
PREFACE

Connecting Public Health Law, Practice, Policy, and Research

James G. Hodge, Jr.

This symposium issue of the *Journal of Law, Medicine & Ethics* is devoted to the reconvening of the first national public health law conference since 2006, *Using Law, Policy, and Research to Improve the Public's Health*, on September 13-15, 2010, in Atlanta, Georgia. This event was conceptualized, organized, and hosted by the American Society of Law, Medicine & Ethics (ASLME) and the Public Health Law Association (PHLA) with generous support provided by the Robert Wood Johnson Foundation (RWJF). The Centers for Disease Control and Prevention (CDC), American Public Health Association (APHA), Association of State and Territorial Health Officers (ASTHO), American Bar Association (ABA), and other collaborators also made significant contributions. The conference brought together premier scholars, leaders, and practitioners in public health law, policy, and research to explore critical topics with over 400 participants from varied backgrounds including law, public health, health care, and nursing, among other fields. Many of these topics, discussed briefly below, are the subject of scholarly and applied manuscripts in this issue.

Unlike many prior conference symposia published by *JLME* and others,¹ however, this issue does not attempt to recount or summarize specific sessions at the national public law conference. The objective is not merely to prepare a conference summary report. Rather, contributors, comprised of established and emerging scholars and practitioners in the field, offer their own unique legal and policy perspectives on selected topics. Their concise manuscripts go beyond

contemporary summaries of key issues at the intersection of law, policy, research, and the public's health. Rather, the authors present definitive findings and trends in core areas in public health law, policy, and research.

This scholarly approach underlying the organization of this issue is consistent with fundamental themes of the larger national conference. Conference leaders and participants came together at a pivotal time in public health law and policy. For nearly two decades, legal scholars like Lawrence O. Gostin have proclaimed that public health law is in a state of *renaissance*, following years of decline in recognition and prominence.² Historical lessons from landmark public health law cases like *Jacobson v. Massachusetts*³ have been revisited, interpreted, and applied.⁴ Public health law theorists, including Peter Jacobson and Wendy Parmet,⁵ have coupled historic lessons with modern trends to redefine the scope of the field. Long-standing public health legal practitioners like Clifford Rees, Gene Matthews, Daniel Stier, and Denise Chrysler, exemplify a national cadre of skilled legal counsel whose careers are staked in helping public health practitioners accomplish communal health goals through law.

Multiple scholarly and practice-based centers provide essential research, guidance, training, and technical assistance in select areas and topics. Countless public health law models and tools have been developed to help achieve public health objectives. Relationships across tribal, state, and local jurisdictions have been formed and sustained through prior national public health law conferences (from 2001-2006) funded by CDC, RWJF, and organized by ASLME, CDC, and PHLA. RWJF and CDC have provided additional, critical funding support. In 2008, RWJF launched a multi-year public health law research initiative led by

James G. Hodge, Jr., J.D., LL.M., is the Lincoln Professor of Health Law and Ethics at the Sandra Day O'Connor College of Law at Arizona State University.

Professor Scott Burris at the Temple Beasley School of Law to provide new empirical evidence underlying public health laws and policies.⁶ At this year's conference, RWJF announced the creation of a new Public Health Law Network of public health law technical assistance centers and collaborators.⁷ The Network seeks to reach out to public health and legal practitioners across the country to provide greater access to practical legal tools and information they can use to change and improve public health outcomes.

Although significant achievements have been made, the field of public health law has not escalated to where it needs to be for law to have its greatest impact on actual public health outcomes. At times lacking coordination and national direction, public health law remains a fragmented discipline. The field has been mired for decades in quick fixes to public health "crises of the day," producing varying legislative, regulatory, or judicial solutions to public health problems as they arise.⁸ As a result, public health laws in many areas are myriad, overlapping, and inconsistent when compared across jurisdictions.⁹ Take a national snapshot of state and local public health laws in almost any area of communicable disease control like tuberculosis, for example. What will emerge is a patchwork of dissimilar legal approaches to treat the same communicable conditions in relatively similar populations.¹⁰ Of course, diversity of public health laws can be beneficial in a federalist system of government that equips states, and not the federal government, with primary public health authority. It can also reflect antiquated, counter-intuitive, and poorly constructed laws that may impede modern public health objectives.¹¹

