Introduction: Perspectives on the Development of Population Health Law

Peter D. Jacobson
University of Michigan

Wendy E. Parmet
Northeastern University

The Symposium on Public Health Law

This special issue of the *Journal* presents articles written by a group of public health law scholars who belong to the George Consortium, which is dedicated to strengthening the capacity of academics, practitioners, and advocates working to advance public health through law. The group's operating premise is that law is fundamental to the origin, understanding, and delivery of public health services, as well as to the social determinants of health. Depending on its content and form, law can improve the likelihood that populations, nationally and globally, can lead healthy, long, and productive lives, or it can hinder their ability to do so. Indeed, more than most aspects of domestic social policy, law creates, defines, and reshapes the organization and delivery of public health services. Virtually every aspect of public health practice is defined and guided by law. One might even think of public health practice as a specialized branch of administrative law.

This interdependence between law and public health is especially apparent (and important) during crises, such as a mass casualty event, a natural disaster, or an infectious disease epidemic, but it also governs the daily work of local health departments (LHDs) in protecting the public's health.

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We need only examine the recent Flint water crisis, in which thousands were exposed to lead-tainted water, to understand what happens when public health and public health law are subordinated to economic considerations (Flint Water Advisory Task Force 2016).

Given law's importance to public health, those who care about health policy should care about its interactions with law. The George Consortium is comprised of public health law scholars, empirical researchers, and practitioners who seek to: study and influence those interactions; increase our understanding of law's relationship to population health; and offer strategies—both theoretical and practical—for policy makers to use law effectively to improve the public's health.

To further its mission, in 2015 the Consortium held a symposium at the University of Michigan School of Public Health to discuss Wendy Parmet's book *Populations, Public Health, and the Law* (Parmet 2009). Among other notable aspects of this book, Parmet argued for reanimating the consideration of population health perspectives in legal and policy discourse. In particular, Parmet noted that, "the law seeks, among other things, to protect and promote public health," and must therefore recognize the "critical importance of populations" (Parmet 2009: 2). As Parmet writes in this issue, "The framework, which I call 'population-based legal analysis,' has both normative and descriptive components. The normative component claims that the protection of population health ought to be relevant to legal analysis and that courts should adopt public health's population perspective. The descriptive component relies on a close transdoctrinal reading of case law to uncover population health's role in law."

The symposium explored the implications of this approach for public health practice and policy. Its objective was to build on Parmet's book, which lays a foundation for new approaches to public health law. In particular, the symposium discussed ways of responding to recent judicial trends that impose new limits on government's ability to protect the population's health. At a time of increasing public and political resistance to regulations, including those that aim to protect public health, the presenters addressed fundamental questions about the future direction of public health law in securing basic public health protections.

Recent Developments in Public Health Law and Scholarship

Since the publication of *Populations, Public Health, and the Law*, the field of public health law has experienced significant growth in several ways.

First, a new generation of scholars has expanded the range of public health law topics and disciplinary approaches. It is now possible to talk about a scholarly community that is focused on shared questions and new ways of addressing them. In the past, most academic conferences devoted to health law or policy had only token public health law representation. Now, to take one example, at the 2016 ASLME Health Law Professors Conference, various public health law topics were discussed on multiple panels. In fact, about 25 percent of the conference was focused on either public health law or the social determinants of health. This is clear recognition that public health law and public health policy are now essential topics for a health law and ethics conference.

Second, thanks in part to the Robert Wood Johnson Foundation's Public Health Law Research Program, multidisciplinary empirical scholarship on public health law topics is opening new approaches that will improve the delivery of public health services. "Empirical public health law research provides the crucial evidence base that informs our understanding of laws or sets of laws on public health" (Beletsky, Parmet, and Burris 2012: 1). An example of such research is the article by Burris et al. in this issue.

Although the articles in this special issue focus primarily on developing public health legal doctrine, insights from fields such as political science and sociology will be essential contributors in understanding how new legal doctrine can be implemented to improve population health. In combination, the public health law renaissance (to use Lindsay Wiley's phrase) and resulting empirical scholarship will shape future public health policy and practice.

Both of these developments have contributed to an expansion of normative public health law, building on Parmet's work. While it is too soon to determine how the burgeoning scholarship will influence public health or health law doctrine, we expect the results of this work to figure prominently in public health policy debates and in litigation that has the potential to significantly affect population health.

The title of this special issue, *Perspectives on the Development of Population Health Law*, reflects more than just the overarching themes in the articles and commentaries that we present. More importantly, it implicitly raises questions as to what the contours of population health law are and should be, given recent court decisions as well as other developments that pose serious challenges to the successful implementation of effective public health policies. These challenges are normative, political, and practical. We describe each briefly.

