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Preface to the Second Edition

Why public health?

First, public health is vital to our lives and health. That’s why public health is in the news every day: mass shootings; drug overdoses; new disease epidemics; school BMI “report cards”; data mining to evaluate health care quality and cost; religious objections to immunizations; access to contraceptives; drunk driving; contaminated food, water and drugs; electronic cigarette regulation; mental health treatment; and even hospital patient injuries. These examples and hundreds like them present legal and policy questions. The answers to those questions can make our lives better or worse.

Second, public health issues affect everyone — students, their families, the professionals they aspire to be, the people they will become responsible for as lawyers, legislators, managers, counselors, administrators, and other professionals. Public health measures have added almost 38 years to the life expectancy of Americans since 1900. While medical care receives the lion’s share of public attention, especially since the Affordable Care Act took effect, some of the most dramatic improvements in health and longevity have occurred through mostly invisible public health programs. Public health law demonstrates how difficult it can be to make sure nothing bad happens.

Third, public health law offers students opportunities for real-world legal problem solving. Laws governing public health run the gamut — from constitutional to statutory to administrative to common law — and solving public health problems requires considering all of these. What law applies? Will it be effective? What alternative approaches would be suitable? These are the kinds of questions that graduates will face in their careers.

Organization of PUBLIC HEALTH LAW

Chapter 1. Introduction to Public Health in the United States. The first edition of PUBLIC HEALTH LAW began with the history of public health — a history rooted in 19th and early 20th century epidemics of contagious diseases. Today, the field of public health — and the laws that shape and respond to it — covers much richer ground. Chapter 1, therefore, begins with examples from the news to illustrate the range of topics within the field. These are by no means exhaustive. Indeed, as the materials explain, the very definition of public health law can be controversial. For some, public health can be seen as anything that affects the health of more than a handful of people. For others, it is limited to government laws and policies. It certainly has become entwined with the field of health law and the laws and policies that affect personal medical care. What is clear is that public health law is no longer primarily a matter for the states; the federal government is a major player in the field. And, although this text is focused on law in the United States, it recognizes and includes materials on global health issues, which increasingly affect domestic public health policy. Nonetheless, this book does not cover environmental or occupational law or, with a few exceptions, mental health law. Those subjects are typically well covered in dedicated separate courses. Furthermore, although many public health laws are criminal laws, this book only glancingly touches on criminal law where it most obviously intersects with non-criminal goals of public health protection, as in drug and alcohol use.
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Chapter 2. Defining Risks to Public Health. Chapter 2 confronts the threshold question in public health law: what counts as a risk to public health? This can be a fraught question in many cases. Although public health scholars insist that identifying and preventing risks should be based on solid evidence, persistent disagreements over the existence or magnitude of specific risks make clear that one’s answer often depends on something other than evidence. Even the most objective person can fall prey to mental short-cuts and cultural biases that distort perceptions of risks and benefits. Thus, this Chapter offers materials from experts in risk perception to introduce readers to methods of evaluating risk and recognizing the potential for error.

Chapter 3. State and Federal Power: Constitutional Principles Applicable to Public Health. Chapter 3 includes several classic United States Supreme Court decisions — and some recent ones — on the respective powers of the state and federal government in matters of public health. Although some cases may be familiar to students of constitutional law, a refresher should prove useful to identify which level of government can and should address particular public health issues. The first part includes cases attempting to distinguish state and federal jurisdiction. These are followed by an illustrative selection of early and contemporary cases concerning the state’s police power. Federal powers to regulate commerce and to tax and spend revenue are covered in the last two parts, respectively, to illustrate the federal government’s direct and indirect regulation of public health programs.

Chapter 4. Public Health, Morals, and Religion. In earlier centuries, the state’s police power was often described as including the power to protect public morals, as well as public safety, welfare and good order. Today, the line between protecting public health and protecting public morals can sometimes seem rather blurred. This Chapter expands on the constitutional principles in Chapter 3, here focusing on the clash between the authority to protect the public health and morals and the limits that the constitution imposes on that authority when it touches intimate spheres of liberty and the free exercise of religion.

