must be quarantined in order to reduce the risk of further spread.

Even if the goal remains the same—stopping the spread of a contagious disease such as SARS—different policies symbolize and convey very different messages. In expressing community, the society's actions symbolize values like respect, care, and appreciation. For instance, in a thoughtful examination of lessons learned from Toronto's experience with SARS, a team from the University of Toronto's Joint Centre for Bioethics concluded that both solidarity and reciprocity, among other values, were exceedingly important in securing the needed professional and public cooperation.[58]

If a society expresses community through its laws and other public policies, it may not be forced to impose community. In the U.S., one major failure of community is the absence of access to health care. Yet in a crisis, limited access to health care may delay identification of contagious diseases and hence voluntary cooperation. Even while insisting that "the state undoubtedly needs a certain amount of authority to protect the public's health," Gostin also recognizes that "the provision of services

57. For the distinction between imposing and expressing community, see JAMES F. CHILDRESS, PRACTICAL REASONING IN BIOETHICS 117-18 (1997).

58. UNIV. OF TORONTO JOINT CENTRE FOR BIOETHICS, *supra* note 42.

may be more important than the exercise of power."[59] Hence, as he stresses, the MSEHPA recognizes several rights for those subject to quarantine or isolation: treatment, clothing, food, communication, and humane conditions.

Because the legislation not only provides legal powers or authorizes services, but also is symbolic, a fundamental question concerns what the MSEHPA or any public health law symbolizes and hence communicates to the public: Does it symbolize an antagonistic relationship between the government, including public health officials, on the one hand, and physicians and other health professionals, health care facilities, and the general public, on the other hand? Does it treat the public and professionals as individualistic, self-serving, and unconcerned about the common good and thus in need of a strong dose of coercion? In effect, does it treat them, in Henrik Ibsen's phrase, as an "enemy of the people?"[60] To treat citizens—both members of the public and professionals whose roles are crucial—as potential enemies of public health and security is to create conditions that could reduce the likelihood of their voluntary compliance. Even though the law must authorize public officials to address the worst-case scenarios of non-compliance, its overall symbolic context is crucially important and may determine how often coercive measures will be necessary. In short, expressing community may encourage individuals and professionals to discharge their communal responsibilities without the necessity of coercion.

VI. JUSTIFICATION IN CONTEXT

Gostin's analysis, in part, attempts "to demonstrate that prevailing theories of political philosophy *support* the exercise of liberty-limiting state power."[61] However, both his selection and his description of "the prevailing theories" limit the value of such an exercise. In addition, the attempt to use any broad political theory may obscure the more important question implicit in Gostin's article on contemporary public health powers: "Support from whom to whom?" "Support" suggests an understanding and a relationship between two parties—in this case between public health officials and community members. Furthermore, public health is at its core about relationships—the community members' relationships to each other biologically, behaviorially, and environmentally, and the individual's relationship to the community and government. Relationships frame the meaning of all public health actions.

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59. Gostin, *Rethinking Individual Rights*, *supra* note 1, at 88.

60. HENRIK IBSEN, *An Enemy of the People*, *in* IBSEN: FOUR MAJOR PLAYS 127 (Rick Davis & Brian Johnston trans., 1995).

61. Gostin, *When Terrorism Threatens Health*, *supra* note 1, at 1141 (emphasis added).

A. *Relationships in Public Health*

Gostin's framework would be enriched by an explicit, detailed analysis of these *relationships,* particularly the relationship between government public health officials and the public. Through its distancing lens, an abstract theory can distort that core relationship by blurring the important distinctive qualities which have an impact on the real-world question of "support" that Gostin implicitly poses. Any examination of the appropriateness of coercive state action depends on understanding the actual dialogical process of support (or of justification, the framework we propose above)—the dialogical, reciprocal interaction of person(s) *with* person(s). The relationship provides both a starting point for the analysis and the context within which coercive action and support for (or justification for) that action takes place. We offer some reflections about the relationship and its important complementary role as context for our framework of deliberation involving presumptions and justificatory conditions.

To begin, the public health relationship is between community members (who have a background understanding of their roles and the reciprocal obligations of membership in that community) and government officials (with their understanding of their authority and role as established by law, as well as their understanding of their role as health professionals in society). The relationship is on-going and complex, with a history and with both intellectual and emotional layers. The relationship between public health and community also pulls together many perspectives, languages, and cultures, since it includes government officials, on the one hand, who often are members of professions with particular expertise and language, and community members, on the other hand, who have numerous and simultaneous memberships in diverse groups, families, cultures, and religions.

