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Special Issue

Pedagogical promise and problems: Teaching public health law

K. Syrett*, O. Quick

School of Law, University of Bristol, Wills Memorial Building, Queens Road, Bristol BS8 1RJ, UK

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SUMMARY

This article considers the case for teaching public health law as a distinct subject of study within the academic curriculum. It offers proposals on syllabus design, assessment and objectives by reference to the authors' own teaching experience, and also seeks to serve as a resource for those considering the introduction of a course in this field. There is consideration of the conceptual analysis of public health law, and an exploration of the obstacles and opportunities involved in teaching public health law in higher education.

To date, issues of public health law have received coverage, if at all, almost exclusively in the context of existing medical or healthcare law modules. Although difficult obstacles remain to be surmounted before the subject can be fully embraced, its marginalization appears to be increasingly misplaced in light of growing awareness of the policy challenges presented by public health and the potential for law to function as a valuable tool to assist in addressing such challenges. There are also potent pedagogical arguments for the teaching of public health law on a liberal academic curriculum.

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Introduction

Public health law resembles the proverbial elephant in the academic room. Although referenced, at least in passing, in most major textbooks on medical law, there has been a *'paucity of research and teaching in public health law'*.¹ However, its significance as an issue of public policy has perhaps never been higher. The threat of bioterrorism and the emergence of new forms of infectious disease have prompted international organizations and governments to review the state of public health laws to facilitate a swift response to health emergencies. Relatedly, there is an emerging acknowledgement that existing legislation on public health is based upon outdated assumptions regarding both the causes and spread of disease and societal arrangements. Furthermore, so-called 'lifestyle' diseases such as obesity and smoking-related illnesses are increasingly regarded as proper subjects for governmental attention – not least because of the pressure which they may place upon finite resources for health care – and legal intervention of various types represents one strategy for addressing the root causes of such conditions. Finally, and perhaps least tangibly, academic work which postulates that modern governments should be centrally concerned with the management of risk has prompted

re-evaluation of the potential of legal mechanisms to provide a framework for the assessment of, and responses to, new forms of risk arising in the public health context.

This article calls upon the academic community to respond to the growing salience of public health law by incorporating the subject fully into the curriculum, with a view to it being offered as an optional module on a degree programme in public health or law. Although this task is not wholly straightforward, given both practical and intellectual obstacles, it is the authors' belief that the topicality of the subject matter and the pedagogical benefits which it may yield significantly outweigh the obstacles which stand in the way of its acceptance within the academy.

Defining 'public health law'

It is perhaps trite to observe that the starting point for any field of study must be to offer a definition of its subject matter and scope. In this context, it is especially important to explain how public health law may be differentiated from the more familiar category of medical law (or, in some instances, health law or healthcare law), which has become an integral part of most university law degree programmes.

The first difficulty, of course, is occasioned by the variety of meanings attached to the phrase 'public health'.² Even if agreement can be reached upon this matter, definitions of the field of study will continue to vary across jurisdictions in response to the characteristics of the domestic legal framework. The most

* Corresponding author. Tel.: +44 117 954 5315; fax: +44 117 925 1870.
E-mail address: keith.syrett@bristol.ac.uk (K. Syrett).

comprehensive definition is that offered by Gostin, developed in an American context:

*'Public health law is the study of the legal powers and duties of the state, in collaboration with its partners (e.g. health care, business, the community, the media, and academe) to assure the conditions for people to be healthy (e.g. to identify, prevent, and ameliorate risks to health in the population) and the limitations on the power of the state to constrain the autonomy, privacy, liberty, proprietary, or other legally protected interests of individuals for the common good. The prime objective of public health law is to pursue the highest possible level of physical and mental health in the population, consistent with the values of social justice.'*³

This might be compared with an Australian definition, which identifies public health law as 'any area of legal regulation which affects the maintenance and improvement of the health of individuals in a community',⁴ and with that of Martin, writing from a UK perspective, who has defined the field as 'that body of law which can be used as a tool in the provision, protection and promotion of the health rights of the population'.⁵

The differences between these definitions reflect the nature of the legal framework in differing jurisdictions: in some instances, public health law will primarily take the form of legislative intervention, while in others (such as England and Wales), a patchwork of legislation dealing with public health sits alongside regulation through the common law, which enables individuals to bring actions in public or private law to protect their public health 'rights'. Common to each, however, is a perception of the facilitative role which may be played by law: that, as Gostin has written, it can function as an 'essential tool for creating the conditions that enable people to lead healthier and safer lives'.^{3,5}

In contrast to the above, medical law concerns itself primarily with the individual, not the collective, with the physician–patient nexus being central. As Kennedy and Grubb note, it 'is essentially concerned with the relationship between health care professionals (particularly doctors and to a lesser extent hospitals or other institutions) and patients'.⁶ It emphasizes internal, rather than external, causes of disease and ill health, and its orientation is towards the remedying of error, not the management and reduction of risks to health. Notwithstanding that there has been a recent emergence of courses in healthcare law, which seek to move beyond the clinical relationship to explore broader legal issues in the organization and delivery of health services,⁷ public health remains, at best, a subsidiary concern as the focus remains upon care of the sick as distinct from promotion of the health of the population.

