

## Gostin on Public Health Law

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*Public Health Law: Power, Duty, Restraint.* By Lawrence O. Gostin. Berkeley: University of California Press and the Milbank Memorial Fund, 2000. Pp. 518.

When I was invited to review Professor Larry Gostin's new book, *Public Health Law: Power, Duty, Restraint*,<sup>1</sup> I immediately said yes despite the fact that my schedule could scarcely bear another deadline. I had the privilege in May 1999 to read and comment on some early chapters of Gostin's book for the Milbank Memorial Fund, which is a co-publisher of the book.<sup>2</sup> Those early chapters whet my appetite for the completed book, which has now been published.<sup>3</sup>

Before I had read a single word of the final product, I was primed to consume what promised to be an outstanding contribution to understanding the complex relationship between public health and law. Gostin's earlier scholarship on public health law has proved important to my efforts to address the neglected relationship between international law and public health. I could not pass up the opportunity to devour and digest Gostin's book and do my part to disseminate the learning it contains.

The book's publication coincides well with this *Journal's* debut. The *Journal* is a unique product of the collaborative energies of faculty and students from medicine, public health, and law—all disciplines for which Gostin has been a teacher and colleague. Gostin intends for his book to speak to the many disciplines affected by, and struggling to contribute to, the pursuit of healthier human populations. And when Gostin speaks, people listen.

Gostin's book further arrives at a timely moment because concern about the status of public health in the United States seems to be increasing. Concern about emerging and re-emerging infectious diseases, the growing threat of antimicrobial resistance, the implications of the West Nile virus outbreak in the Northeast, and fears about bio-terrorism have all concentrated attention in recent years on the fragmented and underfunded condition of public health in the United States. While public

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health officials have been sounding warnings for years, others, such as journalist Laurie Garrett,<sup>4</sup> have now picked up the message of alarm, and are making the case for public health to a larger audience in order to stimulate remedial action.

In this time of ferment and concern for public health in the United States, *Public Health Law* makes a seminal contribution that, I predict, will dominate for the foreseeable future how students and scholars from multiple disciplines approach the role of law in American public health.

### I. LAW AND THE PUBLIC'S HEALTH IN THE UNITED STATES

The basic message of *Public Health Law* is that "law is essential for creating the conditions for people to lead healthier lives."<sup>5</sup> Many people, including health-care professionals, often view medicine and law as antagonistic disciplines. But this popular perception confuses health care and public health. In his Preface, Gostin points out that the contemporary study of the relationship between law and health is dominated by "medicine and personal health care services—clinical decision-making, delivery, organization, and finance."<sup>6</sup> Gostin argues that the population-health perspective provided by public health has been missing in the work done on health care law or health law.<sup>7</sup> Gostin designed his book to address this neglect.<sup>8</sup>

Curiously, although Gostin states that public health law has been "perennially neglected" as a field of study, he does not explain why such neglect occurred and what the consequences are for public health.<sup>9</sup> One could read the book and conclude that law as an instrument of public health has not been neglected but has instead been used extensively for decades at all levels of government in a wide variety of contexts to promote and protect the public's health. After all, Gostin identifies an impressive collection of legal issues in public health that governments and courts have been addressing for a long period of time. In fact, such a book could not have been written if there was not already a large body of law in existence. What, then, does Gostin mean when he says that public health law has been neglected?

The reader must discern the reasons why public health law has been neglected from the structure and argument of the book: Public health law has been neglected because of its broad, diffuse scope and immense complexity; and this neglect has produced law that compromises the ability of the United States to balance properly public health objectives and individual rights and liberties. The neglect that public health generally has endured for the past few decades may also contribute to the neglect of public health law, but Gostin does not explore this important factor.

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When Gostin refers to the perennial neglect of public health law, he also means that neither legal nor public health scholars or practitioners have ever really conceived of “public health law” as a distinct field of inquiry. In American democratic society, law and legal frameworks shape every endeavor. Public health is no different. But, while many areas of social action have attracted significant conceptual and practical legal attention from scholars and practitioners, public health has largely been ignored as a field of legal analysis. The neglect is primarily intellectual rather than practical because governments and public health agencies have continued to rely on and add to public health law in their everyday activities.