Chapter 5. Contagious Diseases. The field of public health arose to prevent or contain the spread of contagious diseases. While epidemics are no longer the source of terror they were long ago, disease outbreaks still occur, and new strains of influenza and other diseases could portend future epidemics. This Chapter considers public health responses to individuals with contagious diseases in the community. It compares the use of civil commitment for this purpose with its doctrinal predecessor, civil commitment of mentally ill, dangerous persons, as well as comparing civil detention with criminal detention. While the subject matter covers some well-trodden ground, unsettled issues remain, such as whether constitutional protections of liberty prevent the government from confining individuals not known to have a disease and requiring individuals to take medication to cure a contagious disease.

Chapter 6. Emergency Preparedness and Bioterrorism. Chapter 6 expands on the materials in Chapter 5 to examine responses to post 9/11 national disasters, examining how 9/11 has changed the nature of public health and preparedness planning to incorporate terrorism with epidemics and natural disasters. How closely should the public health community align its goals and workforce with the national security community? Since both public health and terrorist threats are global and national, the federal government plays the dominant role in both preparedness and response to disasters. Attempts at wide-spread smallpox vaccination in the run-up to the second Iraq war,
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responding to SARS and anthrax, and even planning for the detonation of an improvised nuclear device in a major American city, can all be used to identify public health issues that have not yet been adequately addressed.

Chapter 7. Privacy and Uses of Medical Information. Identifying and preventing health risks depend importantly on information, and some of the most useful information lies in medical records. Information technology increasingly allows that information to be accessed efficiently, linked with other databases, and analyzed for multiple purposes, from identifying the source of an epidemic to calculating the costs and outcomes of medical care. In this age of Big Data, however, not everyone is comfortable with sharing his or her personal health information with government agencies and researchers, no matter how benign or potentially useful the goal. This Chapter reviews the patchwork of laws governing privacy and confidentiality and further examines examples of ways in which health records can be used, both with and without patient consent.

Chapter 8. Chronic Diseases and Health Promotion. As the toll of contagious diseases declined, public health officials shifted their attention to reducing chronic diseases like heart disease, cancers and stroke, which are the major causes of death in the United States. Public health offers a population-based perspective distinct from the principle of autonomy underlying the physician-patient relationship. This Chapter offers an opportunity for comparing the rationales for intervening in personal medical care and personal behaviors for the purpose of improving the overall health and longevity of the population. In particular, it raises the question of paternalism, examining when government should — and should not — intervene with an individual to protect the individual’s own health in order to improve the overall health of the population as a whole.

Chapter 9. Weight and Health. The federal public health agency, the Centers for Diseases Prevention and Control, once proclaimed an epidemic of obesity in the United States, giving new meaning to the concept of epidemic. Since then, the nation has become even more obsessed with weight than earlier generations. This Chapter considers the relationship between weight and health — especially chronic diseases — a relationship not without controversy. In so doing, it raises questions about the goals of public health interventions. The Chapter also reviews possible interventions, such as regulating the food supply, the built environment and schools, placing conditions on employment or the receipt of government benefits, and using litigation to induce food producers to alter their products.

Chapter 10. Tobacco and Health. At the end of the 20th century, tobacco use might have been considered the modern scourge of public health. This Chapter examines the ways in which governments have attempted to reduce tobacco use, both successfully and unsuccessfully. These measures include Food & Drug Administration regulation, advertising restrictions, geographic smoking bans, employment restrictions, and litigation against tobacco companies, as well as legislative reactions to many of these approaches. Because similar measures may be considered to reduce other threats to public health, the tobacco initiatives provide an opportunity to evaluate their application in other contexts.

