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Advancing public health through the law: the role of legal academics: workshop report

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Advancing Public Health Through the Law: *The Role of Legal Academics*

WORKSHOP REPORT

Leo Beletsky, Wendy Parmet and Scott Burris

Executive Summary

The workshop *Advancing Public Health Through the Law: The Role of Legal Academics* was funded by The Robert Wood Johnson Foundation's (RWJF) Public Health Law Research Program and convened by the Northeastern University School of Law Program on Health Policy and Law. The workshop brought together nationally recognized public health legal scholars, public health practitioners and advocates, and representatives of grant-making institutions. (See Appendix A for the workshop roster.) Through interactive exercises and discussions, participants explored the value that legal doctrine and practice add to public health and ways to strengthen public health law's engagement with public health practice. (See Appendix B for the meeting agenda.)

The convening of this workshop was motivated by the realization that today public health exists in a shifting institutional, political, and doctrinal environment. This environment threatens to roll back decades of health outcome improvements and advances in social welfare. At the same time, there are a number of new opportunities related to an increasing prominence of evidence-based policy in general and empirical public health law research in particular.

Throughout the meeting, there was a tangible consensus that the current adverse environment makes this a critical time to engage legal academics and their allies in protecting and advancing public health. Based on this consensus, participants were energized by the prospect of moving forward on a coordinated strategy to increase our influence and effectiveness as public health law scholars and advocates. A number of innovative ideas emerged for advancing this agenda: disseminating a persuasive counter-narrative to the false dichotomy between "free market" choice and regulation using a variety of channels; embedding public health practitioners within law schools for knowledge transfer residencies; supporting theoretical public health law scholarship through writing competitions, mentorship, and loan forgiveness programs; and integrating

public health law content in a wider variety of law and public health courses, including information on strategic litigation, externality theory, and behavioral economics. Given the broad range and scope of the discussion, it was clear that a follow-up meeting should be convened to develop the mission, vision and specific operational strategies. Drawing on these discussions, this report summarizes the proceedings and next steps to engage legal academics in improving public health.

Introduction

Over the course of the last three decades, public health practitioners have come to recognize the critical impact that law has in promoting public health. In particular, public health practitioners today appreciate that law serves as a social determinant of health, influencing access to other structural determinants, such as education, health care, and even clean air and water. Law also establishes the authority and imposes limits upon the powers of public health officials. In addition, specific public health laws, such as those limiting indoor smoking or requiring passengers to wear seatbelts, can have a significant impact on particular health problems.

The recognition of law's vital role in protecting public health has been accompanied and supported by the burgeoning academic field of Public Health Law. Inherently interdisciplinary, this field draws scholars from numerous academic domains, including empirical public health researchers and legal academics. The role of the former is relatively well understood. Empirical public health law research provides the crucial evidence base that informs

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our understanding of the impact of laws or sets of laws on public health. This realm of research has received increasing recognition and support by governmental agencies and private philanthropies.

The role of public health legal scholarship and scholars is less well understood. These scholars and their scholarship can help elucidate and shape the contours of our legal system and legal doctrine affecting public health; identify both the opportunities within the legal system and the challenges it imposes on public health, including constitutional and other legal barriers to public health laws; analyze and attempt to reconcile potential conflicts between public health and other important social and legal values; and translate public health evidence into public health laws and policies. Public health law scholars also play a key educational role in legal, public health, and other interdisciplinary academic settings. Finally, many legal scholars are also public health practitioners who are involved in strategic litigation, legislative and regulatory drafting, health communication, advising decision makers and funders, and other core public health activities.

We now stand the danger of becoming a country of people who must enter into an individual contract with their environment.

More than 25 ago, legal scholars helped to establish the intellectual narratives for a legal and political framework that challenges basic facets of the regulatory state. These scholars formulated and legitimated theories embodied in today's judicial, political, and, ultimately, public opposition to public health intervention. This paved the way for successful legal challenges to the once prevailing view that measured deference should be given to legislatures and regulators when they act to further public health and welfare, while also restricting access to a number of avenues that had been used to further public health through the courts and regulation.