Normative. The public health law scholarship in this issue and elsewhere demonstrates considerable progress in expanding Parmet's theories into

strong doctrinal arguments. Unfortunately, the courts have been more receptive of late to arguments opposing public health interventions. In particular, courts have imposed some significant impediments to the scope of public health law, especially by reading the First Amendment broadly so as to present a barrier to public health policy.

In addition, as we have described elsewhere (Parmet and Jacobson 2014), the US Supreme Court has reinterpreted federalism to place new limits on state and local public health initiatives, as was evident in the Supreme Court's decision in *NFIB v. Sebelius*, blocking the federal government from enforcing the Affordable Care Act's Medicaid expansion (132 S. Ct. 2764 [2012]). Historically, the courts have granted appropriate deference to public health regulatory authorities and health professionals. But several courts have redefined the standard of evidence needed to support public health regulation, imposing significant new burdens on the regulatory process.

Because information-based regulation is an increasingly important aspect of public health policy, the judicial refusal to grant some deference to the regulators will make it difficult to enact regulations regarding a range of public health concerns, including obesity, pharmaceuticals, guns, and tobacco. These developments restrict government's ability to limit harmful activities and to compel health-protecting content on labels or marketing efforts. Likewise, recent cases have compromised health professionals' ability to provide health-related information to their patients about gun safety, fracking, and women's reproductive health (Parmet, Smith and Miller 2016).

Taken together, these developments have significant potential to restrict the ability of LHDs to protect the public's health. Whether a potentially more progressive Supreme Court will be willing to halt this trend, let alone reverse it, remains to be seen. For now, precedent matters, and it matters in a very unfavorable way for public health law scholars. Hence the critical need to develop robust and persuasive legal theories to support public health laws and answer the antiregulatory doctrines nurtured by public health's opponents in both industry and the academy.

Continuing to push the doctrinal arguments considered in this issue is one strategy for offering the courts alternative normative theories to supplant current doctrinal trends. But public health law scholars and advocates will also need a strong counterstrategy that attempts to block further expansion of First Amendment restrictions on public health practice.

Appropriately, in our view, the George Consortium has been attempting to develop a systematic approach to reverse these trends. Noting that the

courts have strengthened First Amendment protection for commercial speech while simultaneously eroding protection for professional speech, the Consortium concedes the stark reality that public health's opponents have effectively used commercial speech as a powerful deregulatory tool to achieve victories that eluded them through other judicial and political attacks. Because these decisions are based on the Constitution, they are not easily, if at all, subject to congressional or other political action (i.e., amending the Constitution). Instead, the most immediate remedy is to advance alternative theories for the courts to consider in reassessing the direction of First Amendment jurisprudence.

Public health advocates are not without effective responses. For one thing, the recent expansion of the commercial speech doctrine is itself a radical departure from prior precedent that should be subject to reconsideration. For another, we can substantiate the adverse public health consequences from these decisions that might encourage a more sympathetic Supreme Court to revisit them. Further, as Parmet's book discusses, the protection of public health has deep constitutional roots. Unearthing these roots, and restoring their place in legal doctrine, is one of the goals of the George Consortium.

Political. Having identified a set of doctrinal questions for ongoing analysis, the looming question for the field is how to take the emerging scholarship to a broader audience. Should the George Consortium attempt to emulate the Federalist Society and develop a wide network of academics and practitioners? If so, how would such an effort be organized and funded? As an alternative, public health law scholars can work with public health officials to devise new ways of promulgating and defending regulations. This is where the policy surveillance approach discussed by Burris and colleagues in their contribution could play an important role in providing guidance to regulators.

As remote as a corrective trend might seem right now, keep in mind that conservative scholars must have felt the same way when they began their legal assault on the then prevailing legal doctrine that in their view unduly constrained the free market. Starting in the 1980s, they systematically adopted long-term legal and political strategies that seemed unrealistic at the time, but have been highly successful in changing the legal and political landscapes. Recall that they shamelessly copied strategies legal scholars had honed in challenging racial segregation culminating in *Brown v. Board of Education* (347 U.S. 483 [1954]; Kluger 2004).

Thus, public health legal scholars and advocates need to develop an agenda that assumes a long-term strategic conflict. While it's certainly

plausible to think that more favorable Supreme Court nominees could offer short-term advantages, we cannot reasonably expect this to happen quickly. Remember, too, that libertarian scholars and industry opponents of regulation will respond in kind. They will tenaciously attempt to preserve and even expand their doctrinal gains, and are not about to cede any ground that would place their gains in jeopardy.

Not only will legal doctrine be contested, but conservative state legislators will continue to enact contentious legislation that may have negative effects on public health, from those that expand personal preference vaccinations exemptions to those that limit physicians' ability to provide patients with truthful health-related information. With the Republicans who often oppose public health measures having effective control over thirty-one state legislatures, public health opponents can continue to enact a barrage of problematic health legislation.