The low profile of public health law

Public health law remains substantially neglected as a subject of academic study. It is striking that qualifications in public health rarely demand evidence of legal knowledge. Taking the UK as an illustration, the syllabus for examinations for membership of the Faculty of Public Health makes no specific reference to awareness of the legal framework, focusing instead upon 'candidates' knowledge and understanding of the scientific basis of public health, and their ability to apply their knowledge and skills to the practice of public health'.^{8,a} Likewise, of the 17 universities offering the degree of Master of Public Health in the UK, only one (Nottingham) currently

offers an optional module specifically dedicated to the study of public health law,^b albeit that legal issues will necessarily arise in the context of other modules, such as those addressing communicable diseases or ethical issues.

A similar gap exists for those who approach the practice of public health from a legal background. Again using the UK as an illustration, of the taught Masters level degree programmes in medical/health law or cognate disciplines which are currently provided by law departments in 17 universities, only that offered by Keele includes an optional module in public health law.^c Notwithstanding that topics properly situated within the field of public health law may receive attention within the context of other modules, this would appear to be a surprisingly low number in view of the increasing salience of the subject matter to contemporary health policy and practice.

This pattern is not restricted to the UK. Even in the USA, where academic interest in public health law is most widespread, in part as a response to the highly influential work of Gostin,³ and in part as a result of growing awareness of infectious threats and bioterrorism in the light of severe acute respiratory syndrome (SARS) and the September 11 2001 attacks, it has been commented that 'the omission of public health from the legal curriculum is almost complete and ubiquitous'.⁹ Elsewhere, the 'invisibility of public health law research and teaching' is evident, albeit with limited exceptions.^{1,10d}

A disjuncture between law and public health?

What might explain this state of relative academic inattention? It is apparent that, notwithstanding the preceding reading of law as a means of facilitating the achievement of public health goals, there remains a sense that law is an 'alien discipline'¹¹ to the practice of public health. Thus, the *Oxford Handbook of Public Health Practice* notes that:

*'public health practitioners often regard law as arcane, indecipherable and not at all helpful in pursuing their objective of improving the public's health... the law is a much under-appreciated tool for health improvement. Many public health practitioners distrust the law and the law-making process.'*¹²

Perhaps the most potent explanation for such distrust derives from the differentiation between the collective orientation of public health and the individualist inclinations of medicine. Law is much more clearly aligned with the goals of the latter. As Johnson notes, 'Western law and medicine developed as professions within the same historical context'.¹³ The Enlightenment notion of the individual body as the subject matter for medical intervention and the site of disease was paralleled by the evolution, within legal theory, of a conceptualization of rights, duties and responsibilities which accrued to the individual. There was, therefore, a detachment of the individual from the collectivity – and a prioritization of the former – within both medicine and law, with the consequence that when the two disciplines coincided, the focus lay upon the individualized physician–patient relationship. A significant consequence of this has been the existence within the public health literature of an

^a The second part of the examination, which must also be passed for full membership of the Faculty to be awarded, consists of a series of scenarios in which candidates demonstrate their ability to apply relevant knowledge, skills and attitudes to the practice of public health. Again, no specific legal knowledge is demanded.

^b The authors understand that the London School of Hygiene and Tropical Medicine is, as this article goes to press, in the process of validating such a module.

^c The University of Edinburgh offers an optional module in international public health law and security on its LLM programmes in Medical Law and Ethics and Innovation, Technology and the Law.

^d Notably, public health law courses are offered in universities in Australia and Hong Kong. For a (non-exhaustive) list of courses currently offered in universities across the globe, see <http://www.publichealthlaw.net/Courses/PHLaw.htm>¹⁰

ongoing debate regarding whether public health goals are consonant with the individualistic inclination of human rights law.^{3,14}

Concurrently, the sphere of public (collective) health has shifted to the domain of politics and economics, albeit that within that arena, costly interventions for the improvement of public health have frequently been eschewed by government, rendering public health legislation unattractive territory for policy makers. Parenthetically, it should be noted that this need not necessarily be an electorally unpopular stance. Although, by definition, public health interventions impact broadly across the population, neglect of such concerns may be justifiable as reflective of a desire to avoid infringement upon individual autonomy and the free market. Such a strategy is, therefore, likely to prove especially attractive to governments of a conservative or neoliberal persuasion.

