DEFINING THE FIELD OF PUBLIC HEALTH LAW

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...In the last century, average life expectancy in the United States rose by thirty years, and public health advances are credited with twenty-five years of that increase.[1] For the most part, this dramatic improvement in longevity was accomplished by marrying advances in public health science with legal interventions. Vaccine requirements, regulation of food and drugs, seatbelt laws, and occupational health and safety mandates were among the key legal measures that led to longer lifespans.[2] Today we face new public health challenges. Perhaps most critically, rising rates of obesity "could shorten the average lifespan of an entire generation by two to five years, [resulting] in the first reversal in life expectancy since the government started tracking data in 1900."[3] Already, states and local governments (and, to a lesser extent, the federal government) are adopting new legal measures in an effort to reverse this trend. The public health threats change over time; the need for legal responses does not.

While law has been central to the major advances in public health, public health has not traditionally been a subject of great interest to legal academics. Until recently, most law schools did not offer a single course on the subject, and legal scholarship exploring public health issues was extremely limited. With the spectacular growth of the health care industry in the past century, *health law* (or *health care law*), which explores the law of medical care and the provision of health care services, emerged as a major field of legal scholarship. *Public health law*, by contrast, was "left in the shadows."[4] To the extent public health law was considered at all, it was typically viewed as a sub-field (and a minor one at that) of health law.

In the past two decades, however, the level of interest in public health law has changed dramatically. There has been a proliferation of public health law scholarship, with new law school courses, new casebooks,[5] new treatises,[6] and an ever-growing number of law review articles and symposia.[7] This surge in interest was partly driven by world events. The emergence of AIDS and the activism of HIV/AIDS patients in the 1980s and 1990s led to new thinking about the laws

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1. Centers for Disease Control and Prevention, *Ten great public health achievements--United States, 1900-1999*, 48 MORBIDITY & MORTALITY WKLY. REP. 241, 241 (1999).

2. *Id.* at 241-242. [note: most internal cross-references have not been corrected]

3. LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 499 (2d. ed., 2008).

4. Gostin, *supra* note 3, at 140.

5. *See, e.g.,* KENNETH R. WING, ET AL., PUBLIC HEALTH LAW (2007).

6. *See, e.g.*, Gostin, *supra* note 3.

7. *See, e.g.*, Elizabeth Weeks Leonard, *Introduction: The Prospects for Public Health Reform*, 39 J.L. MED. & ETHICS 312 (2011) (introducing symposium on the public health impact of health care reform); Jonathan H. Alder, *Symposium on Commercial Speech and Public Health: Introduction*, 21 HEALTH MATRIX 1 (2011); Patricia Ross McCubbin, *Symposium Introduction: Contemporary Issues at the Intersection of Public Health and Environmental Law*, 33 S. ILL. U. L. J. 359 (2009); D. Douglas Blanke & Kerry Cork, *Exploring the Limits of Smoking Regulation*, 34 WM. MITCHELL L. REV. 1587 (2008) (introducing symposium issue on tobacco regulation); Scott Burris & Jeffrey L. Dunoff, *Introduction to the Symposium on SARS, Public Health, and Global Governance*, 77 TEMP. L. REV. 143 (2004); David P. Fidler, *Introduction to Written Symposium on Public Health and International Law*, 3 CHI. J. INT'L L. 1 (2002).

surrounding infectious disease.[8] The attacks of 9/11, the subsequent anthrax mailings, and the SARS and avian flu outbreaks all suggested the need to reexamine our preparedness for public health emergencies. And the success of lawsuits against the tobacco industry (most notably with the 1998 Master Settlement Agreement) led to scholarly interest in litigation as a possible new model for addressing public health challenges. Whatever the varied reasons, the body of public health law scholarship is rapidly expanding….

This article explores whether it is now time to recognize public health law as a new and distinct field of legal academia and, if so, how to define the field of public health law. Central to this discussion is the fact that recent scholarship has advanced a fundamentally new lens through which to view the law, informed by the lessons of public health science (and social epidemiology in particular). This perspective moves beyond exploring the efficacy of targeted public health interventions and thinks more broadly about the impact of law and legal doctrine on the health of populations (as opposed to individuals).[9] In other words, it considers the various ways in which law, legal decisions, and legal structures – even those not specifically addressed to public health issues – create or sustain social, economic, and governmental structures that either promote or threaten the health of populations.[10]

The new public health law scholarship challenges courts to take population health seriously and to consider (scientifically, if possible) the potential impact of different legal rules on health outcomes.[11] It asserts that public health should be considered as a relevant *legal* norm – not as a determinative factor, but as an important value for courts to weigh. In current practice, public health concerns are often absent from legal debates, and even when they are raised, they are often discarded as improper "policy" (as opposed to legal) considerations.[12] Public health law scholarship is increasingly pushing back against this typical response. "[F]ollowing the pragmatic and interdisciplinary footsteps of legal realism and its many heirs, from law and economics on one side of the political spectrum to critical legal studies on the other side," public health law scholarship suggests that population health is an appropriate and valuable factor for consideration in legal analysis…..[13]

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8. *See* SCOTT BURRIS & LAWRENCE O. GOSTIN, *The Impact of HIV/AIDS on the Development of Public Health Law*, *in* DAWNING ANSWERS: HOW THE HIV/AIDS EPIDEMIC HAS HELPED TO STRENGTHEN PUBLIC HEALTH 96-117 (Ronald O. Valdiserri ed., 2003).

