

Reminiscences on Public Health Law and *JLME*

Public Health and the Law

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Abstract: This contribution marks a dual milestone at the intersection of public health law and *JLME*: my 50th publication of a substantive manuscript in the 50th anniversary of the *Journal* in 2022. In recognition of these coinciding landmarks, this installment of the Public Health Law column for *JLME* features observations and reflections of the field based largely on prior publications.

It occurred to me on a long run through a desert mountain pass outside Phoenix, Arizona in 2021: my prior installment of the Public Health Law column for the *Journal of Law, Medicine & Ethics (JLME)* marked my 50th substantive publication in the *Journal*. “A moment for reflection,” I thought internally. When I mentioned the milestone to *JLME*’s long-standing editor, Ted Hutchinson (hands down the finest editor I have worked with in my academic career), he noted how it coincided with the 50th anniversary year, 2022, of the *Journal*. As we have done over many prior manuscripts, we conceptualized together this edition of the column as an opportunity to share salient points and musings underlying my *JLME* publications in the field of public health law across 2 decades. See Table for a complete listing of the articles in order of their appearance in *JLME*, which are referenced in the text by #s (e.g., 1, 2). A series of prime reflections are imparted below.

Recognition. Let me commence with the most important observation of all. None of these publications was possible without the substantive contributions of dozens of colleagues and supreme review and editing of Ted and his *JLME* staff, past and present. Co-authors of many of these articles (*see* Table, column 3) include some iconic figures in public health law, ethics, and policy — Lawrence O. Gostin, Wendy Parmet, Stephen P. Teret, Tia Powell, Kristine Gebbie, to name a few. Additional contributors include outstanding colleagues at the Centers for Disease Control and Prevention, Food and Drug Administration, National Academies, American Public Health Association, Network for Public Health Law, multiple state and local health departments, hospitals, law firms, and over a dozen universities. Among my favorite co-authors, however, are emerging scholars and student collaborators at each of my primary institutions over the years — Georgetown University Law Center, Johns Hopkins Bloomberg School of Public Health, and the Sandra Day O’Connor College of Law, ASU — whose ideas and passion for the subject matter are enscorced in many of the articles. *To all my co-authors and contributors, thank you.*

Diversity. Not all of the 50 articles in Table 1 were submitted as part of my regular Public Health Law column, but its formal introduction in 2013 (16) marked my commitment to cover a diverse array of topics across the field. These manuscripts focus on legal issues underlying every major emergency threat from anthrax (1) to Zika virus (27), and especially COVID-19 (45-50). While emergency legal preparedness and response is a recurring theme of the pieces, other topics are covered as well: cannabis

About This Column

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(30, 38), crisis standards of care (17, 43), equity (20, 47), guns (11, 22), health care access (13), homelessness (28), isolation (44), obesity (12), opioids (31, 37), privacy (2, 4, 5), sugar-sweetened beverages (21, 26), tobacco (18), and vaccinations (39,

49). Some manuscripts do not center so much on a specific subject. They take a broader approach, arguing for constitutional rights to public health (32-34), statutory reforms (9), judicial interpretations (7, 40), or political changes (41). Diversification across

multiple topics and realms of scholarship is an attribute I gleaned from masters in the field, and an aspiration I emphasize with emerging law and policy scholars.