Public health law scholars and researchers compel the field to move forward in expansive ways, but there is no definitive map to chart the course. Although the passage of the Patient Protection and Affordable Health Care Act (PPACA)¹² may help set national priorities for domestic health policy, there is no national agenda for public health law reforms or initiatives. Insufficient government investments in public health generally, and public health law specifically, stymie access to public health law services and practices in many tribal, state, and local governments. Public health law practitioners on the frontlines may lack objective, timely, and informed guidance, training and support, as well as organized means to communicate and share ideas. As a result, critical lessons or findings in public health law that have led to positive reforms or useful interventions in some areas are underutilized or simply unknown elsewhere. Legal initiatives that could lead to positive improvements are never fully engaged. Existing and emerging legal challenges that confront under-staffed or insufficiently-trained

legal counsel become significant barriers to advancing public health objectives despite known solutions. Public health leaders and practitioners may equate law as a hindrance to their goals, avoiding positive legal interventions to deter perceived negative outcomes. Worse still, public health laws in some jurisdictions are being revised in ways that are actually deleterious to the public's health (e.g., repeal of motorcycle helmet laws,¹³ vaccination requirements,¹⁴ and water fluoridation provisions).¹⁵ Populations who may benefit from empirically-supported laws designed to improve communal health may be left behind because the field has failed to mobilize public health law efforts, communicate them effectively, and develop innovative ideas to meet future challenges.

The overarching vision for this conference was to build the field of public health law by (1) bridging these knowledge gaps across jurisdictions; (2) defining (and proving) the role of law as a primary and practical tool to improve population-based health outcomes; and (3) developing a modern public health law infrastructure for the 21st century. Though simple to state, this tripartite vision is complex and challenging to implement. Scholars, researchers, practitioners, politicians, and the public must be prepared to marshal knowledge, resources, and science to "connect the dots" linking public health law to public health improvements. Only then will future directions for public health law emerge. In an era of national health care reforms, there is an opportunity for systemic changes to public health legal infrastructure.

Some may advocate for nationalizing public health laws more extensively despite considerable federalism objections. Others may support enhancements of existing tribal, state, and local public health laws to maintain current merits of public health infrastructure. In truth, reforms consistent with both of these views are likely needed, because the challenges ahead are immense. Global health threats like the 2009/2010 H1N1 pandemic reveal regional vulnerabilities.¹⁶ Health disparities in the U.S. reflect imbedded weaknesses in the existing health care and public health systems. A depleted economy, an obese and aging population, poorly designed communities, emerging communicable and chronic disease threats, widespread availability and marketing of "consumable vices" (e.g., tobacco, alcohol, sugars, fast food, caffeine), disproportionate spending on health care (versus public health) measures, apathy for communal health objectives, and multiple other factors suggest that U.S. public health outcomes for some conditions may decline in the years ahead.

The time is now to right this ship. Paraphrasing Gene Matthews, former CDC General Counsel, public

health leaders “must find their political voice.”¹⁷ Public health practitioners, lawyers, and policymakers must develop political arguments to raise the profile of public health, ensure accountability of public health agencies and practitioners, re-educate the public on its role in partnering with public and private sectors to accomplish communal health goals, and counter decades of practices steering funds away from public health programs. Only through law and legal systems may each of these objectives be realized. From this vision emerges a modern public health legal infrastructure that moves beyond historic notions of how law responds to public health threats to how laws and legal systems “create the conditions for people to be healthy,” consistent with the Institute of Medicine’s sweeping definition of public health.¹⁸ As eloquently espoused by RWJF Senior Vice President James Marks during his conference plenary presentation, summarized in his and others’ manuscript in this issue, nearly every political decision is a public health decision. Consistent with this view, the role of law is penultimate. Public health and legal communities must not only draw stronger connections between law, ethics, policy, and research, they must collaborate with public and private sector leaders to maximize the role of law to promote, protect, and preserve the public’s health.

A Roadmap to the Symposium

Contributing authors to this symposium issue represent diverse backgrounds in law, policy, public health, and medicine. They present compelling examinations of modern issues in public health law, policy, and research. Working with limited space and fairly brief windows to finalize their work post conference, these authors offer key insights on an array of topics. Detailing the primary observations and findings in each manuscript is not possible within the limits of this essay. However, manuscripts are stratified into four primary areas which help illustrate not only the substance of this symposium issue, but also the breadth of the field of public health law itself. These substantive areas include: (1) scoping the field of public health law, policy, and research; (2) emergency legal preparedness and the public’s health; (3) public health implications of national health care reforms; and (4) emerging topics in public health law and policy. Although some of the authors’ works may easily be categorized in more than one of these broad themes, the primary foci of the manuscripts ultimately provided the impetus for their specific classification. As with the national conference, cross-cutting ideas pervade the issue, supporting the wide scope and immense challenges in public health law generally.

I would like to thank all the authors who contributed to this issue for their incredible insights stemming from their scholarly and applied backgrounds, as well as those who participated in the national conference whose views and perspectives may be shared in these collective works. Specific thanks for the members of the PHLA Board of Directors who helped conceptualize and support the issue with their select input, reviews, and contributing articles. They are: Marice Ashe, J.D., M.P.H.; Priscilla Fox, J.D.; Kristine Gebbie, Dr.P.H., R.N.; Lawrence O. Gostin, J.D., LL.D. (Hon); Sharona Hoffman, J.D., LL.M.; Peter Jacobson, J.D., M.P.H.; Brian Kamoie, J.D., M.P.H.; Dan O’Brien, J.D.; Wendy E. Parmet, J.D.; Clifford Rees, J.D.; Stephen P. Teret, J.D., M.P.H.; and Martin P. Wasserman, J.D., M.D.

