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ON AUTHORITY AND JUSTIFICATION IN PUBLIC HEALTH

*Bruce Jennings**

The terrorist attacks on the United States on September 11, 2001, and the mailing of items contaminated with anthrax a few weeks later, quickly redefined the tone—and to some degree the substance—of American political discourse. Decrying the openness of American habits, public places, travel regulations, and even immigration laws, media commentators and public officials alike painted a portrait of a nation grown complacent and vulnerable. According to many, the pendulum had swung too far in the direction of individual freedom from surveillance, privacy, and legal constraints that had been placed on law-enforcement authorities. This was the end of the individualistic era, many opined, and the beginning of a new regime of greater collective security and constraint.

It did not require the tragic and shocking events of 9/11 to demonstrate that the public health infrastructure, at least, had deteriorated to an alarming extent after decades of under-funding and official neglect.¹ The priorities of the American health care system have favored clinical-medical research and high-technology treatments for individuals. Nonetheless, the perceived threat of bioterrorism has provided an opening for increased funding for public health surveillance and prevention measures. Congress has recently increased appropriations under the Public Health Threats and Emergencies Act of 2000,² and in 2002 more than \$1 billion was earmarked to upgrade the nation's public health infrastructure.³

After two years, surprisingly little has been done to improve the capacity for a public health response to an emergency. The general confusion that first attended the most serious natural outbreak of life-threatening infectious disease since 9/11, the spread of Severe Acute Respiratory Syndrome (SARS) in China, Canada, and elsewhere, demonstrates that the risk of bioterrorism is not the only reason to be concerned about this ongoing neglect.⁴

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1. Bill Frist, *Public Health and National Security: The Critical Role of Increased Federal Support*, 21 HEALTH AFF. 117 (2002).

2. 42 U.S.C. §§ 243-247d (2000).

3. Michael Lasalandra, *Docs Attend Seminar on Response to Bioterrorism*, BOSTON HERALD, Jan. 26, 2002, at 12.

4. NAT'L INTELLIGENCE COUNCIL, CENT. INTELLIGENCE AGENCY, INTELLIGENCE COMMUNITY ASSESSMENT: SARS: DOWN BUT STILL A THREAT (Aug. 2003), available at http://www.odc.gov/nic/pubs/other_products/SARS/ICA03_09.htm.

There are various political, financial, and scientific reasons for this lack of progress. Professor Lawrence Gostin's timely and insightful analysis takes a different tack and places this problem squarely within the context of American (and more broadly, Western) legal and moral traditions. After summarizing the nature and extent of the risk of bioterrorism as he sees it, Gostin describes and defends an approach to the moral justification for coercive public health measures. These measures are similar to those authorized in a model statute that he helped to create at the request of the Centers for Disease Control, the Model State Emergency Health Powers Act (MSEHPA). In *When Terrorism Threatens Health: How Far Are Limitations on Personal and Economic Liberties Justified?*, Gostin discusses the nature of normative justification in public health law, policy, and practice and the principled moral foundations of public health today.⁵ Simply put, his thesis is that we will not be able to mount an adequate public health response unless we have the conceptual resources and the political-moral vocabulary necessary to justify it. Gostin writes: "The pitched battle over civil and economic liberties in an era of bioterrorism will not be settled without a principled framework for balancing individual and collective interests."⁶ This is an important topic, and it is surprising how little attention has been paid to it and how little dialogue exists, as yet, between the fields of public health and political theory.

There is much in Gostin's rich article that could be discussed at length. The aspect upon which I focus here is his attempt to show that within the liberal tradition of political theory we do in fact have the necessary and proper resources to justify, both legally and morally, substantial restraints on individual autonomy. I believe that he is largely correct in this hypothesis, but that the theoretical pathway necessary to come to this conclusion is more complex and circuitous than he allows. My purpose here is not so much to refute Gostin's argument as to reframe it, and to pose some additional questions about the relationship between public health policy and political theory.

In particular, there are two large topics looming in the background of this discussion that I propose to explore more explicitly and in a different key than Gostin does. The first has to do with the nature and foundations of authority in public health. Public health has a considerable grant of legal power under the Constitution (the power of public health officials derives from the inherent "police powers" of the state) and in its historical role as an arm of the modern state.⁷ The second topic concerns the logic and dynamics of normative justification in public health conceived as a mode

5. See Lawrence O. Gostin, *When Terrorism Threatens Health: How Far Are Limitations on Personal and Economic Liberties Justified?*, 55 FLA. L. REV. 1105 (2003).

