

PUBLIC HEALTH LAW FOR A BRAVE NEW WORLD

BOOK REVIEW: LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* (UNIVERSITY OF CALIFORNIA PRESS, BERKELEY, CALIFORNIA, 2D ED., 2008)

Elizabeth Weeks Leonard*

| | |
|--|-----|
| RESTRAINT: THE DOMINANT LIBERAL POSITION | 185 |
| POWER: SMART REGULATION | 190 |
| DUTY: THE RIGHT TO HEALTH | 195 |

A second edition of a book is not typically an occasion for reviewers' attention, much less fanfare. Authors may issue new editions of their works out of pragmatic necessity when the contents require updating to remain relevant and accurate, but those later editions typically do not break new ground. But a second edition of a book defining the scope and significance of public health law, which follows a first edition that was published in a pre-9/11, pre-Katrina, and pre-Obama world not only warrants but demands our attention. Since the first edition of Lawrence O. Gostin's *Public Health Law:*

* Associate Professor, University of Kansas School of Law. Thanks to Larry Gostin for the opportunity to review this book and Jennifer Bard for making the introductions.

*Power, Duty, Restraint*¹ compendium was published in 2000, followed in 2002 by a companion volume, *Public Health Law and Ethics*,² an incisive collection of essays, text excerpts, case law, statutory supplements, and commentary, Larry Gostin's name has become synonymous with the burgeoning field of public health law.³ As we embark on a new democratic Presidential Administration, with bold aims to reform the U.S. healthcare system and improve the welfare of the nation and perhaps the world, Gostin's second edition offers a playbook and inspiration for what is to come. If Gostin is not one of the 350,000 applicants for jobs in the Obama Administration,⁴ he should be. And even if he is not, his new book should be tucked in the briefcases and under the elbows of policymakers who gather in hallways in Washington and statehouses around the country over the next few years.

Looking back, there is something almost quaint about the first edition of *Public Health Law: Power, Duty, Restraint* in its unassuming, almost apologetic, need to assert the relevance of public health law to the new millennium. On the very first page of the preface, the author acknowledges the abundance of books on law and health and asks rhetorically, "Why then offer a book on public health law?"⁵ Until events of the past decade, many (myself, included) when asked about the role of public health and public health law in society might have conjured up images of school vaccination programs and tuberculosis sanatoriums. The public health law infrastructure was antiquated, obsolete, and largely irrelevant.⁶ There was a well-documented

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

² LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW AND ETHICS* (2002); see Ross D. Silverman, *Book Review Essay*, *Public Health Law and Ethics: A Reader*, 24 J. LEGAL MED. 241 (2003). A second edition of this volume is currently in progress.

³ See, e.g., Marshall B. Kapp, *Book Review Essay: Public Health Law: Power, Duty, Restraint*, 22 J. LEGAL MED. 581, 582 (2001) (describing first edition as Gostin's "impressive new magnum opus"); Silverman, *supra* note 2, at 243-44 (asserting that "Gostin is well suited for the ambitious undertaking of weaving together the myriad strands that make up the fabric of public health law and ethics" and listing the author's many credentials).

⁴ Kate Bolduan & Larry Lazo, *Job Seekers Flock to Obama Administration*, CNN ONLINE, Jan. 11, 2009, available at http://money.cnn.com/2009/01/11/news/obama_job_seekers/ (last visited April 26, 2009).

⁵ GOSTIN, *supra* note 1, at xvii.

⁶ See Julia F. Costich, *Book Review: Gostin's Public Health Law: Power, Duty, Restraint*, 90 KY. L.J.

history and tradition of public health, which Gostin references,⁷ but there were no current political, social, or scientific developments that compelled a new, comprehensive exposition on the topic. The author himself noted that the field of public health law was “perennially neglected.”⁸ Accordingly, the first edition spent a great deal of time explaining the relevance and redefining the scope of modern public health law. A reviewer of the first edition described Gostin’s book as “a hopeful sign” that public health law perspectives would “come to the fore.”⁹ The first edition had the luxury to stroll through definitions and explanations without the urgency of time or circumstances. At that time, “pressing” public health issues included childhood lead poisoning, antimicrobial resistance, and the aging population,¹⁰ not exactly the sort of hot-button, politically salient concerns that impel people to action.

The revised and greatly expanded second edition¹¹ proceeds more confidently, insistently, and almost impatiently to assert and define its relevance in a world that has become all too familiar with threats to the public’s health and the need for government intervention. Gostin begins the preface with the same rhetorical “Why now?” question but no sooner asks than answers it, “delighted to note . . . that since the last edition of this book, scholarly attention

1083, 1086 (2001) (noting that “public health laws are highly variable across states and tend to be accretions of varying antiquity, large portions of which may be irrelevant to contemporary public health needs”).

⁷ GOSTIN, *supra* note 1, at 9 & n.18 (citing several books and other sources).

⁸ *Id.* at 327 (“Law is a very important, but perennially neglected, tool in furthering the public’s health.”).

⁹ John V. Jacobi, Book Review: Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint*, 31 SETON HALL L. REV. 1089, 1094 (2001).

¹⁰ See David P. Fidler, *Gostin on Public Health Law; Public Health Law: Power, Duty, Restraint*, 1 YALE J. HEALTH POL’Y L. & ETHICS 303, 314 (2001); Jacobi, *supra* note 9, at 1091–93.