9. *See* Scott Burris, Ichiro Kawachi & Austin Sara, *Integrating Law and Social Epidemiology*, 30 J.L. MED. & ETHICS 510, 518 (2002) ("Outside the rather narrow confines of health-care law, health is rarely treated as an outcome worth considering in analyses of law.").

10. *Id.* at 513 ("[L]aw may be a means through which exposure to pathogens or pathogenic practices is unevenly distributed based on socioeconomic position or community social cohesion.").

11. *See generally*, Scott Burris et al., *Making the Case for Laws and Improve Public Health: A Framework for Public Health Law Research*, 88 MILBANK Q. 169 (2010) (outlining a framework for public health law research, which the authors define as "the scientific study of the relations of law and legal practices to population health.").

12. Richard A. Daynard, *Regulating Tobacco: The Need for a Public Health Judicial Decision-Making Canon*, 30 J.L. MED. & ETHICS 281, 284 (2002).

13. This is one place where the academic question of whether public health law is its own field of law has significant practical implications. If it is seen as its own field of law, it is more likely that courts will consider it proper and legitimate to incorporate public health law's insights into their analyses.

II. DEFINING PUBLIC HEALTH LAW

A. What is Public Health?

"Public health" has proven notoriously difficult to define, with definitions "ranging from the utopian conception of the World Health Organization of an ideal state of 'physical, mental and social' health to a more concrete listing of public health practices."[14] The most commonly cited definition is probably the Institute of Medicine's, which it included in its 1998 report entitled *The Future of Public Health*.[15] The IOM posited that "[p]ublic health is what we, as a society, do collectively to assure the conditions to be healthy."[16] This definition highlights a few of the key features of public health. First, the phrase "what we, as a society, do collectively" suggests a focus on collective action (primarily, though not exclusively, government action), as opposed to individual action. It further suggests that "public health applies to actions taken to promote the health of people, not individuals."[17] As opposed to medical care, which focuses on individuals, public health focuses on populations. In addition, by focusing on the "conditions" that influence health, the IOM definition highlights the prevention orientation of public health, which is another fundamental difference between public health and medical care. While medical care is primarily about *individuals* and *treatment*, public health is about *populations* and *prevention*.

The IOM's definition, however, does not explain what the term "conditions" means, and it thereby leaves the most difficult definitional question unaddressed. Broader or narrower understandings of the term "conditions" could produce very different meaning of the term "public health." Because "[m]ost things human beings do, and most characteristics of our environment, have some impact on the level and distribution of health in a population," the scope of the public health concerns could be exceeding vast if the term "conditions" is given the broadest possible reading.[18]

Public health scholars recognize that health is responsive to factors that operate at several different and overlapping levels. First, at the most immediate level, there are pathogenic causes of poor health such as germs and viruses. "Disease, under this view, is seen as a product of microbial infection (or exposure to toxic substances of some other sort), and the job of public health is to identify the pathogen and to eliminate or contain it."[19] Much of public health practice has historically been based on identifying pathogens (infectious diseases, tainted food, lead paint, etc.) that threaten public health and controlling or eliminating them.[20] Public health interventions to control the spread of disease based on a pathogenic model are generally the least controversial applications of public health authority, although even these types of interventions may be controversial in specific cases.[21]

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14. Lawrence O. Gostin, *Conceptualizing the Field After September 11th: Forward to a Symposium on Public Health Law*, 90 KY. L. J. 791, 793-94 (2002).

15. INSTITUTE OF MED., COMM. FOR THE STUDY OF THE FUTURE OF PUBLIC HEALTH, THE FUTURE OF PUBLIC HEALTH 19 (1988).

16. *Id*.

17. *See* WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 8 (2009)

18. Scott Burris et al., *supra* note 11, at 174.

19. Lawrence O. Gostin, Scott Burris, & Zita Lazzarini, *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 70 (1999).

20. *Id*.