In addition, while the relationship between government public health officials and community members is one manifestation of the complex relationship between government and individuals generally, it is a particular type of relationship because health is a primary public good and many aspects of human potential, like employment, social relationships, and political participation, are contingent on it. Furthermore, recent events have demonstrated health's heightened significance for both individuals and the community as bioterrorist and SARS threats to the individual's health created new awareness of our collective vulnerabilities and of the way health connects citizens more fundamentally than most other collective interests. Within the context of this type of relationship, then, public health officials act not only as government officers with general duties, but also as health professionals to the community. People relate not

only as community members to government officials, but also as patients. In some ways the process of justification for public health actions, then, shares some features of an informed-consent process between doctor and patient; one that is framed as a partnership based on voluntary action, with a strong presumption against any "unconsented to" action. Particularly in times of medical need and vulnerability, health professionals usually are approached as trustworthy because of general societal expectations of and beliefs about health care professionals.

In contrast, it is important to note that the public health relationship does not share many overlapping features with the relationship between military officials and the public. This is significant because Gostin's analysis at different points seems to conflate the use of public health power for security reasons and its use for public health purposes. Is there a difference and if so, does this affect, for example, how physical restraint is understood? Given that the context of relationships shapes the meanings and interpretations of actions between parties, one might argue that restraint by a physician with an offer of medicine may have a very different meaning than restraint by a military officer with an offer of medicine or even restraint by a public health officer for military or security reasons. For instance, the "offer" of medicine may be or feel more coercive when presented by the military. Similarly, restraint for security or military reasons by public health officials may make the individual feel more like an enemy than a patient or partner. This could significantly damage the public health relationship and lessen trust and goodwill that may have taken years to develop. We also might explore whether such actions, especially if performed over time, would have an effect on the public health official's personal and professional identity.

Relationships also set the context for analyzing whether an act meets the standards we propose for public justification. A simple case illustrates how relationships structure the interpretation of the condition of necessity. Suppose Homeland Security officers have information that suggests a potential terrorist is hiding in a specific region of the country, and in addition may need emergency medical treatment for a disease that is reportable to public health agencies. Homeland Security officers ask the public health agency for the names of every person of a particular ethnic background who has been treated within the last fifteen days so that law enforcement officers can question them, and in addition they ask that in the future every patient with these characteristics be detained at health clinics until law enforcement officers can arrive and question them. Homeland Security forces believe these actions are necessary, because their frame of reference is national and their mission is to prevent terrorist events. Local public health officials, however, may believe these actions are not necessary, and perhaps even disproportionate, because of their relationship with local-community groups. The requirement to report

health information and to detain all individuals with certain ethnic backgrounds would allow public health officials no discretion to exclude particular patients known to the health officers and would not respect the long-standing relationships with particular individuals and groups in their community. Community trust would be destroyed.

The interpretation of what is necessary could vary, depending on the relationship the government official has with a particular community. Officials with a "national" perspective, security mission, "command and control" approach, and little or no relationship with local communities may analyze what counts as "necessary" differently than the officials who have on-going relationships with their local communities built on collaboration, shared decision-making, and trust, and whose focus is the health of the population they serve.

A further examination of each of the parties involved in the public health relationship will elucidate why the appropriate use of state public health authority, by its very nature, depends on the understanding that community members and government officials bring to that relationship. What is the government public health official's understanding of his or her role? The recent Institute of Medicine (IOM) report, *The Future of the Public Health in the 21st Century*, provides some insight.[62] In emphasizing the multisectoral dimensions of community health, it suggests that a goal of public health is to collaborate with and facilitate the contributions of many community entities. Relationships are highlighted in the report—relationships built on common goals, collaboration, and trust. For example:

> All partners who can contribute to action as a public health system should be encouraged to assess their roles and responsibilities, consider changes, and devise ways to better collaborate with other partners. They can transform the way they "do business" to better act to achieve a healthy population on their own and position themselves to be part of an effective partnership in assuring the health of the population. Health policy should create incentives to make these partnerships easier.[63]

Others have described the contemporary role of public health officials as translators, mediators, negotiators, educators, or caretakers. Because of public health's emphasis on prevention, some also have suggested that

62. COMM. ON ASSURING THE HEALTH OF THE PUB. IN THE 21ST CENTURY, BD. ON HEALTH PROMOTION & DISEASE PREVENTION, INST. OF MED., THE FUTURE OF THE PUBLIC'S HEALTH IN THE 21ST CENTURY (2003).

