

**299. “Public Health Law: A Communitarian Perspective.”**  
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Amitai Etzioni

**ABSTRACT:** American society has often favored individual rights disproportionately over the common good. In the aftermath of September 11, there is a need to readjust our criteria to allow for the strengthening of security, public safety, and public health policies. At the same time, we must assure that liberties are not trampled in the service of the common good. Clear criteria are needed to help determine when the proper balance has been reached. Although we should not expect that every public health policy will affect all members of society in exactly the same way, thought must be given to ways of compensating groups that are burdened more than others by a policy.

The great merit of Lawrence Gostin’s current approach to public health is that it builds on new (or responsive) communitarian thinking, although he does not explicitly embrace it. At issue is not tagging a philosophical label onto an important work of analysis of public health policies in the age of terrorism, but rather the framework one uses in thinking about the policies at hand.

As Gostin recognizes, there are those—civil libertarians and libertarians, to mention just two—who hold that respect for individual rights is at the heart of a free society. Although they do not deny the need to attend to the public interest (which courts often define as tending to public safety and to public health), they demand that any diminution of rights, as they define them, must pass numerous tests to show that there is a need to so act. For instance, they roundly oppose quarantining (both before and after 9/11) as coercive and unnecessary.

The opposite school is not found in the United States in its pure form but is common in totalitarian countries. It accords the rights of way to common good with little concern for, or only lip service to, individual rights. Cuba’s quarantine of persons infected with HIV comes to mind (as does the Chinese harvesting of organs without consent).

New communitarians (a group formed in 1990, which includes scholars such as William Galston, Philip Selznick, Robert Bellah, and myself) adopted a third position: that individual rights and social responsibilities, liberty and the common good, have equal standing; that neither should be assumed a priori to trump the other; and that we need to seek a carefully crafted balance between these two core values.<sup>1</sup> Gostin, in effect, applies this way of thinking most effectively to public health, especially to considering how we ought to face the threat of bioterrorism.

■ **The context of society.** It is important to view the question of balance, rights and responsibilities with the context of the type of society and its history. Some societies in some periods tilt in one direction and hence need to be pulled in the opposite direction, to maintain balance. Throughout much of its history the United States has tilted strongly toward a concern for the public good, while individual rights (especially of minorities, women, the poor, and the physically disabled) were not well protected to put it mildly. The quarantining of those with tuberculosis, for instance, was not considered a violation of individual rights and was common practice in decades past. However, following the liberating 1960s, and especially the rise of the gay rights movement, the balance has tilted in the opposite direction. As the HIV epidemic

spread in the United States, for example, quarantining persons infected with the virus was not even an option for discussion. (Some gay leaders even opposed the closing of public bathhouses.) Similarly, before 9/11 (and occasionally afterward) the possibility of using quarantines following an attack with contagious agent was either not considered at all or approached with grave concern.

Donald Henderson, a leading authority on bioterrorism, who recently became the director of the Health and Human Services (HHS) Department's Office of Public Health Preparedness, testified before Congress 5 September 2001 about preventing the use of biological weapons and on improving a response to them in case of an attack.<sup>2</sup> Quarantining was not so much as mentioned. Gostin himself reported before 9/11 that constitutional doctrine has changed so drastically since the 1960s that he greatly doubted earlier justifications of quarantining would hold and that quarantining would be considered a "massive curtailment of liberty."<sup>3</sup>

■ **Making room for the public interest.** The 2001 attack on America's homeland security clearly demonstrate the need to trim individualistic excess of the previous generation (1960-1990) and make more room for the public interest in general and for shoring up public health in particular. Gostin's current work, in this essay and in the model law he helped to preparer for the states, serves this shift well.

The next step is to ask how we are to tell whether the newly recalibrated balance between individual rights and the common good has been reached or exceeded. In previous work, I suggested three criteria : (1) that a clear and present danger exist (what Gostin calls *necessity*); (2) that voluntary measures be embraced, if possible; and (3) if not, that the intrusion be minimal (what Gostin class *proportionality*).<sup>4</sup>

Gostin Presents four criteria of his own to be the basis of appropriate public health policies. Although these criteria encompass the two of the three communitarian criteria just presented, he does not examine the question of whether people can be convinced to voluntarily undertake whatever steps are needed. In many areas concerning public health, such as vaccinations, we rely almost completely on voluntary compliance. With proper public education, most people might well understand that following an attack with small pox, a disease in which symptoms appear before one is contagious, if they voluntarily would move to a sequestered area for about two weeks, they might well spare their loved ones contamination and possibly death.

Gostin does, however add two criteria to the ones just discussed, one fairly obvious and one that was not previously given due to attention. The fist, effective means, holds that the means to be employed ought to do the job. No one would favor introducing policies that curtail liberty and do not advance the common good (to the extent that one can make such a determination ahead of time). The other criterion, fairness, is that a policy should distribute its burdens and benefits equally. This holds for may reasons. It would be a gross violation of our values if the burdens of new public health policies fell largely on one group in order to serve all the others. Also, such unfair allocation of the burden would undermine the legitimacy, and hence sustainability, of the measures at hand. Indeed, such policies might well be se aside by the courts.

However, once should acknowledge, regardless of how distressing such a fact may be, that no public policy will lay the same demands on all groups. Hence, much more discussion is called for about how to minimize the extra weight that inevitably will fall on some people such as how to possibly compensate them for such burdens if they cannot be avoided, and so on. We should not assume that in the case of a major attack we cold rely only on policies that curtail everyone's movements, work and trade, and communications equally.

The tension between the communitarian balance and fairness is an issue that communitarians have not well addressed, and Gostin greatly helps by pushing us to think through this issue, not only in the context of post 9/11 public health measures or public health policies in general, but also in order to round off the communitarian way of thinking.

#### NOTES

1. A. Etzioni, *The New Golden Rule: Community and Morality in a Democratic Society* (New York: Basic Books, 1996), 3-28.
2. Testimony of Donald Henderson before the Senate Foreign Relations Committee hearing on the threat of bioterrorism and spread of infectious diseases, 5 September 2001, [www.hopkinsbiodefense.org/pages/library/spread.html](http://www.hopkinsbiodefense.org/pages/library/spread.html) (22 August 2002)
3. L.O. Gostin, *Public Health Law: Power, Duty, Restraint* (Berkeley: University of California Press, 2000), 213.
4. A. Etzioni, *The Limits of Privacy* (New York: Basic Books, 1999), 184-186.