¹¹ LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* (2d ed. 2008). The already voluminous first edition weighed in at 328 text pages and over 500 pages total, including tables of contents, lists of tables and illustrations, introductory materials, notes, bibliography, and index. See Costich, *supra* note 6, at 1084–85 (summarizing contents). The revised second edition, with two additional chapters and considerable revisions, expanded discussions, and reorganization, exceeds 500 pages of text alone and approaches 800 pages total. The copious endnotes, detailed index, extensive bibliography, and table of cases and other authorities truly establish the book as a comprehensive encyclopedia of public health law.

to the field of public health law has surged.”¹² In 2000, one had to conjure up examples of public health issues. Today, examples smack us in the face almost daily. Think 9/11 and the massive emergency response that called into service some 11,000 professional rescue workers and volunteer first responders.¹³ Think Anthrax, SARS, smallpox, and the still present fears of bioterrorist attacks. Recall the unprecedented destruction from natural forces of Hurricane Katrina, the Greensburg Tornado, and the Asian Tsunami. Consider the massive resources that government authorities and private industries have spent and continue to spend preparing for pandemic swine flu, avian flu, West Nile virus, and other biological threats. Recall the international scare created when an Atlanta attorney infected with drug-resistant tuberculosis traveled on commercial airline flights in Europe and the United States.¹⁴ Advocates and policymakers regularly invoke principles of, if not the term, public health, when advocating for programs to address obesity,¹⁵ gun violence,¹⁶ and

¹² GOSTIN, *supra* note 11, at xxi-xxii.

¹³ See LLOYD DIXON & RACHEL KAGANOFF STERN, COMPENSATION FOR LOSSES FROM THE 9/11 ATTACKS 53 (2004) (noting that 11,000 New York City firefighters worked on or directly adjacent to the site).

¹⁴ Lawrence K. Altman & John Schwartz, *Near Misses Allowed Man with Tuberculosis to Fly*, N.Y. TIMES, May 31, 2007, at A13, available at <http://www.nytimes.com/2007/05/31/us/31tb.html>. Later reports revealed that the attorney was infected with the less dangerous “multi-drug resistant” strain of the disease, rather than the “extremely resistant” strain originally thought. See Lawrence K. Altman, *Traveler’s TB Not as Severe as Health Officials Thought*, N.Y. TIMES, July 4, 2007, at A11, available at <http://www.nytimes.com/2007/07/04/health/04tb.html?scp=4&sq=&st=nyt>.

¹⁵ See, e.g., New York City Dep’t of Health & Mental Hygiene, *Cardiovascular Disease Prevention; Healthy Heart – Avoid Trans Fat* (announcing final trans fat regulation and providing links to Health Code amendments) available at <http://www.nyc.gov/html/doh/html/cardio/cardio-transfat.shtml>; Charisse Jones & Nanci Hellmich, *NYC Bans Trans Fats in Restaurants*, USA TODAY, Dec. 6, 2006; *For Your Own Good*, N.Y. TIMES, Aug. 3, 2008, at WK2 (noting California’s new law, among others); Jennifer Steinhauer, *California Bars Restaurant Use of Trans Fats*, N.Y. TIMES, July 26, 2008, at A1.

¹⁶ See *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008); Brief for American Public Health Association et al. as Amicus Curaie Supporting Petitioners at 3, 21, *District of Columbia v. Heller*, 128 S. Ct. 1467 (2008) (No. 07-290) (asserting that “[f]irearms have a profound effect on the public’s health in the United States,” and “[i]n this context, the District of Columbia’s decision to focus its firearms regulations on handguns makes public health sense”); Brief of the American Academy of Pediatrics et al. as Amicus Curaie Supporting Petition for Certiorari at 4, *District of Columbia v. Heller*, 128 S. Ct. 1467 (2008) (No. 07-290) (“Handgun-

second-hand smoke.¹⁷ The tragic, catastrophic events and new threats to global health and security laid bare not only the unique role of public health to help during crises but also the crippling shortcomings of our existing public health legal infrastructure. The thesis of Gostin's second edition is no longer What Is Public Health Law and Why We Should Care, but The Power of Public Health Law and What We Now Must Do.

RESTRAINT: THE DOMINANT LIBERAL POSITION

The new world order of public health propels Gostin's second edition but also forces him to reevaluate some of his basic operating premises, namely "the dominant liberal position that individual freedom is by far the preferred value to guide ethical and legal analysis in matters of physical and mental health."¹⁸ That position animated the structure and content of the first edition. He opened the first edition, in Part One, Chapter 2, by grounding public health law in the United States Constitution. He identified specific individual rights protected by the Constitution, which necessarily and appropriately limit the government's public health powers.¹⁹ The first edition advocated, according to one commentator, "a carefully

related injuries and fatalities to children are significant public health problems in terms of both impact on children's physical and mental health, and impact on the cost to the public health system."); Jeffery M Drazen, Stephen Morrissey & Gregory Curfman, *Guns and Health*, NEW ENG. J. MED., July 9, 2008, at 1-2 (citing medical literature demonstrating that closer regulation of guns promotes public health by reducing suicide and homicide, and describing *Heller*: "The Supreme Court has launched the country on a risky epidemiological experiment.").

¹⁷ See, e.g., Jean C. O'Connor et al., Preemption of Local Smoke-Free Air Ordinances: The Implications of Judicial Opinions for Meeting National Health Objectives, 36 J.L. MED. & ETHICS 403, 403 (2008) (noting ongoing challenges to tobacco-related public health concerns, but, as of 2007, all but 16 states adopted some form of indoor smoking ban); see generally James R. Davis & Ross C. Brownson, A Policy for Clean Indoor Air in Missouri: History and Lessons Learned, 13 ST. LOUIS U. PUB. L. REV. 749 (1994) (describing clean indoor air debate); Action on Smoking and Health, State Smokefree Air Laws At-A-Glance, Feb. 9, 2009, <http://www.ash.org/smokingbans.html> (listing states and types of bans). But see German Court Rejects Smoking Bans, BBC NEWS, July 30, 2008, available at <http://news.bbc.co.uk/2/hi/europe/7533132.stm> (responding to challenge by bar owners).

¹⁸ GOSTIN, *supra* note 11, at xxv.