But, when we realize how much law shapes public health as a social value and determines governmental activity in this area, the intellectual neglect of public health law means that we lack a framework to understand how and why law is critical to the objective of public health. We see the individual trees but not the forest—the larger ecosystem in which law and the protection of population health intertwine in ways that we should understand given the importance of the values of the rule of law and public health. While I would have liked Gostin to explore why public health law has been neglected, this desire does not detract from his correct identification of the problem and his ambitious attempt to organize, explain, analyze, and seek to improve how the public health law ecosystem functions.

It is important to emphasize the enormity of the task Gostin set himself in addressing the lack of interest in public health law in the United States. The first challenge relates to the concept of “public health,” which public health practitioners define very broadly. Gostin cites the Institute of Medicine’s definition of “public health” as “what we, as a society, do collectively to assure the conditions for people to be healthy.”<sup>10</sup> This definition reveals that public health cannot be narrowly viewed as, for example, merely the low prevalence of infectious diseases in society. Public health is concerned with the whole panoply of possible threats to human health, which gives public health law an enormous scope.

The second challenge arises in explaining how the American legal system—a very complicated, sophisticated, textured machine—works in the context of public health. The machinery defies simplification, even before one considers sorting out how the machinery operates in the vast terrain of public health. Thus, the ambition in Gostin’s book is quite breathtaking.

I stress the enormity of the task because some people, both in public health and law, may find that Gostin does not analyze with sufficient depth many of the public health and legal issues, principles, and problems the

book addresses. Lawyers may find themselves hungry for more detailed legal analysis, while public health experts may find that the law overshadows public health concepts and principles. These understandable reactions should be tempered with an appreciation of Gostin's attempt to conceptualize public health law as a discrete field valuable to both the legal and public health professions.

Gostin defines "public health law" as follows:

Public health law is the study of the legal powers and duties of the state to assure the conditions for the people to be healthy (e.g., to identify, prevent, and ameliorate risks to health in the population) and the limitations on the power of the state to constrain the autonomy, liberty, proprietary, or other legally protected interests of individuals for the protection or promotion of community health.<sup>11</sup>

Chapter 1 of the book explores this definition to delineate the conceptual boundaries of the role of law in public health—or what Gostin calls the theory of public health law. This theory identifies five essential features of public health law: (1) the special responsibility of the government for public health activities; (2) the focus on the health of populations; (3) the relationship between the state and the population or between the state and individuals or private enterprises that place the greater community at risk; (4) the provision by the government of population-based services grounded in the scientific methodologies of public health; and (5) the power of the government to coerce individuals and private enterprises in order to protect the larger community from health risks.<sup>12</sup>

One of the great strengths of the book is that it grounds the study of public health law in the larger framework of the rule of law in the United States. As Gostin argues:

Public health law should not be seen as an arcane, indecipherable set of technical rules buried deep within state health codes. Rather, public health law should be seen as broadly as the authority and responsibility of the government to assure the conditions for the population's health. As such, public health law has transcending importance in how we think about government, politics, and policy in America.<sup>13</sup>

Gostin successfully demonstrates the fundamental duty governments have at the local, state, and federal levels to protect and promote the public's health and how central law is to the fulfillment of this governmental duty. The book serves not only as an overview of the role of law in public health but also as an exploration of the rule of law's

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importance to the American way of government.

Readers who are knowledgeable about the current crisis in American public health might, however, scratch their heads when Gostin argues that public health law has transcending importance in U.S. politics and governance. The gradual crumbling of the U.S. public health system provides weak evidence that anything connected to public health is transcendent in the United States. Clearly Gostin's argument is normative not descriptive, but these observations suggest that Gostin could have given a more contemporary public health context to support his aspiration "to create a record of the field of public health law at the turn of the millennium."<sup>14</sup>

Also missing from the book's theory of American public health law 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.<sup>15</sup> In a time when local, national, and international public health officials and experts are struggling to come to grips with what has been called the globalization of public health, it was strange to see no discussion in *Public Health Law* of matters beyond American shores. For example, Gostin argues that constitutional, statutory, administrative, and tort law represent the "analytical methods and tools of public health law."<sup>16</sup> Conspicuously absent from the methods and tools of American public health law is international law. The United States is a party to many treaties that directly and indirectly relate to public health, including the Constitution of the World Health Organization (WHO), the International Health Regulations, the World Trade Organization, North American Free Trade Agreement, and international legal agreements on environmental protection. The United States is also a key player in the development of new international law, such as WHO's proposed framework convention on tobacco control. Why is international law not part of the theory and practice of American public health law?<sup>17</sup>

In some respects, Gostin's decision not to include international and global issues was refreshing because it communicated the continuing importance of local, state, and national efforts on public health and did not treat the globalization phenomenon in public health through the repetition of shallow globo-rhetoric. Still, Gostin's approach treats public health law in the United States as if America is isolated and unaffected by the public health problems in, and threats from, other countries. It does not seem prudent to me "to provide an honest account of the doctrine and the controversies facing the field [of public health law] in the year 2000"<sup>18</sup> without including any analysis of international legal issues directly relevant

to public health.