63. *Id.* at 32.

another metaphor may be fire departments because "[t]hey teach and practice prevention at the same time that they maintain readiness to take on emergencies."[64] Relationship-building, it might be argued, is not just instrumental, but rather is the substance of the work of public health professionals. For instance, one proposal in the IOM report is to build "a new generation of intersectoral partnerships that also draw on the perspectives and resources of diverse communities and actively engage them in health action."[65] Building a community of stakeholders—educating and facilitating individuals and entities to see themselves as "connected through health"—is central to the identity and role of public health officials.

B. *Civic Identity and Public Deliberation*

Who is the public with whom government officials partner and collaborate? What are the civic ideals Americans express in their collective governance and in their relationship with government officials? Americans' philosophical views may be more complex than they appear in Gostin's analysis of prevailing political theories. Historically, Americans have had a wide range of attitudes toward their government, often varying with economic, military, and political issues. They also have conflicting, often incoherent, civic ideals that fluctuate between egalitarian and inegalitarian and liberal and nonconsensual orientations, with strong populist and pragmatic sentiments predominating at different times. Shared myths both shed light on the American civic identity and operate to shape that identity. Although they may be "noble lies,"[66] they can persuade people with different philosophies, beliefs, and loyalties that they share a civic identity. For example, in describing the different threads of "liberalism" and "republicanism" throughout U.S. history, Rogers Smith shows how part of their appeal is based on mythical components:

> The liberalism of the Declaration of Independence includes the unproved but sanctifying claim that men have individual rights 'endowed by their Creator.' Both liberal and republican traditions also often invoke stories of social compacts created in a state of nature that represent quasi-religious political

64. COMM. ON PUB. HEALTH, INST. OF MED., HEALTHY COMMUNITIES: NEW PARTNERSHIPS FOR THE FUTURE OF PUBLIC HEALTH 40 box 12 (Michael A. Stoto et al. eds., 1996).

65. COMM. ON ASSURING THE HEALTH OF THE PUB. IN THE 21ST CENTURY, BD. ON HEALTH PROMOTION & DISEASE PREVENTION, INST. OF MED., *supra* note 62, at 4.

66. ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 34 (1997).

> creation myths, easily adapted to confer legitimacy on American constitutions.[67]

What does this complex civic identity mean for justifying state coercive actions in public health? Our tradition suggests that appeals for support or justification must be made to a public that may have inconsistent ideals and that has a legacy of civic myths that can both inspire idealism and mask collective wrongs. Thus, public deliberation becomes critically important so that individuals' civic beliefs can be made explicit and examined. It also means that building and maintaining relationships of trust with government officials may be more important than if we were more united as a public by a coherent political philosophy. An understanding of the significance of relationships built on trust and the power of myths and metaphors suggests that formalistic mechanisms, such as political checks and balances to constrain inappropriate use of power, are not sufficient for public health officials and for the public trust they need.

Instead, more active justification by public health officials and deliberation with the public is necessary to make explicit and acknowledge the "complex" truths about "we, the people." These truths include the remarkable collective and voluntary response of Americans to work together when faced with the terror of 9/11 and also the blaming, isolating, stigmatizing initial reaction of some community members to others infected with HIV/AIDS. The evolution of public health policy and community attitudes toward HIV/AIDS demonstrates the value of public deliberation in forcing us to expose and to challenge our collective and individual responses. Bayer describes the political context (deliberation) that "fostered an unusual series of institutional efforts to engage activists in the process of establishing guidelines for AIDS policy."[68] He states that the process was unique not because "those who spoke on behalf of the vulnerable were engaged at some level, but rather that representatives of vulnerable populations were sought out as collaborators."[69]

In contrast to the case of HIV/AIDS, where societal deliberation was often facilitated and driven by a politically organized gay community, public deliberation about biopreparedness and appropriate government action currently has no interest group to drive it. This means that public health officials themselves, for many reasons, must take an active role in generating public debate on these issues. The fire department metaphor for

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67. *Id.* at 36.

68. Ronald Bayer, *AIDS, Ethics, and Activism: Institutional Encounters in the Epidemic's First Decade, in* SOCIETY'S CHOICES: SOCIAL AND ETHICAL DECISION MAKING IN BIOMEDICINE 458 (Ruth Ellen Bulger et al. eds., 1995).

69. *Id.* at 458-59.

public health provides one reason, by suggesting that drills to prepare for and challenge our potential responses are appropriate preventive measures. Drills are important not only as instructive devices for practicing activities (such as "know the nearest exit"), but also because, in the context of biopreparedness and state power, we need to "prepare" our civic responses when challenged as a community. The purpose of public debate is not merely to have fair procedure or reach consensus on any one course of action, but rather to build and strengthen our civic commitment to continued cooperation, essentially to sustain a collaborative relationship over time. Most importantly, deliberation actively engages the public in preparation and response as partner and full participant in public health. It assumes and communicates that individual community members can be trusted to think and act collectively and voluntarily when threatened. Although Gostin does acknowledge a role for public deliberation, we propose practices of interaction between public health officials and citizens that go well beyond usual democratic procedures.