Practical. As noted above, law is an important determinant of how the public health infrastructure is organized and how resources are allocated. Legislation can require funding for certain services, providing the services according to specific guidelines, or impose certain constraints on how the money can be allocated. Laws and regulations can also be pivotal in assigning and clarifying roles and responsibilities related to a broad range of public health activities and initiatives.

As a result, public health attorneys have an important stake in the challenges confronting public health practitioners, ranging from ensuring a robust public health workforce to maintaining preparedness initiatives that address potential infectious disease outbreaks and rising chronic disease rates at a time of declining public investment in the public health system.

Yet there are some significant gaps that compromise the effectiveness of public health law. First, a recent study found substantial weaknesses in the overall clarity, direction, and cohesion of the laws governing public health emergencies, and that legal knowledge is inadequately developed and disseminated (Jacobson et al. 2012). This means that practitioners are not benefiting from timely legal advice to resolve significant public health challenges. Second, despite law's importance to public health, attorneys and legal scholars have not been prominent in public health policy debates, leaving a critical void in deliberations over public health legislation.

The Contributions to the Special Issue

The articles and commentaries in this issue represent the presentations and subsequent discussions sparked by the symposium. They offer varied

reflections on the developments and challenges described above. They also suggest important responses. Several of the articles focus on the relationship between individuals and populations and how to assess the viability of the doctrinal assertions. The accompanying commentaries challenge certain assumptions, but expand on the population health norm.

To begin, Wendy Parmet observes that courts traditionally have viewed health as a legal norm, an objective worthy of judicial consideration. But after examining the Supreme Court's three major cases relating to the Affordable Care Act (ACA), *NFIB v. Sebelius* (132 S. Ct. 2764 [2012]), *Burwell v. Hobby Lobby Stores, Inc.* (134 S. Ct. 2751 [2014]), and *King v. Burwell* (135 S. Ct. 475 [2014]), Parmet concludes that what she calls the health norm may be eroding, as the Court is now less consistently treating health as a goal warranting legal protection, especially when challenged by countervailing legal claims such as the First Amendment. Consequently, the traditional deference courts have granted to health officials may be fraying, and health policies appear increasingly vulnerable to judicial invalidation. This conclusion, however, remains tentative as the Supreme Court's most recent ACA case, *King v. Burwell*, evinced signs of the health norm. Still, the Court's neglect of the norm in its first two ACA cases points to the need for the type of work to which the Consortium is dedicated.

From a normative perspective, Lindsay Wiley addresses the contrasting ways in which disease is considered. Our current health care delivery system focuses on disease as a problem that afflicts discrete individuals. Wiley argues that the population perspective allows for a more robust understanding of disease to counter the dominant individualist narrative. While not commenting specifically on the ACA trilogy, Wiley offers a compelling rationale for why progress toward a population health legal norm has stalled. She argues persuasively that the individualist narrative essentially obstructs the population health narrative. "Parmet's population legal analysis and her nuanced comparison of it to economic analysis of law is inspiring and exciting new work in the booming field of public health law. But this work remains stymied by political, cultural, and social barriers. Indeed, the very concept of 'group health,' as Parmet describes it, is deeply counterintuitive for most people. Rather than sidestepping the issue, public health advocates should face it head-on." To Wiley, the answer lies in the concept of primordial prevention for bridging the public health and clinical care divide, and as a conceptual approach to integrating the public health and health care systems. It's uncertain whether the bridging concept would influence the development of legal doctrine, but it may be a viable strategy (Hardcastle et al. 2011).

In their contribution, Peter Jacobson and Rachel Dahlen take this one step further. They point to two trends that will emerge in the post-ACA era: enterprise medical liability, and the fusion of health law and public health law doctrine. They argue that these two trends will converge so that future legal doctrine will simultaneously impose enterprise medical liability on health systems and integrate health law and public health law into a population health law framework as Parmet advanced in her book. Jacobson and Dahlen argue that the convergence of clinical care and population health is especially important. Health care systems are under increasing pressure for the community's health, which means they will be expected to deal with the upstream determinants of health. At that point, Wiley's primordial prevention approach has operational and doctrinal implications. As health care systems take increasing responsibility for the population's health, they will incur duties that the courts will need to recognize through new doctrinal arrangements.

Rob Gatter takes a different approach to the same normative question that underlies the Parmet and Wiley articles. He sets forth five criteria to judge the viability of Parmet's population health legal norm: (1) can the framework identify principled connections among disparate common law doctrines and codified legal standards already part of health law; (2) can it suggest principled connections between health law and other fields of law; (3) is it sufficiently general to account for all of health law; (4) is it sufficiently specific to provide insights that are unique to the field; and (5) can it provide a principled framework for resolving normative dilemmas within the field? Applying these criteria to Parmet's legal norm, Gatter concludes that Parmet's theory may operate as an organizing norm for understanding health law's disparate components. Still, he cautions that the theory will be undermined if it is unable to account for individual rights. The challenge Gatter poses is for scholars to explore how individual rights will be protected under the population health legal norm. The success of this sort of normative bridge building between libertarian and communitarian approaches to health policy will determine the viability of using the population health norm to theorize health law.