## II. THE STRUCTURE AND DYNAMICS OF AMERICAN PUBLIC HEALTH LAW

Part One of *Public Health Law* analyzes the conceptual foundations of American public health law. After the definition and theory of public health law are provided in Chapter 1, Gostin gives an overview of the structure and dynamics of the American system of public health law. Chapter 2 (Public Health in Constitutional Design) and Chapter 3 (Constitutional Limits on the Exercise of Public Health Powers: Safeguarding Individual Rights and Freedoms) explore the structure of American public health law through the governing framework established by the U.S. Constitution. The key structural elements Gostin examines in Chapters 2 and 3 are federalism, the separation of powers, and notions of limited government to protect individual liberties.

Grounding public health law in the American constitutional system is critical because the governmental duties to assure the conditions necessary for a healthy population are divided, distributed, and disciplined by the Constitution. Gostin effectively communicates the complicated constitutional principles that guide the pursuit of public health. If I have any quarrel with the way Gostin structures his analysis of federalism, it is with his treatment of state public health powers after his analysis of the federal role in public health. Under the Constitution, direct public health powers belong to state governments, not the federal government; most public health policy, law, and expenditures originate, as a result of the constitutional design, at the state level. Gostin's analysis in Chapter 2 gives pride of place to the federal government's public health powers and role.<sup>19</sup> Gostin does, however, discuss the conflicts that federalism creates in public health between the federal government and state governments by analyzing the *Lochner* era through to the Supreme Court's more recent decisions (*Lopez*,<sup>20</sup> *New York*,<sup>21</sup> and *Seminole Tribe*<sup>22</sup>) that contain a "new federalism" that limits more the power of the federal government to regulate intrastate activities.

Gostin's analysis of the federal government's powers in the public health context focuses on the constitutional authorities to tax, spend, and regulate interstate commerce. The federal government's powers to regulate commerce with foreign nations, make treaties with foreign nations, and conduct the nation's foreign policy are important powers in the public health context that Gostin does not mention. It is these federal powers that have sustained the United State's involvement in international public health efforts since the nineteenth century, including U.S. leadership and participation in the creation and operation of the Pan

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American Sanitary Bureau, Office International d'Hygiène Publique, and the WHO. Gostin's failure to mention these federal powers in the constitutional design reflects the book's lack of an international perspective on American public health law.

Chapter 3 expands on the notion of limited government by analyzing the constraints the Constitution places on government power in order to protect individual rights, and how these limits affect the pursuit of public health. The tension between the government's power to act on behalf of the public's health and the constitutional protection of individual rights dominate *Public Health Law*. Not only does Gostin explore this tension conceptually in Chapter 3, but he also focuses on this issue in Part Two of the book, which contains six chapters. He also raises this theme in other chapters.<sup>23</sup> More than half of *Public Health Law* is, thus, devoted to the public health-individual rights tension.

In the Preface, Gostin questions "the primacy of individual freedom (and its associated concepts—autonomy, privacy, and liberty) as the prevailing social norm."<sup>24</sup> He also questions the assertion associated with the late Jonathan Mann that respect for human rights and public health are synergistic.<sup>25</sup> While Gostin admits that there is validity in the Mannesque position, he asserts that public health and individual rights "sometimes cannot coexist."<sup>26</sup> I return to this issue in my discussion of Part Two of the book below.

The final chapter of Part One—Chapter 4 (Public Health Regulation: A Systematic Evaluation)—provides an overview of the dynamics of public health law in the United States. While Chapters 2 and 3 were mainly descriptive, Chapter 4's focus on public health regulation is prescriptive because Gostin develops criteria to guide policymakers and courts in their respective considerations of public health law. Because public health regulation involves trade-offs between public goods and private interests, governments must justify intervention to promote population health. Gostin identifies three classical justifications for public health intervention: (1) the harm principle—competent adults have freedom of action unless they pose a risk to others; (2) the protection of incompetent persons, such as children or the mentally ill, to ensure their health and safety; and (3) the regulation of self-regarding behavior, or paternalism.

