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Public Health as Statecraft and Soul-Craft

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BOOK REVIEWS

Public Health as Statecraft and Soul-Craft

Bruce Jennings, M.A.*

Public Health Law: Power, Duty, Restraint. By Lawrence O. Gostin. Berkeley: University of California Press, and New York: Milbank Memorial Fund, 2001. Pp. 491

Public Health Law and Ethics: A Reader. Edited by Lawrence O. Gostin. Berkeley: University of California Press, and New York: Milbank Memorial Fund, 2002. Pp. 523.

A book review should not use clichés like *tour de force*, but I can't think of another phrase that does justice to the magnificent achievement of Lawrence Gostin in these two volumes. They belong on the shelf of every reader of this Journal and indeed of everyone whose work or interests touch on the law, ethics, healthcare, and public health policy and practice. When *Public Health Law*¹ was published in 2000, it instantly became the standard-setting, comprehensive treatise on the subject. The appearance last year of *Public Health Law and Ethics*,² a companion reader designed to facilitate teaching as well as scholarship, provides a good occasion to consider this body of work as a whole and the broad significance it holds for the philosophical foundations and future directions of public health as

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1. LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* (2000) [hereinafter *PUBLIC HEALTH LAW*]

2. LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW AND ETHICS: A READER* (2002) [hereinafter *PUBLIC HEALTH LAW AND ETHICS*]

a profession and as an instrument of public policy. In particular, Gostin's work indicates just how important it is to understand the place of public health law and ethics within the framework of liberalism as a public philosophy.

It is rare in these days of burgeoning information for a scholar to master one field thoroughly, let alone three or four. Gostin is at home in public health law, constitutional law, and administrative law; not to mention the epidemiological, social scientific, and historical aspects of public health research and practice; not to mention his more-than-competent mastery of ethics and social theory. Moreover, in the case of these companion volumes, the whole is greater than the sum of the parts. Either volume alone would have been an extraordinary contribution. Read and used together, they complement and supplement one another and create an extraordinary whole.

A glance at each volume's table of contents reveals similar structures. Gostin begins with the theoretical foundations of public health law, policy, and practice. In these sections he draws widely from law, ethics, and social theory. Along the way, he gives a lucid explication of the development of constitutional law and reasoning regarding the state's role in social, health, and welfare matters. The remainder of each volume is composed of a series of chapters organized around various areas and functions of public health. Topics include public health surveillance, communication and health promotion activities, the control of infectious disease (including mandatory vaccination and quarantine), and the use of economic measures and tort law as regulatory tools in public health. Knitting together this broad range of activities and topics is the guiding theme of the tension between individual rights and the common good.

There were some notable omissions in *Public Health Law* when it appeared, and their significance has grown over time. One is public health research, and particularly questions about human rights and cultural diversity, which are often raised in research projects conducted in developing countries. Another is the growing area of public health genetics. A third is the area of chronic illness and the aging society as matters of public health concern. And of course, because the book was published well before 9/11, there is little explicit discussion of bioterrorism. *Public Health Law and Ethics* redresses many of these omissions, including public health genetics and bioterrorism, and hence makes the material more comprehensive and more up-to-date than the earlier volume.

Public Health Law and Ethics contains an extensive sampling from public health case law, especially opinions from the U.S. Supreme Court.

For this reason, the book is a virtual compendium of important legal documents in the history of public health in America. These documents run the gamut from affirmations of state power to defenses of individual liberty. Gostin's analysis traverses the space between *Gibbons v. Ogden* (1824)³ in which Chief Justice John Marshall included public health activities under the authority of the "police powers" of the state,⁴ and *Jacobson v. Massachusetts* (1905),⁵ which sets out the limits of the police power and the public health authority and which Gostin calls "the most important Supreme Court opinion in the history of American public health law."⁶ It also tracks the distance between the *Report of the Sanitary Commission of Massachusetts*, written by Lemuel Shattuck (1850) who is eloquent about the duty (and the authority) of government to assure the health of the populace,⁷ and *DeShaney v. Winnebago County Department of Social Services* (1989)⁸ in which, as Gostin characterizes it, the Court "expresses a vision of a 'negative' constitution where the judiciary is highly reluctant to impose on government an affirmative duty to safeguard the well-being of its citizens."⁹

Gostin calls *Public Health Law and Ethics* a "Reader," but it is actually much more than that. Its opening sections give a fuller treatment of various approaches to ethical theory so that the discussion broadens out beyond the constitutional law analysis of the earlier book. Also in each section of the book (both those on theoretical foundations and those on particular public health issues like surveillance, health promotion, and infectious disease prevention), Gostin takes the trouble to lay out the conceptual, political, and historical groundwork before presenting the reprinted selections from court decisions, policy documents, and academic books and articles. This is an ingenious way to organize an anthology, and it works particularly well for teaching purposes. As a result, *Public Health Law and Ethics* can stand alone (but it shouldn't), and it can be used by itself in a course. Indeed the books are supported by a web site (www.publichealthlaw.net/reader), which provides the latest case law, reports and articles to update the material in the book. Links to other web sites are also helpful to teachers and students in courses on public health

3. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

4. PUBLIC HEALTH LAW AND ETHICS, *supra* note 2, at 185.

5. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

6. PUBLIC HEALTH LAW AND ETHICS, *supra* note 2, at 206.

7. *Id.* at 24-27.

8. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989).

9. PUBLIC HEALTH LAW AND ETHICS, *supra* note 2, at 169.

law and ethics.

The books can be read apart; read them together, though, and what you find is a fascinating interplay between two of Gostin's voices—the voice of the legal theorist in the first volume and the voice of teacher, historian, and contextualizer in the second. You also get Gostin's own mind and intelligence in juxtaposition with those of Supreme Court Justices and other thinkers past and present who vie with him in these pages. A good example, already mentioned, is the way Gostin positions himself between Chief Justice Rehnquist writing for the majority in *DeShaney*, and Justice Blackmun, who wrote a strong dissent in that case.¹⁰ Another example is the way Gostin sets out the tension between the prevailing view in the field of public health and the ideology of free-market libertarians.¹¹

For Gostin the adjective “public” in public health is no mere modifier, and it does not simply refer to the fact that we are talking about the health of a lot of people. The concept of the public—and closely related notions such as community, membership, justice, solidarity, and what otherwise separate individuals and groups may have in common—is both a problem to be defined in these books and a constituent feature of the very subject matter itself. The paradox that animates much of Gostin's inquiry is that there could be no public health unless there is already a public; and that there can be no public if there is no public health.

Health is a primary social good; we want and need it no matter what else we may want and need; it is a prerequisite for pursuing, attaining, and enjoying any and all the other goods and interests that are important to human life. Health is something individuals and societies need regardless of whatever else it is they want. So it follows that one can hardly have a democratic society, or a robust civic life for citizens, unless individuals are well enough to be active, engage in common activities with others, and the like. A society made up of individuals too weak and frail in body, or too jaundiced and fearful in mind, to engage in the activities that comprise a civic society would not be a community of citizens but at best a collectivity of subjects. As Gostin puts it, “[w]ithout minimum levels of health, populations cannot fully engage in the social interactions of a community, participate in the political process, generate wealth and assume economic prosperity, and provide for common defense and security.”¹²

There is a difference between measures undertaken to protect the health of a large number of citizens who are acting with a sense of

10. *DeShaney*, 489 U.S. 189.

11. PUBLIC HEALTH LAW AND ETHICS, *supra* note 2, at 229-233.

12. PUBLIC HEALTH LAW, *supra* note 1, at 8.

common obligation in support of authoritative institutions—a “public”—and the measures (no matter how effective) to promote health imposed by tyrants on a powerless, subjugated population of people who have no political rights or civic status. There can be no public health (properly speaking) in such a context because public health “can be achieved only by collective action, not by individual endeavor. . . . Meaningful protection and assurance of the population’s health require communal effort.”¹³ Again, Gostin points out that “the quintessential feature of public health is its concentration on communal well-being. . . .”¹⁴ And finally, “the communal efforts of the body politic to protect and promote the population’s health represent a central theoretical tenet of what we call public health law.”¹⁵

In contemporary American political culture, with its predominate libertarian and individualistic ethos, it is difficult to grasp the conception of the political, the public, the civic, or the communal for which Gostin is searching. One of the things that makes these volumes so interesting is that someone like Gostin, who has shown himself through his previous work to be an ardent champion of civil liberties and human rights, should face off against the question of what is public about public health in such a serious, albeit sometimes tentative and searching, way. The kind of liberalism that exerts considerable intellectual influence in these books, a generous, progressive liberalism of tolerance and the protection of individual privacy and self-determination against the will of the majority or the power of government, can so easily privatize public health by reducing the normative notion of a public to the statistical concept of a population. And as someone once remarked, in the field of public health, p-values have often seemed more important than ethical or civic values.

While fully aware of the intellectual power, moral appeal, and political importance of this liberal tradition, Gostin makes an honest attempt to place it properly as one element among several in the dynamic value conflicts that arise in the face of public health policies and public health law. Although this notion is present in both of these volumes, I believe it comes through most clearly in *Public Health Law and Ethics*. Consider the following important formulation of what is really at stake in public health ethics:

Few public health experts advocate denial of truly fundamental

13. *Id.* at 7-8.

14. *Id.* at 12.