6. *Id.* at 1108.

7. LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 25-83 (2000).

of democratic practice and shaped by a moral discourse with particular semantic (that is, meaning-making) features.

First, I will discuss the authority of public health policy. Gostin grounds the authority of limiting personal liberty in the severity of the risk posed to public health and the harm that could be caused if liberty were not curtailed. But, by grounding authority on protection of interests, his argument partakes of a long-standing tendency within the liberal tradition to empty the concept of authority of its normative content. Liberalism, I argue, does not have a philosophically coherent normative concept of authority, but tends to convert authority into legitimacy. In order to avoid this result, political theories generally must posit more than the prevention or protection of individuals from harm as their guiding moral purpose; they must also make room for the promotion of individuals flourishing in accordance with some conception of the human good.

Second, I will address the politics of moral justification in public health. Gostin's account of moral justification itself is, if I may say so, overly "legalistic" and insufficiently "political" in character. It does not do justice to the dynamic, deliberative, and conflict-ridden interpretive process that marks actual political discourse and which also marks the process of (contested) moral justification in public health. It is this contrast between a juridical conception of moral reasoning and a deliberative democratic conception that characterizes one of the most important differences between liberalism and democratic communitarianism. In his discussion of communitarianism, Gostin unduly neglects its deliberative democratic side, while highlighting its emphasis on collective obligation. Gostin's communitarians understand and obey their duty to the common good, but I think they see the common good as something pre-existing and external and do not see it as a way of life constituted by their own moral praxis. I should like to change that perception.

I

From what source do public health policies, programs, or interventions draw their authority and legitimacy in a liberal democratic state? Notice that these two concepts are not exactly synonymous, although at least since the time of Max Weber, we tend to use them as if they were interchangeable.⁸ Authority is essentially an ethical, normative concept—the *power* that is wielded by officials is not transformed into genuine *authority* unless it is morally justified. Legitimacy is essentially a sociological and descriptive notion. It points not to rational justification

8. See generally John H. Schaar, *Legitimacy in the Modern State*, in *POWER AND COMMUNITY: DISSIDENTING ESSAYS IN POLITICAL SCIENCE* 276 (Philip Green & Sanford Levinson eds., 1970).

but to actually existing beliefs, sentiments, and loyalties in a political culture under certain historical conditions. Only good reasons can challenge authority; better reasons than the holders of authority are able to mount. But many winds can undermine legitimacy and the reasons do not have to be good ones or even reasons, strictly speaking, at all.

These concepts tend to blur into one another as the objective or foundational character of human reason (or divine revelation) is cast into doubt. Two central political and ideological movements in the modern period, democracy and liberalism, each contributed to this normative crisis in the concept of authority, but in different ways.

Democracy contributes to the normative crisis of authority because authoritarian political theory since Plato has held that the capacity to discern the rationality underlying political authority was possessed only by a very few in any society, and thus their judgment ought to prevail over the beliefs of the many. In a democracy, authority must rest on reasons that are within the reach of everyone, in principle, and virtually everyone (at least a majority), in practice.

Perhaps less noticed, but equally significant, is the fact that liberalism also contributes to this blurring of the lines between authority and legitimacy, between the reasoned and the believed. This is not because liberalism wants to spread authority out, make it more accessible and shared more widely by common persons as democracy does, but because liberalism is at heart distrustful of authority and very, very stingy in granting it. To tame authority and to bring its oppressive potential to heel, liberalism demands not just reasoned justification for the exercise of rightful government power but reasons of a very special kind. These reasons must somehow be grounded in the protection, preservation, and promotion of the interests of individuals, *as individuals themselves define those interests*. (Without this latter proviso, of course, the bulwark against the external imposition of power would be very fragile indeed.) So authority is authoritative (rationally justified) in so far as its exercise protects and promotes what individuals believe to be in their own best interest. The difference between reason and belief (so vast and so important to Plato and to most other Western political theorists prior to the seventeenth or eighteenth century) is hollowed out; “justified authority” turns into “legitimate authority,” and whether it is legitimate gradually becomes more an empirical than a normative question.