Gostin argues that the state bears the burden of justification and has to demonstrate the existence of significant risk to the public health in order to intervene. He explores risk analysis in public health law by presenting four factors to consider: the nature of the risk, its duration, the probability of harm, and the severity of harm. While these factors closely align with science, Gostin properly cautions that social values also play a role in risk

assessment and management.

But the government's job is not finished when it has identified a significant health risk because it must also show that (1) the intervention has a good chance of being effective because the means and ends are reasonably related; (2) the public health benefits are proportional to the economic and other costs; and (3) the intervention produces a fair distribution of benefits, costs, and burdens in society.

Gostin acknowledges that this framework for making public health decisions does "not invariably lead to the best policy because any analysis is fraught with judgments about politics and values and is confounded by scientific uncertainty."<sup>27</sup> Gostin hopes, however, that his systematic analysis provides a structure that will help public health authorities and politicians craft and apply consistent standards when making policy and law.

### III. BALANCING CIVIL LIBERTIES AND PUBLIC HEALTH OBJECTIVES IN AMERICAN PUBLIC HEALTH LAW

Part Two of *Public Health Law* contains five chapters, each of which analyzes what Gostin believes is a conflict between the enjoyment of civil liberties and the effective pursuit of public health. See Table 1 for an overview of Part Two.

It would be foolhardy and impossible for me to try to comment in detail about the massive amount of public health and legal materials Gostin expertly organizes and analyzes in these chapters. He succeeds in covering very complicated legal areas comprehensively yet concisely, as well as always tying his discussion firmly to the objectives of public health. Gostin combines analysis of the background legal principles and frameworks with exploration of current hot topics in public health law, such as health information privacy, HIV screening of pregnant women and infants, and litigation against the tobacco and firearms industries.

My concerns with Part Two are, on the whole, minor. The sections in Chapter 9 on public health and the rise 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 was laying down the basics of public health law. Chapter 10's focus on tort law seemed somewhat out of place in the part of the book dealing with the conflict between civil liberties and government regulation for public health purposes, but I could not identify a better place to put this material given the structure of the book.<sup>28</sup> Gostin could also have grappled more with the problem many people see in the tort litigation on tobacco and firearms: The courts are effectively being asked and allowed to make public health



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**Table 1. Summary of Part Two of *Public Health Law***

Chapter	Topic	Examples of Issues Analyzed
Chapter 5	Personal Privacy	<ul style="list-style-type: none"> <li>- Public health surveillance</li> <li>- Mandatory disease reporting</li> <li>- Partner notification</li> <li>- Population-based research</li> <li>- Ethical underpinnings and legal status of health informational privacy</li> <li>- Confidentiality</li> <li>- Model public health information privacy law</li> </ul>
Chapter 6	Freedom of Expression	<ul style="list-style-type: none"> <li>- Theories of health communication</li> <li>- Public health communications</li> <li>- Commercial speech and public health</li> <li>- Compelled commercial speech</li> <li>- Regulation of cigarette advertising (case study)</li> </ul>
Chapter 7	Bodily Integrity	<ul style="list-style-type: none"> <li>- Compulsory vaccination</li> <li>- Testing and screening</li> <li>- Compulsory screening and unreasonable search and seizure</li> <li>- Compulsory screening and disability discrimination</li> <li>- HIV screening or pregnant women and infants (case study)</li> </ul>
Chapter 8	Autonomy and Liberty	<ul style="list-style-type: none"> <li>- History of personal control measures</li> <li>- Isolation, quarantine, and compulsory hospitalization</li> <li>- Compulsory physical examination and medical treatment</li> <li>- Criminal law and knowing or willful exposure to infection</li> </ul>
Chapter 9	Regulation of Economic Behavior	<ul style="list-style-type: none"> <li>- History of commercial regulation</li> <li>- Public health and the rise of the administrative state</li> <li>- Regulatory tools of public health agencies</li> <li>- Economic liberty and public health—contracts, property uses, and “takings”</li> </ul>
Chapter 10	Tort Law and Public Health	<ul style="list-style-type: none"> <li>- Theories of tort liability</li> <li>- Mass tort litigation and epidemiology in the courtroom</li> <li>- Public health value of tort litigation</li> <li>- The “tobacco wars” (case study)</li> <li>- Tort litigation and firearms (case study)</li> <li>- Limitations of tort law for public health</li> </ul>

policy where legislatures have failed to take action. Finally, I could not help but think of all the parallels between Gostin’s analysis in Part Two on civil liberties and the discourse in international human rights law about public health actions by governments. Gostin has previously applied his approach to individual rights in the public health context in the context of international law,<sup>29</sup> and Part Two easily lent itself to mentioning the similarities in approach in domestic law and international law concerning the tension between individual rights and the pursuit of public health.