15. *Id.* at 8.

individual liberties in the name of paternalism. In the public health model, individual interests in autonomy, privacy, liberty, and property are taken seriously, but they do not invariably trump community health benefits. The public health approach, therefore, differs from modern liberality primarily in its preferences for balancing; public health favors community benefits, whereas liberalism favors liberty interests. Characterizing public health as a utilitarian sacrifice of fundamental personal interests is as unfair as characterizing liberalism as a sacrifice of vital communal interests.¹⁶

This is a more nuanced and sophisticated understanding of both liberalism and communitarianism than one generally finds, and perhaps marks some movement for Gostin away from views he himself expressed a decade ago. One trait that drives Gostin in this more communitarian direction is his intellectual honesty and fidelity to the record of American constitutional history and jurisprudence. Public health is one area in which taking the law seriously means having something like a concept of the public that is a normative notion and not just a statistical one. Using his voice as an educator, Gostin helps us to understand this concept and the reasoning behind it, even if we (and he) are made morally uncomfortable by the degree of legitimate authority it vests in our body politic and in the hands of the wielders of statecraft.

This also shows Gostin the theorist at his best. Rather than moving from a former liberalism to a newer communitarianism or even authoritarianism, he endeavors to call into question this very dichotomy. He does this not by denying that individualistic and communally-oriented values often conflict. Instead he does it by questioning the notion that there is a zero-sum relation between these values at all times. He challenges the idea that, to the extent that the social good of public health is served by placing restraints on choice and behavior, individual interests and liberty must necessarily be sacrificed.

To visit the theoretical terrain Gostin explores is again to traffic in seeming paradox: although some of my interests as an individual may be overridden by public health measures is it not the case that other interests which are just as much mine and just as authentic are promoted thereby? As Charles Taylor observed some time ago,¹⁷ modern day communitarian theory is mainly a new chapter in the intellectual history of Anglo-American liberalism, much like guild socialism and democratic socialism

16. PUBLIC HEALTH LAW AND ETHICS, *supra* note 2, at 13.

17. CHARLES TAYLOR, PHILOSOPHICAL ARGUMENTS 181-203 (Harvard University Press 1995).

before it. It is not really a throwback to authoritarian, pre-liberal conservatism. It is an attempt to rescue what is still living and valuable in liberal theory in the face of a continuing failure of liberal governance and practice in the context of capitalist society. Although he never talks explicitly about such matters, Gostin is fully aware of the contemporary terrain of political theory and knows where on that map he wants to stand.

If I have a criticism to make of these books, it is not that Gostin too boldly embarks on this more difficult, more nuanced response to the framing of clashes between liberal or libertarian and communitarian values. It is that his quest for the right language, the right rhetoric (in the best sense of the term) is not completely successful. Throughout the richness of this masterful thousand page symphony of his, he does not, at least to my ear, get the communitarian tonality quite right. What separates liberals from communitarians *au fond* is not a proclivity to balance individual and social interests in different directions. They differ more fundamentally because they see political and moral reality differently. One's moral balance in hard cases derives ultimately from one's social ontology. For communitarians that social ontology is fundamentally relational; for liberals it is individualistic. Given this, where should we go from here? I suggest a detour from legal scholarship and jurisprudence and a more direct foray into philosophy. Communitarian theory is much more compelling at devising critiques of excessive individualism and social atomism than it is of making its own positive, constructive moral case. In fact, communitarian theorists would do well to familiarize themselves with public health because it is a fecund venue for constructive exploration and positive theory-building.

The public is not separate and distinct from the privates that make it up. It is not some realm of collective being that stands over and above the reasons, hopes, and desires of ordinary persons in everyday life. There are times in public health controversies when by losing one wins. I may have enjoyed the freedom to smoke in a restaurant, but I can't honestly say that my overall freedom has been diminished by the loss of this liberty because not only are risks to my own health reduced (and perhaps the health of others in the room) but by obeying the ban I now have a different set of possible relationships and identities with others open to me. My self-presentation and my relationships are no longer mediated by the fact that I am smoking; new possibilities come to the fore in my interactions, and new freedoms emerge that I hadn't even thought of before.

Public health law, policy, and practice are not only about protecting populations and individuals from risk and harm, nor even about more actively promoting health and well-being. Public health is also about

nurturing and enriching the moral imagination, to empathize with the needs of others, to define oneself in terms of reciprocity and solidarity with others, and to reconcile a public identity as a citizen with responsibilities with a private identity as a person with interests. Public health is not only about statecraft, it is also about soul-craft.

A reader can lose himself or herself in the thousand pages of Lawrence Gostin's wonderful books and not reemerge for days or weeks. I recommend the trip. You come out the other side having learned an enormous amount.