Gostin observes, quite rightly, that debates about the scope of the state’s public health authority often fail to differentiate the nature and degree of the risk that purportedly calls for a public health response.⁹ By distinguishing among degrees of risk (significant, moderate, negligible)

9. Gostin, *supra* note 5, at 1135.

and types of state response (well-targeted interventions and arbitrary interventions), it is possible to see that the question is not whether the use of public health police power is ever justified, but rather what degree of exercise of authority and interference with liberty is justified under what circumstances. This way of formulating the issue leads naturally enough to two closely-related notions of justification. One is the notion of graduated response. For Gostin, as for common sense, the more significant the risk and the more well targeted the intervention, the greater the justification for the exercise of authority and the limitation of liberty. The other is the notion of balancing values or interests. As Gostin sees it, the trade-off is between personal and economic liberty and security or safety. Interestingly, he chooses not to speak much of balancing these two interests within the same individual, but rather to put individuals on the liberty side and the public or a collectivity on the security side of the equation.

The best way to construe this account of how limitations on liberty may be justified is to view it as a series of dynamic equilibria along a continuum of risk with various threshold points that trigger the need for a new equilibrium. At the significant and the negligible thresholds the moral balance of interests stabilize rather easily around security and liberty, respectively. In the middle ground of moderate risk, even well-targeted interventions may be quite controversial and it may be hard to achieve an equilibrium.

One approach is to adopt Gostin's account of justification (which is also, as I argue below, a model of moral reasoning, regarded from a different angle), then use the approach to arrive at different types of justifications than does Gostin. I leave this exercise to others. Another way to get a critical purchase is to examine the implications and assumptions behind the metaphors of moral reason and political discourse used in this model.

The notion of degrees of risk suggests that "risk" is a concept that can be quantified and measured and that there is a common metric available to use to calibrate different risks and to comparatively grade them. This way of thinking is of course widespread in the utilitarian tradition, economics, policy analysis, and public-choice theory. However, the normativity of risk is unstable in the same way as is authority. Risk is not the same as probability. (Often, the discourse of public health, when addressing "risk factors" and an increased risk of suffering from a certain disease, is careless because it is assumed to be self-evident that the outcome being discussed is bad, as in the case of cancer. But there are many impairments and disabilities for which this value judgment cannot

be assumed, but must be argued, and will be contested by reasonable people.¹⁰).

Risk is a function of the normative importance of a potential state of affairs and the likelihood or probability of that state of affairs coming to pass.¹¹ While estimates of probability may be impersonal and objective, the value estimates of what is at stake lack such an Archimedian point. Indeed, the link between the problem of authority and risk as normative concepts is forged within the liberal tradition by “contractarianism,” which, in effect, makes the normative formation of the state itself into a kind of risk-benefit exercise. It is hard to see then how the logic of moral justification from a liberal perspective can give priority to ascertaining the degree of risk in justifying a particular trade-off between liberty and security. One might equally say that we must determine how to balance liberty and security first, before we can determine whether something is a “risk” at all, let alone before we can determine whether it is a significant, moderate, or negligible one.

A second important metaphor in the liberal model of moral justification is the notion of balancing. What type of activity is this supposed to be exactly, and who—what kind of subject, what kind of agent—is doing this activity?

In his account of moral justification and moral reasoning, John Rawls introduces the notion of “reflective equilibrium,” by which he means a kind of taking back and forth between moral judgments or intuitions rooted in immediate experience, on the one hand, and the moral perspective offered by more abstract and theoretical principles and rules, on the other.¹² Hans-Georg Gadamer offers a similar account of the process of interpretive judgment as an interaction between the tentative judgments about meaning given by the reader and her experiential background (or “horizon”) and the constellation of possible meanings embedded in a text. Similar accounts may be found in Aristotle’s notion of “phronesis” and Kant’s concept of judgment.¹³ In each of these accounts the activity of judgment is not only something that a person does, it is also a process of deliberation that refines, educates, and shapes the person.

10. See generally DAVID R. BUCHANAN, *AN ETHIC FOR HEALTH PROMOTION* (2000) (discussing reasons it may be rational to resist health promotion interventions).

11. See generally K.S. SHRADER-FRECHETTE, *RISK AND RATIONALITY: PHILOSOPHICAL FOUNDATIONS FOR POPULIST REFORMS* (1991) (discussing the value-laden character of the concept of risk).

12. See Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHIL. 256 (1979) (discussing Rawls’ conception of moral reasoning).

13. RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM* 207-23 (1983) (discussing interpretation and practical reasoning in Gadamer, Aristotle, and Kant).

Moral agents make judgments and perform actions which in turn remake them as agents.

No such interconnection between person and judgment seems to inform the balancing metaphor. On the contrary, the activity of balancing and the things balanced are entirely external to the person. Indeed, in the liberal tradition, the notions most often said to be subject to balancing, and that lend themselves most readily to this metaphor, are “interests” and “values”: precisely the notions that are taken to be external to the moral agent in that they are the instruments through which the person’s core self makes its way through the dangers, competition, and general pushing and shoving of the social world. But if such things as liberty and security are merely weights on the scale, what is within the core of the self?

For what ends are liberty and security valuable in the first place? For political theory generally, this is a tough question. In the domain of combating terrorism and bioterrorism perhaps it is less difficult. In the cases Gostin has in mind, the answer to that question surely must be “life” and sometimes “protection from disease.” Without these, neither liberty nor security would have much value. But this answer won’t suffice across a wide range of cases in public health where “slightly more protection from disease” is the answer for the individual and “statistically better health” is the answer for the community. There must be more normative substance to the self and to the self-in-society. Moreover, as social critics from Thomas Hobbes to Aldous Huxley teach us, to externalize the value and meaning of life itself from liberty and security is debatable.¹⁴

Imagining a life devoid of liberty or security is enough to make one realize that the moral importance of preserving life may itself hinge on the prospect of sustaining (or regaining) a life of human flourishing and meaning. What we really mean when we talk about balancing liberty against other values is not an act of balancing at all but one of interpretation: it is understanding the significance of forgoing some desired or planned activity in the context of an overall life-plan aimed at human flourishing, where liberty is understood as a constitutive element in that flourishing.

Consider the following example: In evaluating the air transportation security rule against taking knives on board airplanes, I do not balance my liberty against my security as interests or values. I critically assess my desire to take my knife in the context of my overall aspirations and sense of myself and my life. In this case the conclusion is clear: My planned activity is petty and insignificant compared to the benefits that the rule brings to my overall life plans. I do not balance, trade-off, or sacrifice my

14. THOMAS HOBBS, *LEVIATHAN* (J.C.A. Gaskin ed., Oxford World’s Classics 1998) (1660) (on the worthlessness of life and liberty without security); ALDOUS HUXLEY, *BRAVE NEW WORLD* (Modern Library 1956) (1932) (on the worthlessness of life and happiness without freedom).

liberty when I obey this rule, and the rule itself does not limit my liberty; it enhances it. What the rule does is limit my will, and it is the will of my desiring self, not the will of my rational self, at that. Now, if the airline rule were that I could not take a book on board, I would likely not come to the same assessment, and I would protest the rule and use political or legal action to get it changed. But again I would not do so because liberty weighed more heavily in the balancing in this case than it did in the first case. I would fight against this rule on behalf of my larger identity as a person and my notion of the good life, including, but not limited to, considerations of my liberty.

This brings us to the second dimension of the model of moral justification Gostin presents and employs. This is the notion of well-targeted versus arbitrary (excessive or pretextual) intervention. I believe that Gostin is exactly right in arguing that when assessing the justification for the exercise of power or coercion, one must take into account not only the intended purposes of the intervention but also the nature of the means employed.¹⁵ This line of reasoning is familiar in the legal doctrines of strict scrutiny, proportionate response, and in the notion of the least restrictive alternative in cases involving the paternalistic protection of incompetent subjects.¹⁶

Nonetheless, there is an ambiguity in Gostin's discussion of what well-targeted means. An intervention could be well-targeted because it was efficient and effective at neutralizing or controlling the risk. Such an intervention would limit the liberty only of those it was necessary to affect in order for the public health or security operation to be successful. The coercion would be a surgical strike; collateral damage to liberty would be held to a minimum. On the other hand, well-targeted could mean justly, fairly, or equitably targeted. A requirement for the moral justification of the public health intervention would be that the intervention's burdens (loss of liberty) and benefits (increased protection) be fairly distributed. If we follow the now widely accepted Rawlsian notion of fairness, that would mean that the benefits and burdens would have to be distributed equally across the population unless a deviation from that equal distribution could be shown to redound to the benefit of the least well off. While there may be no inherent conflict between considerations of efficiency and equity, in a given case a scarcity of manpower or resources might likely mean that an operation that was more widely administered in

15. See generally WILLARD GAYLIN & BRUCE JENNINGS, *THE PERVERSION OF AUTONOMY: THE PROPER USES OF COERCION AND CONSTRAINTS IN A LIBERAL SOCIETY* 165-88 (2d expanded ed. 2003) (discussing the justification of coercion).