21. *Id*. at 71. Efforts to mandate the human papillomavirus (HPV) vaccine provide a recent example. While the target is a pathogen, the vaccine has been controversial in part because the HPV virus is primarily transmitted through sexual

Secondly, public health scholars also recognize that human behaviors contribute to disease, and behavioral interventions became a staple of public health efforts starting in the last half of the 20th century.[22] Behavioral causes of disease are most clearly apparent in the case of chronic diseases such as cancer, heart disease, and stroke that can result from smoking, lack of exercise, or a poor diet, but behaviors (ranging from sexual activity to alcohol abuse) also play a significant role in spreading infectious disease and causing accidental or intentional injuries.[23] Like pathogenic causes of disease, it is generally accepted that responding to these behavioral risk factors falls within the appropriate scope of public health activities, although particular public health interventions may be highly controversial (particularly when public health activities are seen as "paternalistic interference with personal choice").[24]

At the broadest level, poor health can also be seen as the product of the social, cultural, economic, and political environment in which a population lives. Under this "ecological" theory of disease, pathogens and personal activities may be the immediate causes of disease, but they are simply reflective of the broader social conditions in the society, and any serious attempts to improve the public's health must address these more fundamental causes of poor health.[25] For example, an ecological examination of childhood obesity would look not at children's individual behaviors (caloric intake, physical activity, etc.), but rather at societal conditions such as parental employment and access to healthy food in the community.[26] This perspective, by definition, "requires much more radical measures to remedy causes of poor health," and is accordingly far more controversial.[27]

There has been an extensive amount of public health research in the past several decades attempting to quantify the impact of ecological and social factors on health. Reviewing and summarizing this research, Sandro Galea and colleagues recently estimated that in the year 2000, "approximately 245,000 deaths in the United States were attributable to low education, 176,000 to racial segregation, 162,000 to low social support, 133,000 to individual-level poverty, 119,000 to income inequality, and 39,000 to area-level poverty."[28] The authors do not contest that more immediate causes of death – both behavioral causes and pathogenic causes – can also be identified. However, they contend that ecological causes of death are no less important and, at least at a population-wide level, they can be identified and calculated in a relatively precise way.

To refer back to the IOM definition, are the social factors identified by Galea the type of "conditions" that public health is meant to address? The Galea article identified nearly 500 articles on the connection between social factors and mortality,

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intercourse (and thus it is on the line between pathogenic and behavioral causes of disease). Some fear that distribution of the vaccine will undermine efforts to promote sexual abstinence among teens. *See generally* Alexandra M. Stewart & Marisa Cox, *HPV Vaccine School Entry Requirements: Confronting the Myths, Misperceptions and Misgivings*, 4 J. HEALTH & BIOMED. L. 311 (2008).

22. Gostin, Burris & Lazzarini, *supra* note 19, at 71.

23. *Id.* at 72.

24. *Id*. at 72-3.

25. *Id.* at 74-5.

26. *See, e.g.,* Sherburne Hawkins, Tim J. Cole, Catherine Law, et al., *An Ecological Systems Approach to Examining Risk Factors for Early Childhood Overweight: Findings from the UK Millennium Cohort Study*, 63 J. EPIDEMIOLOGY & CMTY. HEALTH 147 (2009).

27. Mark A. Hall, *The Scope and Limits of Public Health Law*, 43 PERSP. BIOLOGY & MED. S199, S206

28. Sandro Galea et al, *Estimated Deaths Attributable to Social Factors in the United States*, 101 AM. J. PUB. HEALTH 1456, 1462 (2011).

suggesting that public health scholars increasingly see the analysis of such issues as falling within their purview.[29] Some scholars, however, even while recognizing that it is "increasingly difficult to avoid recognizing how broad social policies . . . affect health," worry that defining public health to include "housing, unemployment, and political inequality may spread the [public health] sphere so thin that it ceases to have any discernable limits."[30]

Defining "public health" is not merely a theoretical challenge; there are also political and ideological issues lurking just below the surface. Lawrence Gostin explains the political dimension:

> In the end, the field of public health is caught in a dilemma. If it conceives of itself too narrowly, public health will be accused of lacking vision. It will fail to see the root causes of ill health and will fail to utilize the broad range of social, economic, scientific, and behavioral tools necessary to achieve a healthier population. If however, public health conceives of itself too expansively, it will be accused of overreaching and invading a sphere reserved for politics, not science. The field will lose its ability to explain its mission and functions in comprehensible terms and, consequently, to sell public health in the marketplace of politics and priorities.[31]

Given the challenge that public health already has in competing with other priorities for funding, it is not surprising that public health practitioners want to avoid defining their field in a way that could cause additional political challenges (and put the limited amount of existing funding for public health efforts at risk). The IOM definition may have been deliberately ambiguous about the scope of the field for just that reason. This may also be why public health advocates frequently frame their arguments (at least in the public sphere, if not the academic sphere) in ways that reinforce our cultural orientation toward "personal responsibility" and seek to avoid the "nanny state," "paternalist," or "socialist" labels that would inevitably follow any more forthright discussion of the cultural, social, or economic determinants of health….[32]

B. Defining Public Health Law: Gostin's Definitions

The only major systematic attempt to define <u>public health law</u> was presented by Lawrence Gostin in his book *Public Health Law: Power, Duty, Restraint*, which was first published in 2000.[33] Eight years later, Gostin released a second edition of his book, in which he modified his definition of public health law in a few key respects.[34] Any discussion of how to define public health law should (and typically does) start with a review of Gostin's thoughtful definitions. Carefully examining Gostin's 2000

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29. *Id.* at 1457.