The 'lack of fit' between law and public health is exacerbated by further characteristics of the legal system which are especially apparent in 'common law' jurisdictions such as England, Australia and the USA. Here, judge-made case law has tended to emphasize protection of economic interests, rights over property or individual bodily integrity, frequently at the expense of public goods such as the health of the wider population. To posit an obvious illustration of this point, English tort law has largely been bereft of effective mechanisms for responding to harms caused to large numbers of people, in the form of the group action (for the continuing problems with such actions, see Gibbons¹⁵). Lawyers undertaking challenging group actions are few and far between, with those UK law firms which undertake health law tending to focus on claims of negligence, contested consent, requests for assisted suicide, or employment and financial issues within the National Health Service (NHS).

As Brownsword concedes,¹⁶ common law principles may, on occasion, further the goals of public health; most notably, in cases involving the tort of nuisance. Nonetheless, such an outcome is perhaps best viewed as a mere by-product of legal doctrine which is oriented towards individual rather than collective interests. Brownsword's view is, therefore, that the population-wide, policy-based goals of public health are better regarded as the stuff of public, not private, law.^e However this, too, is not unproblematic. In common law jurisdictions (as distinct from their 'civil law' counterparts, e.g. in continental Europe), public law has – at least until relatively recently – lacked a distinct identity and institutional structure. Coupled with the hegemony of 'Diceyan' readings of the function which law might fulfil vis-à-vis the state (namely, that its role is to restrain the exercise of governmental power in order to safeguard the sphere of individual autonomy),²⁰ this has meant that the facilitative capabilities of public law mechanisms – that which Harlow and Rawlings term the 'green light' or functionalist approach to law²¹ – have largely been overlooked in the public health context.

If the individualistic orientation of law and its consequent congruence with the medical model affords an obvious basis for the marginalization of public health law both within the curriculum and practice of public health, other pertinent causative factors may also be identified. Thus, Martin and Coker have pointed to the 20th

Century faith in scientific solutions as a means of eradicating or controlling communicable disease; efforts therefore focused upon biomedicine, coupled with strategies to alleviate socio-economic deprivation. The ready assumption that these avenues would prove successful led to the neglect of law as a tool for ensuring public health:

*'For a long time, the poor state of our public health law failed to trouble us because of the belief that advances in antibiotic medicines and vaccines, and health benefits that accrue from improved social conditions, would be sufficient to control infectious disease, making law practically redundant.'*²²

The consequence of this inattention to the legal framework was that – notably in the UK, but also elsewhere – public health law tended to remain rooted in a 19th Century model, based upon the containment of diseases caused by particular physical sources of nuisance or activities, and did not develop in accordance with new understandings of the social and economic determinants of health. This very anachronism meant that policy makers tended to ignore the opportunities offered by legal tools; rather than seeking to reform the law in pursuance of these new understandings, they preferred to sideline it and to trust, instead, to science.

Here, therefore, is another factor which has hindered the growth of the study and practice of public health law. The patchwork nature of this subject – which is a direct product of its downgrading by policy makers, public health practitioners and lawyers alike – has meant that there are '*difficulties of knowing where to start, what to include, what to exclude, and what constitutes the essence of public health law*'.²² This problem is, of course, exacerbated by the multidisciplinary nature of public health itself. The problem of scope, and its implications for the teaching and study of this subject, will be addressed further below.

Law as a public health tool

The severance between law and public health has thus given rise to a state of, at best, 'mutual ignorance' between the two disciplines.¹¹ Yet, from a functionalist standpoint, law can assist in fulfilment of the public health mission in a multitude of differing ways.¹² Fiscal intervention can be deployed to encourage individuals to refrain from or limit risky behaviour, such as smoking and drinking. Laws can regulate the availability of information, for example by restricting the advertising of unhealthy products (such as tobacco and alcohol) or requiring provision of facts to consumers (e.g. nutritional information on food labels).^f Persons, professionals and businesses can be regulated directly (e.g. licensing of care homes or laws requiring the wearing of motorcycle helmets) or indirectly through the tort system (e.g. actions in respect of environmental damage, exposure to toxic substances etc.). Legal measures may be implemented to bring about environmental change to reduce risks to health (e.g. improvement of sanitation or health and safety in the workplace), or to bring about broader socio-economic change (legislative measures to alleviate poverty should assist in enhancing overall population health). Also, on occasion, deregulation may be necessary to achieve public health objectives; for example (and, needless to say, controversially), declassification of certain categories of drug, or decriminalization of prostitution may be said to enhance public health, particularly