16. See generally Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976) (explaining the logic of constitutional analysis in civil liberties jurisprudence).

the name of fairness would be less effective in terms of public health outcomes.

In pursuing further this facet of Gostin's discussion, it would be necessary to begin to distinguish among various strands of the liberal-political tradition, because utilitarianism and what might be called welfarist liberalism will define a well-targeted intervention differently from contractarianism and egalitarian liberalism. Now there are several candidates for the balancing scales—not just liberty and security, but justice and security, equity and efficiency, the calculus of social benefit versus moral and legal rights as justificatory trumps. I believe that the conceptual difficulties mentioned above—problems encountered in giving priority to risk or harm (the harm principle) and the balancing metaphor—apply to the concepts of justice and rights as they do to liberty.

At bottom the problem comes back to the move that liberalism makes to transform authority into legitimacy. Authority provides an objective standard of right against which the particular individual's judgment can be assessed and adjudicated. Legitimacy provides an indication that public or state power is being used in a way acceptable to the private individual's judgment in the aggregate, at least so much so that this acceptability manifests itself in the obedient behavior of most individuals, the absence of widespread protest or resistance, and the stability of the regime. The logic of moral justification in the liberal tradition, and in the model employed by Gostin, only provides—and, I would argue, can only provide—the rationales for liberty-limiting public health policy that may be perceived as legitimate. This logic cannot ground liberty-limiting public health policies in authority, in a conception of moral rightness and obligation that points to the common good and to individual human self-realization, or flourishing.

An argument from legitimacy may be politically solid and psychologically well-anchored. It may be rooted in perceptions of danger and emotions of fear. And it may find reasonable support in the public as well as the private purpose of preservation of settled ways of life, of expectations, hopes and plans, of vested interests and familiar desires. But these grounds for obedience and legitimacy fall short of the principled moral grounds of obligation and authority that I think Gostin seeks, and that we should seek in our discourse about ethics, politics, and the law in public health. Those grounds must be the moral purpose of human transformation and growth, not just preservation.

In the contractarian tradition specifically, and in the liberal tradition more generally, the preservation of the individual (of life, liberty, and property) is the basic reason for the creation of political society. That fateful move resulted in the privatization of politics and in the elimination of the pursuit of the good as a valid goal of life together in a shared space of common purpose, shared civic activity, and communal authority.

Authority exists in a form of life that morally transforms its individual members, not from outside or above, but from within—through their judgments, deliberations, commitments, the exercise of imagination and purposive agency, and through their choices and actions.

At best, liberalism has been comfortable with a vision of that transformational form of life only fitfully and sporadically. For the most part, liberalism has wanted to create a very different kind of civic space—a space of economically-productive cooperation, promise keeping, mutual toleration, respect for boundaries and separations, and forbearance from violence and harm to one another. This is a public space designed principally to make private happiness possible. In this protected private domain, persons can cultivate their talents and their individuality; they can learn self-reliance, confidence, and independence; they can form personal beliefs, commitments, and goals; they can relate to the transcendent in security and peace so long as they respect the reciprocal rights of others to do likewise.

For quite some time it appeared that the concept of authority could survive in this semantic environment; that it could make the transition to liberal modernity. In recent times, one cannot be sanguine about its prospects. Through technology and telecommunications, the power of the state has increased enormously since the rise of liberalism in the nineteenth century. We make do with the discourse and the logic of legitimacy. From time to time, however, particular fields or issues reveal the limits of that discourse and logic. Despite Gostin's powerful analytic skills and best efforts to stave off the conclusion, I am becoming increasingly convinced that public health is one of those fields.