30. Wendy K. Mariner, *Beyond Emergency Preparedness*, 38 J. HEALTH L. 247, 254 (2005).

31. Gostin, *supra* note 3, at 41.

32. *See* Micah L. Berman, *From Health Care to Public Health Reform*, 39 J.L. MED. & ETHICS. 328, 332-33 (2011); *See also* Mariner, *supra* note 30, at 260 ("[M]ost public health campaigns, from education to advocacy for new laws, have focused on the risks to health that arise from personal behaviors, such as a high fat diet, lack of physical exercise, smoking cigarettes, and violence. This emphasis on personal risk behaviors lends support to those who wish to characterize the primary problems in public health as the personal responsibility of individuals themselves, rather than as problems that require societal solutions. Rather than making the world safer for people, it seeks to have people protect themselves from risks in the world as it exists.").

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

34. Gostin, *supra* note 3.

and 2008 definitions, and the subtle but important differences between them, illuminates the key challenges faced by any attempt to define the field.

1. 2000 Definition

In 2000, Gostin defined "public health law" as:

> the study of the legal powers and duties of the state to assure the conditions for 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, privacy, liberty, proprietary, or other legally protected interests of individuals for the protection or promotion of community health.[35]

This definition can be divided into its component parts:

1. First, focusing on "the study of legal powers and duties" is what first marks this as a definition of public health *law*, rather than of public health.

2. The term "of the state" suggests that by *public*, Gostin is referring to governmental actions.

3. The phrase, "to assure the conditions to be healthy (e.g., to identify, prevent, and ameliorate risks to the health in the population)" incorporates the 1998 IOM definition of public health, while adding an explanatory parenthetical that more clearly highlights the population-based orientation of the field. With this nod to the IOM, however, Gostin also builds into his definition the ambiguity inherent in the IOM's formulation. Gostin's definition does not delineate which "conditions" are the relevant ones to consider, and which (if any) fall outside of his definition.

4. The next clause, "and the limitations on the power of the state to constrain the autonomy, privacy, liberty, proprietary, or other legally protected interests of individuals," is arguably redundant and unnecessary. Any study of "the legal powers and duties of the state" (phrases 1 and 2) would by nature also include the study of the limits of such power. But by adding this phrase, Gostin, suggests that the tension between rights (primarily individual rights, but also business rights) and the population's (or government's) interest in public health is *the* key tension in public health law.[36] Consistent with his background as a human rights lawyer, Gostin's sees the potential trade-off between public health and individual rights as the analytical core of the field.[37]

5. Finally, the last phrase "for the protection or promotion of community health" is somewhat ambiguous, but it may suggest one of two things.

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35. Gostin, *supra* note 33, at 4.

36. Aagaard suggests that "policy trade-offs" could be one type of commonality that can used to provide a legal field with coherence. Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221, 242 (2010).

37. *See generally* Lawrence O. Gostin, *From a Civil Libertarian to a Sanitarian*, 34 J. L. & SOC. 594 (2007).

> First it may be a proposed normative goal for the field. Gostin may be suggesting that public health law is an activist field that aims not only to study the relevant legal doctrines in the abstract, but also to apply legal doctrine to protect and promote public health. Alternatively, this last phrase could be read as a limiting principle, i.e., that the field should be limited to the study of legal actions and authorities *intended* to protect public health – as opposed to those that may have some incidental effect on public health. Judging from the content of the rest of the book, it appears that Gostin was primarily referring to this second interpretation of the phrase.

In sum, Gostin's 2000 definition seeks to bring both coherence and distinctiveness to the field of public health law by pointing to (a) a shared factual context (analysis of powers related to protecting and improving public health); (b) a shared methodological approach (the study of law's impact on populations, not individuals); and (c) and a primary set of policy trade-offs (between public health interests and individual rights). The focus on the trade-off between public health and individual rights may be the most controversial part of Gostin's definition. Others in the field have suggested that significant conflicts between public health efforts and individual autonomy are in fact rare, and have pointed out that the day-to-day work of public health officials rarely involves managing such tensions.[38] Indeed, although the issue of mass quarantine is often studied in depth in public health law courses, there has been no mass quarantine in the U.S. since the 1918 pandemic flu.[39] In the 2008 version of his book, Gostin, perhaps in response to this criticism, reworked the text to make the discussion of such trade-offs less of a focal point, while giving increased prominence to more practical concerns such as the operation of administrative agencies.[40]

