Public Health Law Reform

Public health law reform is necessary because existing statutes are outdated, contain multiple layers of regulation, and are inconsistent. A model law would define the mission and functions of public health agencies, provide a full range of flexible powers, specify clear criteria and procedures for activities, and provide protections for privacy and against discrimination.

The law reform process provides an opportunity for public health agencies to draw attention to their resource needs and achievements and to form ties with constituency groups and enduring relations with the legislative branch of government. Ultimately, the law should become a catalyst, rather than an impediment, to reinvigorating the public health system.

Lawrence O. Gostin, JD, LLD (Hon)

PUBLIC HEALTH LAW IS OFTEN perceived as an arcane set of rules buried deep within indecipherable statute books and regulatory codes. It does not have to be this way. The law can be transformed to become an essential tool for creating the conditions for people to be healthy. The Institute of Medicine[1] and the Department of Health and Human Services[2] recommend reform of an obsolete and inadequate body of enabling laws and regulations. Currently, a consortium of states and national experts are drafting a model public health law.[3] In this commentary, I make the case for law reform and propose a set of principles to guide the legislative process.

A model public health statute should reflect at least 3 principles—duty, power, and restraint. First, the law should impose duties on government to promote health and well-being within the population. Surprisingly, state statutes rarely impose affirmative obligations on public health agencies, and the Supreme Court finds no constitutional duty to safeguard the public.[4] However, the creation of statutory duties to perform essential public health functions and to protect the community's health and safety would be beneficial in several ways: (1) legislatures would have a standard by which the health authority's performance could be assessed; (2) the electorate would have higher expectations for health promotion and disease prevention; (3) government would demonstrate its enduring commitment to a strong public health infrastructure. Agencies should also have the responsibility to work with the private (e.g., managed care and business) and voluntary (e.g., community-based) sectors to ensure the public's health.[5]

Second, the law should afford public health authorities ample power to regulate individuals and businesses to achieve the communal benefits of health and security. This idea of regulatory power is counterintuitive to a civil libertarian but natural and instinctive to a sanitarian. The power to regulate is the power to make people secure in the most important aspect of their lives—their health and well-being. Individuals cannot exercise civil or political rights or enjoy life without a certain measure of health. One important way of ensuring the health of the community is by giving government adequate powers, and flexibility, to regulate. Individuals acting independently, without organized community activity, cannot ensure many of the essential conditions of health—clean air and water, safe products, healthy workplaces, and control of infectious diseases. Sound and effective public health statutes, therefore, should afford agencies ample authority to set standards of health and safety and to ensure compliance.

Third, the law should restrain government from overreaching in the name of public health. Public health authorities should respect, to the extent possible, individual autonomy, liberty, and privacy. They should act only on the basis of clear criteria where necessary to protect the community. Public health agencies should also provide procedural due process before exercising coercive powers. Fair and objective decision making is essential in a democracy.[6]

Effective public health protection is technically and politically difficult.[7] Law cannot solve all, or even most, of the challenges facing public health authorities. Yet law can become an important part of the ongoing work of creating the conditions necessary for people to live healthier and safer lives. A public health law that contributes to health will, of course, be up-to-date in the methods of assessment and intervention it authorizes. It will also conform to modern standards of law and prevailing social norms. It should be designed to enhance the reality and the public perception of the health department's rationality, fairness, and responsibility. It should help health agencies overcome the defects of their limited jurisdiction over health threats facing the population. Finally, a new law and the process of its enactment should provide an opportunity for the health department to challenge the apathy about public health that is all too common within the government and the population at large.

PROBLEMS WITH PUBLIC HEALTH LAWS

The law relating to public health is scattered across countless statutes and regulations at the state and local levels. Problems of antiquity, inconsistency,

redundancy, and ambiguity render these laws ineffective, or even counterproductive, in advancing the population's health.[8] In particular, health codes frequently are outdated, built up in layers over different periods of time, and highly fragmented among the 50 states and the territories.

Antiquity

The most striking characteristic of state public health law, and the one that underlies many of its defects, is its overall antiquity. Certainly, some statutes are relatively recent in origin.[9,10] However, a great deal of public health law was framed in the late 19th and early to mid-20th century and contains elements that are 40 to 100 years old.[11,12] Old public health statutes are often outmoded in ways that directly reduce their effectiveness and conformity with modern standards. These laws often do not reflect contemporary scientific understandings of injury and disease (e.g., surveillance, prevention, and response) or legal norms for protection of individual rights. Rather, public health laws use scientific and legal standards that prevailed at the time they were enacted. Society faces different sorts of risks today and deploys different methods of assessment and intervention. When many of these statutes were written, public health (e.g., epidemiology and biostatistics) and the behavioral (e.g., client-centered counseling) sciences were in their infancy. Modern prevention and treatment methods did not exist.

