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DEFINING THE FIELD OF PUBLIC HEALTH LAW

Micah L. Berman*

Nothing is more important than the health, safety, and security of the people, and it is time that research, scholarship, and teaching reflected this priority.

Professor Lawrence Gostin¹

As of yet, no scholar has systematically examined whether public health law is a distinct field of law, meeting the criteria for “commonality and distinctiveness” that other, more established legal fields satisfy.² Yet because law is the mechanism through which society can effectively control dangerous activities and implement measures that improve health, public health law has existed in some form for centuries, if not millennia. The Bible propounds rules relating to leprosy and personal hygiene, while Blackstone’s *Commentaries* discusses laws enforcing quarantines and punishing the sale of “contagious or unwholesome flesh.”³

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.⁴ 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.⁵ 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

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1. Lawrence O. Gostin, *Public Health Law: A Renaissance*, 30 J.L. MED. & ETHICS 136, 140 (2002).

2. See Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221, 242 (2010).

3. See, e.g., Leviticus 13:1-59; WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND, Chap. 13, §2. See also Keith Syrett & Oliver Quick, *Pedagogical Promise and Problems: Teaching Public Health Law*, 123 PUBLIC HEALTH 222, 226 (2009) (noting that “issues of public health were among the earliest subjects of legal regulation by the state”).

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

5. *Id.* at 241-242.

to five years, [resulting] in the first reversal in life expectancy since the government started tracking data in 1900.”⁶ 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.”⁷ 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,⁸ new casebooks,⁹ new treatises,¹⁰ and an ever-growing number of law review articles and symposia.¹¹ 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 surrounding infectious disease.¹² 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

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

7. Gostin, *supra* note 1, at 140.

8. See text accompanying notes 174-175 *infra*.

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

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

11. 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); Gostin, *supra* note 1 (introducing a symposium on public health law).

12. 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).

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. As a very rough indicator, a LEXIS search of U.S. law reviews and journals for the years 2002-2011 found 1,223 articles mentioning the phrase “public health law,” including 118 mentioning “public health law” in the title. By contrast, in the previous decade, only 485 articles referred to “public health law,” and only fourteen of them included the phrase in their title.

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).¹³ 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.¹⁴

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.¹⁵ 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.¹⁶ Public health law scholarship is increasingly pushing back against this typical response.

13. 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.”).

14. *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.”).

15. 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.”).

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

“[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.¹⁷

Is public health law a distinct field of law? And if so, how should the field of public health law be defined? My discussion of these issues proceeds in three parts. Part I discusses what constitutes a field of law. After reviewing the traditional characteristics of a legal field, it considers the experiences of two relatively young legal fields – environmental law and health law – that have clearly established their place in the legal academy, despite lacking many of these traditional attributes. Part II then attempts to define what constitutes public health law. Following a detour to discuss the meaning of the terms “public health,” this section reviews how various scholars, most notably Lawrence Gostin, have sought to define the term “public health law.” It then sets forth a proposed definition of public health law that incorporates the contributions of Gostin and other leading public health law scholars. Finally, Part III engages the question of whether public health constitutes its own distinct field of law. I conclude that public health law, despite lacking many of the traditional characteristics, can make a strong argument that it is entitled to recognition as its own academic field. As a practical matter, however, public health law scholars must engage in building the structure of a legal field – expanded course offerings, academic centers, dedicated journals, etc. – before the wider law school community will recognize the emergence of public health law as a significant and valuable legal field.

I. DEFINING A LEGAL FIELD

A. Why Define a Legal Field?

Before addressing the question of what constitutes a “field of law,” it is worth asking whether the question is itself significant. Should we care whether or not public health law is considered a discrete field of law (as opposed to a sub-field or simply the exploration of laws related to a particular subject)? Are such categorizations meaningful and helpful, or is

17. 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.

such line-drawing an empty academic exercise with little practical application?

Certainly, the legal academy accords significant value to such categorizations, and thus – at least in the context of law schools – such categorizations have functional importance. Faculty hiring and tenure evaluations, for example, can be heavily influenced by how fields of law are defined. Law schools try to ensure that their faculties are well-balanced and can teach all major fields of law. Thus, they typically reserve at least one faculty position for a health law professor (since health law is generally considered to be a significant field of law). By contrast, because public health law is not typically seen as its own field of law, it is exceedingly rare for any school to consider public health law as a priority when it conducts a search for new faculty. Similarly, once faculty are hired, they are expected to make significant contributions to their field of law, and tenure decisions are often heavily influenced by peer reviews from others in the same field. How “field” is defined for such purposes can strongly influence – or bias – the faculty hiring and review processes.¹⁸

There is also an “internal status hierarchy” in many law schools, with “traditional” subject areas such as contracts and constitutional law at the top of the pecking order.¹⁹ These fields, which form the core of the first-year curriculum, are typically categorized by a high degree of “coherence,” i.e., the subject matter is clearly organized and well defined.²⁰ Newer fields, which typically occupy places further down in the subtle status hierarchy of law schools, therefore feel pressure to bring similar order and definition to their fields.²¹ Defining a field may be necessary to address the “coherence anxiety” (or status anxiety) of those teaching in the area, and it also serves a signaling function to the rest of the legal academy.²² In other words, self-definition as a discrete legal field appears to be a precondition for academic legitimacy (which again can impact faculty hiring, faculty retention, and curricular decisions).

18. Although law school students are generally not required to declare a subject-matter specialization, many law school curricula are organized around “tracks” or “focus areas” from which students can select. If public health law is seen as sub-field of health law, a single course about public health law (offered as part of the health law track) might suffice. If it is seen as its own focus area, then one might expect to see numerous public health law courses available at any given time (and correspondingly, a need for additional public health law faculty).

19. See Theodore W. Ruger, *Health Law’s Coherence Anxiety*, 96 GEO. L.J. 625, 630 (2008).

20. Aagaard, *supra* note 2, at 229-30. Of course, this “coherence” is in some senses artificial; the legal issues are rarely presented so cleanly and divisions between legal fields are rarely so clear in the real world.

21. Ruger, *supra* note 19, at 630.

22. *Id.* at 626.

Beyond the functional role that legal fields play in law schools' organizational structures, attempting to define a legal field can be beneficial in and of itself because the process involves an open discussion and debate about a field's (or potential field's) goals, purposes, and limits.²³ To decide whether a particular subject qualifies as a "field of law," one must first define the scope and limits of the field. This process – determining which subjects are in and which are out – is inherently a value-laden exercise that requires confronting unspoken assumptions and articulating justifications for the distinctions made. For example, as discussed in Part I(C) below, the academic debate about how the relatively young field of environmental law should be defined has revealed substantial normative disagreement about the purpose, goals, and scope of the field.

In addition, defining a subject as a distinct academic field may also motivate legal practitioners to organize and self-identify along similar lines. This can then "create a demand for other correlates of a legal field, such as practice materials, conferences, academic research, and law school courses."²⁴ In this way, the categorizations made by the legal academy and legal practice can be mutually reinforcing.²⁵ This seems to be what occurred in the field of health law, where only fifty years ago "health law was not a field of study or of practice, at least under that terminology."²⁶ Only in the last half of the 20th century, as the field of academic health law emerged, did health law "become an area in which practitioners specialize and in which students can find employment."²⁷ While both the bar and the legal academy were responding to seismic changes in the health care industry and its legal foundations, they worked with one another to establish the identity of this new field and facilitate its acceptance in the broader legal community.

Finally, being recognized as a "field" may be most important for the purpose of shaping legal doctrine. "[L]aw operates through categories," and therefore definitions and categorizations can powerfully frame the analysis of legal issues by courts and practitioners.²⁸ As suggested in the

23. See Roger S. Magnusson, *Mapping the Scope and Opportunities for Public Health Law in Liberal Democracies*, 35 J. L. MED. & ETHICS 571, 572 (2007).

24. Aagaard, *supra* note 2, at 250.

25. This may be particularly true in the public health law setting, where many leading scholars are, at least to some extent, also involved in providing technical assistance or legal representation to public health practitioners.

26. James F. Blumstein, *Health Care Law and Policy: Whence and Whither?*, 14 HEALTH MATRIX 35 (2004).

27. *Id.*

28. Mark A. Hall, *The Scope and Limits of Public Health Law*, 43 PERSP. BIOLOGY & MED. S199, S202

introduction, because public health law is not well-established or well theorized, judges tend to view public health considerations as “non-legal” factors that must not influence their decisions. By contrast, because the field of law and economics has established its legitimacy as a mode of analysis, it is commonplace for judges to incorporate marketplace values or concerns about judicial efficiency into their reasoning.²⁹ Categorizations also influence how legal issues are conceptualized in the first place.³⁰ If, as often occurs, underlying public health law issues are not named and a case is viewed simply as an issue of statutory interpretation or constitutional interpretation, then the public health implications of a given decision are likely to be ignored.