II

I turn now to the second topic that Gostin's article suggests and that I would like to develop in my own way in ongoing discussion between public health and political theory: a conception of the structure and dynamics of moral discourse and justification in public health. Here I introduce as terms of art a distinction between a judicial conception of moral reasoning and justification, and a deliberative-democratic conception.¹⁷ The former centers on the notion of the interpretation and application of general moral principles to particular decisions. The latter centers on the activity of debate and deliberation that channels

17. I have previously addressed these notions in more detail. See Bruce Jennings, *Bioethics and Democracy*, 34 CENTENNIAL REV. 207 (1990); Bruce Jennings, *Possibilities of Consensus: Toward Democratic Moral Discourse*, 16 J. MED. & PHIL. 447 (1991); Bruce Jennings, *Taking Ethics Seriously in Administrative Life: Constitutionalism, Ethical Reasoning, and Moral Judgment*, in ETHICAL FRONTIERS IN PUBLIC MANAGEMENT 64 (James S. Bowman ed., 1991).

disagreement toward consensus on practical strategies of community-based problem solving.

In the preceding discussion of an argument that legitimates versus an argument that authorizes, I was at pains to drive a wedge between these two notions. The reason is that we need to be able to appeal to authority in the justification of public health policy, not just legitimacy. In order to have the semantic resources and environment necessary to accomplish this objective, we must recover to some extent the notion of the civic or the political as the space of moral transformation—it is as a democratic citizen that I develop the capacity to discipline my conduct in certain ways; not only because it protects my individual interests (nor even because it promotes my interests), but also because it is conducive to the ongoing project of mutuality, solidarity, and communal flourishing of which I too am a part.

When it comes to the distinction between judicial- and deliberative-moral reasoning, however, my aim is not to drive a wedge in a gesture of recovery and political reformation, but to suggest that these two modes of politics are symbiotic and mutually reinforcing. Indeed, each is seriously flawed and incomplete without the other.

Gostin openly embraces the judicial mode of moral reasoning, and in this he places himself squarely within the liberal tradition. The notion of a relatively coherent, interconnected, and stable framework of moral principles as a touchstone for the justification of public policies and practices stands at the heart of the liberal tradition's conception of political action (just as the notion of a framework of individual interests stands at the heart of its conception of private action). This conception leads toward a kind of constitutional elitism (the experts should decide) and civic privatism (let's let the experts decide) which undermines the rationale for a more deliberative-democratic context within which to locate public health as a practice; that is, as a structure of rule-governed conduct that has both extrinsic (instrumental) goals and purposes and internal (intrinsic) values and virtues.¹⁸ In fact, the judicial mode and the deliberative-democratic mode of moral reasoning are themselves practices in this sense, and like all practices they require an institutional structure to sustain them.

The judicial model of politics provides one solution to the problem of authority in liberalism. Historically, liberalism had to tread a fine line between aristocratic authoritarianism in the early modern period of absolute monarchy, on the one hand, and majoritarian authoritarianism in the later period of the rise of democratic government, on the other. Between these two unacceptable alternatives, liberalism, especially

18. See generally ALASDAIR MACINTYRE, *AFTER VIRTUE* 169-89 (1981) (defining the concept of a practice).

American liberalism, has found three important concepts to embody its distinctive form of politics: first, the protection of fundamental, individual liberties (rights) in a (written) constitution; second, representative government; and third, an independent, politically insulated judiciary. This structure limits popular democracy to periodic elections and to referendum and recall procedures in some states, to jury service, and to participation in non-governmental organizations like political parties and special interest groups.

If objectively-normative authority is no longer available to a society through the exercise of reason, nor through transcendent revelation, nor through ingrained moral intuition, then it must be embedded in some man-made product, institution, or artifice. In American political culture, that artifice is the Constitution. Created by the Founders, it has been interpreted by judges in a growing corpus of case law, and amended from time to time by the elected representatives of the people at large. The principles of political morality as articulated by political and legal philosophers, political leaders, academic scholars, and the intelligentsia at large, are not identical with the Constitution and constitutional law, of course, but historically they have tended to converge, especially in those areas such as individual civil liberties and the regulation of commerce where liberalism as a political theory has had its greatest interest. As legislators who are elected and accountable to the citizenry accept and embrace the principles found in the written Constitution by impartial and non-partisan judges, these principles become reaffirmed and enshrined over time in the virtual constitution of public morality. At some periods constitutional interpretation seems to lag behind public morality; at other times, as with *Brown v. Board of Education*,¹⁹ for example, it may be ahead of it. But gradually, the two seem to come into alignment.