^e In this context, one might note that a successful challenge by an individual in a judicial review case may yield collective health benefits to a wider population. For example, it was reported that the consequence of the decision of the Court of Appeal in *R (Rogers) v Swindon PCT NHS Trust* [2006] 1 WLR 2649 was that 'hundreds of women' would receive Herceptin for the treatment of early stage breast cancer,¹⁷ and that eventual approval of the drug for use on the NHS by the National Institute for Health and Clinical Excellence (NICE) was, as a result of the case, a 'foregone conclusion'.¹⁸ However, for a case in which a judicial review challenge failed to realize a collective health benefit, see *R v Northumbrian Water Limited, ex parte Newcastle and North Tyneside Health Authority*.¹⁹

^f For example, Regulation 1924/2006/EC restricts the marketing of products by means of certain terms (e.g. 'superfood'), unless accompanied by a specific authorised health claim which explains to consumers the manner in which the product is beneficial to health.

when implemented in conjunction with other measures, such as provision of drug rehabilitation facilities or increased availability of information on sexual health.

From this perspective, law and public health are more properly regarded as complementary and interconnected. A straightforward, but topical, example of the ‘fit’ between legal mechanisms and public health goals is afforded by action on smoking. Epidemiology – the core biomedical science of public health – offers evidence that smoking presents a risk to an individual’s (and, by extension, to a population’s) health. A public health practitioner, seeking to move beyond medicine’s focus upon diseases caused by behaviour (emphysema, lung cancer etc.), will seek to identify external factors which may stimulate such behaviour, such as parental and peer influences or socio-economic background. However, the realization of the objective of reducing this form of risky behaviour is likely to rest, in large part, upon a legal framework. Legal measures can regulate where and to whom tobacco can be sold, where it can be consumed, how it is marketed and/or displayed, the information which is provided upon the packaging and the extent to which it is taxed. In addition, law furnishes the basis for state intervention to address causative socio-economic factors in the form of action to address deprivation; for example, through improvement of housing conditions, availability of benefit or minimum wages, enhancement of educational and employment opportunities etc.

Furthermore, the value of law as a mechanism for securing improvement in public health is increasingly recognized by policy makers. The apparently fatal undermining of the assumed superiority of biomedical solutions to public health concerns – evident both in the resurgence over recent decades of communicable diseases such as human immunodeficiency virus/acquired immunodeficiency syndrome, SARS, avian influenza and tuberculosis, and the ‘emergence’ of non-communicable conditions such as obesity or new threats such as bioterrorism – has been paralleled by a re-awakening of interest in legal and regulatory strategies.^{1,23} The legal instruments thus employed may take differing forms. Thus, they may be ‘hard’ or ‘soft’ in character; for example, contrast the legislation banning smoking in enclosed and substantially enclosed public places and shared workplaces in England and Wales⁸ with non-binding guidance to the NHS on public health interventions and programmes produced by the National Institute for Health and Clinical Excellence (NICE). In addition, they may be regional, national, supranational or international in genesis and application; illustrations of each include the Public Health etc. (Scotland) Act 2008, the UK Civil Contingencies Act 2004, Article 152 of the EC Treaty and the International Health Regulations of 2005.

In short, therefore, ‘laws, like other prevention strategies, can intervene at a variety of levels’²⁴ but, taken as a whole, their importance for realizing policy goals should not be underestimated, as has often tended to be the case in the past. Rather, as Martin has written, ‘law has enormous potential to be used for the benefit of public health’, in the context both of communicable disease control and, increasingly, in respect of non-communicable diseases.²⁵ A central pedagogical goal of a course in public health law will therefore be to fully explicate the facilitative capabilities of law in this field, while not being neglectful of the tensions to which it may give rise, particularly those which arise from the need to reconcile notions of the public good with culturally valued principles of individual autonomy and human rights.^{24,25}

Public health law’s vocational and liberal pedagogical value

In view of the growing synergies between law and public health policy, there are clear vocational benefits associated with the teaching of a module in public health law. For those students who have already entered into the practice of public health or who are considering embarking upon such a career, knowledge of the legal framework and of how law works in broader terms is clearly highly advantageous. Indeed, it may be described as increasingly imperative. Similarly:

‘For lawyers to serve as effective partners in public health, they should have a basic familiarity with public health: how public health professionals see the world and the key issues they tackle. A practical grasp of public health can be acquired, and often is acquired, “on the job”. But perhaps that is not enough. If lawyers are to be competent members of the public health team and understand the public health implications of the laws, rules and regulations they draft, enforce, litigate and adjudicate, they should be more firmly grounded in the theory, practice and problems of public health. That suggests that law schools should provide their students with ample exposure to public health.’²⁶

This line of reasoning would point to the availability of a module in public health law as an optional subject of study on a Master of Public Health degree programme or a law degree syllabus, probably at postgraduate level (since it is those who study at postgraduate level who are most likely to enter into practice in a given field).