It should be noted, however, that the definition of a legal field must be carefully considered, or it risks obfuscating as much as it illuminates. As discussed, definitions and categorizations can powerfully impact the framing of legal issues, but such framing can be limiting if it is too narrowly drawn. Likewise, the process of defining a “field of law” could potentially obscure relevant legal issues that fall outside the definition. For example, use of the term “white collar crime” may, depending on how the term is defined, exclude harmful corporate conduct that is not technically criminal, such as systemic labor abuses.³¹ As a result, the study of white collar crime may ignore the insights that could be gained from the analysis of such misconduct, and the question of whether such non-criminal conduct should be criminalized might never be asked. Accordingly, when framing a definition of a legal field it is important to take stock of the critical debates that are taking place (or might need to take place) within the field and ensure that the definition is broad enough to allow those discussions to continue.

B. What Constitutes a Legal Field?

Despite the centrality of “field” concept to legal academics and legal analysis, “[t]he literature is notable for the absence of an epistemology or *meta* theory for positively defining the essential characteristics of a field of

(2003).

29. Daynard, *supra* note 16, at 281-82.

30. Critics of a government involvement in public health have noted (with concern) that when an issue is labeled as a matter of public health, “the case for government intervention . . . gets that extra boost of legitimacy.” Richard A. Epstein, *In Defense of the ‘Old’ Public Health: The Legal Framework for the Regulation of Public Health*, 69 BROOK. L. REV. 1421, 1424 (2004).

31. Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. R. 1, 4-5 (2004).

law.”³² Nonetheless, various scholars have attempted to outline the typical characteristics of a field of law.

One of the most recent and comprehensive attempts to define what constitutes a field of law was set forth by Todd Aagaard in the process of exploring whether environmental law constitutes a legal field (and, if so, how it should be defined).³³ Aagaard explains that “[a]t a minimum, a legal field must exhibit two characteristics: commonality and distinctiveness.”³⁴ Commonality means that the field must exhibit some defining pattern or characteristic. This pattern may relate to a particular legal doctrine (e.g., torts), to shared factual context (e.g., labor and employment law), to values and interests (e.g., civil rights law), or to policy trade-offs (e.g., environmental and natural resources law).³⁵ The more powerfully descriptive the shared pattern is, the more “coherent” the field is seen to be. But, as Aagaard notes, a field unified by a shared factual context must be able to explain why that factual context is legally relevant. Otherwise, “[a]n area of law unified only by factual commonality – that is, a common factual characteristic or characteristics that make no difference to the application of the law – is the Law of the Horse; a joke rather than a legitimate field of legal study because the various laws that govern activities related to horses have nothing legally important in common.”³⁶

Aagaard’s second requirement, distinctiveness, is also important. A field cannot simply be defined solely with reference to a pattern or characteristic that is widely shared by a number of other legal fields. Statutory interpretation, for example, is not a field of law, although (and because) it is a significant characteristic of many different fields of law. While in search of coherence it may be tempting to adopt a broad and

32. Wendy K. Mariner, *Toward An Architecture of Health Law*, 35 AM. J. L. & MED. 67, 79 (2009).

33. Aagaard, *supra* note 2.

34. *Id.* at 242.

35. *Id.*

36. *Id.* The “Law of the Horse” refers to Judge Frank Easterbrook’s point (which he attributed to Gerhard Casper) that “‘Law and . . .’ courses should be limited to subjects that could illuminate the entire law.” Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207 (1996). Easterbrook explained:

Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort to collect these strands into a course on “The Law of the Horse” is doomed to be shallow and to miss unifying principles.

Id. at 207-08. Easterbrook famously questioned whether the “Law of Cyberspace” was worth studying, or whether it was just an example of the “Law of the Horse.” Aagaard uses the term “transcendence” to refer to Easterbrook’s idea that “legal fields should ‘illuminate the entire law’ and teach ‘general rules.’” Aagaard, *supra* note 2, at 245.

simplified definition, a definition that is overbroad may encroach on other areas of law – and thereby dilute its distinctiveness.

While Aagaard outlines two broad parameters – commonality and distinctiveness – that shape the definition of a legal field, others have more specifically catalogued the specific commonalities that are the “traditional” characteristics of legal disciplines. Theodore Ruger, discussing whether health law meets the traditional tests, writes that the key characteristics of a coherent field are “(1) a reductionist focus on internal logic; (2) a focus on essential legal form; (3) and emphasis on linear historical development, and (4) a high level of institutional specification and centralization.”³⁷ Running through a series of examples, Ruger concludes that “[w]hile not all of these are required for a field to be considered coherent . . . a field that lacks most or all of these will rarely be perceived as such.”³⁸

No one has even sought to make the case that public health law contains the four “traditional” characteristics that Ruger and others have listed, but anyone seeking to do would face obvious challenges. Public health law does not have any typical, much less any essential, legal forms. Those studying public health law must be conversant in a wide range of legal forms, as significant cases in public health law include statutory actions, criminal cases, personal liability suits, administrative law challenges, and a variety of other types of legal actions.³⁹ Neither does public health law cohere around any centralizing documents or institutions; public health law issues arise in disparate contexts ranging from the local to the global. While public health law has a centuries-long history, that history was largely forgotten as public health law slipped into decline (largely a victim of its own success) during the Twentieth Century.⁴⁰ Although public health law has unquestionably experienced a profound resurgence in the last two decades, it has no recent history of being recognized as a distinct legal field.⁴¹ That leaves the final element on Ruger’s list: a “reductionist focus on internal logic,” i.e., a

37. Ruger, *supra* note 19, at 629.

38. *Id.*

39. See, e.g., *Burditt v. U.S. Department of Health and Human Services*, 934 F.2d 1362 (5th Cir. 1991) (enforcing statutory obligation to provide emergency medical services); *Ferguson v. South Carolina*, 532 U.S. 67 (2001) (constitutional challenge to criminal prosecution); *Cipollone v. Liggett Group, Inc.* 505 U.S. 504 (1992) (personal injury suit raising questions of federal preemption); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (constitutional challenge to public health authority); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (administrative law challenge to agency authority).

40. See Burris et al., *supra* note 15, at 170.

41. See David P. Fidler, *Gostin on Public Health Law*, 1 YALE J. HEALTH POL’Y L. & ETHICS 303, 305 (2001).

straightforward organizing principle that can explain the field. It is difficult to imagine that any one principle could organize such a broad and eclectic field, but even assuming such a principle exists, that would provide public health law with only one of the four characteristics of a “traditional legal field.”

As Ruger notes, however, these traditional characteristics are historically contingent. These elements are seen as the key components of legal field only because legal fields have traditionally been organized along these lines in the past. A field organized around other sets of commonalities would not necessarily be less “coherent” in any normative sense. Accordingly, other scholars have sought to throw off the traditional rules, arguing that they are neither normatively compelling nor an accurate description of how modern legal fields are organized. Wendy Mariner, for example, also writing in the health law context, concludes that the “most accurate” account may simply be that “separate fields have become accepted as a matter of historical accident or practical need,” and the true test of a field’s validity is simply whether others accept its self-definition as a field.⁴² Mariner writes that although academics tend to scoff at the idea of organizing legal fields simply by subject matter (again by raising the specter of the Law of the Horse), “many [fields] are defined in that manner, and they have ample precedent.”⁴³ Thus, the question of whether public health law constitutes a distinct legal field may be resolved in part by reference to the “traditional” characteristics, but the question by and large reduces to whether advocates of public health law can make a cogent argument that their field contributes something of importance and value to legal thought and to the legal academy.

Before exploring how public health law might seek to define itself as a distinct field, it is useful to look in more depth at two relatively young legal fields – environmental law and health law. In exploring these two examples, my goal is not to resolve the debate about what constitutes a field of law. Rather, it is to examine how these two fields have sought to define and organize themselves, applying the conceptual frameworks discussed above. Since both of these fields lack many of the “traditional” aspects of a field discussed by Ruger, they have searched for other means of establishing their “commonality and distinctiveness,” as Aagaard requires.⁴⁴ These approaches to organizing a field of law have fallen in one of two general categories: *prescriptive* approaches and *descriptive*

42. Mariner, *supra* note 32, at 79.

43. *Id.*

44. Aagaard, *supra* note 2, at 242.

approaches.⁴⁵ Prescriptive approaches seek to organize a field around a normative principle or viewpoint, while descriptive approaches describe (in a more neutral manner) the subject matter covered by the field. After using environmental law and health law to explore the benefits and drawbacks of these different approaches, we can return the question of how best to define public health law.

C. Examples: Environmental Law and Health Law

1. Environmental Law

Scholars of environmental law have struggled to bring definition and coherence to the field, recognizing that:

when one sums up the cases, statutes, and administrative regulations that make up the core of what most people consider environmental law, one is hard pressed to reduce them to a set of distinctive, fundamental principles, let alone rules that can be applied to a wide range of current and future issues, as one can do in other areas of 'real law.'⁴⁶

Like public health law, environmental law does not share any unifying legal form, it lacks a centralizing document, and (much more so than public health law) it lacks deep historical roots. Thus, it is left with trying to either distill a "reductionist focus on internal logic" or to define itself with reference to other characteristics or commonalities.