Scott Burris and colleagues move beyond normative considerations to address a new legal strategy of policy surveillance, defined as the "systematic, scientific collection and analysis of laws of public health significance." The authors maintain that too much information about the effectiveness of public health laws and policies remains hidden from practitioners and scholars who can use the data to track trends and the status

of current legislation. Similar to public health's long-standing emphasis on disease surveillance, Burris et al. contend that policy surveillance, especially tracking laws and regulations, should be a core public health function. In a sense, this approach combines two of the three core public health functions (surveillance and policy development—assurance is the third) into a new, fourth core function. "Accessible legal trend data is important to the accountability of the public health system, because laws and policies are frequently used as measures of progress, or defined as goals in themselves in health policy guidance like the Community Guide to Preventive Services and Healthy People 2020." Among other benefits, the authors argue that policy surveillance will help build the public health workforce's capacity.

In addition to the articles, the issue includes two commentaries offering provocative observations on the issue's themes. In his commentary, James Hodge commends Burris et al. for developing the policy surveillance concept, and agrees that it can have great utility for the field. But Hodge raises some important caveats as well. For one thing, Hodge questions whether the current public health workforce is sufficiently skilled to use the data effectively. For another, Hodge points out that opponents of public health policies might be able to misuse the data to undermine those very policies. Thus, Hodge concludes that although policy surveillance "has its place in public health theory, and increasingly may become the standard for meaningful improvements through law," the details of what is subject to surveillance, and how the surveillance is conducted, matter a great deal to its utility.

In his commentary, Efthimios Parasidis, in a manner similar to Rob Gatter, uses Parmet's theory as a point of departure to address a controversial area of public health policy—vaccine resistance. He argues that adopting Parmet's public health legal norm would "maximize the [individual and public] health benefits and minimize the risks of vaccines." Noting that distrust of both government and the pharmaceutical industry motivates vaccine resistance, Parasidis offers several reforms that would "address [the] concerns of institutional vaccine skeptics" and help build trust in government: "(1) establishing a system of active post-market analysis for FDA-approved vaccines; (2) modernizing the 1980s-era legal framework that governs claims for vaccine-related injuries; and (3) reevaluating legal immunities for vaccine manufacturers." It is uncertain whether this strategy would provide the normative bridge building that Gatter advocates for, but the possibility that it might do so is certainly worth considering.

Conclusion

Taken together, the articles in this issue provide an overview of just a few of the exciting developments, as well as the serious challenges, faced by public health law. While readers may not agree with all of the perspectives or conclusions reached by the authors, we hope that this issue alerts both policy makers and scholars across many disciplines to some of the critical issues confronting public health law and policy, as well as the need for further work to ensure that legal doctrine can support rather than impede efforts to improve the population's health. If any lesson is clear from these articles, it is that public health policy can only be effective when it comports with and can be sustained by our legal system.

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Peter D. Jacobson is professor of health law and policy, and director, Center for Law, Ethics, and Health, at the University of Michigan School of Public Health, where he teaches courses on health law, public health law, and public health policy. Jacobson's recent research has examined health departments' strategic adaptations, public health entrepreneurship, and the US Surgeon General's vital mission. Jacobson's most recent book is *Law and the Health System* (co-authored—Foundation, 2014). Previous books include work on tobacco control, breast cancer, and the role of the courts in shaping health policy. Jacobson is a member of the Board of Directors, National Center for Healthcare Leadership. Jacobson is also Chair of the Board of Health for Washtenaw County Public Health. Currently, Jacobson is working on a health law text for health administration students, and is leading a Robert Wood Johnson Foundation project examining the implementation of Health in All Policies initiatives. He is the principal investigator for the Mid-States Region of the Network for Public Health Law, a Robert Wood Johnson Foundation program.

Wendy E. Parmet is the associate dean for interdisciplinary education and research support at Northeastern University School of Law and George J. and Kathleen Waters Matthews Distinguished Professor of Law and Professor of Public Policy and Urban Affairs. The director of Northeastern University's Program on Health Policy and Law, her research focuses on the use of law to protect public health, and the role that public health has played in the formation of legal doctrine. Her books include *The Health of Newcomers: Immigration, Health Policy, and the Case for Global Solidarity* (with Patricia Illingworth, NYU Press, forthcoming); *Populations, Public Health, and the Law* (Georgetown University Press, 2009); and *Debates on U.S. Health Care* (with Jennie Jacobs Kronenfeld and Mark A. Zezza, Sage Publications, 2012).

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