Assessments. Some of the manuscripts take on critical and timely

Table

JLME Substantive Articles in Public Health Law, Ethics, and Policy

#	Title, Year & JLME Citation	Co-Authors
1	Bioterrorism Law & Policy: Critical Choices in Public Health. 2002; 30:2: 254-261.	
2	Health Information Privacy & Public Health. 2004; 31: 4: 663-671.	
3	Tobacco Control Legislation: Tools for Public Health Improvement. 2004; 32:3: 516-523.	Eber G
4	Challenging Themes in American Health Information Privacy & the Public's Health: Historical & Modern Assessments. 2005; 32: 4: 670-679.	Gostin KG
5	An Enhanced Approach to Distinguishing Public Health Practice & Human Subjects Research. 2005; 33:1: 125-141.	
6	Scope of Practice for Public Health Professionals & Volunteers. 2005; 33: 4: Supp. 53-54.	Mount JK, Reed JF, Couig M
7	Jacobson v. Massachusetts: Alternate Perspectives. 2005; 33: 4: Supp. 26.	
8	Community & Interjurisdictional Preparedness. 2005; 33: 4: Supp. 73-76.	Murphy AM, Hinrichs SH, Fox P, Stier D
9	Transforming Public Health Law: The Turning Point Model State Public Health Act. 2006; 34: 1: 77-84.	Gostin LO, Gebbie K, Erickson DL
10	Assessing Legal Competencies for Public Health Emergency Preparedness. 2008; Special Supp: 28-35.	Gebbie K, Hoke C, Fenster-sheib M, Hoffman S, et al.
11	The Ethics of Restrictive Licensing for Handguns: Comparing the United States & Canadian Approaches to Handgun Regulation. 2008; 35:4: 657-679.	Vernick JS, Webster D
12	Preemption & the Obesity Epidemic: State & Local Menu Labeling Laws & the Nutrition Labeling & Education Act. 2008; 36:772-789.	Rutkow L, Vernick JS, Teret SP
13	Congress, Courts & Commerce: Upholding the Individual Mandate to Protect the Public's Health. 2011; 39:3: 394-400.	Brown EF, Orenstein D, O'Keefe S
14	Review: Reconsidering Law & Policy Debates: A Public Health Perspective (Culhane, JG, ed.). 2011; 39:4: 704-706.	
15	"Gaming the System" During Public Health Emergencies. 2012; 40:3 690-695.	White LC, Sniegowski A
16	A Modern Survey on Teaching Public Health Law in the United States. 2013; 40:4: 1034-1039.	
17	Practical, Ethical & Legal Challenges Underlying Crisis Standards of Care. 2013; 41(s1): 50-55.	Hanfling D, Powell T
18	Reconsidering the Legality of Smoking Advertisements on Television. 2013; 41:1:369-373.	Collmer V, Orenstein DG, Mil-lea C, Van Buren L
19	Legal Responses to Communal Rejection in Emergencies. 2013; 41(2):529-534.	Orenstein DG, Weidenaar K, Meza N, Van Buren L, et al.
20	Major Trends in Public Health Law & Practice: A Network National Report. 2013; 41(3):737-745.	Barraza L, Bernstein J, Chu C, Collmer V, et al.
21	A Proposed Ban on the Sale to & Possession of Caloric Sweetened Beverages by Minors in Public. 2014; 42(1):110-114.	Barraza L, Russo S, Nelson K, Measer G
22	Active Shooters in Health Care Settings: Prevention & Response Through Law & Policy. 2014; 42(2):268-271.	Nelson K
23	Global Emergency Legal Responses to the 2014 Ebola Outbreak. 2015; 42(4):595-601.	Barraza L, Measer G, Agrawal AM

issues largely to educate readers or share perspectives. Others more fully analyze a legal or policy issue or approach, providing a core assessment of its relevance, utility, or impact. Take, for example, one of my favorite pieces from 2013, which

centered on an innovative survey and analyses of public health law graduate-level courses (16). Beyond reporting survey results among academicians teaching these courses, the column lays out a panoply of curriculum topics, methods, and

approaches. This assessment served as a *de facto* blueprint for developing public health law and policy courses in the years ahead. Other assessment-oriented manuscripts in the series examine model state public health laws (9), privacy protections (2), pre-