Some have suggested a *prescriptive* approach that would view environmental law as a distinct field because it contributes a unique normative perspective to legal thought, namely environmentalism. Dan Tarlock, for example, suggests that the "most honest" theory would recognize environmental law as a significant break from the Western legal tradition (which prioritizes the rights of individuals) because "it seeks to protect two communities, natural systems and future generations, that have traditionally lacked a legal personality."⁴⁷ In this view, environmental law is characterized not by the subjects that it examines, but by the distinctive and valuable analytic perspective that it brings to bear on legal thought.

45. *Id.* at 240-41 (comparing descriptive and prescriptive approaches).

46. A. Dan Tarlock, *Is There a There There in Environmental Law?*, 19 J. LAND USE & ENVTL. LAW 213, 217-18 (2004); See also David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. DAVIS L. REV. 619, 621 (1994) ("Environmental law has no explicit unifying principles that could serve to organize the jumble of statutes, regulations, cases, and academic analyses that collectively form the academic subject of environmental law.").

47. Tarlock, *supra* note 46, at 235.

Although Tarlock suggests this argument, he backs away from fully endorsing it, because he recognizes that “no such legal revolution has occurred in environmental law.”⁴⁸ While he argues that a clear commitment to protecting natural systems and future generations *could* provide a unifying focus for environmental law, Tarlock suggests that environmental lawyers (himself included) have instead tried to pursue environmental objectives *sub rosa* in one of two ways:

First, we have tried to use the courts as instruments of change by pursuing a rule of law strategy based on the fiction that courts were simply applying pre-existing duties. Second, we have pretended that environmental law is consistent with liberal individualism because it is a modest extension of the principle that persons should be responsible when they cause harm to others.⁴⁹

While these legal advocacy efforts have been remarkably successful, they have perhaps come at the expense of “coherence,” because this incremental approach does not embody any overarching view of environmental law. Moreover, in Tarlock’s view, they have handicapped the ability of environmental advocates to pursue some of their objectives, instead pushing them towards legal advocacy efforts that best fit the “liberal individualism” paradigm.⁵⁰

Like Tarlock, although for somewhat different reasons, Todd Aagaard agrees that a prescriptive approach to environmental law does not accurately sum up the field as it currently exists. He writes, “[e]nvironmentalism does not predominate in current environmental law, and there is little prospect of changing that in the future.”⁵¹ Rather than being animated solely by solicitude for the natural environment, Aagaard believes that “environmental law reflects a balance among a variety of competing values and interests, which include environmentalism but also other, arguably more powerful, values such as maintaining traditional patterns of resource exploitation and resistance to government regulation.”⁵² Thus, he concludes that it is more accurate to describe environmental law *descriptively* as the body of law that explores these

48. *Id.* at 236.

49. *Id.* at 237.

50. *Id.* Similarly, I have previously argued that some efforts to conform public health law to the prevailing “individualist/biomedical paradigm” may undermine the long-term effort to reshape how the public (and the legal academy) conceptualizes public health issues. See Micah L. Berman, *From Health Care to Public Health Reform*, 39 J.L. MED. & ETHICS 328, 332-33 (2011).

51. Aagaard, *supra* note 2, at 256.

52. *Id.* See also Todd S. Aagaard, *Environmental Harms, Use Conflicts, and Neutral Baselines in Environmental Law*, 60 DUKE L.J. 1505 (2011) (elaborating upon this use-conflict framework).

various tensions over the use of natural resources. Even without identifying any “fundamental, unifying substantive principles” that animate environmental law, Aagaard contends that a descriptive “organizational framework” is sufficient to provide coherence to the field.⁵³ (Although he does not address the “Law of the Horse” problem directly, he implicitly argues that the environmental law’s “distinctive patterns” of “use-conflict trade-offs” make it a unique field worthy of separate consideration.⁵⁴)

This descriptive approach, however, also has its pitfalls. If environmental law is not characterized by any unique methodological approach or ideological perspective, it may flourish in the short term – while issues relating to the environment remain the focus of popular interest and political disputes – but it may prove to be no more than a fad.⁵⁵ Tarlock summarizes the danger (and the benefits of a more prescriptive or normative approach):

One of the primary characteristics of a distinct area of law is that it contains a relatively unique set of core principles distinguishing it from other areas of the law. One could dismiss environmental law, with considerable justification, as applied administrative law with a heavy dash of statutory construction law, if there is such an area of law. Many areas of law flourish without meeting this criteria, but a distinctive core along with the respect of the academy is important, if not necessary, to prevent their marginalization and perhaps extinction. Without a distinctive core and the self-study that the academy provides, an area of law will lose power in the judicial and political arena. It becomes a factor or screen to be considered from time to time rather than a consistent decision driver.⁵⁶

This brief review of environmental law suggests the tension inherent in defining a field of law. The definitional exercise raises fundamental questions about what the purpose of establishing the discipline is. In the case of environmental law, is the goal to infuse a new perspective (environmentalism) into legal thought and legal doctrine? Or is the goal to institutionalize and support the study of tensions relating to the use of the

53. Aagaard, *supra* note 2, at 277.

54. *Id.* at 282.

55. Tarlock provides “Poverty Law” as an example. He writes that “law and poverty courses were very much in vogue in the late 1960s and early 1970s, reflecting the high political priority that structural poverty ameliorization enjoyed,” but “eventually, the legal construct of poverty died as political priorities shifted . . .” Tarlock, *supra* note 46, at 229.

56. *Id.* at 228.

natural environment, whether those doing the analysis are environmentalists or not? The prescriptive approach can provide the discipline with a “distinctive core,” but it may exclude or marginalize those who do not share the same normative goal. Too close of a connection to environmentalism (which, at least at present, is largely associated with a more liberal political outlook) may also make the field vulnerable to the shifting political winds. A descriptive approach allows for a broader tent by not taking a stand on whether or to what degree environmentalism trumps other values. But by leaving such fundamental questions unanswered, it raises the concern that environmental law is just another “Law and . . .” course that will have trouble establishing long-term legitimacy because it brings nothing unique to the table.⁵⁷

2. Health Law

Even more so than environmental law, health law lacks the traditional characteristics of a legal field. Health law has no readily apparent normative value – like environmentalism – to even consider using as an organizing principle. This has not stopped scholars from suggesting such principles, but the organizing principles suggested – law and economics (a market paradigm), patient autonomy, professional self-regulation, and public determination, among others⁵⁸ – are both inadequate and in sharp tension with one another.⁵⁹ Some suggested approaches are simply too narrow to embody the full range of the field. Patient autonomy, for example, even if a valuable lens for considering doctor-patient interactions, is not a useful organizing principle when the focus turns to the financing of the health care system. Other approaches – like a law and economics approach or a social justice approach – reflect the ideological and methodological approach of the scholar, but fail to illuminate anything unique about the study of health law.⁶⁰

57. *Id.*

58. M. Gregg Bloche, *The Emergent Logic of Health Law*, 82 S. CAL. L. REV. 389, 408 (2009) (providing these four examples of attempts to provide a “big theory” that would unify the field of health law); *See also* Nan D. Hunter, *Risk Governance and Deliberative Democracy in Health Care*, 97 GEO. L.J. 1 (2008) (proposing “risk management” as an organizing principle for health law); Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463 (2002) (suggesting “trust” as an overarching theme).

59. *See* Mariner, *supra* note 32, at 85.

60. Many foundational fields, including Contracts, Torts, and Property, are regularly taught from either a law and economics or a social justice perspective. These perspectives bring valuable insights to the fields, but do not define them. *See* Einer R. Elhauge, *Can Health Law Become a Coherent Field of Law*, 41 WAKE FOREST L. REV. 365, 367 (2006) (“Many people teach contracts coming from all sorts of disparate normative perspectives, and yet they share in common a vocabulary for thinking about contracts issues that helps them to better pinpoint just where their disagreements lie and to see its connections to other issues in the field we call contracts.”).

“[T]he protection of health” has also been suggested as a normative principle, but while this is broad enough to encompass the field, it is unclear what value is added by a principle framed so broadly. Wendy Mariner, discussing this concept, writes: “The value of health is an essential consideration, but not necessarily controlling in any particular setting or circumstance. Lawyers need to think carefully about when a legal principle is controlling and when the health concern is controlling.”⁶¹ If “health” is just an additional consideration that competes with many other legal considerations (and, presumably, non-legal considerations such as cost and equity), then it is essentially indistinguishable from a descriptive approach that posits that health law is the study of the legal structures, rules, and cases that have a significant bearing on health.