Vocational value, however, may be insufficient to justify the incorporation of public health law into an academic curriculum. Both Twining²⁷ and Bradney²⁸ have emphasized the need for the modern teaching of legal subjects to move beyond a professional/vocational model to embrace a pluralistic, liberal idea of education. On this analysis, subjects should be taught not solely for their vocational utility, but for their capacity to ‘allow [students] to understand the structures and values that permeate and underpin law... to introduce students to the wide variety of conversations that is going on within law at any one moment, so that they can explore law from a range of different stances’.²⁸ A liberal curriculum is thus characterized by pluralism and variety such that those who have benefited from study upon it may be capable of providing ‘explicit or implicit personal and individual answers to questions about how the world is ordered and connected and how we value and evaluate these connections’.²⁸

It is submitted that a strong case can be made for the pedagogical value of public health law on such liberal academic grounds. One such argument has already been outlined: the opportunity which the teaching of this subject presents to familiarize students, whether of public health or of law, with the facilitative capabilities of law; that is, its capacity to ‘provide an opportunity to explore the ways that law can be used to advance public health goals’.²⁶ In so far as this represents a departure from the more familiar reading of law’s function as a negative control mechanism, this embodies a liberal pedagogical objective, since such teaching thereby allows students to comprehend law from a different stance than the norm or, to use Bradney’s terminology, to be introduced to an alternative ‘conversation’ regarding the societal roles which law may perform.²⁸

A related liberal pedagogical goal which can be pursued through the teaching of public health law arises from its population perspective. As a contrast to the traditionally individualistic orientation of law, including medical law, study of public health law can therefore offer ‘valuable lessons about the complexity of the relationship between individuals and populations’ and law’s role in mediating this relationship.²⁶ This, in turn, can assist in building greater understanding amongst all students of the variety of functions fulfilled by law. Thus, the justifiability of legal measures

⁸ In England and Wales, the relevant legislation is the Health Act 2006, Chapter 1 and regulations made thereunder.

to limit risky behaviour may be more clearly identifiable when regarded from the epidemiological perspective adopted within public health than from the more traditional standpoint of individual autonomy, thereby allowing students to be presented with an alternative 'conversation' in the form of 'a different perspective for analysing so-called paternalistic laws'.²⁶ Moreover, the population-based approach adopted in this context represents a 'transferable skill' which can assist in enhancing comprehension of law's function in other fields. For example, it facilitates a reading of criminal behaviour not as an instance of individual delinquency, but rather as activity which may be socially or economically conditioned. This, in turn, prompts questions regarding the legitimacy and efficacy of those legal sanctions which attach to such behaviour. These are precisely the types of inquiry about the values inherent within law which Bradney has identified as fundamental to a liberal pedagogy.

In addition to its value across the disciplinary boundaries, public health law will also benefit the student of law, given its 'tight intertwining... with existing core courses' in that field of study.²⁹ Understanding of key principles and concepts in numerous subjects, such as administrative law, criminal law, environmental law, European Community law, housing law, human rights law, international law, medical law and tort law, can be enhanced if they are viewed through a public health 'prism', that is:

'to understand not only public health, but the law, students should grasp the public health context in which key legal doctrines have developed. Students will then recognise public health issues when they arise, placing them in a fuller and familiar context of similar issues they have studied. They will appreciate more fully the reasons for and implications of the particular doctrines they are mastering'.²⁶

To cite an obvious example, the leading English case on the tort of negligence, *Donoghue v Stevenson*, emerged in a public health context (that would now be categorized as food safety). Lord Atkin described the issue of whether the manufacturer owed a duty of care to the consumer as 'important... because of its bearing on public health'.³⁰ Similarly, the common law of nuisance is also interwoven with public health concerns,⁵ and the doctrine of nuisance was employed as the legal mechanism for control of disease in public health legislation, much of which, in turn, has been largely subsumed within modern environmental law. Familiarity with public health thus provides a valuable basis for building comprehension of foundational legal tenets, although it may be stretching the point to claim that there exists 'no less a role for public health law than as a unifying, syncretic theme for law school education'.²⁹

In sum, the benefits of a module in public health law extend well beyond the vocational. While the growing salience of law to public health policy requires that students of public health develop an understanding of legal processes and rules which can be applied to practical situations, the teaching of legal principle also serves a broader pedagogical purpose by exposing such students to a particular mode of analytical reasoning and fostering a deeper understanding of societal ordering. Similarly, the educational experience of students of law will be enhanced by the interdisciplinarity and social context which public health brings, offering 'a vantage point and a set of methodologies that can enrich a lawyer's ability to comprehend the world and practice law effectively'.⁹

Caveat magister: the problems of teaching public health law

The vocational and liberal pedagogical benefits of public health law are therefore significant, but there are nonetheless a number of inherent obstacles which may give those considering the introduction of a module in the area some pause for thought.