2. 2008 Definition

In the 2008 edition of his book, Gostin retains the core features of his definition, but adds some new nuances and emphases. He defines "public health law" as follows (text added to or modified from the 2000 definition is in bold):

> the study of the legal powers and duties of the state, **in collaboration with its partners (e.g., health care, businesses, the community, the media, the academe)**, to ensure the conditions for people to be healthy (to identify, prevent, and ameliorate risks to health in the population), and of the limitations of the power of the state to constrain **for the common good** the autonomy, privacy, liberty, proprietary, and other legally protected interests of individuals. **The prime objective of public health law is to pursue the highest possible level of physical and mental health in the population, consistent with the values of social justice.**[41]

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38. *See, e.g.*, Mariner, *supra* note 30, at 274.

39. *See* Kathleen S. Swendiman & Jennifer K. Elsea, Cong. Research Serv., *CRS Report for Congress: Federal and State Quarantine and Isolation Authority*, at 9 n. 54 (2007), *available at* http://www.fas.org/sgp/crs/misc/RL33201.pdf.

40. *See* Elizabeth Weeks Leonard, *Public Health Law for a Brave New World*, 9 HOUS. J. HEALTH L. & POL'Y 181, 186-87 (2009). Gostin did, however, keep the tension between rights and public health as a central part of his definition of the field.

41. Gostin, *supra* note 3, at 4.

The most obvious and significant difference is the addition of a clearer normative goal to the definition. The last sentence, indicating that "the prime object" of the field is to "pursue the highest possible level of physical and mental health in the population, consistent with the values of social justice" is entirely new.[42] This sentence moves Gostin's definition from a primarily descriptive account of what public health law *is* to a more explicitly prescriptive account of what he thinks public health law *should be*. This sets the stage for him to explain – much more clearly than in the first edition – *why* public health should be seen as a primary goal of legal decision-making (still balanced against other important rights, but given a considerable amount of weight) and why the needs of community health and social justice demand more aggressive (and potentially invasive) governmental action. For example, in the context of discussing obesity, Gostin writes:

> Government passivity, leaving individuals free to make unfettered choices, will almost certainly perpetuate health disparities. A social justice perspective requires the state to identify and ameliorate the common causes of disease and premature death among the most deprived. It supports systemic actions to redress persistent patterns of disadvantage, even if ill health is attributable to personal lifestyles.[43]

Such explanations and arguments makes the second edition of the book more passionate and more compelling reading than the fist edition, but his revised definition of public health law will not be agreeable to those that do not share Gostin's "purposive and interventionist" orientation and are fearful of the "nanny state."[44]

Gostin's focus on social justice in the 2008 edition of his book may suggest that he favors a broad definition of public health that includes an exploration of the social and economic determinants of health. Ultimately, though, Gostin pulls back from fully endorsing this position. Instead, he offers a thoughtful and balanced discussion of "the legitimate scope of public health and the law" without explaining how or where he would set the boundaries of the field.[45] He warns that using too narrow a conception of the term "public health" will blind public health law to the importance of social and cultural determinants of health, while too broad could enmesh the field of public health law in politics and compromise its ability to gain academic recognition. But by failing to provide a clear answer to the key question of what "public health" means, Gostin left his definition open to criticism from both those who think he is calling for an excessively expansive definition of "public health" and those who see his formulation as too narrow.[46]

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42. It replaces the phrase "for the protection or promotion of community health" from the 2000 definition.
43. Gostin, *supra* note 3, at 502.
44. *Id.* at 513.
45. *Id.* at 38-41; *See supra* text accompanying note 31 for a section of this discussion.
46. *See* Burris et al, *supra* note 11, at 172, stating:

> Scholars have argued from diverse standpoints that Gostin and his colleagues in public health are expanding the jurisdiction of public health beyond its legitimate mission and into a ream of wrongful – and counterproductive – meddling in the autonomy of citizens. Yet for others, Gostin's definition may be too narrow…. Other commentators insist that public health law must include the role of law as a determinant and mechanism for the health effects of social and physical environments.

C. Other Definitions of Public Health Law

…Other definitions of public health law have ranged from the extremely broad to exceedingly narrow. Starting on the broader end of the spectrum, Scott Burris, the director of the Public Health Law Research ("PHLR") program at Temple University's Beasley School of Law, recently categorized public health laws into three different types: interventional, infrastructural, and incidental.[47] *Interventional* laws are those intended to improve public health; *infrastructural* laws are those that set up and define the authority of public health entities; and *incidental* laws are those that are intended to address issues other than public health, but have an impact on public health nonetheless (such as zoning laws). Burris was seeking to organize the field, not define it, and so his categorization assumes that there is some overarching definition of "public health law" that subsumes these three different categories. If this is the case, then Burris – one of the leading public health law scholars – is suggesting a definition that is potentially broader than Gostin's.[48] Gostin's definition clearly includes the study of interventional and infrastructural public health laws, but it is less clear whether he intended to include the study of incidental public health laws (unless, perhaps, those laws were intentionally repurposed to serve a public health objective).[49]