Indeed, although the search goes on, there seems to be an emerging consensus that a dominant normative paradigm for the field of health law is unlikely to emerge. Hank Greely, for example, writes that “experience and logic” dictate that such a paradigm is unlikely to develop.⁶² More than twenty years of effort have not brought health law closer to cohering around any central organizing principle, and the sheer breadth of the field makes this unlikely to occur. Instead, Greely would define health law in a purely descriptive way, as “encompassing all legal and public policy issues involving the provision of health care (medical or otherwise) or health status.”⁶³ He dismisses the “Law of the Horse” concern as “a catchy put-down, but with very little substance,” noting that many legal academic fields, including bankruptcy and banking law, employment law, family law, and others, are applied fields of law that focus on the analysis of a particular factual setting or particular types of relationships.⁶⁴

Another prominent figure in the field, Einer Elhauge, has defended health law’s importance as a unique field while agreeing with Greely that it is unlikely (and, indeed, undesirable) that any normative paradigm could fully describe the field.⁶⁵ Elhauge argues that although health law is a field of applied law that draws from tort law, contract law, antitrust law, tax law, corporate law, and more, those varied fields of law often have differing and distinct applications when applied to the subject of health

61. Mariner, *supra* note 32, at 71. Mariner also suggests “justice” as a second normative goal of the field. *Id.* at 70. But this suggestion, while also being too broad, is clearly lacking in distinctiveness. Mariner ends her paper by concluding that no normative approach is sufficient and that “descriptions of the field should avoid normative stances.” *Id.* at 85.

62. Henry T. Greely, *Some Thoughts on Academic Health Law*, 41 WAKE FOREST L. REV. 391, 407 (2006).

63. *Id.* at 392. This broad definition would conceptualize public health law as a sub-field of health law.

64. *Id.* at 405.

65. Elhauge, *supra* note 60.

care. Thus, the distinctive context of health care is an important locus of scholarship (while the study of horses would not be, because other legal disciplines can be applied to horses in a relatively straightforward way). Elhauge explains:

While understanding general rules of, say, tort, contracts, anti-trust, and ERISA might be fine for a horse lawyer, it would actually be misleading to a health lawyer because each of those fields has specially tailored doctrines to deal with health care. For example, general tort law matters much less in health care than the special laws of medical malpractice, informed consent for medical treatments, and the particular forms of liability that sometimes exist for the work of medical subordinates.⁶⁶

In other words, the health care context produces financial and interpersonal relationships that are unique in legally relevant ways, even if they cannot be neatly summarized. Just as other fields have emerged to explore how the law is shaped by distinctive personal (family law) or commercial (corporate law) relationships, health law is the analysis of a “similarly complex web of relations that affect our health.”⁶⁷

In sum, scholars of health law (like those of environmental law) continue to debate whether there is a “there there,” i.e., whether health law can be defined in a comprehensive way that demonstrates that it deserves its place as a “real” field of law. The field has explored both normative definitions and descriptive approaches, with neither approach proving completely satisfying. Prescriptive approaches tend to be “too subject-driven or too value-laden,”⁶⁸ while descriptive approaches must struggle against the “Law of the Horse” question (though there may be good answers available). While no singular approach has captured the field, the discussion and debate has contributed to the growth and development of health law as an academic field. The search for paradigms and definitions has led to voluminous scholarship explaining (or seeking to explain) what is unique about the health care context and why the study of health law is an important and valuable endeavor.

II. DEFINING PUBLIC HEALTH LAW

As has been demonstrated, scholars in an emerging legal field typically suffer from some degree of “coherence anxiety,” i.e., concern

66. *Id.* at 371.

67. *Id.* at 370.

68. Mariner, *supra* note 32, at 85.

about how to describe the scope of their field and about what unique insights their discipline contributes to legal analysis. Public health law is no different. Like environmental law and health law, public health law is a (potential) field in search of coherence and distinctiveness, which might come from either normative values or a descriptive account of the field's subject matter.

Before considering how public health law might be defined, it is first necessary to explore the meaning of the term "public health." From there, this article moves on to the main project of defining the field of public health law. Finally, as public health law is often considered to be a sub-field of health law, it is important to clarify the distinction between the two fields.

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."⁶⁹ 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*.⁷⁰ The IOM posited that "[p]ublic health is what we, as a society, do collectively to assure the conditions to be healthy."⁷¹ 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."⁷² 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*.

69. 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).

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

71. *Id.*

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

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.⁷³

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."⁷⁴ 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.⁷⁵ 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.⁷⁶

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.⁷⁷ 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.⁷⁸ Like

73. Scott Burris et al., *supra* note 15, at 174.

74. 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).

75. *Id.*

76. *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 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).

77. Gostin, Burris & Lazzarini, *supra* note 74, at 71.

78. *Id.* at 72.

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”).⁷⁹

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.⁸⁰ 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.⁸¹ This perspective, by definition, “requires much more radical measures to remedy causes of poor health,” and is accordingly far more controversial.⁸²

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.”⁸³ 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?

79. *Id.* at 72-3.

80. *Id.* at 74-5.

81. 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).

82. Hall, *supra* note 28 at S206.

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

The Galea article identified nearly 500 articles on the connection between social factors and mortality, suggesting that public health scholars increasingly see the analysis of such issues as falling within their purview.⁸⁴ 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.”⁸⁵

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.⁸⁶

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.⁸⁷

84. *Id.* at 1457.

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

86. Gostin, *supra* note 6, at 41.

87. See Berman, *supra* note 50, at 332-333; See also Mariner, *supra* note 85, 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

At its core, the debate between broader definitions of public health (which would include ecological causes within the definition) and narrower definitions (which would not) is largely a proxy fight for disputes about the appropriate role of government. Mark Rothstein, for example, argues that public health should be narrowly defined because “only activities falling within a narrow definition of public health can justify the use of [coercive governmental] power.”⁸⁸ His fear is that a broader definition of public health will inevitably lead to coercive government interference in personal decisions that should be outside the scope of governmental control. He writes that “just because war, crime, hunger, poverty, illiteracy, homelessness, and human rights abuses interfere with the health of individuals and populations does not mean that eliminating these conditions is part of the mission of public health.”⁸⁹ Those on the other side of the ideological divide also seem to assume that a broader definition of public health would lead to more extensive government involvement in social and economic issues, though they would welcome that development rather than oppose it. For instance, in his seminal 1976 article, *Public Health as Social Justice*, Dan Beauchamp suggested that a broad definition of public health (incorporating social determinants of health) led logically to a political program of action focused on addressing inequality.⁹⁰ Expressing a view shared by many public health scholars, he wrote that “the public health ethic is a *counter-ethic* to market-justice and the ethics of individualism as those are applied to the health problems of the public,” and that it should therefore be the “central task” of the public

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.”).

88. Mark A. Rothstein, *Rethinking the Meaning of Public Health*, 30 J.L. MED. & ETHICS 144, 147 (2002). Rothstein would define public health functionally as the actions taken by duly authorized public health officials “to protect the health of the public.” This definition, while it may be a plausible (if contestable) view of the appropriate sphere of public health law, it is clearly too narrow a definition of public health. The definition focuses only on *responses* to public health challenges (and only governmental responses, at that), leaving the *problem* side of the equation completely out of the picture. Certainly the field of public health must be just as interested in exploring the causes of poor health as it is in fashioning appropriate responses. Moreover, there is no reason to assume that the actions of public health departments and the definition of “public health” must be congruent. It is true that to the extent governments seek to address these larger cultural and social issues – poverty, education, racism, etc. – public health departments are not typically involved or even consulted. (Rothstein’s definition of public health – which seems reverse-engineered to screen out the study of ecological determinants of health – is built on the premise that this is the appropriate distribution of authority.) But the politically and historically contingent decisions to delegate these authorities to other sections of the executive branch says little about whether the questions involved can be considered, at least in part, as public health questions.

89. *Id.* at 144.

90. DAN E. BEAUCHAMP, *NEW ETHICS FOR THE PUBLIC’S HEALTH* 101, 108 (Dan E. Beauchamp et al. 1999).

health movement to advocate for political and social change, including more expansive governmental authority.⁹¹

The underlying assumption of both sides – that a broader definition of public health will necessarily lead to a broader scope of authority for public health officials – is not necessarily correct. As Wendy Mariner has written, “[i]t should be possible to study and identify the effect of factors external to individuals without necessarily making it the responsibility of health professionals to devise or implement solutions.”⁹² Fear that the “public healthification” of social problems might lead to more invasive and coercive governmental controls is derived from awareness of all-to-real governmental abuses in the past (such as forced sterilization).⁹³ But at the same time, a more limited definition cuts off promising avenues for research that could help clarify and explain the complex relationships between social conditions, broader environmental developments (such as climate change), and health. Such research findings may indeed create pressure for the government to address those social conditions, but such actions need not be the responsibility of public health departments.

While this debate is certain to continue, any attempt to shape a definition of public health *law* must confront how or whether to resolve this ongoing ambiguity about the meaning of the term “public health.” As explored in more detail below, using a broader conception of “public health” would give the field a broader reach, but it could also potentially weaken its coherence, dilute its distinctiveness, and entangle the field in political controversies. By contrast, utilizing a narrower definition of “public health” might provide the field with a narrower and more coherent focus, but at the cost of ignoring (or downplaying the impact of) a critically important body of public health research.

B. Defining Public Health Law: Gostin’s Definitions

The only major systematic attempt to define public health law was presented by Lawrence Gostin in his book *Public Health Law: Power, Duty, Restraint*, which was first published in 2000.⁹⁴ 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.⁹⁵ Any discussion of

91. *Id.* at 105, 109.