The social, political, and cultural ramifications of landmark Supreme Court rulings (or a series of rulings gradually fine-tuning doctrine over many years) may often be more significant than their narrow legal implications. Thus, legal-judicial authority tends to diffuse into political authority as such in our political culture. And the judicial mode of moral reasoning, the notion of applying general and abstract principles to specific problems or cases, becomes the model for all political leadership. This may not be so all the time, but it is when ordinary interest group political bargaining, which impresses no one with its moral authority, is not enough for the occasion. Thus, political representatives characterize their decision-making as a responsiveness to the mundane special interests of

19. 349 U.S. 294 (1955).

constituents combined with an attentiveness to higher principles of political morality and the public interest.²⁰

When embraced in this way so widely outside the distinctive institutions of the legal system, the judicial mode of reasoning takes on an elitism that is much more troubling outside the courthouse, in the public square. Judicial reasoning is a protection against what has been variously called an excess of democracy, the tyranny of the majority, or simply mob rule. The influence of the judicial model prompts elected representatives to move from a delegate to a trustee style of representation.²¹ Professional and intellectual expertise and a specialization of function tend to routinize and bureaucratize authority rather than democratize it. If political and moral judgment hinge on the specialized training and expertise of those who can comprehend abstract principles and then apply them correctly to particular cases, then both participatory democracy and even delegate-style representation are irrational, perhaps even dangerous.²² If the requisite skills of political judgment are not widely shared, even in a society with a relatively high level of education, then the vast majority of the population will be better served by the rule of competitive and circulating elites than by stronger democratic institutions and practices.²³

The judicial mode of justifying political and policy decisions has a long history in the field of public health and has played an important role where the main concerns were protection from environmental contamination, control of infectious disease, or surveillance to permit early detection and

20. Even in the field of applied and professional ethics (such as bioethics) during the last thirty years, ethicists have described their methods in this fashion, and I believe this has helped them find acceptance and authority among professionals and policymakers who otherwise would not have been inclined to pay much attention to those with academic training in philosophy or the humanities.

21. *See generally* HANNA F. PITKIN, *THE CONCEPT OF REPRESENTATION* (1972) (discussing the difference between delegate and trustee theories of representation).

22. It may be objected that in this sketch of judicial reasoning I have both oversimplified it as an interpretive process and exaggerated the extent to which it is a specialized skill unlike the ordinary moral reasoning capacities of grassroots-democratic citizens. I am prepared to concede the first objection, and perhaps the second as well, although an aura of difficulty, demanding intelligence and the like, does seem to pervade the popular image of judges (and other judge-like actors). For a richer and more adequate treatment of this topic than I am able to give here, see RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996); RONALD DWORKIN, *LAW'S EMPIRE* (1986).

Despite its shortcomings, however, this judicial model of political discourse does illuminate much of what goes on in public health debates. In those circles, it is not unusual to encounter a rather simplified account of applying principles of general knowledge (whether this be medical, epidemiological, social scientific, or moral knowledge) to particular decisions and practices. Appeals to authority based on claims of expertise in applying knowledge are a staple of the field.

23. For a thorough discussion of this line of argument, see PETER BACHRACH, *THE THEORY OF DEMOCRATIC ELITISM: A CRITIQUE* (1967).

treatment of disease. Expertise has been appealed to in order to achieve moral justification and authority in public health again and again, but it can become a bad habit when too often or too readily used. In many cases it strikes me that what really prompts a coercive or paternalistic top-down approach in public health is not the public's inability to understand the scientific facts, the medical rationale for the intervention, or the public interest served. Rather, it is the fact that the liberty being limited (the desired behavior being forgone) by the intervention indicated by public health knowledge is too immediately important or too intensely desired to be amenable to reasonable public dialogue and consensus building, at least not in the amount of time available in an emergency. People use contaminated water when they have no alternative supply readily available to them. People practice unprotected sex or pursue certain risky lifestyles when those activities are deeply embedded in their self-identity and sense of self-esteem. People fail to comply with medical treatment regimens when their lives are too hectic and too stressed and they are emotionally fragile.

In most of the examples I can think of involving an appeal to judicial-style decision-making in public health policy, the same outcomes could have been justified and defended just as well through a more deliberative, culturally respectful, and inclusive participatory process. In that case, though, public health officials would have needed more faith in the capabilities of ordinary citizens, and they would have needed sufficient time and resources to undergird coercive measures with a process of explanation, exploration of alternatives, participatory design of the implementation of these measures, and consensus building.