C. *Imaginative Engagement*

Gostin also neglects another strand of political thought that provides insight into the government-individual relationship and notions of civic life that are particularly relevant for public health. This strand focuses on civic imagination. In contrast to detached moral principles which ensure evenhandedness and predictability (but may also weaken emotional attachment), Martha Nussbaum suggests that civic imagination plays a role in creating community bonds and in providing motivation and emotional energy for good citizenship.[70]

In their relationship with the community, public health officials have an opportunity for such "imaginative engagement" to explore deep collective responses to terror and fear, to vulnerability, and to loss. Through imaginative engagement, which may include personal narratives, stories from history or literature, or revelations of personal uncertainties and vulnerabilities, public health officials and the community together can imagine various scenarios and the different ways community members may respond to threats. In this way, they can *create* community bonds and can shape collective responses. The stories reported in the national media of those killed or hurt while selflessly attempting to rescue victims from the World Trade Center towers are examples of community-building narratives that shape our social responses and nurture compassion and trust. As Nussbaum says, "All we can do is trust our imaginations, and then criticize them (listening if possible to the critical voices of those we are trying to understand), and then trust them again. Perhaps out of this

70. Martha C. Nussbaum, *Compassion & Terror*, DAEDALUS, Winter 2003, at 10.

dialectic between criticism and trust something like understanding may eventually grow."[71]

Our reflections suggest that attention to the *relationship* between the individual and the government public health official must play a central role in any analysis of liberty-limiting state power. In our view, a relationship-centered approach to public health decision-making and emergency biopreparedness will require that all interventions and interactions explicitly include the following key elements of the relationship: collaboration, deliberation, and imaginative engagement.

D. *Implications for Risk Analysis and Management*

Since risk is a major consideration in Gostin's analytic framework, it may be useful to briefly illustrate how a "relationship-centered" public health approach incorporating collaboration, deliberation, and imaginative engagement could enrich his analysis. Risk—essentially the probability of an undesired outcome—can be quantitatively assessed by sophisticated mathematical formulas. However, while "[t]he accepted measure of likelihood is probability[,] and probabilities obey well-known mathematical laws," a significant amount of social-science research has demonstrated that "the human brain tends to manipulate [mathematical laws] in ways that can ignore this logic, and sometimes contradict it," and additionally that if these heuristics ("ingrained patterns of thought") are left unchecked, "they lead to various common biases in dealing with probabilities."[72] Risk perception and the public's reaction to risk are as important, if not more important, for public health officials as the scientific, mathematical calculations are, particularly in biopreparedness when cooperative community action is essential. Risk perceptions are sometimes thought to be socially constructed, "a combination of culturally acquired dispositions."[73] Langford, Marris, and O'Riordan explain: "Within that broad phrase [risk perception] lie the norms of scientific analysis and peer review, expectations and doubts over 'expertise', bonding and solidarity among people that shape their views on fairness and trust, and structures of regulation that build in support or suspicion."[74]

Given this complexity, trust has a crucial role in risk communication. As Peter Bennet points out, "[p]ut simply, the point is that messages are often judged first and foremost not by content but by source: *who is telling*

71. *Id.* at 26.

72. Peter Bennett, *Understanding Responses to Risk: Some Basic Findings*, *in* RISK COMMUNICATION AND PUBLIC HEALTH 11 (Peter Bennett & Kenneth Calman eds., 2001).

73. Ian Langford et al., *Public Reactions to Risk: Social Structures, Images of Science, and the Role of Trust*, *in* RISK COMMUNICATION AND PUBLIC HEALTH, *supra* note 72, at 33.

74. *Id.*

me this, and can I trust them?"[75] These very simple introductory comments about risk and risk perception demonstrate the different scientific and lay perspectives. How can we integrate these different perspectives in public health policy? Laws or analysis, such as Gostin's, which are based on expert assessments and declarations that risk is significant, may not garner the necessary community support for collective action. In contrast, creating channels of communication and building relationships between public health professionals, experts, and the public to understand risk, from different perspectives, could engender community trust and acceptance. In an exploration of the treatment of risk in public policy, Henry Richardson suggests that sometimes "it is more intelligent to try to work these matters out via a process of collective, democratic deliberation than to trust to the spurious systematization of risk rationality."[76]