At the same time, many public health laws predate the vast changes in constitutional (e.g., equal protection and due process) and statutory (e.g., disability discrimination) law that have transformed social and legal conceptions of individual rights. Failure to reform these laws may leave public health authorities vulnerable to legal challenge on the grounds that the laws are unconstitutional or that they are preempted by modern federal statutes. Even if state public health law is not challenged in court, public health authorities may feel unsure about applying old legal remedies to new health problems within a very different social milieu.

Multiple Layers

Related to the problem of antiquity is the problem of multiple layers of law. The law in most states consists of successive layers of statutes and amendments, built up in some cases over 100 years or more in response to existing or perceived health threats. This is particularly troublesome in the area of infectious diseases, which forms a substantial part of state health codes. Because communicable disease laws have been passed piecemeal, in response to specific epidemics, they tell the story of disease control in the United States (e.g., smallpox, cholera, tuberculosis [TB], sexually transmitted diseases [STDs], polio, AIDS).

Through a process of accretion, most states have come to have several classes of communicable disease law, each with different powers and protections of individual rights: those aimed at traditional STDs; those targeted at specific currently or historically pressing diseases, such as TB and HIV; and those applicable to "communicable" or "contagious" diseases, a residual class of conditions ranging from measles to malaria whose control usually does not raise problematic political or social issues.

The disparate legal structure of state public health laws can significantly undermine their effectiveness. Laws enacted piecemeal over time are inconsistent, redundant, and ambiguous. Even the most astute lawyers in public health agencies or offices of the attorney general have difficulty understanding these arcane laws and applying them to contemporary health threats.

Inconsistency Among States and Territories

Public health laws remain fragmented not only within states but among them. Health codes within the 50 states and the territories have evolved independently, leading to profound variation in the structure, substance, and procedures for detecting, controlling, and preventing injury and disease. In fact, statutes and regulations among American jurisdictions vary so significantly in definitions, methods, age, and scope that they defy orderly categorization. There is good reason for greater uniformity among the states in matters of public health. Health threats are rarely confined to single jurisdictions but pose risks within whole regions or the nation itself (e.g., air or water pollution, disposal of toxic waste, bioterrorism).

Public health law, therefore, should be reformed so that it conforms with modern scientific and legal standards, is more consistent within and among states, and is more uniform in its approach to different health threats. A single set of standards and procedures would add needed clarity and coherence to legal regulation and would reduce the opportunity for politically motivated disputes about how to classify newly emergent health threats.

GOALS FOR REFORM

Define Mission and Functions

State public health statutes should define a cogent mission for the agency and identify a full set of essential public health functions that it should, or must, perform.[13] Broad and well-considered mission statements establish the purposes or goals of public health agencies. By doing so, they inform and influence the activities of government. From a political perspective, mission statements provide a measure of the kinds of activities that are politically sanctioned. When it is acting under a broad mission statement, a public health agency can better justify its decisions to legislators, the governor, and the public. Finally, courts pay deference to statements of legislative intent and may permit a broad range of activities consistent with mission statements. Thus, even if the aspirational qualities of mission statements do not produce the desired results, they can help support agency action.

Few state public health statutes define a cogent mission for the health department or identify a full set of essential public health functions.[14] One notable exception is Texas, which passed a statute defining a public health mission and functions consistent with modern public health guidelines.[15]

Provide Public Health Powers

Public health authorities need a flexible set of tools to advance the community's well-being, ranging from incentives and minimally coercive interventions to restrictive measures. Reformed public health statutes should grant agencies the authority to employ a broad variety of measures to encourage and, if neces-

sary, ensure safer behaviors: traditional prevention strategies (e.g., counseling, education, health promotion); incentives for behavior change (e.g., tax breaks, cash allowances, food, transportation, child care); means for behavior change (e.g., condoms or sterile drug injection equipment); mandatory attendance for counseling, education, testing, or treatment; directly observed therapy; and outpatient care or treatment. These less restrictive powers would enable public health authorities to encourage, supervise, or control persons who pose a significant public health risk.

Limit Powers Substantively

While public health authorities should have all the powers they need, statutes should place substantive limits on the exercise of those powers. The legislature should state clearly the circumstances under which authorities may curtail autonomy, privacy, liberty, and property rights. At present, a few state statutes articulate clear criteria for the exercise of public health powers; others provide vague or incomplete standards; and still others leave the exercise of these powers partly or wholly to the discretion of public health officials. While public health authorities may prefer an unfettered decision-making process, the lack of criteria does not serve their interests or the interests of regulatory subjects.