¹⁹ GOSTIN, *supra* note 1, at 65-66 ("When government acts, even for the well-being of the community, it must abide by constitutional constraints.").

constrained and narrowly delineated interventionist role for government . . . when intervention may conflict with the civil liberties of distinct persons.”²⁰ To illustrate his overarching theme, Gostin discussed the canonical public health law Supreme Court case of *Jacobson v. Massachusetts*,²¹ which upheld a City of Cambridge mandatory smallpox vaccination ordinance. For Gostin, the real significance of *Jacobson* was not so much the Court’s approval of the mandatory vaccination law but its establishment of a “floor of constitutional protection” and four specific limits on public health powers.²²

Operating from that premise, the bulk of discussion in the first edition, save introductory materials in Part One (Conceptual Foundations of Public Health Law) and a concluding Part Three with a single chapter on Public Health Law Reform, was devoted to Part Two: Public Health and Civil Liberties in Conflict. Subsequent chapters each addressed a discrete area of public health powers and individual rights in tension, including Chapter 5, on public health information and privacy, Chapter 6, on health communication and freedom of expression, Chapter 7, on immunization and bodily integrity, Chapter 8, on quarantine and freedom of movement and liberty, and Chapter 9, on market regulation and economic freedom. A final Chapter 10 of Part Two focused on the important but thematically misplaced topic of tort law and public health.

In the second edition, Gostin moves off of individual rights as the central organizing principle and predominant theme of his book – and of public health law. The new edition is divided into four rather than three parts, with Public Health and Civil Liberties in Conflict moved back into a discrete Part Three. Part One, Conceptual Foundations, is abbreviated to two chapters. Part Two more broadly identifies various sources of public health law, including the United States Constitution as just one source. Other specifically identified sources include administrative law, or “direct regulation” of public health by government agencies. In the first edition, discussion of

²⁰ Kapp, *supra* note 3, at 585.

²¹ 197 U.S. 11 (1905); GOSTIN, *supra* note 1, at 66–69.

²² GOSTIN, *supra* note 1, at 68 (listing “four standards that I shall call public health necessity, reasonable means, proportionality, and harm avoidance”).

administrative law did not appear until deep in Chapter 9 on economic regulation, which marginalized the exceedingly important, central public health role of federal (think Centers for Disease Control and Prevention (CDC), Food and Drug Administration (FDA), Environmental Protection Agency (EPA), Health and Human Services (HHS), Federal Emergency Management Agency (FEMA) to name a few) and state public health agencies and authorities.²³ Counterbalanced with the direct regulation chapter, Gostin also finds a better fit for the chapter on tort law, as a form of “indirect regulation.” He acknowledges the importance of tort law as a specifically identified source of public health law, rather than a mere afterthought to civil liberties.²⁴ Private litigation has made significant contributions to improving public health, as Gostin illustrates with detailed examples of successful lawsuits against Big Tobacco and similar attempts against firearms manufacturers and purveyors of junk food.²⁵

The most significant, and much needed, addition to the second edition is an entire Chapter 7 in Part Two on Global Health Law. The first edition barely mentioned public health laws outside of the United States, an omission that seems untenable in today’s international marketplace and global political community. Grave threats to domestic public health emanating from foreign terrorism and infectious diseases can migrate from one country to another almost instantaneously through airline and other travel.²⁶

²³ *Id.* at 242–58; see Fidler, *supra* note 10, at 310 (reviewing the first edition and suggesting that discussion of “the administrative state and the regulatory tools of public health agencies struck me as information the reader needed in Part One of the book when Gostin is laying down the basics of public health law”).

²⁴ See generally Elizabeth A. Weeks, Beyond Compensation: Using Torts to Promote Public Health, 10 J. HEALTH CARE L. & POL’Y 27 (2007).

²⁵ See GOSTIN, *supra* note 11, at 204–24.

²⁶ See Fidler, *supra* note 10, at 307 (“Also missing . . . is any perspective that public health in the United States is connected to international and global issues and forces, actors, and rules that complicate the use of law to promote and protect public health.”); see, e.g., Michelle Higgins, *What Travelers Should Know*, N.Y. TIMES, April 28, 2009 (discussing travel risks associated with swine flu outbreak), available at <http://travel.nytimes.com/2009/04/28/travel/28practravel.html>; Centers for Disease Control and Prevention, Travel Health Warning, Travel Warning: Swine Influenza and Severe Cases of Respiratory Illness in Mexico — Avoid Nonessential Travel to Mexico, April 27, 2009, available at <http://www.cdc.gov/travel/content/SwineFluMexico.aspx>

Accordingly, Chapter 7 describes the international health law infrastructure, including the World Health Organization; international trade laws, especially relevant to intellectual property and biotech developments; and international responses with domestic parallels, including pandemic preparedness, privacy and health information, tobacco control, and obesity. Modern public health law is unavoidably transnational, and public health responses will be inadequate if constrained to sovereign borders.

Along with the new global perspective, Gostin confesses his reorientation away from a constitutionally-based individual rights orientation to public health law in the preface to the second edition: "My devotion to civil liberties was particularly strained by events surrounding September 11 and the anthrax attacks, only a year after the first edition of this book was published."²⁷ He goes on to explain that "in this book I question the primacy of individual freedom (and the associated concepts of autonomy, privacy, and liberty) as the prevailing social norm."²⁸ Community needs, our common bond, may compel government action despite the individual interest in being free from economic or personal restraint. The *Jacobson* decision remains a foundational case, and gets an even longer discussion in the second edition's chapter Constitutional Limits on Public Health Powers.²⁹ But Gostin's approach to the case has shifted. He now homes in on the Court's "social compact theory" and staunch defense of government's public health powers, describing *Jacobson* as "a classic case of reconciling individual interests in bodily integrity with collective interests in health and safety."³⁰ The take-home message of *Jacobson* for Gostin's second edition is the defense of public health powers and collective social goals.³¹ The four - now five - specific limits on government power identified in the first edition still merit discussion but are in acknowledged tension with the social compact

²⁷ GOSTIN, *supra* note 11, at xxv.

²⁸ *Id.*

²⁹ *Id.* at 116-28.

³⁰ *Id.*, at 123; *see also Jacobson*, 197 U.S. at 29 ("[I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subject to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand").

³¹ GOSTIN, *supra* note 11, at 126.

theory.³² A new theme emanates, urging us to recognize the necessity of relinquishing some of our hard-fought individual rights in the name of public health.³³ That is a profound paradigm shift for an avowed libertarian scholar—and for a liberal, individualistic society.