The inclusion of the concept of incidental public health law would be a valuable addition to Gostin's definition. As Burris writes, using the example of land use laws:

> Land use laws structure how communities are laid out and thus how people behave within them. These laws have implications for physical activity, exposure to toxins, and physical security. These outcomes mediate a significant range of health endpoints, from hypertension to depression and anxiety.[50]

Without clearly incorporating such concerns into the definition of public health law, they could easily fall into an analytical black hole. Public health law scholars might not see such concerns as falling within their purview, and it is unlikely scholars of other fields would turn their attention to health-related impacts on their own accord…..[51]

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47. Scott Burris, *From Health Care Law to the Social Determinants of Health: A Public Health Law Research Perspective*, 159 U. PA. L. REV. 1649, 1662-63 (2011).

48. In addition, Burris has written that the PHLR's research on incidental public health laws will "help direct policy attention from agentic to structural interventions and from single pathologies to drivers of the level and distribution of overall health." *Id*. at 1663. In other words, Burris – much more clearly than Gostin – appears to endorse a definition of public health law that will encompass the analysis of structural and environmental determinants of health.

49. Gostin's book has a chapter that discusses how tort law could be used to promote public health, which is arguably an example of a set of laws designed for another purpose being reframed to serve public health goals. *See* Gostin, *supra* note 3, at 181-226. For another broad definition that incorporates the same concept of incidental public health laws, *see* Judith A. Monroe et al., *Legal Preparedness for Obesity*
Prevention and Control: A Framework for Action, 37 J. L. MED. & ETHICS S15, S16 (Supp. 1 2009). ("Defined most broadly, public health laws include any law that has important consequences for the health of populations. They encompass laws that focus explicitly on prevention and health promotion as well as laws that are adopted for other purposes but that nonetheless influence the public's health.").

50. Burris, *supra* note 47, at 1663.

51. *See* Wendy C. Perdue, Lawrence O. Gostin & Lesley A. Stone, *National Challenges in Population Health: Public Health and the Built Environment: Historical, Empirical, and Theoretical Foundations for an Expanded Role*, 31 J.L. MED. & ETHICS 557, 558-59 (noting that "the 1995 edition of Urban Land Use Planning, a standard text, does not even contain an index entry for "health and safety").

D. The Population-Based Perspective

[A]s Wendy Parmet has explained, the population-based perspective ("population-based legal analysis," in her words), informed by epidemiology and public health science, contributes a new and distinct viewpoint that is largely absent from traditional legal analysis.[52] Parmet writes:

> Population-based legal analysis [exposes] the hyperindividualism that infects much of contemporary American discourse, uncovering critical insights into the relationship between individuals, populations, and legal doctrines. Key among these insights is that the choices individuals exercise and the health risks they face are determined, to a large degree, by the environments they experience and the populations they comprise. Also important is the prevention paradox, which suggests that laws that have only a modest impact on a broad population may have a greater effect on human health and well-being than laws that target, often coercively, so-called high risk individuals.[53]

Parmet's book, *Populations, Public Health, and the Law*, powerfully demonstrates how a population-based perspective can inform, challenge, and highlight the otherwise ignored public health dimensions of prevailing legal doctrines in a variety of legal fields (including health law, constitutional law, and torts). Her account demonstrates how many issues that are typically viewed as questions of individual rights or business rights – Due Process and First Amendment issues, for instance – are often constructed in ways that ignore population-level issues. For example, in the analysis of commercial speech issues under the First Amendment, the potential negative impact of such speech (fast food advertising, for example) is typically viewed in a highly individualistic way that does not reflect the population-level effects of marketing and advertising. Courts normally ask whether a particular marketing practice can be directly linked to negative outcomes in particular individuals, instead of looking to the population-level effects of cumulative exposure to advertising. As Parmet explains:

> [A] court applying a population level analysis informed by epidemiology would understand the potential impact of determinants to which a population is widely exposed. Hence, even if advertising is not 'the' cause of the obesity epidemic, indeed even if it only plays a minor role in determining the probability that any one child will be obese, across the population of children exposed to it directly and indirectly (through the behavior of their peers), advertising may significantly increase the number of cases of obesity.[54]

Parmet's point is not that "public health protection should always trump claims of free speech," but instead that courts (and legal academics) should apply the lessons of public health science and consider how legal doctrines impact populations, not just individuals.[55]

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52. Parmet, *supra* note 17.
53. *Id*. at 268.
54. *Id. at* 184.
55. *Id.* at 181.