92. Mariner, *supra* note 85, at 254.

93. Rothstein, *supra* note 88, at 145-46 (suggesting a narrow definition for public health in part because “public health has been the justification for some overreaching or even reprehensible prior government activities, ranging from eugenics to unethical research on human subjects . . .”).

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

95. Gostin, *supra* note 6.

how to define public health law should (and typically does) start with a review of Gostin's thoughtful definitions. Carefully examining Gostin's 2000 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.⁹⁶

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

96. Gostin, *supra* note 94, at 4.

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.⁹⁷ 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.⁹⁸

5. Finally, the last phrase “for the protection or promotion of community health” is somewhat ambiguous, but it may suggest one of two things. 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.⁹⁹ Indeed, although the issue of mass quarantine is often studied

97. Aagaard suggests that “policy trade-offs” could be one type of commonality that can used to provide a legal field with coherence. Aagaard, *supra* note 2, at 242.

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

99. See, e.g., Mariner, *supra* note 85, at 274.

in depth in public health law courses, there has been no mass quarantine in the U.S. since the 1918 pandemic flu.¹⁰⁰ 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.¹⁰¹

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.**¹⁰²

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.¹⁰³ 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

100. 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>.

101. 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.

102. Gostin, *supra* note 6, at 4.

103. It replaces the phrase “for the protection or promotion of community health” from the 2000 definition.

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.¹⁰⁴

Such explanations and arguments makes the second edition of the book more passionate and more compelling reading than the first 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."¹⁰⁵

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.¹⁰⁶ 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.¹⁰⁷

104. Gostin, *supra* note 6, at 502.

105. *Id.* at 513.

106. *Id.* at 38-41; See *supra* text accompanying note 86, for a section of this discussion.

107. See Burris et al, *supra* note 15, 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 realm 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

Gostin's definition of public health law is of course not authoritative, but no one else has put nearly as much time and energy into assembling a comprehensive definition of the term. Most other definitions of public health law have been put forth in passing, often in the course of discussing other issues. Nonetheless, reviewing other definitions and categorizations of public health law can help to illuminate aspects and tensions within the field that Gostin's definition does not fully capture.¹⁰⁸

1. Broad Definitions

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*.¹⁰⁹ *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.¹¹⁰ 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).¹¹¹

108. My discussion in this section is limited to definitions of public health law offered in a the context of U.S. law. Others have offered broader and narrower definitions of public health law in the course of discussing other legal systems. See Syrett & Quick, *supra* note 3, at 223 (noting that different definitions "reflect the nature of the legal framework in differing jurisdictions").

109. 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).

110. 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.

111. 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 6, at 181-226. For another broad definition that incorporates the same

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.¹¹²

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,¹¹³ and it is unlikely scholars of other fields would turn their attention to health-related impacts on their own accord.¹¹⁴

Another leading public health law scholar, Wendy Mariner, has offered a different three-part classification scheme for public health laws.¹¹⁵ Her categories are borrowed from international law, specifically the International Covenant on Economic, Social and Cultural Rights ("ICESCR"). Under this treaty, which the United States has signed but never ratified, nations commit to "respect, protect, and fulfill" the human right to health. Mariner argues that the respect/protect/fulfill distinction is a useful way of categorizing public health laws. Laws safeguarding individual rights codify the government's obligation to *respect* individual freedoms¹¹⁶; laws setting forth safety and health standards *protect* against public health hazards, and laws that ensure adequate access to health care *fulfill* the health needs of the population.¹¹⁷ As with Burris's approach, this

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.").

112. Burris, *supra* note 109, at 1663.

113. Recall the earlier discussion of a field's definition potentially limiting the scope of issues examining. See *supra* text accompanying note 31.

114. 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").

115. Mariner, *supra* note 85, at 268-70.

116. Mariner seems to include within this first category laws that impose restrictions on individual conduct (such as criminal laws and smoke-free laws), though she does not explain how these laws relate to the ICESCR's concept of "respect." *Id.* at 269.

117. *Id.* at 269-270.

is a classification scheme, not a definition, so it presupposes a broader definition that would encompass these three categories of laws.

Mariner's classification scheme seems both overinclusive and underinclusive, in part because it tries to overlay the ICESCR's categories onto a U.S. legal system that operates differently from most other countries. In particular, the "fulfill" concept relates to the affirmative right to health, which is recognized as a constitutional entitlement in many other countries. But since the U.S. does not recognize any such right, Mariner repurposes that category and applies it to programs that provide healthcare services or information to low-income residents.¹¹⁸ This raises the important question of whether the study of these direct service programs – which now consume a large portion of public health department budgets – should be considered part of public health law. On the one hand, ensuring broad access to health care – and to health insurance – unquestionably impacts health at the population level.¹¹⁹ On the other hand, viewing the provision of care to individual patients as a public health law issue significantly blurs the line between health law and public health law. (The distinction between these two fields is discussed further in Section II(F).)

While Mariner's classification may be overinclusive in its inclusion of health care services,¹²⁰ it also seems underinclusive by focusing narrowly on standards that *protect* against health hazards. The phrase "protect" suggests (perhaps unintentionally) a pathogenic model of disease prevention. But public health laws do much more than protect against pathogens; they also promote healthy behaviors and help to create health-supporting environments. Other public health laws structure and organize public health systems and responses to public health emergencies. These activities do not clearly fit within Mariner's typology, which seems to be a somewhat arbitrary (and ultimately unhelpful) attempt to squeeze all of public health law into the three-part categorization created by ICESCR for an entirely different purpose.

118. *Id.* at 274.

119. See Parmet, *supra* note 72, at 209 stating:

[Lack of health insurance] threatens the health of not only the uninsured . . . but everyone else as well. Individuals without insurance may delay treatment, compromising efforts to keep track of an emerging epidemic and permitting infections to remain untreated and spread in the community. In addition, failure to compensate providers for the care ultimately provided to the uninsured creates a financial strain on providers, especially hospitals, leaving them with fewer resources . . .

120. To be fair, Mariner purports to be categorizing "laws affecting health," not public health laws specifically. Mariner, *supra* note 85, at 268. Elsewhere, she has put forth the same three-part categorization in the context of discussing health law. See Mariner, *supra* note 32, at 73-4.

2. Narrow Definitions

Those favoring a narrower conception of the field of public health law have gravitated toward structural or descriptive definitions that focus on the powers and duties of public health agencies and their authority to respond to public health challenges. Mark Rothstein, for example, writes:

The term 'public health' is a legal term of art, and it refers to specifically delineated powers, duties, rights, and responsibilities. Even beyond its legal usage, public health applies to specific institutions and individuals, such as public health departments and public health officials.¹²¹

He therefore endorses a conception of public health (and, presumably, public health law) that he refers to as "[g]overnment intervention as public health"—"public officials taking appropriate measures pursuant to specific legal authority, after balancing private rights and public interests, to protect the health of the public."¹²² In his view, this is *all* that the field of public health law should consider.

But Rothstein goes beyond setting forth a (narrow) structural definition of public health law. He uses his definitional exercise to advocate for a limited conception of *when* governments are justified in exercising their legal authority to address public health concerns. In his view, government action is justified only when (a) the health of the public is threatened by pathogens (e.g., infectious diseases) or polluted common resources (e.g., water) that can spread disease if not controlled or kept safe; (b) government has unique powers and expertise (e.g., disease surveillance); or (c) government action is more efficient or likely to produce an effective intervention (e.g., newborn screening).¹²³ He criticizes a broader "population health as public health" model that would view any health problem shared by a large number of people as an appropriate target for public health interventions, especially when the poor health of one person does not directly threaten the well-being of others.¹²⁴

Like Rothstein, Richard Epstein and Mark Hall have also latched on to structural definitions of public health law that would focus on the structure and authority of public health agencies.¹²⁵ And like Rothstein –

121. Rothstein, *supra* note 88, at 144.

122. *Id.* at 146.

123. *Id.*

124. *Id.* at 145.

125. See, e.g., Hall, *supra* note 28, at S202 ("Public health law is about enforcing government efforts to promote health."); Epstein, *supra* note 30, at 1421.

indeed, even more so than Rothstein – they seek to narrowly constrain when public health authorities can act. According to both Epstein and Hall, the invocation of coercive public health powers by government entities is only appropriate when there are “significant collective action problems.”¹²⁶ Thus, in their view, government action is appropriate to respond to contagious diseases and public nuisances, but obesity is not a proper subject of governmental action because, in Epstein’s words, “[t]here are no non-communicable epidemics.”¹²⁷ Not surprisingly, they strongly object to definitions of public health law that would incorporate broader social and ecological causes of poor health.¹²⁸

While all of these scholars – Rothstein, Epstein, and Hall – have a respectable position about the proper scope of public health interventions (and the dangers of overly ambitious government action), their position is, at its core, an ideological one. While they frame their definitions of the field in neutral, structural terms, they are in fact attempting to define the field narrowly in a way that fits with their own ideological perspective. Whereas Gostin, in my view, defines the field of public health law too narrowly when he includes “social justice” as a normative goal (thereby excluding from the field those that do not share that perspective), Rothstein, Hall, and Epstein’s definitions define the field too narrowly by definitively *excluding* social justice concerns from the purview of public health law. The field of public health law should be defined such that this important dialogue between different positions can continue and neither side is excluded from the conversation.