Chapter 11. Drugs and Alcohol. Intoxication could be the eighth deadly sin, so often is it the subject of preventive — or punitive — legislation. Like tobacco, licit drugs and alcohol are lawful for adult use and are unlikely to be banned. Unlike tobacco, however, excessive use of alcohol or drugs can cause more immediate harm, both to the user and others. This Chapter considers how civil measures may discourage abuse of alcohol and
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drugs and how to distinguish permissible from impermissible criminalization and civil restrictions. The growing use of drug testing by government agencies is examined in light of Fourth Amendment protections against unreasonable searches and seizures. The Chapter concludes by examining responsibility for harm caused by intoxication.

Chapter 12. Injury Prevention. If a goal of public health is to prevent avoidable causes of death, then it must include injuries as well as illnesses. This Chapter examines two important causes of injury and death: medical care and firearms. These turn out not to be strange bedfellows: both have benign or beneficial uses; both contribute significantly to the nation’s death toll; and effective policies to reduce deaths from either cause have not been implemented. The Chapter examines the major policy options and whether they can address the underlying cause of harm to the public. In the case of firearms, the Second Amendment places some limits on regulation, while legislation has restricted the causes of action available for litigation.

Chapter 13. Global Health. The final Chapter addresses the emerging topic of global health, and concentrates on global public health, a field that has spawned its own legal specialty: health and human rights. The human rights framework provides a theoretical framework to promote global health on the basis of universal human rights and dignity, as spelled out in the Universal Declaration of Human Rights and other post-World War II human rights instruments. Public health challenges routinely cross international boundaries, and it is not just contagious diseases that are of contemporary concern, but chronic diseases as well. The field of global health governance is in its infancy, and most law in this area can properly be described as “soft” law, including the expanding field of litigation designed to enforce the growing international “right to health.” The most developed legal area is in the regulation of global research on human subjects, dating from the Nuremberg Doctors’ Trial. While governments tend to dominate public health, global health will require the active participation of the private sector as well — nongovernmental organizations (NGOs), transnational corporations, and transnational professionals (especially physicians and lawyers).

Ways to Use Public Health Law

Courses in public health law have been offered as a stand-alone course and as a supplement or alternative to courses in health law or law and medicine or law and bioethics. This book can be used in any of such courses. The first four Chapters provide the foundation for examining government power and policies affecting public health, as well as constitutional limitations on policy options. The remaining Chapters serve as case studies of specific topics. Each of these Chapters provides examples of different laws and policies — such as mandates, prohibitions, regulatory standards, and litigation — to address each problem. Some Chapters include additional constitutional issues. For example, the First Amendment principles applicable to commercial speech generally are examined using the example of tobacco advertising in Chapter 10; and Fourth Amendment search and seizure principles applicable to some civil matters are discussed in the materials on drug screening in Chapter 11.

Much has changed since the first edition of Public Health Law was published and, therefore, a substantial portion of the materials in this second edition is new. The most recent Supreme Court decisions on public health issues are included. At the same time, we have retained many of the foundational decisions concerning the state’s police power to protect public health and federal powers to regulate health-related matters.


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The Notes and Questions provide some background and explanation of many of the court decisions. They also include references to basic reference materials, which are hyperlinked in the electronic versions of this book. Perhaps more important, the Notes offer examples of current issues to which the materials may apply. We have grouped notes, commentary and questions to follow the material to which the Notes refer, instead of consolidating all notes at the end of a Chapter. To locate a specific topic, consult the Table of Contents, which lists each Note and its subject matter.

Our First Edition Co-Authors

Professor Ken Wing, of University School of Law, who inspired the Ken Wing Fun Run, held annually at the Health Law Professors Conference, led the writing of the first edition of PUBLIC HEALTH LAW. He greatly disappointed us by retiring, but was generous in encouraging us to go forward with a new edition.

Professor Dan Strouse was also taken from us too soon. We are pleased that the Center for the Study of Law, Science, & Technology, of which Dan was Director at Arizona State University Sandra Day O’Connor College of Law, established the Daniel Strouse Prize in his memory.

Wendy Mariner
George Annas
Boston University
Boston, Massachusetts
May 2014
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