The risks associated with terrorism increase the need for public involvement, both because the risks are unique (of a different kind and intensity) and because they are accompanied by uncertainty, including about how the public will react. While there is concern about potential public panic and civil unrest or disobedience in response to a terrorist event, Thomas Glass and Monica Schoch-Spana point out that "research on population responses to a wide range of natural and technological disasters suggests that there is a tendency toward adaptability and cooperation and that lawless behavior is infrequent."[77] However, they note that "in times of disaster, panic may be 'iatrogenic': that is, the actions of emergency managers may determine the extent and duration of panic, to the extent it exists."[78]

What, then, might an appropriate public health response include, using a relationship-based framework? Certainly at a minimum, it would include a central role for collaboration and deliberation with many partners and community members about identifying, assessing, and communicating risk. Perhaps laws could specify ways that the public should be included in assessing risk, such as by establishing citizen boards on risk assessment and communication or specific requirements for public deliberation in multiple spheres, including the media, the Internet, and government and private forums. Imaginative engagement with the public about understanding and responding to terror and risk would also influence social norms that operate like laws to express social attitudes about acceptable behavior and what ought to be done. Nussbaum suggests that the experience of terror and grief could result in a range of reactions from

75. Bennett, *supra* note 72, at 4.

76. HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY 241 (2002).

77. Thomas A. Glass & Monica Schoch-Spana, *Bioterrorism and the People: How to Vaccinate a City Against Panic*, 34 CLINICAL INFECTIOUS DISEASES 217, 218 (2002).

78. *Id.*

blind rage and aggression to compassion and that collectively we can educate our emotional responses.[79] Whatever the state public health action, however, a primary goal should be building relationships of trust, defined in an IOM report as "the belief that those with whom one interacts will take one's interests into account, even in situations in which one is not in a position to recognize, evaluate, or thwart a potentially negative course of action by those trusted."[80]

VII. CONCLUSION

"As Euripides knew, terror has this good thing about it: it makes us sit up and take notice," writes Martha Nussbaum.[81] The critical questions concern how we take notice. Certainly the events of 9/11 and the anthrax attacks "provided the occasion for a debate over core values of public health."[82] One early response, within a matter of weeks, was the draft MSHEPA, prepared by a team under Gostin's leadership. Some critics of the MSHEPA charged that it put the cart before the horse, by proceeding with statute drafting, which "is a technical and instrumental job," before the society had undertaken, much less completed, "the more fundamental task of deciding what that statute ought to say."[83] Furthermore, the drafting (and even the redrafting in response to criticisms) occurred, some contend, under the shadow of the events of fall 2001 "when fear ruled reason."[84] In many ways, Gostin's current article develops a framework, with both principled analysis and process, that can provide support for the MSHEPA.

Nevertheless, as we have argued, Gostin's framework, while helpful in several respects, is problematic in others. What is required is an alternative that moves beyond the liberal-communitarian impasse and beyond balancing liberty and public health/security. In our judgment, such a framework must recognize that liberty is part of our communal interests, along with public health; that trade-offs between liberty and public health/security can usually be avoided; that, in the selection of means or measures to protect or promote the goal of public health, there is a presumption for liberty over coercion; that this presumption for liberty can be rebutted or overridden when several justificatory conditions are met—effectiveness, necessity, least restrictive or intrusive means, proportionality, impartiality, and public justification; that public

79. Nussbaum, *supra* note 70, at 26.

80. COMM. ON PUB. HEALTH, INST. OF MED., *supra* note 64.

81. Nussbaum, *supra* note 70, at 26.

82. Ronald Bayer & James Colgrove, *Public Health vs. Civil Liberties*, 297 SCIENCE 1811, 1811 (2002).

83. Kenneth Wing, *The Model Act: Is It the Best Way to Prepare for the Next Public Health Emergency?*, NW. PUB. HEALTH, Spring/Summer 2002, at 10, 10.

84. Annas, *Human Rights*, *supra* note 10, at 96.

justification takes place in the context of relationships that frame the meaning of public health actions; that the appropriate use of state liberty-limiting authority must be interpreted through the lens of the understanding and the expectations community members and public health professionals have of each other; and that public justification, deliberation, and other relationship-building activities may be more important for biopreparedness than state power because they maintain and nurture civic ideals, cooperation, and trust.

Perhaps one way we should "take notice" is to extend and deepen the meaning of the "public" in public health. A stronger public that deliberates, collaborates, partners, and, most importantly, expects government officials to provide explicit public justification for their actions (including legislation, implementation of laws, and actions that fall within their legal discretion) will be more likely to foster its members' voluntary participation and trust. For its part, the government can usually elicit voluntary cooperation from the public by *expressing* community rather than imposing it—that is, by extending solidarity to members of the public, including professionals, from whom much is expected.