126. Hall, *supra* note 28, at S204 (writing that such problems exist when “individuals, acting in their own self-interest, even if fully informed and rational, will not effectively address the problem because they do not internalize some of the major costs or benefits of action or non-action, or for other reasons a centralized response is much more *cost-effective*.”) (emphasis in original); Epstein, *supra* note 30, at 1423 (endorsing the “traditional position” that state public health powers should be limited to “containing epidemics, contagion, and nuisances, which . . . do not lend themselves effectively to either market solutions or to private actions in tort.”). It is not clear whether Epstein endorses the second part of Hall’s statement, i.e., the reference to *cost-effective* government interventions (such as water fluoridation).

127. Epstein, *supra* note 30, at 1462.

128. In their view, public health responses to these broad social and economic concerns are likely to be counterproductive and potentially dangerous. *Id.* at 1425 stating:

I believe that today’s broad (and meddlesome) definition of public health will compromise the health of the very individuals its proponents seek to protect. That definition extends regulation into areas where it ought not operate, sapping the material resources and political focus from responding to matters more appropriate for regulation, such as the spread of communicable diseases or public nuisances like widespread pollution.

In my view, these scholars underestimate the extent to which public health challenges such as smoking and obesity are in fact the result of collective action problems. See Berman, *supra* note 50, at 358-59 (discussing population-level causes of obesity); Parmet, *supra* note 72, at 183 (“[F]ood marketing does not simply provide children and their parents with messages. Rather, food advertising operates at a population level, altering the environment in ways that individuals cannot control.”).

D. The Population-Based Perspective

As demonstrated above, Gostin has devoted much thought and effort to developing a workable definition of public health law, while other scholars have developed their own definitions that range from nearly all-encompassing to exceedingly narrow. In many ways, the spectrum of proposed definitions appears to track different perspectives regarding whether the analysis of laws and policies addressing the social and economic determinants of health fall within the purview of public health law. While this is an important debate – indeed, perhaps *the* key debate – that must take place within the field of public health law, it need not be resolved in the definition of the field. As Gostin suggests, aligning the field with an ideological viewpoint – on the left or the right – is unwise and could threaten the long-term viability of the field.¹²⁹ Thus, the definition I will propose below attempts to avoid prescriptive viewpoints that could be seen as overly ideological, and it incorporates the “constructive ambiguity” inherent in Gostin’s definition regarding the scope of the field.¹³⁰

A separate issue, however, is whether the definition of public health law should incorporate public health’s distinct population-based perspective. Such a perspective, as applied to legal analysis, would emphasize that populations – and not individuals – are the primary subject of analysis in the field of public health law. This reflects the orientation of the field of public health, which, as previously discussed, focuses on populations and prevention, rather than individuals and medical treatment.

In some ways, the importation of this population-based perspective into the definition of public health law incorporates an ideological element as well. Epstein and Hall, among others, strongly object to a population-based notion of public health law, because they believe – correctly – that it vastly expands the scope of public health law by moving the field from a narrow focus on infectious disease and other communicable health risks to a broader focus on any health risks (obesity and domestic violence, for example) that threaten the health of a significant percentage of a given population. They would limit the scope of public health law to cases

129. Gostin, *supra* note 6, at 41.

130. Christine Bell & Kathleen Cavanaugh, ‘Constructive Ambiguity’ or Internal Self-Determination? *Self Determination, Group Accommodation, and the Belfast Agreement*, 22 FORDHAM INT’L L.J. 1345, 1356 (1998) (discussing “constructive ambiguity” as a “classic maneuver” in international relations in which differing sides “deliberately adopt language that is vague and can, simultaneously, mean different things to different people”). As Bell and Cavanaugh note, “[t]he classic problem with constructive ambiguity is that it postpones real agreement until some future date.” *Id.* In an academic setting, however, “real agreement” is never a necessity.

where *individual health* is threatened by health risks that necessitate a governmental response (infectious disease being the most often cited example). But the narrower view espoused by Epstein and Hall is simply untenable as a descriptive matter. Many – if not most – public health law scholars focus largely on “new public health” issues such as chronic disease prevention, accident prevention, and violence prevention.¹³¹ A narrower definition that did not incorporate such topics would provide an incomplete and inaccurate description of the field.

Just as importantly, the population-based perspective, derived as it is from the science of public health, is what gives public health law its *distinctiveness*. Without a separate and distinct perspective, public health law might appropriately be characterized as simply a sub-field of health law. But as 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.¹³² 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.¹³³

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

131. See Lindsay F. Wiley, *Rethinking the New Public Health*, 69 WASH. & LEE L. REV. 207, 211-12 (2012) (discussing the debate between the “new public health” and the “old public health”).

132. Parmet, *supra* note 72.

133. *Id.* at 268.

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.¹³⁴

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.¹³⁵

Parmet has primarily focused her writing on infusing this population-based perspective into other legal fields. She has not explored whether or how this population-based perspective might form the foundation for a distinct academic field of public health law. This population-based perspective, however, is in my view one of the key elements that sets public health law apart from other disciplines. Parmet’s analysis cogently demonstrates that public health law is much more than a “Law and. . .” subject. It has a distinct viewpoint and important voice to contribute to legal analysis – a voice that is currently marginalized (if not completely absent) in many law schools and in legal analysis. Using this population-based perspective as one of the key building blocks, I now move to providing a workable definition of “public health law” that could describe the contours of a new academic field.

134. *Id.* at 184.

135. *Id.* at 181.

E. A Workable Definition of “Public Health Law”

Building on Aagaard’s work, a workable definition of “public health law” must demonstrate both the field’s commonalities and its distinctiveness. What follows is my attempt to construct such a definition, 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.¹³⁶ 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.¹³⁷

136. The phrase “and limits” is not needed, as an examination of government’s authority implies an examination of the limits on such authority.

137. This is an insight shared by others, including Gostin. See Gostin, *supra* note 6, at 16-17.

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.¹³⁸

Like Gostin’s definitions, this definition does not seek to define which risks are the relevant ones to analyze, and whether some risk factors (such as poverty or poor education) are so diffuse or remote to be beyond the scope of the field. That topic should remain an active subject of debate within the field. This proposed definition does, however, remove the vague IOM language and replace it with more descriptive terms, borrowed in part from the parenthetical phrase used in Gostin’s definition.

The phrase added at the end of the definition – “as well as the study of legal structures that have a significant impact on the health of populations” – is intended to incorporate the concept of “incidental” public health law expressed by Burris, and also to reinforce the population-level focus discussed by Parmet. Implicit in the proposed definition (although an argument could be made for making it explicit), is the idea that public health law considers the lessons and methodologies of public health, giving weight to “empirical and probabilistic reasoning.”¹³⁹

While I believe this proposed definition of “public health law” to be a workable one, I expect – and hope – that other alternatives will be offered. A field of law cannot develop without a healthy debate about what the field does or does not encompass and what its objectives and methodologies are.

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.¹⁴⁰ If this is the case, then public health law,

138. I adopt Parmet’s notion that “the population perspective refers to any group or number of individuals . . . sharing some common trait.” Parmet, *supra* note 72, 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*.

139. *Id.* at 53.

140. 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

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.¹⁴¹ 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.”¹⁴² By contrast, public health law focuses on preventing disease and improving health at the population level (as does the field of public health).¹⁴³ 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.”¹⁴⁴ 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

Law).

141. Berman, *supra* note 50, at 336.

142. Hall, *supra* note 28, at S202.

143. Berman, *supra* note 50, at 336.

144. 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).

health policy.¹⁴⁵ Other scholars of public health law have expressed similar statements.¹⁴⁶

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 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.¹⁴⁷ 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.¹⁴⁸

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

145. Hardcastle, *supra* note 144, at 319.

146. See, e.g., Mariner, *supra* note 85, 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”).

147. Hardcastle, *supra* note 144, at 317.

148. *Id.* at 319.

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.¹⁴⁹ 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 focusing solely on the overlap between public health and medical care would keep such population-level causes and interventions out of view.¹⁵⁰

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

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

150. 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.

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).¹⁵¹

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. The first step in this process is defining the field of public health law, the issue to which I now turn.

III. IS PUBLIC HEALTH LAW A SEPARATE ACADEMIC FIELD?

This article began by discussing what constitutes an academic field of law, and then turned to a discussion of how public health law could best be defined. Now that I have suggested a definition of public health law (and discussed how it differs from health law), we can return to where we started: What is a field of law, and does public health law qualify as its own academic field? Applying the “traditional” tests of a legal field and considering the more flexible questions of commonality and distinctiveness, can public health law make a cogent case for recognition as a field of law?