One of the greatest strengths of Part Two of *Public Health Law* is that Gostin provides ways to make the conflict between civil liberties and public health regulation more palatable by laying out substantive and procedural

principles that can help ensure that infringement of individual rights for public health reasons are scientifically justified, non-discriminatory, and the least restrictive measures possible. In Gostin's hands, the inevitable conflicts between civil rights and public health law are principled, constrained conflicts that demonstrate continuing respect for individual rights and commitment to protecting the public's health. Such an approach supports powerfully the contribution that respect for individual rights can make to general public health.

#### IV. THE FUTURE OF AMERICAN PUBLIC HEALTH LAW

Part Three of *Public Health Law* focuses on the future of public health law in the United States. Chapter 11 analyzes the need for public health law reform and provides principles to guide such reform. Gostin argues that his final chapter answers the critique of American public health law issued by the Institute of Medicine (IOM) in 1988. The IOM called for reform of public health law to clarify the authority and responsibility of public health agencies and to empower them to deal effectively with contemporary public health threats. Gostin takes up the IOM's challenge by: (1) outlining the inherent problems of public health; (2) setting out three conceptual principles that each public health statute should contain; and (3) laying out the guidelines for public health law reform (table 2).

Gostin's analysis in Chapter 11 remains at a general level, and he does not apply his reform principles to specific public health problems facing the United States today. I understand why Gostin chose this approach,<sup>30</sup>

**Table 2. Problems, Principles, and Guidelines: Reform of Public Health Law in the United States**

Inherent Problems of Public Health	Politics, money, leadership, jurisdiction, legitimacy, and trust
Principles All Public Health Statutes Should Have	The law should empower public health agencies to regulate individuals and businesses for the public's health. The law should restrain government in its exercise of power to achieve the benefits of liberty and freedom. The law should impose duties on government to promote the public's health.
Guidelines for Public Health Law Reform	Create modern, consistent, and uniform public health laws. Define a mission and essential functions for public health agencies. Provide a full range of public health powers. Impose substantive limits on the exercise of public health powers. Impose procedural requirements on the exercise of public health powers. Provide strong protection against discrimination. Provide strong protection for privacy and security of public health information.

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but I found myself wanting to know what Gostin thinks are the priorities for public health law reform in the United States today. While Gostin mentions perennial difficulties that confront public health, he does not discuss the depth of the problems now confronting American public health. Public health literature, especially in connection with infectious diseases, contains a great deal of hand-wringing and teeth-gnashing about eroding public health capabilities in the United States. Gostin's argument for public health law reform has an abstract, detached feel to it because the general American political, economic, and social commitment to public health as an endeavor is weak, and has been so for many years. The political resurrection of public health seems a precondition for plans to reform public health law.

Gostin mentions the conceptual and practical obstacles public health faces, and he argues that it "needs opportunities to draw attention to its resource requirements and achievements, and to develop constituencies for programs."<sup>31</sup> He claims that the "lawmaking process provides just such an opportunity,"<sup>32</sup> and that the law reform process can rebuild support and commitment for public health. If antimicrobial resistance cannot get the attention of legislators and politicians in the United States, then I have a hard time believing that advocating general legal reform efforts will stimulate and sustain a public health renaissance in the United States. Legal reform efforts, I imagine, need to be parasitic on specific efforts to deal with public health threats. Interesting legal reform efforts have, for example, taken place in at least one state trying to cope with threats of possible pandemic influenza and bio-terrorism.<sup>33</sup>

In Chapter 11, Gostin does not focus on any specific public health threats facing the United States. In other writings, Gostin and colleagues made specific arguments and recommendations about public health law reform with respect to the problem of infectious diseases.<sup>34</sup> Gostin was also involved in promoting model principles for health information privacy.<sup>35</sup> It was easier to grasp those recommendations because they flowed from an analysis of specific, contemporary problems in American public health. But Gostin does not connect his general ideas on public health law reform to the concrete challenges confronting American public health today and in the foreseeable future. In other chapters, Gostin provided case studies of current public health problems to illustrate the application of general legal principles, rules, and precedents. Chapter 11 perhaps needed some application of the general law reform guidelines to actual public health problems.