This history highlights the important opportunity for public health legal academics to formulate a coherent strategy focused on promoting a legal environment that is favorable to effective public health regulation, respectful of individual freedom. With the appropriate support and facilitation, public health law scholars are capable of providing further critical normative and doctrinal support for the

effective use of law to protect public health, extending and expanding on public health successes. Likewise, public health legal scholars can help move public health law in a direction compatible with our legal traditions and constitutional norms. Unless public health laws are crafted in a manner that is consonant with our legal system, they are unlikely to succeed. Most urgently, a focused legal strategy is needed now to protect the very foundation of collective action and regulation for the public health and welfare from further erosion.

Workshop Mandate and Structure

The Northeastern University Program on Health Policy and Law convened this workshop to examine the field of public health legal scholarship, consider the impact it has had and can have on public health protection and response, and identify the ways this field can be strengthened to the benefit of public health. The workshop brought together public health legal scholars from law schools, schools of public health, and other institutions, several public health practitioners, and grant-making institutions.

Based on the recognition of the opportunity to shape the broader intellectual and political environment to improve public health, the specific goals were to:

1. Explore the value that legal theory and scholarship add to public health thinking and practice,
2. Understand how public health legal scholars' contribution to public health practice can be strengthened,
3. Identify barriers and opportunities for public health law scholarship in law schools and elsewhere in academy, and
4. Identify ways to strengthen the theoretical and doctrinal foundations of effective public health laws.

The workshop was organized around five programmatic components (See Appendix B for the full workshop Agenda). After the overview of these discussions, this report concludes with a number of proposed steps to strengthen the influence and impact of public health legal scholars.

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Critical Opportunities and Strategic Vision

In discussions about critical opportunities for public health law scholars and scholarship, workshop participants discussed both observed and theoretical ways in which legal and political doctrines can drive change in public health outcomes—for better or for worse. In particular, participants identified a number of paradigms that now threaten public health regulation and programs from several angles, forcing it into “retreat” mode:

- innovative First Amendment interpretation favoring corporate speech, but limiting government regulation,
- simultaneous and strategic use of federalism and pre-emption doctrines to narrow regulatory jurisdiction on all levels of government,
- “textualist” approaches to constitutional interpretation selectively applied to support anti-regulatory positions,
- utilization of procedural and other reforms to diminish access to courts for individuals and groups, especially in mass torts and qui tam litigation,
- continuous legislation and political drive to reduce government revenue and appropriations for key regulatory activities,
- legal and political mantra of “free choice” and “free markets” that has been selectively co-opted to drive opposition to public health regulation, and
- regulatory and educational “capture” by highly-financed interests and their proxies.

We must start talking about things that matter to people in a way that speaks to them.

The confluence of these developments was seen as effectively moving public health “backwards” in terms of outcomes as well as in terms of public norms and expectations.

Specifically related to public health law research, these developments run counter to the improved ability of investigators and practitioners to discern the impact of

laws on health. Despite empirical support for the benefit of certain public health legal interventions, the evolving legal environment is not conducive to translating this public health law evidence into sound policy and practice.

From a broader theoretical standpoint, the growing understanding of “social determinants of health” and “structural factors” that is supported by a substantial evidence base is now the defining paradigm in public health. On a similar note, the emergence of Behavioral Economics exposes social and cognitive influences on individual decision-making, especially the difficulty in

Failure to act now will result in a decisive retreat from gains made in the last century.

shifting individual behavior without shifting environmental and structural influences. This evidence base has not yet been meaningfully translated into legal doctrine, practice, or policymaking.