At first sight, there would not appear to be any difficulty arising from the novelty of the subject matter. Public health law is not a 'new' field in the manner of cyberlaw or space law; disciplines relating to recent technological developments which have not yet secured unequivocal status within the academy. Indeed, public health law is of venerable heritage. For example, Martin notes that governmental intervention to control public health dangers in the UK dates back to the 13th Century,⁵ with Acts dealing with the repair of sewers³¹ and control of nuisances,³² and Regulations of the City of London ordering removal of pigsties from streets.^h In this regard, therefore, issues of public health were among the earliest subjects of legal regulation by the state,ⁱ and 'the importance of law as a tool for the protection of the public health in England was recognised well before the practice of medicine engaged with systemic approaches to illness and disease'.¹

That said, the epistemological hegemony of the medical approach to ill health coupled with the confidence in scientific solutions has tended, as noted above, to render public health law marginalized. While the field may, therefore, not be new, it has been largely dormant for the best part of a century, owing its resurgence to a concatenation of contemporary developments including the emergence of new forms of infectious disease, the threat of bioterrorism, and the growing desire of the state to intervene to regulate personal behaviour which may cause ill health and thereby place pressure on finite healthcare resources.^j Although the contemporary relevance of the subject matter may serve to enhance the learning experience as students are presented with topical illustrations of the principles which they are studying, it presents a significant challenge for academics who must keep pace with a rapidly changing environment of law and policy. In short, the subject is in a state of transition from a 19th Century model to one which is fit for the 21st Century and, while this presents exciting academic opportunities, it renders it less straightforward to teach than a field in which the legal rules are relatively settled.^k

A second difficulty arises from the broad scope of the subject matter. Martin observes that:

'Very little law is completely divorced from health. Criminal law has implications for the harm which results from crime; laws on the workplace, transport, the building industry, education or discrimination look to health and welfare; laws on negligence and contract have as objectives safety standards and deterrence; even laws regulating financial transactions will have consequences for health. Categorising that body of law which regulates public health is therefore as difficult as the task of defining public health'.⁵

In the preceding section, the 'intertwining' of public health law with various other subjects of study, especially within the legal syllabus, was presented as pedagogically beneficial. However, it also poses a considerable challenge for academics, the vast majority

^h 25 Ed I (1297), Regulations for the safe-keeping of the streets.³³

ⁱ Beyond the UK, the origins of public health law can be traced back still further. See, for example, the sanitary laws contained in Leviticus 11:16.

^j There are, of course, parallels with other fields of legal study which now find a central place in the curriculum. For example, environmental law, which shares common origins with public health law, might be dated back to 'medieval statutes on small-scale pollution and the development of private law principles to deal with threats to communal assets such as water' (see Bell and McGillivray³⁴) but, in the UK, the majority of environmental law courses commenced between 1992 and 1995 at a time when environmental issues had moved to the centre of the politico-legal stage (see Environmental Protection Act 1990, Rio Declaration on Environment and Development 1992).³⁵

^k Bell *S et al.*, report that rapid changes in law and policy are regarded by academics in the field of environmental law as the most significant challenge in teaching the subject.³⁵

of whom are likely to have developed specialisms in a relatively small number of fields. The teaching of public health law demands a degree of polymathism – both within the discipline of law and external to it (given the multidisciplinary character of public health) – which may prove unduly daunting to individuals in an increasingly time-pressed academic environment.

This is undoubtedly a significant obstacle, but it is not one which is unprecedented. Similar challenges have been confronted in the teaching of environmental law, another subject with strong interdisciplinary and intradisciplinary dimensions.³⁵ Various strategies may be adopted to minimize this difficulty, albeit that it is improbable that it will be eliminated completely. Prominent amongst these are likely to be the development of forms of intramural and extramural collaboration or networking, which facilitate the sharing of expertise and the pooling of knowledge among scholars with particular disciplinary specialisms. Allied to this will be measures to enable broad scholarly access to resources on public health law, for example through the creation of a ‘virtual knowledge bank’ containing case law, legislation, official publications, regulatory information and governmental policy statements. Relatedly, but more conventionally, publication of a textbook or text and materials volume and availability of relevant academic journals will greatly assist those who might consider entering this field of study in future years; scarcity of teaching resources is undoubtedly a serious impediment to student and scholar alike.