E. A Workable Definition of "Public Health Law"

...What follows is my attempt to construct [a workable definition of Public Health Law], using Gostin's definition as the starting point and making modifications based on the insights of the scholarship described above.

1. Start with the beginning of Gostin's definition, which focuses on the authority of government to address public health challenges.[56] This is the key factual commonality that unifies the field of public health law.

2. Subtract from Gostin's definition the focus on social justice as the "prime objective of the field." This sentence, which was added into the 2008 version of the definition, suggests a normative goal that may not be fully shared by all scholars within the field. In addition, the meaning of the term is contested and may suggest a broad ecological/social determinants focus that is the subject of debate and controversy. This is not to suggest that social justice cannot, or should not, be a central focus of public health scholarship – only that it should not be included in the definition of the field. (In other words, my view is that the definition of the field should be a primarily descriptive one, rather than a prescriptive one.)

3. Add Burris's recognition that "incidental" public health laws – those that have an important influence on public health, even if they were not enacted with public health goals in mind – are an important focus of analysis. Gostin's definition does not clearly include such laws within its scope.

4. Emphasize Parmet's insight that a focus of the effect of legal doctrines and structures on populations, informed by the science of public health, is the unique perspective that sets public health law apart from other disciplines.[57]

Adding these four elements together, I suggest the following definition for "Public Health Law":

> **Public health law is the study of the legal powers and duties of the state to identify, prevent, and ameliorate risks to the health of populations, as well as the study of legal structures that have a significant impact on the health of populations.**[58]

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56. The phrase "and limits" is not needed, as an examination of government's authority implies an examination of the limits on such authority.

57. This is an insight shared by others, including Gostin. *See* Gostin, *supra* note 3, at 16-17.

58. I adopt Parmet's notion that "the population perspective refers to any group or number of individuals . . . sharing some common trait." Parmet, *supra* note 17, at 18. The health risk need not impact the entire population of a given area to be worthy of consideration and concern. A given risk, for example, may impact only children, only women, or only people who engage in a particular activity. For this reason, my proposed definition refers to *populations*, and not a static *population*.

F. Differentiating Health Law and Public Health Law

…From the preceding discussion and definition of public health law, it should be apparent that public health law is quite distinct from health law. Nonetheless, public health law is often considered to be a sub-field or a sub-specialty of health law.[59] If this is the case, then public health law, however it is defined, cannot be said to constitute its own field of law. Thus, it is useful to disentangle the two subjects and describe why the categorization of public health law as a sub-field of health law is problematic.

The operating principles underlying health law and public health law are not simply different; in important ways they are direct opposites. Health law is focused on the legal structures that relate to the treatment of individual (and often already ill) patients.[60] The core legal doctrines emphasize "maximizing patients' options, protecting their individual best interests, and enforcing obligations that arise from the fiduciary character of the treatment relationship."[61] By contrast, public health law focuses on preventing disease and improving health at the population level (as does the field of public health).[62] Instead of examining the role of medical care, public health law is primarily concerned with identifying the sources of disease (be they pathogenic, behavioral, or, potentially, ecological) and developing appropriate legal interventions at the population level. The core legal doctrines of public health law address the authority for government to take action (and the limits of governmental authority) to protect the health of populations. The two fields are undeniably connected by their overlapping subject matter, but to lump the two together ignores their fundamental dissimilarities.

In recent years, leading public health law scholars have suggested that the lines between health care and public health – and, by extension, health law and public health law – are blurring. Peter Jacobson and Lawrence Gostin, two of the foremost scholars in the field, have argued that the distinction between these two fields is overstated, and that "public health and health care should be conceptualized as two interconnected parts of a single health system."[63] They contend that "[d]espite their differences in methodologies, goals, and organizational structures, these two disciplines share more similarities than differences," and therefore "integration" between the two disciplines should be a primary focus of health policy.[64] Other scholars of public health law have expressed similar statements.[65]

Gostin and Jacobson are undoubtedly correct that it makes sense to better integrate public health concerns and insights into the health care system. Moreover, given the fact that "[h]ealth care services receive the bulk of funding and political support, while public health is chronically starved of resources," it may make

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59. *See, e.g.*, MARK A. HALL, MARY ANNE BOBINSKI & DAVID ORENTLICHER, HEALTH CARE LAW & ETHICS (7th ed. 2007) (dedicating one chapter to Public Health Law in a ten-chapter casebook on Health Law).

60. Berman, *supra* note 32, at 336.

61. Hall, *supra* note 27, at S202.

62. Berman, *supra* note 32, at 336.

63. Lorian E. Hardcastle, et al., *Improving the Population's Health: The Affordable Care Act and the Importance of Integration*, 39 J.L. MED. & ETHICS 317, 319 (2011) (co-authored by Gostin and Jacobson); *See also* LAWRENCE O. GOSTIN & PETER D. JACOBSON, LAW AND THE HEALTH SYSTEM 1 (2002) (writing that "we believe the separation between health care and public health is exaggerated and that personal and population-based services are interconnected).