Post-9/11 we are all too familiar with major and minor intrusions on civil liberties in the name of public safety. The grossest infractions of bodily integrity and liberty were horrifically depicted to the world in the Guantanamo Bay torture reports.³⁴ On a much more mundane level, air-travelers now unflinchingly accept the inconvenience of removing shoes and Ziploc-bagging four-ounce liquids, and the indignity of having luggage randomly searched and bodies scanned or patted-down in the middle of busy, public airport terminals. We readily succumb to at least those less intrusive breaches of privacy, autonomy, and liberty because we live in fear of terror forces at home and abroad that exceed our individual abilities to protect ourselves and our families. We, like Gostin, have been compelled to recognize our common bond and the necessity of subordinating our individual interests to the welfare of the community.³⁵ In a post-9/11 world, society craves governmental provision of security and seems ready to do (almost) whatever is required to maintain it.

Other noted libertarian scholars, who arguably occupy the opposite end of the political spectrum from Gostin, have similarly questioned the primacy of individual rights in the post-9/11 world. In his 2006 book, *Not a Suicide Pact: The Constitution in a Time of*

³² *Id.* at 126–28 (adding “fairness”); see *supra* note 22 (listing original four limits).

³³ *Id.* at xxv–xxvi (“As members of society in which we all share a common bond, our responsibility is not simply to defend our own right to be free from economic or personal restraint. We also have an obligation to protect and defend the community as a whole against threats to health, safety, and security.”).

³⁴ See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (holding Bush Administration’s military tribunals violated the Geneva Conventions and Uniform Code of Military Justice); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (recognizing government’s power to detain unlawful combatants but holding that detainees who are U.S. citizens have the right to challenge their detention before an impartial tribunal); see also Colum Lynch, *U.N. Draft Decries U.S. on Detainee Treatment*, WASH. POST, Feb. 14, 2006, at A9, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/13/AR2006021301848.html>.

³⁵ See GOSTIN, *supra* note 11, at 8–9.

National Emergency, Richard Posner advocated restriction of individual constitutional rights and broad expansion of executive powers in the name of public safety.³⁶ Posner's audience was primarily other federal judges, whom he effectively admonished to back off and allow the legislative and executive branches to handle the current crisis.³⁷ Posner went much further than Gostin in defending executive powers to compel suppression of individual rights in order to safeguard our nation. He squarely addressed the purported rights of prisoners of war and the Guantanamo Bay controversy, finding "persuasive argument[s]" to support both indefinite detention of suspected terrorists and some forms of torture, deferring to the discretion and moral judgment of the executive branch to decide the appropriateness of those measures.³⁸ Posner's view of constitutionally identified individual rights is flexible, yielding necessarily to the exigencies of the current political and military reality.

POWER: SMART REGULATION

Gostin likely would not go so far in defense of public health powers to impinge on constitutional rights, but he does place increased emphasis on the executive branch and the administrative state, including the new Chapter 5 on Public Health Governance: Direct Regulation for the Public's Health and Safety. The second edition gives administrative law much greater prominence than the first edition, devoting a discrete chapter close to the beginning of the book to the topic. Gostin expressly acknowledges that much of public health law emanates from executive branch agencies, which are charged with broad powers by Congress and state legislatures to

³⁶ Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (2006).

³⁷ *Id.* at 10 ("Fortunately, when national security measures are agreed on by Congress and the president, the need for judicial intervention diminishes."); see also Stephen Reinhardt, *Weakening the Bill of Rights: A Victory for Terrorism*, 106 MICH. L. REV. 963, 963 (2008) (suggesting that Posner "argues that we should repose full confidence in the executive branch to handle the most sensitive constitutional issues of our time") (The author is a federal judge on the U.S. Court of Appeals for the Ninth Circuit.).

³⁸ POSNER, *supra* note 36, at 71 (on detention), 85 (on torture).

implement and enforce regulations in areas of special expertise.³⁹ Public health regulations extend to countless areas of daily life, including transportation, workplace safety, sale of food, public sanitation, consumer products safety, drinking water, infectious disease control, facility inspection, professional licensure, and environmental standards.⁴⁰

The first edition seemed almost reluctant to acknowledge the tremendous power of administrative agencies, focusing narrowly on regulation of property and contract rights. Civil libertarians may more willingly tolerate restrictions on commercial or economic activities than personal freedoms and conduct. After all, free markets and big business tend to impair individual liberties as much if not more than government, and with no salutary objective other than profit-making.⁴¹ Gostin described the view of “[p]ublic health advocates,” without expressly but implicitly including himself, as “opposed to unfettered private enterprise and suspicious of free-market solutions to social problems.”⁴² Further, he characterized the mere recognition of “economic liberty” as “politically charged” and asked (barely able to avoid shouting his own answer), “How important are contract and property rights compared with political and civil liberties?”⁴³ Not very, he concluded, at the chapter’s end: “If government has a reason, based on averting a significant risk to the public’s health, then there appears nothing in the nature of economic liberty that should prevent the state from intervening. . . .”⁴⁴ That summary is a far cry from his very cautious view on government interference with personal civil liberties.

³⁹ GOSTIN, *supra* note 11, at 149 (noting that “administrative agencies form the bulwark for public health activities in the United States”).

⁴⁰ *Id.* at 151.

⁴¹ See Kapp, *supra* note 3, at 586 (noting Gostin’s “basic antagonism, shared by most of the current public health leadership, to private enterprise and free market solutions to social problems”).

⁴² See GOSTIN, *supra* note 1, at 238.

⁴³ *Id.* at 239.

⁴⁴ *Id.* at 267; Kapp, *supra* note 3, at 586 (noting Gostin’s “eager endorsement of vigorous government public health authority to regulate commercial activities,” in “stark contrast to [his] unwillingness to expect either much personal sacrifice by risk-posing individuals on behalf of the public’s health or much personal responsibility for our own health”).