For example, many experts believe that the general aging of the U.S. population will present public health challenges, the likes of which

American public health has not previously confronted. How should public health law be reformed, if at all, in the face of the public health concerns created by the aging of the population? Antimicrobial resistance is another growing crisis in American public health that relates to infectious diseases. How should Gostin's law reform guidelines be applied to the problem of antimicrobial resistance, and what would be the scope and shape of the resulting legal reform?<sup>36</sup>

Another reason I yearned for some discussion of specific public health threats in Chapter 11 is that such discourse might have revealed Gostin's priorities for public health law reform. As Part One demonstrated, public health law is a massive field. In Chapter 11, Gostin does not indicate whether he thinks public health law reform is needed more urgently in, say, infectious diseases than in environmental protection. Where should public health law reform realistically be targeted first? Is there one area of public health law (e.g., infectious diseases) that provides the most fertile opportunity to apply all or most of Gostin's law reform guidelines?

Gostin's approach to public health law reform does have the advantage of not being linked to specific public health problems that may not be perceived as urgent in five or ten years time. His general approach might not, therefore, become outdated, giving his ideas on public health law reform longevity and permanence. My concern is, however, that by not identifying specific public health problems and the lack of priorities for legal reform, Gostin's arguments may lack immediacy and impact. Instead of supporting the normative goal of making public health law transcendent in American society and governance, Gostin's approach in Chapter 11 may unintentionally invite further neglect.

My concern will be proved baseless if the readers of *Public Health Law* understand and then apply Gostin's ideas on legal reform to specific areas that require attention. Previously, reform of public health law was a problem in search of principles. Gostin has now provided the principles with which to approach the problem both generally, and in connection with any specific public health threat facing the United States. Despite my concerns about Chapter 11, this is a seminal and noble achievement.

#### CONCLUSION

*Public Health Law* will quickly become the leading intellectual and practical guide to American public health law. In the United States, the study of law is populated by works of enduring significance whose authors became synonymous with a field of law: Corbin on Contracts, Prosser on Torts, etc. Now, both the public health and legal disciplines have Gostin on Public Health Law. Let neither my praise nor my criticism herein deflect

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the readers of this *Journal* from appreciating the accomplishment and contribution Gostin's book represents for all those interested in the future of public health in the United States.

## References

1. LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT (2000) [hereinafter PUBLIC HEALTH LAW]. Gostin has also produced a reader in public health, law, and ethics that is designed to be used with PUBLIC HEALTH LAW in schools of law, public health, medicine, health administration, and other fields. LAWRENCE O. GOSTIN, PUBLIC HEALTH, LAW, AND ETHICS: A READER (forthcoming 2002). The reader is not reviewed herein.
2. Memorandum from David P. Fidler to Daniel M. Fox, Milbank Memorial Fund, and Lynne Withey, University of California Press, providing comments on draft chapters of PUBLIC HEALTH LAW (May 19, 1999) (on file with author).
3. A three part series by Professor Gostin, published in *JAMA* in June 2000, also provided a sneak preview of the finished book. Lawrence O. Gostin, *Public Health Law in a New Century – Part I: Law as a Tool to Advance the Community’s Health*, 283 *JAMA* 2837 (2000); *Part II: Public Health Powers and Limits*, 283 *JAMA* 2979 (2000); and *Part III: Public Health Regulation: A Systematic Evaluation*, 283 *JAMA* 3118 (2000).
4. LAURIE GARRETT, BETRAYAL OF TRUST: THE COLLAPSE OF GLOBAL PUBLIC HEALTH (2000); LAURIE GARRETT, THE COMING PLAGUE: NEWLY EMERGING DISEASES IN A WORLD OUT OF BALANCE (1994).
5. PUBLIC HEALTH LAW, *supra* note 1, at 309.
6. *Id.* at xvii.
7. Exceptions to this general neglect of public health law are FRANK P. GRAD, THE PUBLIC HEALTH LAW MANUAL (2d ed. 1990) and KENNETH R. WING, THE LAW AND THE PUBLIC’S HEALTH (4th ed. 1995).
8. The neglect of law by public health, and the neglect of public health by law, is also apparent at the international level. In the 1990s, the neglect of the relationship between international law and public health became the source of a growing body of scholarship, to which Gostin contributed. See LAWRENCE O. GOSTIN & ZITA LAZZARINI, HUMAN RIGHTS AND PUBLIC HEALTH IN THE AIDS PANDEMIC (1997).
9. PUBLIC HEALTH LAW, *supra* note 1, at 327.
10. *Id.* at 13.
11. *Id.* at 4. The subtitle of the book—*Power, Duty, Restraint*—summarizes the key attributes in Gostin’s definition of public health law.
12. *Id.*
13. *Id.* at 327.
14. *Id.* at xxi.
15. I identified only two moments in the book when the analysis drew in things international. The first involved a brief description of the controversies that arose around clinical trials in developing countries of anti-HIV drugs. *Id.* at 124. The second contained an even shorter mention of international law on quarantine matters. *Id.* at 206.
16. *Id.* at xviii.
17. In reading *Public Health Law*, I sensed Gostin’s desire to lay out the “concept” of public health law. I recalled the effort of the great English scholar of jurisprudence, H.L.A. Hart, to capture what he called the “concept of law.” H.L.A. HART, THE CONCEPT OF LAW (1961). In explaining the concept of law, Hart attempted to deal with international law because he apparently believed that he could not ignore this realm of law. *Id.* at