In this regard, the work of Gostin once again warrants highlighting. In addition to authoring the leading text in the field,³ Gostin’s *Reader* volume extracts and comments upon key materials, with a companion website providing links and updates (although this appears to be somewhat outdated).³⁶ More broadly, the Centers for Law and the Public’s Health, which are World Health Organization (WHO) collaborating centres in public health law and human rights (and of which Gostin is a director), seek to serve ‘as a primary resource on public health law for public health practitioners, lawyers, legislators, policy-makers, advocates, and the public’ and to ‘develop core legal competencies in public health law and corresponding curricula, as well as new training materials as needed’.^{37,38}

However, as Coker and Martin comment,¹ many of the published and online resources are US oriented, and the recent evolution of the European Public Health Law Network therefore represents a welcome development for scholars based outside the USA. The Network possesses the potential to become a highly valuable resource for those embarking upon teaching, particularly in so far as it aims to ‘facilitate communication and exchange of information and expertise on public health law within and beyond Europe’.³⁹ Hence, although further work remains to be done in this area (notably, in respect of the availability of ‘standard’ pedagogical resources such as textbooks relating to particular jurisdictions),¹ those contemplating the development of courses in public health law need not feel isolated but can draw upon an evolving community of expertise, information and contacts in order to supplement their existing knowledge.

Syllabus design and content

The all-embracing nature of public health presents a further pedagogical challenge in terms of curriculum design; specifically, which topics to include and which to exclude given the necessarily

limited coverage possible in any taught module. The difficulty arises because, as Gostin observes, ‘almost everything human beings undertake impacts the population’s health’.³⁶ Once again, the problem is not unique to the field; those teaching environmental law have reported similar concerns.³⁵

One should be wary of overstating the case here. It may be argued that precisely because ‘public health... can be everything’,⁴⁰ academics have free rein to select topics of study in which they have particular research interests (thus facilitating research-led teaching), which are of contemporary relevance (thus underlining the contextual dimension of the field), and/or which correspond to their existing expertise (thereby minimizing the need for polymathism). Moreover, the difficulty may be transitional; here, comparison may be made with medical law which, as it secured a firmer foothold upon the university curriculum, developed a clearer context and dynamic of its own.⁴¹

However, Gostin is surely correct to caution that the field of public health law becomes ‘less credible if it over-reaches’,^{2,36} and it is, of course, pedagogically important to design coherent courses with academic integrity which contribute to the realization of specified aims and objectives. For this reason, as well as for pragmatic purposes, it is necessary to separate out issues of core and peripheral importance when undertaking the task of syllabus design. This entails identification of an ‘inner group’ of laws which indisputably concern public health, and an ‘outer group’ of legal rules which, while they may impact upon the health of the community, are more properly regarded as falling within the remit of other subjects of legal study, such as domestic violence, road safety or urban planning.⁴² The task of classification will therefore require engagement both with the compass and meaning of ‘health’ – which ‘perplexing and ambiguous’ term⁴³ will necessarily form the central organizing concept of a course in this field – and with the appropriate topics for, and sources of, legal intervention on public health grounds.^m This is an admittedly difficult exercise given that debates regarding the proper scope of such intervention sit at the very heart of this subject,ⁿ although some assistance may be provided by the syllabi of public health law courses available on the Internet,¹⁰ in addition to the discussion below. However, it is precisely the existence and contemporary relevance of such debates which warrants extended academic analysis, which the teaching of this subject can only serve to stimulate.

In structuring such a course, attention should be given both to general questions of public health law (such as its meaning, underlying themes and foundational sources), and to specific issues of public health in respect of which the law operates or has the potential to do so. The latter allows the flexibility to tackle emerging issues of importance, such as avian influenza or biosecurity and bioterrorism. As noted previously (and notwithstanding the difficulties thereby generated), this facilitates the topicality of the course – thus (it is to be hoped) maintaining student interest and yielding further pedagogical benefits such as the building of familiarity with a broad range of online and

¹ The only dedicated text examining the field from a UK-based perspective is Martin and Johnson.⁵ This book – which is in fact a collection of essays as distinct from a standard textbook – is now out of print. Medical law texts also devote space to discussions of public health law, albeit at too brief a length to serve as student texts for a stand-alone course in the field (e.g. Montgomery).⁷

^m Reynolds⁴² seeks to limit the scope of the subject matter by excluding ‘laws that are administered by Ministers other than the Ministers for Health’. This is problematic not only because it marginalizes the role of the private and voluntary sector in assuring public health, but also because it fails to take account of the impact of notions of ‘joined up government’ in this sphere, reflected in ‘healthy public policy’ or ‘health in all policy’ strategies, in which other governmental departments are required to consider the implications for public health when making and implementing policies within their own fields of competence. For discussion, see Puska.⁴⁴

ⁿ ‘Does it [public health law] act modestly or boldly? Does it choose scientific neutrality or political engagement? Does it leave people alone or change them for their own good? Does it intervene for the common welfare or respect civil liberties? Does it aggressively tax and regulate or nurture free enterprise?’⁴⁵

conventional source materials – and serves to underline the centrality of the subject matter within the contemporary sociopolitical environment.