But the second edition stands ready to accept the significant, necessary role of direct regulation of a broad range of conduct, not just commercial activities, affecting public health. From the beginning of Chapter 5, Gostin asserts that “regulation has value because market forces do not always ensure the health and safety of workers, consumers, or the general public” and acknowledges that “the state has an abiding interest in effective, efficient, and economical interventions to improve the public’s health.”⁴⁵ The chapter then traces the long history of public health agencies at the federal, state, and local levels. He provides a nice primer on administrative law, describing the unique posture of executive branch agencies as wearing all “three hats” of government power – executive, legislative, and judicial – and agencies’ interactions with other branches of government through enabling legislation, shared enforcement duties, and judicial review.⁴⁶ Gone is the first edition’s tone that government regulation is desirable, if at all, when it targets insidious business practices and so-called “economic liberty.” In Gostin’s new edition, he admonishes readers that the prevailing “antigovernment narrative” of agency inefficiency, intrusion, and self-dealing is, if not unwarranted, at least oversimplified. He notes that we rely on administrative agencies “to address important social problems” and “ensure basic necessities,” from clean air to efficacious vaccines.⁴⁷ The new chord Gostin strikes is that regulation, if “smartly” implemented, and perhaps including a healthy dose of public-private partnership, may be a very good thing for the public’s health.⁴⁸

Further indication of Gostin’s increased acceptance of the power of public health authorities is his own professional role in legal preparedness efforts following 9/11, which he discloses in the preface to the second edition. Gostin served as primary drafter of the Model State Emergency Health Powers Act (MSEHPA), a CDC initiative that encourages states to enact legislation expanding their powers to respond to terrorism and other public health

⁴⁵ GOSTIN, *supra* note 11, at 147–48.

⁴⁶ *Id.* at 166–71.

⁴⁷ *Id.* at 178, 172.

⁴⁸ *Id.* at 146–49 (defining “smart regulation” and “new governance” theories).

emergencies.⁴⁹ MSEHPA drew considerable controversy from civil libertarians because it advocated broad state power to track suspected infected patients, compel testing and treatment, conscript health care workers, compel reporting of health information, and condemn private property.⁵⁰ Gostin and others defended MSEHPA as a necessary intrusion on civil liberties and noted that the model act includes careful safeguards against governmental abuse of power.⁵¹ Gostin does not specifically describe MSEHPA in the new edition but identifies other terrorism-driven legislation, such as Project Bioshield, which increases federal authority to ensure availability of vaccines against potential bioterrorism threats, perhaps at the expense of patient safety and individual compensation for harm.⁵²

Outside of the national security context, Gostin's shift toward a more communitarian view of public health is explicit in the new edition of *Public Health Law: Power, Duty, Restraint*. In particular, he recognizes and defends recent changes in policies regarding individuals infected with HIV and AIDS. When the disease emerged

⁴⁹ *Id.*, at xxv (noting his role as drafter); The Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities, Model State Emergency Health Powers Act (MSEHPA), Draft for Discussion (Dec. 21, 2001), available at <http://www.publichealthlaw.net/MSEHPA/MSEHPA.pdf>.

⁵⁰ GOSTIN, *supra* note 11, at xxv (noting that "MSEHPA, in an era of deep concern about terrorism and civil liberties, became a lightning rod for debates about public health preparedness and conformance with the rule of law"); see, e.g., Daniel M. Fox, *Populations and the Law: The Changing Scope of Health Policy*, 31 J.L. MED. & ETHICS 607, 611 (2003) (discussing objections to broad public health powers); Daniel S. Reich, *Modernizing Local Responses to Public Health Emergencies: Bioterrorism, Epidemics, and the Model State Emergency Health Powers Act*, 19 J. CONTEMP. HEALTH L. & POL'Y 379, 388 (2003) (discussing balance between "individual's legitimate expectation of privacy and the public health benefits to society as a whole").

⁵¹ Lawrence O. Gostin, *When Terrorism Threatens Health: How Far Are Limitations on Personal and Economic Liberties Justified?*, 55 FLA. L. REV. 1105 (2003); Lawrence O. Gostin, *The Model State Emergency Powers Act: Public Health & Civil Liberties in a Time of Terrorism*, 13 HEALTH MATRIX: J.L. & MED. 3, 25-27 (2003); Lawrence O. Gostin, *Public Health Law In An Age of Terrorism: Rethinking Individual Rights and Common Goods*, HEALTH AFFAIRS, Nov.-Dec. 2002, at 79; see also Costich, *supra* note 6, at 1087-88 (discussing MSEHPA as illustration of Gostin's approach to uniform, statutory development and updating of states' public health laws, and noting provisions of the model act balancing individual rights and public health needs).

⁵² Project Bioshield Act of 2004, Pub. L. No. 108-276 (2004); GOSTIN, *supra* note 11, at 391-92 (describing legislation that fast-tracks availability of vaccine countermeasures and provides liability protection for manufacturers).

in the 1980s, persons living with HIV/AIDS faced great potential for stigma, ostracization, and discrimination, concerns that led to public health policies strongly protective of individual rights. The patient-rights approach persisted even in the face of demonstrable public health benefits of more invasive measures, including routine screening, partner-tracing, and notification.⁵³ Gostin highlights a recent change in HIV/AIDS policy. In light of scientific and social advances, public health authorities, including the CDC, Institute of Medicine, and “[s]cholars have wrestled with the question of whether the civil rights paradigm is still justified.”⁵⁴ Routine, early screening of individuals, especially pregnant women and newborns, even before signs of infection are apparent, can promote early treatment and prevention of the disease.⁵⁵ Such interventions have been more widely adopted, despite enduring controversy.

Certainly, arguments in favor of mandatory AIDS screening of infants are not analogous to arguments in favor of torture of detainees, but Gostin’s underlying premise is not so dissimilar from Posner’s: a new reality requires new legal responses. Individual rights must, at times, yield to communal security, health, and welfare interests. Gostin’s second edition makes clear that communitarian needs and restrictions on individual rights are by no means limited to national emergencies but are the foundation of public health law. As individuals, we can no better protect ourselves from terrorist attacks and recover from natural disasters than we can eradicate contagious diseases and protect natural resources from depletion.⁵⁶ The rights of the collective and power of the government are foundational to Gostin’s new definition of public health law.