Based on the discussions of these barriers, participants identified several key areas of thinking and action:

1. Bold, uncompromising, and compelling narrative is needed to counter the “personal responsibility” trope and shore up support for public health law and policy. Framing effective and balanced public health regulation, the effect of health externalities, and the psychology of choice in an understandable, cogent way through effective talking points and channels is vital to the future of effective public health policy and programming;
2. Strategically employ the ability of the law to shape social norms and incentive structures, avoiding over-reliance on instrumental regulation;
3. Critically assess the balance between targeted approaches focused on at-risk populations, stigmatization, and rights-based concerns. Public health laws must reflect both evidence and values;

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4. Utilize the legal system to counter regulatory capture. This includes bringing qui tam and public nuisance-based litigation, along with other strategies. Highlight the need for incremental change and strategies; for example, leveraging the ability of litigation to expose deceptive or corrupt practices in discovery rather than in an outright courtroom victory;
5. Continue to research the impact of law on health including health externalities of all laws, and monitor interventions to assess effectiveness. Research should also focus on formulating new ways of measuring impact; and
6. Find ways to bridge disciplinary, disease-specific, and other silos to formulate a “united front” for community health improvement.

Participants also identified a number of support mechanisms potentially useful in strengthening the ability of law to affect health. In the educational realm, initiatives like scholarships, loan forgiveness, mentoring programs, writing competitions, clinical education (for law, public health, and other students), and “mainstreaming” public health law content into core curricula may be useful. To shape public and intellectual debates, participants suggest organizing speaker bureaus, cultivation of relationships

Practitioners-in-residence programs at law schools, schools of public health, and other institutions can facilitate knowledge transfer.

with the media and an overall public relations effort to popularize concepts like structural determinants of health, cognitive biases that undermine individual choice, and the disease model of addiction, as well as to fight general apathy towards public health issues.

Participants also emphasized the importance of a rapid response approach to respond to doctrinal and polemical attacks on public health. In addition to pursuing litigation and educating various constituencies, this included monitoring litigation trends and coordinated filing of amici briefs in district and other courts. In these activities, there may be opportunities to collaborate with a number of stakeholders including industry players.

In this discussion, there was a clear consensus that coordinated and multi-faceted action is needed to mount an effective response to preserve and improve public health. A focus on long-term (10 year) “end-game” strategies was emphasized. Participants referred to examples of other movements that have effectively employed coordinated legal, educational, and social movement strategies to affect change, including the Civil Rights movement, the Federalist Society, and the movement for marriage equality. The importance of a committed funder and resource streams for all of these activities was emphasized.

Linking Public Health Law and Public Health Practice

The discussion next turned to ways to link public health law scholarship to public health law practice. How can public health legal scholars help inform the work of public health practitioners? What are the barriers that prevent public health legal scholars from asking questions and presenting their analyses in ways that are helpful to public health practice and policy? What barriers keep practitioners from valuing and utilizing the work of public health legal scholars?

Participants identified a number of barriers to this translational process. This includes the length and format of legal scholarship, which is valued virtually exclusively in the legal academy but is not conducive to consumption and interpretation by public health practitioners and policymakers. Legal academics do not always work diligently to disseminate their theories and ideas among practitioners, although there are many examples to the contrary as well as examples of legal academics personally working to apply their ideas in public health practice.

New channels of dissemination such as blogs, Twitter, and other forms of social media can be utilized to rapidly disseminate ideas and talking points; policymakers rely on soundbites contained on “3 x 5 cards” and one-page policy statements. For this, a coordinated and targeted strategy is necessary. Additionally, practitioners and legal scholars need opportunities to interact, exchange ideas, and formulate joint strategies. Practitioners-in-residence programs at law schools, schools of public health, and other academic institutions may be useful to facilitate the knowledge transfer processes.

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Overcoming Academic Barriers

The final set of discussions focused on ways to bolster public health law expertise in law schools and other academic institutions. This conversation focused on questions like: How do the tenure rules and values within the legal academy impede translational public health legal scholarship? More broadly, how do we encourage innovative thinking in the legal field and build a public health law movement?

A number of barriers were flagged as hindering the amount and level of public health law scholarship. Such barriers include the disincentives for empirical scholarship among legal scholars, the pressure to publish solo-authored

We must do more to integrate public health law concepts and case studies into other areas of legal and public health curricula.

law review articles (impeding effective interdisciplinary collaboration), and the disjunction between “hard money” and “soft money” institutions and professionals. In legal academia in particular, novelty is highly valued and incremental scholarship is discouraged. This can act as a disincentive for scholars to work together to advance a body of theory and knowledge. In order to foster public health law scholarship among junior faculty, there is a need to educate tenure committees about the value of non-traditional legal scholarship and collaborative scholarship, as well as advocate for increased weight being placed on hands-on involvement in policymaking, litigation, and other “service” activities. Overall, strategic thinking is needed to foster a cohort of well-versed, well-connected public health law scholars who can rise to positions of influence as educators, policymakers, jurists, etc.