Finally, I would like to thank the members of my research team at the Public Health Law and Policy Program, Sandra Day O’Connor College of Law, Arizona State University (ASU) who contributed many hours to the review, edits, and formatting of these manuscripts. These individuals include: Sarah O’Keefe, Megan Scanlon, Daniel Orenstein, and Samantha Fritzel, all J.D. Candidates at the Sandra Day O’Connor College of Law, ASU; and Chase Millea and Alexa Kissinger, who are talented undergraduate students enrolled in the Barrett Honors College, ASU. These students’ contributions to this issue were invaluable in ensuring its production in proximity to the national conference.

References

1. See, e.g., “The Public’s Health and the Law in the 21st Century: The Proceedings of the Third Annual Partnership Conference on Public Health Law,” *Journal of Law, Medicine & Ethics* 32, no. 4, Supp. (2004).
2. L. O. Gostin, *Public Health Law: Power, Duty, Restraint*, 2nd ed. (Berkeley and New York: University of California Press and Milbank Memorial Fund, 2009).
3. 197 U.S. 1 (1905).
4. L. O. Gostin, “Jacobson v. Massachusetts at 100 years: Police Power and Civil Liberties in Tension,” *American Journal of Public Health* 95, no. 4 (2005): 576-580; W. K. Mariner, G. J. Annas, and L. H. Glantz, “Jacobson v. Massachusetts: It’s Not Your Great-Great-Grandfather’s Public Health Law,” *American Journal of Public Health* 95, no. 4 (2005): 581-590; W. E. Parmet, R. A. Goodman, and A. Farber, “Individual Rights Versus the Public’s Health – 100 Years after Jacobson v. Massachusetts,” *New England Journal of Medicine* 352, no. 7 (2005): 652-654; J. G. Hodge, Jr., “Jacobson v. Massachusetts: Alternative Perspectives in 2005,” *Journal of Law, Medicine & Ethics* 26 (2005): 33-34.
5. W. E. Parmet, *Populations, Public Health, and the Law* (Washington, D.C.: Georgetown University Press, 2009).
6. S. C. Burris, A. C. Wagenaar, J. W. Swanson, J. K. Ibrahim, J. Wood, and M. M. Mello, “Making the Case for Laws that Improve Health: A Framework for Public Health Law Research,” *Milbank Quarterly* 88, no. 2 (2010): 169-210.
7. Public Health Law Network, available at <www.publichealth-lawnetwork.org> (last visited November 8, 2010).

8. L. O. Gostin, S. Burris, and Z. Lazzarini, "The Law and the Public's Health: A Study of Infectious Disease Law in the United States," *Columbia Law Review* 99 (1999): 59-128.
9. *Id.*
10. J. G. Hodge, Jr., *Interjurisdictional Legal Issues Among Public Health Agencies*, presentation at *Institute of Medicine Committee on Public Health Strategies to Improve Health, National Academies of Science*, Washington, D.C., May 18, 2010.
11. B. M. Meier, J. G. Hodge, Jr., and K. Gebbie, "Transitions in State Public Health Law: Comparative Analysis of State Public Health Law Reform Efforts Following the Turning Point Model State Public Health Act," *American Journal of Public Health* 99, no. 3 (2009): 423-430.
12. The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, amended by Health Care and Education Reconciliation Act, Pub. L. No. 111-152, is commonly referred to as the Affordable Care Act.
13. A. Muller, "Florida's Motorcycle Helmet Law Repeal and Fatality Rates," *American Journal of Public Health* 94, no. 2 (2004): 556-558.
14. O. B. Saad and W. K. Y. Pan et al., "Nonmedical Exemptions to School Immunization Requirements Secular Trends and Association of State Policies with Pertussis Incidents," *JAMA* 296, no. 1 (October 11, 2006).
15. D. A. Balog, "Fluoridation of Public Water Systems: Valid Exercise of State Police Power or Constitutional Violation?" *Pace Environmental Law Review* 14, no. 2 (1997): 645-690, available at <<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1326&context=enlwa>> (last visited November 8, 2010); S. Mobley, "Redding Voters Reject Fluoride," November 6, 2002, *Record Searchlight*, available at <<http://www2.fluoridealert.org/Alert/United-States/California/Redding-Voters-Reject-Fluoride>> (last visited November 9, 2010).
16. J. G. Hodge, "Global Legal Triage in Response to the 2009 H1N1 Outbreak," *Minnesota Journal of Law, Science, and Technology* 11, no. 2 (2010): 599-628.
17. G. Matthews, presented at *Institute of Medicine Committee on Public Health Strategies to Improve Health, National Academies of Science*, Washington, D.C., May 18, 2010.
18. Institute of Medicine, *The Future of Public Health* (Washington, D.C.: National Academy Press, 1988).