If one looks solely at the “traditional” criteria identified by Ruger (and discussed in Part I), public health law still fairs rather poorly. It lacks institutional centralization, an essential legal form, and a clearly identifiable internal logic, and its historical pedigree is debatable. However, if one looks at Aagaard’s process for characterizing a legal field, public health law fares markedly better. Aagaard focuses on a field’s “common and distinctive patterns,” which can be related to one or more of “four underlying constitutive dimensions of the field”: (1) factual context, (2) policy trade-offs, (3) values and interest, and (4) legal doctrine.¹⁵² The discussion surrounding the proposed definition of “public health law” set

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

152. Aagaard, *supra* note 2, at 225.

forth above suggests that public health law can demonstrate a significant amount of both commonality (a focus on an identifiable subject) and distinctiveness (an approach distinguishable from other legal fields) in the four dimensions identified by Aagaard:

- ***Factual context:*** Public health law focuses on a distinctive subject: the impact of the law – both positively and negatively – on the health of populations. While “traditional” public health law focused primarily on coercive laws such as those allowing for quarantines or involuntary treatment, the “new” public health law scholarship tends to focus much more on the role of law in “structuring . . . behavioral options and its potential use as an intervention to change community and social level norms and practices.”¹⁵³
- ***Policy trade-offs:*** Gostin’s definitions highlight the tension between the health of populations and individual or business autonomy.¹⁵⁴ His definitions focus on “negative rights,” i.e., rights to be free from government interference. This framing, however, incorporates a very individualized notion of “rights.” Subsequent public health law scholarship has emphasized that “[a]t the population level, the most pressing public health right of individuals is not to be free of interference when they pose a significant risk, but to face fewer risks.”¹⁵⁵ Thus, while individual and business rights to be protected from unwarranted government interference should be taken seriously,¹⁵⁶ public health law adds nuance to this discussion by requiring consideration of population-level interests as well.¹⁵⁷

153. See Burris & Gostin, *supra* note 12, at 104. On the flip side, public health law is equally interested in exploring how law “inadvertently facilitat[es] unhealthy behaviors and outcomes.” *Id.* at 105.

154. This central tension has alternatively been phrased as the conflict between public health (or the common good) and civil (or individual) rights. See, e.g., Ronald Bayer, *The Continuing Tensions Between Individual Rights and Public Health*, 8 EMBO REP. 1099 (2007).

155. Burris & Gostin, *supra* note 12, at 112 (writing that “[a] focus on the individual’s right to be free of specific interference from society obscures the practical and moral obligation of society to collectively create conditions in which individuals have healthy options”).

156. See Bayer, *supra* note 154, at 1102:

Across the spectrum of threats to the public health—from infectious diseases to chronic disorders—are inherent tensions between the good of the collective and the individual. To acknowledge this tension is not to foreordain the answer to the question ‘How far should the state go?’; rather, it is to insist that we are fully cognizant of difficult trade-offs when we make policy determinations.

157. See Parmet, *supra* note 72, at 116 (writing that “recognition of positive rights is based on the premise that individuals cannot satisfy their own preferences or choices wholly apart from the populations in which they exist”).

- **Values and interests:** Public health law considers the population-level effects of legal structures as a central focus of analysis, thereby giving value to the interests (and particularly the health-related interests) of *populations*. This is in many ways different from – if not opposite to – the analysis typical in the field of health law, which focuses on the needs, interests, and preferences of individual patients.¹⁵⁸ This approach also stands in stark contrast to the highly individualized law and economics perspective that is highly influential in the legal academy.¹⁵⁹
- **Legal doctrine:** Commonality in legal doctrine, according to Aagaard, means that there are “unique legal rules that apply only within the field” or that “the application of general rules results in outcomes that are unique to the field.”¹⁶⁰ Using this narrow definition of “legal doctrine,” it is unlikely that the field of public health law can make a strong argument for this type of commonality. The wide range of legal forms and structures implicated by public health law make this a near impossibility. However, in a broader sense, public health does share a common doctrinal/analytical approach – *population-based legal analysis*, to use Parmet’s term – that sets it apart from other legal fields.

Working towards a definition of “public health law” helps to make clear the commonalities that bind the field of public health law together, as well as the unique perspective that public health law contributes to legal theory. To use another term highlighted by Aagaard, public health law possesses not only commonalities, but also *transcendence*, i.e., an important contribution that “justifies studying the field in order to

158. Berman, *supra* note 50, at 336; See generally Micah L. Berman, *A Public Health Perspective on Health Care Reform*, 21 HEALTH MATRIX 353 (2011).

159. See Jess Alderman et al., *Application of Law to the Childhood Obesity Epidemic*, 35 J.L. MED. & ETHICS 90, 90-91 (2007), stating:

As the doctrine of law and economics has become increasingly dominant in judicial and regulatory analyses, legal approaches have become more individual in their focus at the expense of any serious accounting for situational factors. To be as effective as possible as a policy tool, the law should focus not only on frequently illusory individual choices, but also on population-wide change and environmental conditions that affect individual decisions.

160. Aagaard, *supra* note 2, at 244. As noted above, Elhauge argued that the field of health law was unified by this sort of commonality.

understand better the law in general.”¹⁶¹ In the case of public health law, the population-focused perspective of the field is not only relevant to laws intended to specifically address public health issues, but it can also help to illuminate the impact of legal structures studied by other fields (criminal law, tort law, health law, constitutional law, etc.) on the health of populations.¹⁶² For example, public health law’s population perspective would raise questions about whether criminal activity should be viewed simply as “an instance of criminal delinquency,” or as “activity which may be socially or economically conditioned.”¹⁶³ This could prompt a deeper discussion in criminal law courses about the purpose and effectiveness of criminal sanctions, as viewed not from the perspective of each individual case (as criminal law is generally taught in first-year courses), but from a more systemic perspective.¹⁶⁴ Similarly, as Parmet has written, a population-based perspective could lead to a wholesale reassessment of the doctrine of causation in tort law.¹⁶⁵ An actor who indisputably causes harm at a population level is currently able to escape tort liability if no individual plaintiff can prove that his or her injury was the direct result of the defendant’s conduct. This leads to underdeterrence which can threaten the public’s well-being. A population-based approach might seek out alternates that do not employ a binary (yes or no) approach to causation and are more sensitive to probabilistic epidemiological evidence. These brief examples suggest that public health law is much more than simply a “law and . . .” field; it has its own unique viewpoint and methodology that can contribute to and enrich legal analysis more generally.¹⁶⁶

161. *Id.* at 246.

162. Population health issues lurk just below the surface in a range of different legal subjects, but at present, these issues are rarely explored in any depth. As Parmet and Anthony Robbins explain:

Tort law, after all, is most fundamentally about the allocation of risk, often risk to the public health. Administrative law considers how we organize and oversee those who regulate industries that potentially harm the public health. Evidence questions what facts are material to an understanding of the causes of harm and what role scientific debates should play in the determination of liability. Constitutional law considers the powers of government to protect the public. While the relevance of public health is clear, none of these courses expect students to understand what we really mean by public health, how a public health perspective differs from the individualistic perspective presented by clinical medicine (not to mention microeconomics or traditional American jurisprudence), or how we can assess claims made on behalf of public health.

Wendy E. Parmet & Anthony Robbins, *A Rightful Place for Public Health in American Law*, 30 J.L. MED. & ETHICS 302, 303 (2002). Parmet and Robbins also note that even in health law courses, population health issues and concepts are often ignored. *Id.*

163. Syrett & Quick, *supra* note 3, at 226.

164. *Id.*

165. Parmet, *supra* note 72, at 227-31.

166. Syrett and Quick suggest that public health law can also help inform other disciplines by sharing its focus on the “facilitative capacities of law,” i.e., the ability of law to further positive social change. This stands in contrast to “the more familiar reading of law’s function as a negative social control mechanism.”

Additionally, as suggested earlier, if public health law is considered a distinct “field of law,” it could potentially lead courts to give more weight to public health concerns. Consider, for example, the recent decision by the D.C. Circuit Court striking down the FDA’s proposed graphic warning labels for cigarette packages on First Amendment grounds.¹⁶⁷ In the course of its decision, the Court wrote: “[W]e are skeptical that the government can assert a substantial interest in discouraging consumers from purchasing a lawful product, even one that has been conclusively linked to adverse health consequences.”¹⁶⁸ With this phrase, the court – in a decision about tobacco products, the nation’s leading cause of preventable death – questioned whether protecting the public’s health is a “substantial interest” of the government.¹⁶⁹ The legal maxim of *salus populi suprema lex* (the health of the people is the highest law) “has always been constrained in law by civil rights” and respect for other constitutional values,¹⁷⁰ but the D.C. Circuit Court seemed to dismiss the importance of the public health issue altogether.¹⁷¹

This opinion reflects a disturbing trend in jurisprudence of downplaying the importance of public health issues and dismissing their relevance to legal decision-making. There is certainly no guarantee that recognizing public health law as legal field would lead to a reversal of this trend, but it would create space and opportunities for public health scholars to further develop (and disseminate) the argument that public health considerations should be given legal weight. And the mere fact of broader academic recognition may alert judges (and law students, who make up the next generation of lawyers and judges) to the need to take this scholarship seriously.¹⁷²

Id.