⁵³ See GOSTIN, *supra* note 11, at 404–07 (tracing the shift in AIDS policy from civil liberties approach to public health model); see also Kapp, *supra* note 3, at 585 (noting that “Gostin appears to reject disease screening programs that target high-prevalence population groups, even while conceding the cost-effectiveness of this approach”).

⁵⁴ GOSTIN, *supra* note 11, at 405.

⁵⁵ *Id.* at 407–08.

⁵⁶ *Id.* at 9 (urging that “no single individual or group of individuals can ensure his or her health. Meaningful protection and assurance of the population’s health require communal effort.”).

DUTY: THE RIGHT TO HEALTH

The tension between individual rights and governmental power animates much of public health law as well as current health care reform debates. The United States has a long history of viewing health as a matter of individual concern, involving a relationship between patient and physician and, more recently, patient and insurer.⁵⁷ That view more accurately describes traditional notions of health and health law, as distinct from public health and public health law.⁵⁸ Gostin's project in both editions of *Public Health Law: Power, Duty, Restraint* is to spell out a distinct field of public health law.⁵⁹ Having largely achieved that mission in the first edition, the second now seeks to apply public health paradigms to social problems beyond the traditional realms of infectious disease,

⁵⁷ See, e.g., Joseph M. Boyle, Jr., *The Concept of Health and the Right to Health Care*, 3 SOC. THOUGHT 5, 5 (Summer 1977) (noting common perception that "being healthy is primarily a matter of individual responsibility"); Yvonne Denier, *On Personal Responsibility and the Human Right to Health Care*, 14 CAMBRIDGE Q. OF HEALTHCARE ETHICS, 224, 224 (2005) (discussing "role of personal responsibility in healthcare," noting, "[o]n the one hand, it is reasonable to hold people responsible for the consequences of their actions"); see also Jonathan Oberlander, *Who Pays? Who Benefits? Distributional Issues in Health Care*, 60 LAW & CONTEMP. PROBS. 245, 252 (2006) (noting that "American political culture values liberty over equality, cherishes markets and individual responsibility over government and social solidarity").

⁵⁸ GOSTIN, *supra* note 11, at xxi (distinguishing a book on public health law from books "concerned principally with medicine and personal health care services," which are "only one contributor to health, and probably a relatively small one at that"); Jacobi, *supra* note 9, at 1089 (noting that "the tools of health law, focused on bilateral disputes over health finance, medical injury, and patients' rights, are not well suited to the analysis of population health issues"); see also Scott Burris, *The Indivisibility of Public Health: Population-Level Measures in Politics of Market Individualism*, 87 AM. J. OF PUB. HEALTH 1607-10 (1997) (defining "health" as a "personal, medical matter, a state of freedom from pathology achieved by an individual through the mediation of a doctor" and "public health, by contrast" as "an attribute of communities in social and physical environments," which "ideally, includes not just a high level of well-being for some but its even distribution throughout a society") (excerpted in GOSTIN, *supra* note 1, at 41-47); Andrew W. Siegel, *The Jurisprudence of Public Health: Reflections on Lawrence O. Gostin's Public Health Law*, 18 J. CONTEMP. HEALTH L. & POL'Y 359, 361-62 (2001) (describing Gostin's distinction, "Public health law is concerned with the state's role in advancing the health of the community, whereas health care law is concerned with the 'microrelationships between health care providers and patients.'").

⁵⁹ See Jacobi, *supra* note 9, at 1095 (suggesting that Gostin struggled to define the dividing line between healthcare and public healthcare, and accordingly defined "a distinct and rather narrow discipline called public health law").

workplace safety, urban sanitation, and the like. As he states: "With this [second edition] book I hope to provide a fuller understanding of the varied roles of law in advancing the public's health."⁶⁰ One such new role for public health law may be health insurance reform.⁶¹

The traditional view of health and healthcare in the United States, associated with Senator John McCain and other conservative policymakers, relies on market principles of competition and individual choice to guide health policy. Healthcare providers and health insurance plans compete for customers. McCain's plan would have moved the country away from its anachronistic, historical reliance on an employer-based health insurance system, toward an individual health insurance market, by shifting tax incentives from employers to individuals.⁶² Deregulating the private insurance market and allowing individuals to comparison-shop freely across state lines for health insurance plans, as they do for any other consumer products, was supposed to make health insurance more accessible and affordable.⁶³ That approach emphasizes individual responsibility for healthcare spending and decision-making and minimizes the role of government.

Another view, associated with President Barack Obama and liberal policymakers, shifts greater responsibility to the government to provide health insurance to individuals who are unable to obtain coverage through the market. Many people obtain affordable,

⁶⁰ GOSTIN, *supra* note 11, at 4.

⁶¹ See Jacobi, *supra* note 9, at 1090-91 (suggesting ways that public health perspective can shift health insurance reform debate).

⁶² See David Blumenthal, Election 2008: Primum Non Nocere—The McCain Plan for Health Insecurity, *NEW ENG. J. MED.*, Oct. 21, 2008, at 1645, 1646; Jonathan Oberlander, Election 2008: The Partisan Divide - The McCain and Obama Plans for U.S. Health Care Reform, *NEW ENG. J. MED.*, Aug. 21, 2008, at 781, 781; Mark V. Pauly, Blending Better Ingredients for Health Reform, *HEALTH AFFAIRS*, Sept. 16, 2008, at w482, w484, web exclusive available at <http://content.healthaffairs.org/cgi/reprint/27/6/w482>.