Participants agreed that there was a need to increase the number and scope of public health law offerings in the curricula of law schools, schools of public health, and other academic institutions, especially within interdisciplinary programs. Additionally, there was consensus that we must do more to integrate public health law concepts and case studies about using law to advance public health in other courses (including components of core curricula like Torts and Contracts). This would help bring public health law out of its silo and integrate it into all areas of the law and public health education.

Next Steps

Throughout the meeting, there was a tangible consensus that legal academics and their allies have a critical role in protecting and advancing public health in the current adverse environment. In formulating strategic next steps, the group agreed to:

- Assemble a Steering Committee to conceptualize and plan the follow-up meeting and to coordinate the background paper process. Ideally, the next meeting is to be held before the end of the year.
- Solicit interest in drafting “background papers,” which we will use in our next meeting to shape the visioning and operationalization process. These papers are also needed to help shape the “narrative” for this nascent project. These papers would include a number of themes, including concept pieces drawing on strategic ideas from the meeting, papers describing projections for where we could be or where we want to be in public health terms by 2022, as well as pieces considering the possibility of what may happen if we don’t act now.

Acknowledgements

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Advancing Public Health Through the Law: *The Role of Legal Academics*

WORKSHOP ROSTER

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Leo Beletsky*	Northeastern University
Scott Burris	Temple University
Glenn Cohen	Harvard Law School
Richard Daynard	Northeastern University School of Law
Lance Gable	Wayne State University
Lawrence Gostin	Georgetown University Law Center
Gregg Gonsalves	Yale University School of Public Health
Daliah Heller	City University of New York
Christina Ho	Rutgers School of Law
James Hodge	Arizona State University School of Law
Renee Landers	Suffolk Law School
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WORKSHOP AGENDA

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Rationale

In the last three decades, law has become recognized as a key component in public health promotion. In the most basic terms, law establishes the authority of, and imposes limits upon, the powers of public health officials. Public health laws, such as those curbing indoor smoking, directly impact morbidity and mortality. Laws can also serve as important structural determinants of health through their incidental impact.

Seeking to understand and facilitate the interface between law and public health, empirical researchers and legal scholars have coalesced into an interdisciplinary field of *public health law* and public health law research. Beyond their contribution in the empirical realm, however, legal scholars are uniquely situated to shape the normative, intellectual and architectural foundations of the public health enterprise. This workshop is designed to illuminate the role of legal scholars and scholarship in promoting health through the law and to set an agenda for strengthening their influence and impact.

Legal Scholarship as a Public Health Tool

From the early days of this nation, legal doctrines and professionals have been employed to improve population health. Debate and litigation concerning the balance between individual freedom and community well-being opened the door to critical public health interventions, including vaccination laws, food safety laws, injury prevention laws and tobacco control laws. Throughout this history, lawyers and legal thinkers have played a key role in shaping local, state and federal public health laws and other interventions.

More recently, legal academics whose work does not focus on public health have helped to engineer key components of a new legal paradigm that threatens the viability of many public health laws. Over 25 years ago, leading legal scholars helped to establish the intellectual narratives for a legal and political framework that challenges basic facets of the regulatory state. These scholars formulated and legitimated theories embodied in today's judicial, political and ultimately public opposition to public health interventions. This paved the path for successful legal challenges to the once prevailing view that broad deference should be given to legislatures and regulators when they act to further public health and welfare.

This history highlights the important and still largely unrealized role for public health legal academics in promoting a legal environment that is favorable to effective public health regulation that is respectful of constitutional rights. With the appropriate support and facilitation, public health law scholars are capable of providing further critical normative and doctrinal support for the effective use of law to protect public health, extending and expanding on public health successes. Likewise, public health legal scholars can help move public health law in a direction compatible with our legal traditions and constitutional norms. Unless public health laws are crafted in a manner that is consonant with our legal system, they are unlikely to succeed. Most urgently, a focused legal strategy is needed now to protect the very foundation of public health law from further erosion. This one-day workshop is designed to engage public health legal scholars, in partnership with public health practitioners, in these tasks.