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208-31. With Hart in mind, I wondered why Gostin chose not to include international law in his “concept of public health law.”

18. PUBLIC HEALTH LAW, *supra* note 1, at xxii.

19. In the Preface, Gostin explains this approach by stating that he “felt it important to develop a common understanding of the constitutional basis for the exercise of public health powers and the limits on those powers.” *Id.* at xxiii. Thus, Gostin “decided not to examine the rich constitutional history and structures at the state level, which are equally important to the field of public health but whose inclusion would have made the book too diverse and detailed.” *Id.*

20. *United States v. Lopez*, 514 U.S. 549 (1995).

21. *New York v. United States*, 505 U.S. 144 (1992).

22. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

23. See, for example, Gostin’s discussion of “The Synergy Between Human Rights and Public Health” in Chapter 4. PUBLIC HEALTH LAW, *supra* note 1, at 107-109.

24. *Id.* at xxi.

25. *Id.* at xx (stating that “My friend, the late Jonathan Mann, was particularly eloquent in urging the conclusion that public health and human rights are synergistic; preserving and promoting individual rights most often advances human well-being.”).

26. *Id.* at 109.

27. *Id.* at 107.

28. Perhaps Chapters 9 and 10 could have been combined into a separate part focused on public health and the direct

and indirect regulation of economic behavior. Whether this alternative structure would have really improved the book is very questionable because the substance of Gostin’s analysis in these chapters is excellent.

29. See GOSTIN & LAZZARINI, *supra* note 8.

30. PUBLIC HEALTH LAW, *supra* note 1, at 310 (“It is important to emphasize that no single model of law reform is likely to fit the entire spectrum of public health ranging from the regulation of food, drugs, and water supply to the workplace, environment, and infectious diseases. The proposed guidelines, therefore, represent general themes important to good governance of public health agencies engaged in a variety of public health activities.”).

31. *Id.* at 326.

32. *Id.* at 327.

33. See COLO. REV. STAT. § 24-32-2103 (2000).

34. LAWRENCE O. GOSTIN ET AL., IMPROVING STATE LAW TO PREVENT AND TREAT INFECTIOUS DISEASE (1998); Lawrence O. Gostin et al., *The Law and the Public’s Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59 (1999).

35. Lawrence O. Gostin et al., *The Public Health Information Infrastructure: A National Review of the Law on Health Information Privacy*, 275 JAMA 1921 (1996); Lawrence O. Gostin & James G. Hodge, Jr., *Model State Public Health Privacy Act*, at <http://www.critpath.org/msphpa/privacy.htm> (last visited Apr. 20, 2001).

36. Gostin discusses the problem of drug resistance in Chapter 8 and mentions

possible policy options for addressing it—government incentives for, or regulation of, physician prescribing; government provision of compliance-enhancing services for vulnerable patients; compulsory measures to ensure antibiotics and anti-retrovirals are not misused, ranging from civil commitment to the less restrictive approach of directly observed therapy. PUBLIC HEALTH LAW, *supra* note 1, at 221-23.