⁶³ See Thomas Buchmueller et al., *Cost Coverage Implications of the McCain Plan to Restructure Health Insurance*, *HEALTH AFFAIRS*, Sept. 16, 2008, at w742, w473, available at <http://content.healthaffairs.org/cgi/reprint/27/6/w472>; see similarly Health Care Choice Act of 2005, H.R. 2355, 109th Cong. (2005); S. 1015, 109th Cong. (2005) (proposed legislation that would allow health insurers to sell individual health insurance policies in any state without being required to comply with insured's home state insurance laws); Elizabeth A. Pendo, *The Health Care Choice Act: Individual Insurance Market and the Politics of "Choice,"* 29 *W. NEW ENG. L. REV.* 473 (2007) (describing same).

comprehensive coverage through their employers,⁶⁴ but that avenue does not work for elderly, disabled, children, unemployed, and many other people whose employers do not offer health plans. Under Obama's and similar plans, existing public benefits programs, such as Medicaid and the State Children's Health Insurance Program (SCHIP), would be expanded to cover more people, and a new government health insurance program, modeled on Medicare or the health insurance program for federal employees, would be added.⁶⁵ The remaining private market for health insurance, including both employer-based group plans and individual policies, would be more closely regulated to protect consumers.⁶⁶ That approach recognizes government's responsibility to protect individuals and ensure access to healthcare or at least health insurance.

Gostin advocates a view closer to Obama's, that is, government has the power and, more importantly, the duty to safeguard the public's health.⁶⁷ His project for the second edition is to show "that law can be an essential tool for creating conditions for people to live healthier and safer lives."⁶⁸ Within that objective, providing government health insurance for those who cannot otherwise obtain it and regulating the content of certain insurance policy provisions seem incredibly modest proposals. A broader public health view advocates not merely government provision of essential medical care

⁶⁴ See Joseph R. Antos, *Symptomatic Relief, But No Cure – The Obama Health Care Reform*, NEW ENG. J. MED., Oct. 21, 2008, at 1648; Victor R. Fuchs, *Election 2008: Three "Inconvenient Truths" about Health Care*, NEW ENG. J. MED., Oct. 23, 2008, at 1749, 1750 (noting that more than half of insured Americans obtain coverage through employers).

⁶⁵ See Joseph Antos et al., *The Obama Plan: More Regulation, Unsustainable Spending*, HEALTH AFFAIRS, Sept. 16, 2008, at w462, w463–64; Jonathan Oberlander, *Health Care 2009: Great Expectations – The Obama Administration and Health Care Reform*, NEW ENG. J. MED., Jan. 27, 2009, at 321, 322; Oberlander, *supra* note 62, at 782; see similarly Michael Sparer, *Health Care 2009: Medicaid and the Path to National Health Insurance*, NEW ENG. J. MED., Jan. 27, 2009, at 323, 324–25 (advocating Medicaid expansion).

⁶⁶ See Antos et al., *supra* note 64, at w462; Pauly, *supra* note 62, at w486–87 (describing modified community rating and guaranteed renewal aspects of Obama plan).

⁶⁷ GOSTIN, *supra* note 11, at 5.

⁶⁸ *Id.* at 4; see similarly INSTITUTE OF MEDICINE, *THE FUTURE OF PUBLIC HEALTH* 19 (1988) ("Public health is what we, as a society, do collectively to assure the conditions for people to be healthy.").

but government assurance of healthy and safe conditions for living.⁶⁹ In Gostin's revised and expanded communitarian orientation to public health law, government's role is not merely to stay out of private conduct unless absolutely necessary, but rather to step in and improve our circumstances.⁷⁰

Gostin is not the first to propose the broader view of public health law that aims more deeply at the underlying conditions for health, including social problems such as poverty, lack of education, and discrimination.⁷¹ Recent public discourse acknowledges that individual health may have both social determinants and social costs.⁷² Translated into the language of healthcare reform, that acknowledgement means that government has a duty not just to make sure that everyone has a health insurance card but to improve environmental and social conditions that impair optimal health. Gostin offers Hurricane Katrina as one example of this "social justice" view of public health. The gross failure of authorities to respond to that catastrophe in so many regards,⁷³ included failure "to act expeditiously and with equal concern for all citizens, including the poor and less powerful."⁷⁴ As other commentators summarized, "Disasters are never strictly 'natural'; they invariably stem from social as well as environmental factors."⁷⁵ A complete, "modern" public health response to Katrina would both examine the

⁶⁹ GOSTIN, *supra* note 2, at 2-3 (quoting and parsing IOM definition), 97 (distinguishing "negative or defensive" rights to be free from government abuse or overreaching from "positive" rights that place obligations on government to act for the common good).

⁷⁰ GOSTIN, *supra* note 11, at 5-11.

⁷¹ *Id.* at 21-23.

⁷² See, e.g., MICHAEL MARMOT & RICHARD G. WILKINSON, SOCIAL DETERMINANTS OF HEALTH (2d. ed. 2006); Norman Daniels et al., *Why Justice is Good for Our Health: The Social Determinants of Health Inequalities*, DAEDALUS, vol. 128, no. 4, 215 (Fall 1999); GOSTIN, *supra* note 11, at 35 (citing sources).

⁷³ See Hurricane Katrina: A Nation Still Underprepared, Executive Summary, Report of the Senate Committee on Homeland Security and Governmental Affairs (May 2006), available at <http://www.npr.org/documents/2006/apr/katrina/execsummary.pdf>.

⁷⁴ GOSTIN, *supra* note 11, at 22-23; see generally DANIEL A. FARBER & JIM CHEN, DISASTERS AND THE LAW 109-30 (2006) (chapter on "Social Vulnerabilities," suggesting that "Hurricane Katrina unfolded as a tragedy of race and class, of official incompetence and social injustice").

⁷⁵ FARBER & CHEN, *supra* note 74, at 109.

underlying causes of the unique vulnerabilities of the affected population and address recovery efforts at improving housing, employment, social support, healthcare, and environmental safety of the victims.