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Workshop Framework

This workshop brings together public health legal scholars, public health practitioners and advocates, and grant-making institutions. Through interactive exercises and discussions, we will explore the value that legal doctrine and practice add to public health and the ways in which the field's engagement with public health practice may be strengthened. The event's proceedings are organized around the following programmatic components:

- I. **Rationale and Mandate:** During the introductory session, the organizers will set out the scope and the goals of the meeting. This session will highlight the contribution of legal thinking and scholarship to addressing population health. Using case studies of smoking regulation, gun control and carbonated beverage taxes, this session will illustrate the kinds of legal, political and other factors that shape the impact of public health interventions on public health outcomes. These illustrations will be used to outline the parameters for the day's discussion on the role of legal academics in advancing public health through law.
- II. **Strategic Vision:** This session will identify key legal and educational strategies for building a legal environment supportive of appropriate and effective public health regulation. Participants working in small groups will have 45 minutes to:
 - A. identify 2-3 critical opportunities to strengthen public health through legal and policy tools, and
 - B. outline an agenda of legal scholarship that can provide the normative and doctrinal support to maximize the impact of the tools identified in Part A. Groups may consider specific actions needed to shore up or reform traditional public health regulatory mechanisms (local, state or federal), impact litigation, or structural policy interventions, including taxation, environment and other related realms. Each team will then have an opportunity to pitch their proposals from both categories to the larger group and respond to questions. Taking a long-term view, the group discussion will focus on what, if any role, legal scholars and educational institutions should play in shaping the kind of intellectual discourse that catalyzes effective public health regulations consonant with our legal traditions.
- III. **Overcoming Silos Brainstorm:** This session will be dedicated to discussing the relationship between public health legal scholars and public health practitioners (including practitioners and others working in the NGO and private sectors). How can public health legal scholars help inform the work of public health practitioners? What are the disciplinary, cultural and other barriers that may prevent public health legal scholars from asking the questions and presenting their analyses in ways that are both helpful to practitioners and readily translatable to public health action? What barriers keep practitioners from valuing and utilizing the work of public health legal scholars?
- IV. **Overcoming Academic Challenges Brainstorm:** This session will be dedicated to discussing the barriers within the academy that impede the development of public health legal scholarship in general, as well as in formats that may be of use to public health practice. How do the tenure rules and values within the legal academy impede translational public health legal scholarship? More broadly, how do we encourage innovative thinking in the legal field and build a public health law movement?
- V. **Summary and Next Steps:** The day will conclude with a discussion of lessons shared and learned and the identification of specific proposals for furthering the development of public health legal scholarship in such a manner as to promote the utilization of law as a public health tool. Participants will be asked to join small working groups that will write short "white papers" focusing on specific action proposals for publication in a symposium issue of *Jurimetrics*, *The Journal of Law, Science, and Technology*.

The workshop is funded by the Robert Wood Johnson Foundation's Public Health Law Research Program.

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July 23, 2012

- 4:00-6:30pm Pre-Dinner Harbor Islands Cruise (*Long Wharf, Boston*)
- 6:30-8:30pm Dinner (*The Living Room, 101 Atlantic Ave, Boston*)
- Informal Drinks (*Location to be Announced*)

July 24, 2012

(Northeastern University Faculty Club, 716 Columbus Ave., Boston)

- 9:00-9:15am Continental Breakfast
- 9:15-9:45am Introductions
- 9:45-10:15am Rationale and Mandate
- 10:15-11:15am Strategic Vision: Small Groups
- 11:15-11:30am Coffee Break
- 11:15am-12:30pm Strategic Vision: Group Discussion
- 12:30-1:45pm Lunch
- 1:45-2:45pm Overcoming Silos Brainstorming Session
- 2:45-3:45pm Overcoming Academic Challenges Brainstorming Session
- 3:45-4:45pm Summary and Next Steps