167. *R.J. Reynolds v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012).

168. *Id.* at 1219 n.13.

169. Another tobacco-related case earlier in the year said essentially the same thing, questioning whether the government even had a “legitimate interest” in reducing tobacco use. *National Association of Tobacco Outlets v. City of Worcester*, 851 F. Supp. 2d 311, 316 (D. Mass. 2012) (“[Plaintiffs] contend that the City has no legitimate interest in prohibiting non-misleading advertising to adults to prevent them from making decisions of which the City disapproves. I agree.”).

170. Scott Burris, James Buehler & Zita Lazzarini, *Applying the Common Rule to Public Health Agencies: Questions and Tentative Answers About a Separate Regulatory Regime*, 31 J.L. MED. & ETHICS 638, 643-44 (2003).

171. I am not arguing that public health considerations should always outweigh First Amendment interests or other important civil liberties, but I am asserting that public health should be deemed a valid and important government interest that needs to be considered and weighted against countervailing concerns.

172. Just as importantly, public health considerations are often overlooked in policy debates. An important example is the Patient Protection and Affordable Care Act of 2010, which reformed the health care system and the provision of health care insurance. Although the Act did include some provisions that addressed public health, those provisions were relatively minor parts of the overall Act, they received almost no public attention, and they tended to conceptualize public health “in a limited and narrow way ...

In this respect, public health law has the example of environmental law to look back to. Defining “environmental law” as a distinct academic field provided new opportunities for scholarship, and this scholarship – in synergy with advocacy from outside the academy – led courts to more seriously consider the impact of legal rules on the environment. Today, it would be hard to imagine a court declaring that protection of the environment is not a “substantial government interest,” but the same cannot yet be said for the protection of public health. In summary, recognition of public health as a distinct field of law does not just matter for institutional reasons, but also because it can, over time, have a profound effect on legal doctrine.

IV. CONCLUSION

Is public health law its own field of law? Wendy Mariner put it succinctly when she wrote that the real test of field’s validity “lies in whether others accept it.”¹⁷³ Although public health law exhibits many characteristics of a distinct field of law, the legal academy – and the broader legal community – does not currently consider it as such. Therefore, as a practical matter, scholars of public health law need to first build the infrastructure of a distinct field of law – expanded course offerings, academic programs, journals, conferences, and the like – before the argument that public health law should be considered a discrete field of law will gain much traction.

While much remains to be done, such infrastructure is already under construction. Indeed, The growth of public health law over the past decade has been remarkable, as several different data points can demonstrate. First, according to the Network for Public Health Law, J.D./M.P.H. dual degrees “have gone from being almost nonexistent ten years ago to a current tally of 25 accredited programs in the U.S today.”¹⁷⁴ Secondly, a recent informal (and almost certainly incomplete) survey conducted by the Public Health Law and Policy Program at Arizona State University’s Sandra Day O’Connor College of Law located 158 professors who have taught public health law courses during the last five years.¹⁷⁵

misaligned with the way that most public health experts would conceptualize their field.” Berman, *supra* note 50, at 328.

173. Mariner, *supra* note 32, at 82.

174. Mary Uran, *JD and MPH: Public Health Law and the Dual Degree*, THE NETWORK FOR PUB. HEALTH L. BLOG (Aug. 22, 2011), at http://www.networkforphl.org/the_network_blog/2011/08/22/58/jd_and_mph_public_health_law_and_the_dual_degree.

175. James G. Hodge, Jr., *The Public Health Law List of Professors in the United States* (updated as of July 25, 2012), SANDRA DAY O’CONNOR SCHOOL OF LAW: PUBLIC HEALTH LAW AND POLICY PROGRAM,

These courses have been taught at sixty-two different law schools, as well as at numerous medical schools and schools of public health. By contrast, a review of law school course listings in 2001 found only seven public health law courses.¹⁷⁶ Third, public health law programs and centers are being established at law schools around the country. These programs include ASU's Public Health Law and Policy Program, Georgetown's O'Neill Institute for National and Global Health Law (which, despite its name, is primarily focused on public health law), the PHLR program based at Temple University's Beasley School of Law, and the Public Health Law Center at William Mitchell College of Law. The Network for Public Health Law, established in 2010, links together public health professionals and academics interested in public health law, and, along with the American Society for Law, Medicine, and Ethics, it sponsors a biennial Public Health Law Conference. Finally, as discussed previously, the number of public health law symposia and law review articles has increased tremendously over the past decade.

However, this infrastructure is all quite new and for the most part its integration into the legal academy remains limited. Several of the public health law centers located at law schools exist primarily to provide technical assistance or legal support to public health practitioners. They are not "academic centers" in the traditional sense of facilitating, encouraging, and promoting scholarly research in the field. But although funding for legal research is difficult to come by, there may be opportunities for the existing centers to put more of an emphasis on scholarly pursuits and thereby facilitate the development of public health law as a legal field.¹⁷⁷ While these centers should not abandon their primary mission of providing much-needed legal and policy support to public health practitioners, they could potentially transform themselves into broader academic centers that model a new, synergistic relationship between scholarly research and practice-oriented technical assistance.¹⁷⁸

at <http://www.law.asu.edu/LinkClick.aspx?fileticket=6BT27fed-EA%3D&tabid=2210>. It should be noted that many of those on this list are adjunct professors, not full-time faculty members.

176. Richard A. Goodman et al., *Other Branches of Science are Necessary to Form a Lawyer: Teaching Public Health Law in Law School*, 30 J.L. MED. & ETHICS 298, 299 (2002).

177. This would be a time-honored way of growing a new legal field. Some claim that the field of health law was effectively created with the establishment of the Law-Medicine Center at Case Western Reserve University's law school in 1953. See Maxwell J. Mehlman, *The Law-Medicine Center 50th Anniversary Symposium: The Field of Health Law: Its Past and Future; Introduction*, 14 HEALTH MATRIX 1, 1 (2004).

178. There is also potential for public health law programs and professors to better incorporate public health law concepts and experiences into clinical legal education. The Medical-Legal Partnership model is a promising example of clinical education that looks beyond the provision of health care services and considers the "legal and social barriers that affect health" at a population level. Emily A. Benfer et al., *Advancing Health Law & Social Justice in the Clinic, the Classroom and the Community*, 21 ANNALS HEALTH L. 237, 243 (2012).

Also of importance is the need to expand the number of public health law course offerings in law schools. Currently, most law schools offer only a single course in public health law (although a growing number offer J.D./M.P.H. programs). The debate to this point within the public health law literature has focused on whether public health law should be taught as a single course, or whether there should be more of an effort to incorporate the population-based perspective of public health into existing core courses such as constitutional law and criminal law.¹⁷⁹ But if public health is to be recognized as its own field, the goal should be framed more ambitiously; ideally law schools would offer a range of course offerings related to public health law *and* recognize that its perspective is a valuable one that should be infused into other courses.¹⁸⁰ Of course there are many barriers to implementing such changes. Offering additional courses in public health law is difficult because of “the nature of the legal curriculum, the need to teach many of the subjects in the legal core curriculum, and the relative shortage of faculty and scholarship in the area.”¹⁸¹ Likewise, integrating a public health law perspective into the broader legal curriculum is unlikely to happen “unless and until a body of legal scholarship demonstrates its relationship to law and its power to enhance legal analysis.”¹⁸²

179. Mariner, *supra* note 85, at 277.

180. For a discussion of how engagement with public health law issues could help enrich the law school curriculum, see generally Wendy Parmet & Anthony Robbins, *Public Health Literacy for Lawyers*, 30 J.L. MED. & ETHICS 701 (2003).

181. Jason A. Smith, *Training Individuals in Public Health Law*, 36 J. L. MED. & ETHICS S50, S55 (Supp. 3, 2008).

182. Parmet & Robbins, *supra* note 180, at 708 (adding that “[i]f such a body exists, then there is reason to hope that law professors will take note”).

As demonstrated in this article, such a body of public health law scholarship has been gradually emerging over the past two decades. Scholars including Gostin, Burris, and Parmet have – perhaps unintentionally – made a persuasive case that public health law is indeed a distinct field of a law with its own valuable perspective to contribute to legal analysis. A primary function of legal scholarship is to push attorneys and courts to reconsider the ways in which they conceptualize legal issues, and to pay attention to previously ignored considerations. Even though public health interventions have produced breathtaking advances in life expectancy over the past century, the recent public health law scholarship suggests that population-level health remains an undervalued consideration in legal doctrine, often overshadowed by attention to issues of individualized medical care. Building towards recognition of public health as a distinct academic field could help to remind courts that “[a]mong all the objects sought to be secured by governmental laws none is more important than the preservation of public health.”¹⁸³

183. *People ex rel. Barmore v. Robertson*, 134 N.E. 815, 817 (Ill. 1922).