#	Title, Year & JLME Citation	Co-Authors
24	Domestic Legal Preparedness & Response to Ebola. 2015; 43(1):15-18.	Penn MS, Ransom M, Jordan JE
25	Legal Innovations to Advance a Culture of Health. 2015; 43(4): 904-912.	Weidenaar K, et al.
26	Taxing Sugar-Sweetened Beverages to Lower Childhood Obesity. 2016; 44: 359-363.	Wetter S
27	Mitigating Risks to Pregnant Teens from Zika Virus. 2017; 44:657-659.	Maynard A, Bowman D
28	Homelessness & the Public's Health: Legal Responses. 2017; 45(SI): 28-32.	DiPietro B, Horton-Newell A
29	Public Health "Preemption Plus." 2017; 45(1): 156-160.	Corbett A, Weidenaar K, Wetter S
30	Driving Under the Influence of Marijuana Laws & the Public's Health. 2017; 45(2): 280-283.	Turnbull, D
31	Emerging Legal Responses to Curb the Opioid Epidemic. 2017; 45(3): 460-463.	Wetter SA, Noe SA
32	Constitutional Cohesion & Public Health Promotion, Part I. 2017; 45(4): 688-691.	
33	Constitutional Cohesion & Public Health Promotion, Part II. 2018; 46(1): 185-188.	
34	Constitutional Cohesion & Public Health Promotion, Part III. Ghost Righting. 2018; 46(2): 802-805.	Piatt J, Johnson WG.
35	Emerging Legal Threats to the Public's Health. 2018; 46(2): 547-549.	Barraza L, Morcelle M, Wetter SA, Piatt, J, et al.
36	Revisiting the Renaissance in Public Health Law. 2019; 46(4): 1031-1033.	
37	Innovative Law & Policy Responses to the Opioid Crisis. 2019; 47(1): 173-75.	Gulinson CL, Barraza L, et al.
38	Medical Cannabis Law & Policy Issues. 2019; 47(S2): 108-111.	Tilburg W, Gourdet C
39	Immunization Laws & Policies Among Institutes of Higher Education. 2019; 47(3): 342-346.	Barraza, L, Gulinson CL, Hensley D, Castagne M
40	Public Health Law & Policy Implications Concerning Justice Kavanaugh. 2019; 47(S2): 59-62.	Parment W, Benjamin G, Somers S, Gulinson CL
41	Major Health Law & Policy Positions Among 2020 Democratic Presidential Candidates. 2019; 47(3): 459-464.	Barraza L, Castagne M, Fleming H, White EN
42	Legal Crises in Public Health. 2019; 47(4): 778-782.	Wetter SA, White EN.
43	Revisiting Legal Foundations of Crisis Standards of Care. 2020; 48(1): 221-224.	
44	Legal & Policy Interventions to Address Social Isolation. 2020; 48(2): 360-364.	White EN, Reeves CM
45	Legal "Tug-of-Wars" During the COVID-19 Pandemic: Public Health v. Economic Prosperity. 2020; 48(3): 603-607.	Wetter S, Carey E, Pendergrass E, Reeves CM, et al.
46	Post-COVID U.S. Legal Reforms Promoting Public Health & Equity. 2020; 48(4): 784-788.	Wetter S, Piatt JL, Reinke H
47	Ethical Allocation of Scarce Food Resources During Public Health Emergencies. 2021; 49(1): 132-138.	Wetter S, Carey E
48	Nationalizing Public Health Emergency Legal Preparedness & Response. 2021; 49(2): 315-320.	
49	Legal Challenges Underlying COVID-19 Vaccinations. 2021; 49(3): 495-499.	Piatt JL, Barraza L, Freed R, Wells N, et al.
50	Legal Interventions to Counter COVID-19 Denialism. 2021; 49(4): __-__ (forthcoming).	Piatt JL, Barraza L

emption (29), health equity (25), and food insecurity (47). Even within the abbreviated space of most of these pieces (e.g., 1500-2000 words), they provide a key glimpse of extant laws and approaches.

Process. Crafting each manuscript involving co-authors (39 of the 50 manuscripts noted in Table 1) entailed different processes depending on particular collaborators. However, each manuscript is built around an organized series of efforts to examine emerging ideas through quality

Risks. Working in the constantly-evolving field of public health law, ethics, and policy carries an enormous risk — *quite simply, there is a chance of getting it wrong*. A chance of arguing for a position that is unsustainable, or worse yet, unlawful or unethical. A chance of positing a legal theory that is instantly rejected. A chance that emerging facts arising after (and sometimes during) the production of a piece change its trajectory or kill its original thesis. Many scholars and students are rightfully

the extant legal environment and opportunities for real reform. Others are grounded in legal outcomes that one seeks, but probably knows cannot be achieved. Some arise from close reviews of comparable facts or case studies lending to analogies. My co-authors and I have issued our share of predictions fitting each of these approaches on topics including the sale of sugar-sweetened beverages to minors (21), the role of preemption (29), curbing opioid abuse (31, 37), constitutional rights to public health (32-34), regulating cannabis (38), and ameliorating social isolation (44). One of my favorite “predictions” is restated below (edited for length):

A common worry I hear, especially from public health law students, is the potential for their publication ideas to be preempted, negated, or outdated by specific cases, legislative developments, or extant circumstances out of their control. My response? Embrace the risks. Pursue the “avant garde” perspective. Share your ideas. Take on the scholarly criticisms when they arise (I have received a bevy of my own for sure). And above all, take the chance that your well-reasoned, -researched, -drafted, and -edited work may prove accurate, relevant, and timely in the end.