64. Hardcastle, *supra* note 63, at 319.

65. *See, e.g.*, Mariner, *supra* note 30, at 254, 268 (suggesting that the distinction between the two fields is "rapidly blurring" and that "[i]nstead of medicine and public health the world sees a field of Health, writ large, with shared components of research prevention, treatment, and care throughout").

strategic sense to try to integrate public health concepts into health care funding streams, rather than to seek wholly separate funding streams for public health efforts.[66] But to say that the two *systems* should be better integrated does not mean that health *law* and public health *law* should be seen as one integrated whole.

Consider an example that Jacobson and Gostin use to illustrate their point:

> Depending on the lens through which a health service is viewed, the same activity can be conceptualized as either a public health or a health care service. For example, a throat swab for strep throat is a health care service insofar as it is performed to diagnose and treat a patient. The provision of the same service has public health dimensions. The doctor addresses public health issues by advising the patient on behavior modification to avoid the spread of the disease. In addition, by confirming the diagnosis before prescribing antibiotics, the doctor helps to avoid antibiotic resistance, an issue with implications for the population as a whole.[67]

While indeed the same activity can serve both public health and health care functions, Jacobson and Gostin give away the key point with the first sentence: the *lens* is crucial. Whether an activity is viewed as an issue of health care or public health (or both) has theoretical, legal, and practical implications. In this example, the doctor's fiduciary obligation is to his patient, and he or she is paid based on the services that he or she provides to the patient. While it may be good practice to counsel the patient and to avoid overprescribing antibiotics, there is little incentive for the doctor to do either; indeed, any time spent counseling the patient is uncompensated time that cuts into the doctor's bottom line. Thus, as a practical matter, the public health implications of the transaction are, at best, a secondary consideration, and they may often be completely ignored.

This is, of course, why Jacobson and Gostin argue for better "integration" of health care and public health, but the danger with integration is that the health care (rather than the public health) concerns are likely to dominate. Moreover, public health concerns are likely to be marginalized, if not ignored, to the extent they do not intersect (as they do in Jacobson and Gostin's example) with the treatment of individual patients. To return to their example, the advice given to the patient is to engage in "behavior modification to avoid the spreading of the disease." While such behavior change may be important, this advice is still targeted to the individual patient, who may or may not be in a position to act on such advice. A public health perspective would also consider how to reduce the spread of strep throat at the population level. If the patient, for example, is the resident of an overcrowded nursing home, poor sanitary practices may be the reason that strep throat is spreading rapidly, and there may be little that the patient could do on his or her own to protect others from exposure. But there may be simple, population-level interventions – the addition of convenient hand sanitizers for staff use, for example – that could sharply reduce the spread of the disease.[68] Or perhaps more drastic interventions, such as legal actions that limit overcrowding in nursing homes, are needed. In either case, it is quite possible that preventive actions will prove to be far cheaper and more effective in the long run than treating each case of strep throat individually. But

66. Hardcastle, *supra* note 63, at 317.

67. *Id*. at 319.

68. *See* Steven B. Auerbach et al., *Outbreak of Invasive Group A Streptococcal Infections in a Nursing Home*, 152 ARCH. INTERN. MED. 1017 (1992).

focusing solely on the overlap between public health and medical care would keep such population-level causes and interventions out of view.[69]

As Lawrence Gostin has explained in other work, public health has been "politically and publicly underappreciated" for at least four different reasons:

> (1) *The rescue imperative*—society is willing to spend inordinately to save a life of a person with a name, face, and history, but less so to save "statistical lives;" (2) *The technological imperative*—public health services are less appealing and salient than the high technology solutions of microbiology and genetics; (3) *The invisibility of public health*—when public health is working well (e.g., safe food, water, and products), its importance is taken for granted; and (4) *The culture of individualism*—society often values personal goods (individual responsibility, choice, and satisfaction) over public goods (population health and safety).[70]

Given these powerful cultural (and even psychological) biases, if public health law continues to be seen as a sub-field of health law – or if academics continue to push for "integration" of the two fields – the distinct voice of public health law will inevitably be drowned out. Rather than blurring the distinction between health law and public health law, what is needed is a further articulation of how the two are distinct and why the unique perspective of public health law is important and valuable…..

69. Similarly, consider modifying Jacobson and Gostin's example so that the patient involved was dealing with obesity. The doctor could prescribe medication (or perhaps surgery) and also suggest behavioral change (better diet, more exercise, etc.). But such medical interventions and advice leave the cultural and environmental structures (and industries) that promote obesity in our culture untouched. This case-by-case approach is unlikely to make a serious dent in our national obesity problem.

70. Lawrence O. Gostin, *Health of the People: The Highest Law?*, 32 J.L. MED. & ETHICS 509, 509 (2004).