Effective and constitutionally sound public health statutes should set out a rational and reliable way to assess risk to ensure that the health measure is necessary for public protection. Public health authorities should be empowered to employ a compulsory intervention only to avert a significant risk (not speculative, theoretical, or remote) based on objective and reliable scientific evidence and on an individualized (case-by-case) basis.[16] The standards for risk assessment should include the nature of the risk, its probability, its duration, and the severity of potential harm.[17] Statutes should also require health officials to choose the least restrictive alternative that will accomplish the public health goal.

Limit Powers Procedurally

There are good reasons, both constitutional and normative, for legislatures to require health authorities to use a fair process whenever their decisions seriously infringe upon autonomy, liberty, or proprietary or other important interests. For example, if health authorities seek to close a restaurant, withdraw a license, or restrict liberty, they should provide due process.[18] Procedural protections help both to ensure that health officials make fair and impartial decisions and to reduce community perceptions that public health agencies arbitrarily employ coercive measures. Where few formal procedures exist, public health officials risk rendering biased or inconsistent decisions and erroneously depriving persons and businesses of their rights and freedoms. Although public health authorities may feel that due process is burdensome and an impediment to expeditious action, due process can actually facilitate deliberative and accurate decision making.

Protect Against Discrimination

Throughout modern history, the stigma associated with serious diseases and the social hostility that is often directed at those with, or at risk of, disease have interfered with the effective operation of public health programs.[19] The field of public health has always had to grapple with issues of race, gender, sexual orientation, disability, and socioeconomic status. Persons who fear social repercussions may resist testing or fail to seek needed services. As part of any effort to safeguard the public's health, legislators must find ways to address both the reality and the perception of social risk.

There exist good reasons for public health statutes to have strong antidiscrimination provisions. The Supreme Court has narrowed the definition of disability, excluding large numbers of persons from the protection of the Americans with Disabilities Act (ADA).[20] Moreover, the Supreme Court held that Title II of the ADA, which proscribes discrimination in public services, unconstitutionally authorizes private lawsuits against state agencies; the court sees this as an impermissible abrogation of the state's sovereign immunity.[21] State public health statutes could remedy these, and other, problems of scope and effectiveness in the ADA.

Protect Privacy and Information Security

Privacy and security of public health data are highly important from the perspective of the individual and the public at large. Individuals seek protection of privacy so that they can control intimate health information. They have an interest in avoiding the embarrassment, stigma, and discrimination of unauthorized disclosures to family, friends, employers, or insurers. Privacy assurances can also facilitate individual participation in public health programs and promote trust between health authorities and the community. Public health laws, therefore, should have strong safeguards of privacy to protect these individual and societal interests.

Public health legislation should, however, give agencies reasonable access to data and the power to use those data for important public health purposes, such as surveillance and response to health threats. If privacy rules become overly strict, legislatures undermine important public interests. The Centers for Disease Control and Prevention (CDC) advises states to consider adopting the Model State Public Health Privacy Act drafted by Georgetown University Law Center (http://www.critpath.org/msphpa/privacy.htm).[22,23]

THE PROCESS OF LAW REFORM

The methods and goals of public health are often misunderstood and undervalued within government and society.[24] Health departments receive modest funding, particularly in comparison with resources allocated to medical services. The fact that public health can coerce for the common good and champions population-based risk reduction through behavior change (e.g., smoking cessation, designated drivers, exercise, diet modification) deprives it of specific beneficiaries who are motivated to form political constituencies. The prevalence of an individualistic, market ideology makes it difficult even to speak of public health in the vocabulary of contemporary politics.[25] Public health needs opportunities to draw attention to its resource needs and achievements and to develop constituencies for programs.

The lawmaking process provides just such an opportunity. A bill is the first step toward a coalition. It is an occasion for contact with interest groups and affected communities, some of whom may be motivated to act in support. Contact and cooperative effort also help to establish long-term ties and to identify important sources of support for other programs. Moreover, the process of negotiating for support can be a useful and concrete way for health agencies to incorporate the views of persons who receive public health services or are subject to regulation.

Legal reform has the potential to enhance the agencies' relationships with legislature. The drafting, negotiating, and hearing process provides a variety of forums for educating lawmakers and their staffs about public health needs and methods, and also provides health planners with better information about legislative views and priorities. Public health is a problem of politics as much as science, and relationships between the 2 branches of government are essential in a democracy.

Law reform, of course, cannot guarantee better public health. However, by crafting a consistent and uniform approach, carefully delineating the mission and functions of public health agencies, designating a range of flexible powers, specifying the criteria and procedures for using those powers, and protecting against discrimination and invasion of privacy, the law can become a catalyst, rather than an impediment, to reinvigorating the public health system. ■

About the Author

The author is with Georgetown University Law Center, Washington, DC, and the Center for Law and the Public's Health, Baltimore, Md, and Washington, DC.

Requests for reprints should be sent to Lawrence O. Gostin, JD, Georgetown University Law Center, 600 New Jersey Ave NW, Washington, DC 20001.

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