[P]ublic health laws and policies ..., however, are at significant risk. Rollbacks, rescissions, and repudiations of solidified public health principles and “best practices” have dominated modern political agendas at the federal, state, and local levels ... Preemptive efforts to stymie local public health innovations are a common tactic among some federal and state lawmakers ... Public health sciences are debunked or ignored ... Too often public health efforts garner scant public attention. Americans demand fair access to health services, especially when they need them most, but may be apathetic to underlying public health policies. They want the benefits of herd immunity so long as they do not have to personally face the perceived risk of vaccines ... In essence, people want the benefits of public health services, just not the burdens.

research, exposition, and editing. The process commences with a simple recognition: *others’ ideas are often better than my own*. From this premise arise explorations and exchanges on critical issues in law, policy, and ethics that ultimately generate a working outline setting parameters for the article’s production. Each co-author’s contributions are valued and assessed against the backdrop of the cohesive theme of specific manuscripts. As many of my co-authors may attest, my edits can be extensive and profound. It is a two-way street, however. Premier co-authors proffer their own edits of my or others’ drafts that strengthen each piece. The process is not complete until all contributors assess and hopefully concur that the end product, our submitted manuscript, reflects their best ideas and efforts.

concerned about these risks. A common worry I hear, especially from public health law students, is the potential for their publication ideas to be preempted, negated, or outdated by specific cases, legislative developments, or extant circumstances out of their control. My response? *Embrace the risks*. Pursue the “avant garde” perspective. Share your ideas. Take on the scholarly criticisms when they arise (I have received a bevy of my own for sure). And above all, take the chance that your well-reasoned, -researched, -drafted, and -edited work may prove accurate, relevant, and timely in the end.

Predictions. Taking chances through scholarship also includes making predictions about law, policy, ethics, or facts. Great predictions extend from careful assessments of

One might easily conclude this passage refers to the rampant introductions of laws and policies antithetical to the public’s health in response to COVID-19, addressed by Jennifer L. Piatt, Leila Barraza, and me in *Legal Interventions to Counter COVID-19 Denialism* (50). In fact, this seg-

ment was drafted in my piece on the “renaissance” in public health law (36) in early 2019, a year prior to the inception of the pandemic. Political and legal themes underlying COVID-19 denialism were already at play, it seems, well before the specter of the pandemic darkened the nation.

Future. Just as COVID-19 has overtaken so many aspects of our lives, it has overtaken the Public Health Law column for *JLME* these past 2 years. Each of the last 6 columns (45–50) has centered on some core law and policy facet in emergency legal preparedness and response arising directly from the pandemic. I appreciate the interests and willingness of Ted and his staff to consider, review, and ultimately publish these pivotal pieces in response to the most significant, infectious disease threat the country has ever faced. Someday, COVID-19 will be in

our national “rear-view” mirror, opening the door again to diverse public health law topics characterizing my submissions over the years.

My newest prediction in this specific piece is neither bold nor novel. It is just a fact. No matter what public health topic may be covered next — e.g., chronic conditions, safe environments, health justice, or constitutional rights — its assessment will somehow be shaped or impacted by the pandemic. Nearly every power society can wield to protect the public’s health has been on display these past 2 years. Early on in the pandemic when information, tests, protective equipment, treatments, and vaccines were either non-existent or scarce, public health law was a premier “tool” to save millions of American lives via emergency declarations and resulting interventions. The most extensive use

of public health emergency powers in modern history (45) led to widespread political controversy (48), generated massive litigation (46), reshaped federal-state emergency responsibilities (48, 50) and affirmed the role of law in protecting communal health (49). Consequential lessons from the pandemic may inform future uses of public health laws in emergencies and other settings.

Note

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