Another example of the broader reach of public health law is the obesity epidemic, which Gostin discusses in detail in the final Part Four, Chapter 13 (Concluding Reflections on the Field) as a “capstone” for the various themes in the new edition. It is well-documented that obesity is associated with a host of chronic and severe medical conditions, including diabetes, heart disease, hypertension, stroke, and certain cancers.⁷⁶ Obesity has also been shown to disproportionately affect racial minorities and the poor. A government hands-off, private market approach to the problem would leave it up to individuals to make choices about what foods to consume and activities in which to engage. But Gostin suggests that leaving already socially disadvantaged individuals to fend for themselves “will almost certainly perpetuate health disparities” inasmuch as poor, especially urban, environments offer little opportunity for safe recreation, limited availability of fresh, healthy food, and targeted marketing of fast food, tobacco, and alcohol. Those underlying determinants of health must be addressed before health improvements will be realized. Gostin offers a non-exhaustive list of how law can be used as a tool to create healthier, safer lives, including advertising restrictions, school lunch programs, educational campaigns, public parks and sidewalks, food prohibitions, weight monitoring, and tort litigation.⁷⁷ He also raises the global public health implications of the obesity problem.⁷⁸ Social determinants of health also operate at the transnational level, as the developed world gorges at the expense of the developing world’s starvation and industrialized nations export various trappings of their “progress,” including “McDonald’s, Burger King, KFC, and Dunkin’ Donuts.”⁷⁹

The most successful obesity lawsuit to date, modeled on the

⁷⁶ GOSTIN, *supra* note 11, at 498 (citing sources).

⁷⁷ *Id.* at 504–13.

⁷⁸ *Id.* at 238–39.

⁷⁹ *Id.* at 239 (also reprinting political cartoon on international implications of obesity).

successful litigation campaigns against tobacco manufacturers, amply demonstrates the relevance of social determinants of health.⁸⁰ The lead plaintiffs were poor, adolescent black females who sued McDonald's on theories of misrepresentation of the food's health benefits and inadequate disclosure of its addictive qualities. One child, Jazlyn Bradley, when she was not in a homeless shelter, lived with her nine siblings in an overcrowded, dilapidated apartment with no kitchen sink and no place to store or prepare food. She ate McDonald's up to three times a day because it was cheap and close to her home.⁸¹ If the government does nothing, leaving Jazlyn to her unfettered choices, Jazlyn will almost certainly become obese and develop serious health problems. The new frontier of public health law urges that government has a duty to intervene and improve the social, racial, and environmental conditions that underlie Jazlyn's nascent health problems.

The culmination of Gostin's broad view of public health law seeks recognition of health as a fundamental human right, which can be protected and promoted through legal tools. "The public's health is so instinctively essential that human rights norms embrace health as a basic right."⁸² The concept of an affirmative right to health remains controversial but is well grounded in international human rights standards.⁸³ The "rights" view is consistent with the theme that

⁸⁰ *Perlman v. McDonald's Corp.*, 396 F.3d 508 (2d Cir. 2005) (allowing claim on state deceptive trade practices act to proceed); see GOSTIN, *supra* note 11, at 213–15, 508 (discussing case).

⁸¹ See *Perlman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 519 (S.D.N.Y. 2003); Regina Austin, *Super Size Me and The Conundrum of Race/Ethnicity, Gender, and Class for the Contemporary Law-Genre Documentary Filmmaker*, 40 LOY. L.A. L. REV. 687, 697 (2007).

⁸² GOSTIN, *supra* note 11, at 8 (citing sources); see also *id.* at 278–83 (listing various international agreements, regional accords, and charters).

⁸³ See Eleanor D. Kinney, *Recognition of the International Human Right to Health and Health Care in the United States*, 60 RUTGERS L. REV. 335, 353–56 (2008) (discussing "right to health" under UDHR and other international declarations, as well as U.S. Constitution and state laws); Mason Meier & Larisa M. Mori, *The Highest Attainable Standard, Advancing a Collective Human Right to Public Health*, 37 COLUM. HUM. RTS. L. REV. 101, 112–15, 121–24 (2005) (distinguishing "health" and "public health" rights); Jennifer Prah Ruger, *Governing Health*, 21 HARV. L. REV. F. 43 (May 2008) (supporting "right to health and health care" as "ethical demand," realized through "public moral norms"); George P. Smith, II, *Human Rights and Bioethics: Formulating a Universal Right to Health, Health Care, or Health Protection?* 38 VAND. J. TRANSNAT'L L. 1295, 1313–17 (2005) (defining right to health, healthcare, or health promotion in the global context).

government has affirmative obligations to provide health, or at least minimal healthcare, for citizens. But Gostin would go further: nations' obligations "are not limited to medical care but extend to insurance of the socioeconomic conditions necessary for people to lead healthy and safe lives."⁸⁴ The significance of recognizing a "right" to health, and a duty on behalf of government to provide it, is that nations "can be held accountable for violations."⁸⁵ Enforceability of international law is a dubious proposition, especially when the right is articulated in non-binding, merely aspirational standards, such as the Universal Declaration of Human Rights (UDHR).⁸⁶ Nor does the United States Constitution or other sources of domestic law explicitly recognize an enforceable "right to health."⁸⁷ But the absence of a specifically identified, legally cognizable right should not stop lawmakers from affirmatively addressing public health concerns as a matter of sound policy. Gostin's second edition of *Public Health Law: Power, Duty, Restraint* offers not only an encyclopedic source of public health laws but a sound prescription for health care reform.

⁸⁴ GOSTIN, *supra* note 11, at 278.

⁸⁵ *Id.* at 278.

⁸⁶ *See id.* at 278 (citing Article 25 of UDHR); GOSTIN, *supra* note 2, at 100-01 (noting that the United Nations General Assembly adopted the UDHR in 1948 as a "statement of aspirations" and that member nations' legal obligations would arise through formal treaties and domestic laws).

⁸⁷ *See* Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care* (June 12, 2009) (unpublished manuscript, on file with author) (concluding that no right to healthcare exists in U.S. Constitution but examining state constitutional provisions arguably creating such a right). *But see* Mark Earnest & Dayna Bowen Matthew, *A Property Right to Medical Care*, 29 J. LEGAL MED. 65 (2008) (tracing debate in United States about affirmative right to healthcare, evaluating various proposed constitutional and other legal identifications of the right, ultimately advocating a property right to medical care); Alan Jenkins & Sabrineh Ardalan, *Positive Health: The Human Right to Health Care under the New York Constitution*, 35 FORDHAM URB. L.J. 479 (2008).