The authoritative limitation of liberty does not need to be based on expert appeal to general principles and a process of balancing in which one's duty to the safety and well-being of the community outweighs the individual liberty in question. The limitation of liberty can also be justified through a process of democratic deliberation in which the harmfulness or the wrongness of a particular kind of behavior at a particular time is demonstrated (both through analytic reasoning and through the sharing of personal and group narratives and cultural traditions) and functional alternatives to the proscribed behavior are made available to meet significant personal or communal needs.

Most individuals are ashamed to be seen publicly as being selfish; most individuals have more than one behavioral choice to meet important economic or psychological needs (or are willing to receive training to increase their range of behavioral options); most individuals do not have to be forced to care about the welfare of the community with which they identify (if they did it would be a misnomer to call it a community) and most individuals do not deliberately want to harm or wrong others. When these generalizations do hold, community reaffirmation and nurturing are

called for. When they do not hold for a large number of individuals in certain cases, then we are indeed in the presence of extreme social pathology and cultural breakdown, and community reclamation and civic renewal are the appropriate long-term responses. Communities so broken down that they cannot be revitalized will eventually be abandoned, just as some inner-core areas of large American cities have become virtual wastelands, with no stable or measurable population at all.

Gostin gives an interesting comparison of the way liberals and communitarians would reason about limiting liberty in the face of risk with well-targeted interventions.²⁴ He observes that the two schools of political philosophy would agree in cases of significant and negligible risk, but that they might part ways in the face of moderate risk, with the liberals tending to err on the side of liberty and the communitarians on the side of security. Thus he concludes:

Like liberals, communitarians would have a more difficult time with the hard case of moderate risk, but they would grant the state more latitude. They would recognize the deficiencies in government claims—lack of specificity in the risk assessment and lack of clarity in the efficacy of the intervention. Yet, they would stress the government's obligation to safeguard health and security. Communitarians would not see a stark conflict between individuals and the oppressive state. Rather they would perceive the government, acting on behalf of the population, seeking to reduce a risk common to all. Ideas of community would lead them to conclude that everyone would be better off if each person ceded a small amount of liberty to achieve a safer and more secure population.²⁵

This seems right to me. But another aspect of the communitarian orientation (the democratic, progressive branch of communitarianism, that is) is revealed by the contrast I have just drawn between the judicial and the deliberative process of moral reasoning and justification. Community safety *per se* does not seem to me to be a particularly important value or consideration for communitarianism, any more than individual rights and liberty are unimportant. If community safety and security are important (and they are) for communitarians, it is because they are the preconditions for deliberative-democratic decision-making to function institutionally. People gripped by fear of imminent danger, panic, hatred, and revenge will not be capable of reasoning or the practice of justification under the

24. Gostin, *supra* note 5, at 1158.

25. *Id.*

deliberative model. At such times, even the viability of the judicial model is threatened, and people tend to turn to charismatic leaders who assert rather than argue, provoke rather than persuade. Both liberals and communitarians should be exceedingly nervous at this prospect. At such times political theory can do little but hope that the citizenry returns to its senses quickly and that countervailing checks and balances within the government will prevent the worst abuses of power.

The lesson to be drawn from these considerations is that the political process of moral reasoning, debate, and justification in public health policy should be institutionally rich and commodious enough to incorporate both the judicial and the deliberative model. Elites whose authority is based on a kind of expertise in moral knowledge, or the ability to reason from general moral principles to particular action-guiding conclusions, still have an important role to play in public health policy and programs. That style and form of justification continue to have widespread trust and appeal in democratic publics, and they often provide philosophically coherent accounts of what should be done and why in public affairs, including public health.

But as we move away from bioterrorist attacks, emergency outbreaks, and the like, to the less glamorous areas of public health, the importance of the deliberative mode of moral and political discourse comes to the fore. These areas have more to do with behavior modification, the elimination of social discrimination, inequalities, and stigma, and the management of chronic disease on the population level, than they do with quarantine, confinement, or the commandeering of private property. They are less about public health's police power than about its persuasive power; less about coercion than about trust and the changing of hearts and minds. For this purpose we need an institutional structure and a cultural practice of moral justification closer to the deliberative than to the judicial model. Like the public health infrastructure itself, this civic infrastructure of deliberative politics and democratic citizenship is not in good repair.²⁶ It needs concerted attention and significant investment.

26. See generally ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (discussing the decline of social capital and civic activity in the United States).