With no intention of being prescriptive, the following is the syllabus for the authors' LLM unit, with the listed topics being taught across 10 2-hour seminars.

Pursuing public health and public health law

Three preliminary issues are examined in this part of the unit:

- defining 'public health' and 'public health law';
- tracking threads, themes and tensions; and
- foundations of public health law.

As observed previously, the definitional task is complex, offering the opportunity for extensive and illuminating classroom debate, particularly with regard to the sociopolitical role of law and its capacity to act in a facilitative manner in this field.⁹

The choice of underlying threads, themes and tensions will, to some extent, be a matter for personal choice, although, as noted, 'health' must act as a central organizing concept. The focus in the authors' unit is upon the broad notions of freedom, responsibility, risk, trust and power. As in other fields of law, the latter is at the heart of the most important and interesting tensions in public health decision making; the issues of who decides, on what basis and how such decisions are challengeable are fertile ground for academic analysis. Historically, much public health power has tended to reside with local authorities and police forces, leaving public health practitioners relatively powerless. However, such powers are increasingly dispersed across a number of strata – regional, national, supranational and international. Students will therefore be exposed to multiple sources of law and institutions of governance, and will develop an understanding of the impact which one has upon another, for example in setting the parameters of national policy space.¹⁰ This fuses into an exploration of the foundations of public health law, entailing analysis of the sources of law and regulation, methods of legal intervention, governmental duties and powers at various levels (including an examination of key players such as WHO) and, more broadly, development of an understanding of the policy environment in which public health law operates.

A more ambitious goal here is to consider both the feasibility of evolving, and the possible shape of, a '*constitutional settlement for public health*', which might establish the scope of legitimate state intervention on public health grounds and the most appropriate modes by which this might be achieved.¹⁶

Infectious diseases

Measures imposed by the state to control the spread of communicable disease represent the classic territory of public health law. However, as noted previously, while this form of intervention is of venerable heritage, it is of considerable – indeed growing – contemporary significance. WHO confirms that infectious diseases are on the increase and that urgent action is required;⁴⁸ a conclusion supported by Baker who, in his highly readable account of the history of such diseases, laments the fact

that a golden age of protection has slipped away, and cautions that we continue to be '*stalked by the quiet killers*'.⁴⁹

This topic naturally lends itself to exposition by means of case study analysis, entailing exploration of the legal mechanisms for and implications of control of one or more infectious diseases of modern-day importance, such as SARS, tuberculosis, pandemic influenza and/or sexually transmitted infections. A particular focus – and the central concern of much of the US literature on public health law³ – will be upon the compatibility of control measures such as surveillance, screening, immunization and confinement with principles of human rights. In addition, the topic offers the opportunity to expose students to the inter-relationship between multiple levels of governance and their legal outputs, given the contribution of international, supranational, national, regional and local agencies to the realization of the objective of control of such diseases.

Non-communicable diseases

WHO has estimated that non-communicable diseases will account for 75% of all deaths globally by 2030.⁵⁰ Here, therefore, is the frontline for contemporary public health policy and a domain in which law can both facilitate and hinder the achievement of public health objectives. Interesting and controversial debates open up around the so-called lifestyle conditions caused by tobacco, alcohol and food, revolving around the key tension between individual freedom and state responsibility; for example, as to the ethics and legality of existing screening programmes for breast and cervical cancer, and the case for introducing new programmes such as those for heart disease.

In view of the fact that '*tobacco use is the single largest cause of preventable death in the world today*',⁵⁰ it is imperative for any course in this field to examine the role of law in controlling such use, exploring the largely failed attempts of tort law and the opportunities afforded by other methods of regulating the consumption and marketing of tobacco.⁵¹ Equally important issues arise in respect of legal measures to control food consumption and obesity. Insufficient food used to be (and in some places still is) a major threat to public health; the irony of the 21st Century is that excessive or harmful foodstuffs/ingredients are a leading cause of chronic disease. This is compounded by the further irony that chronic conditions which were thought to be characteristic of higher income nations (caused as they are by excess food, alcohol and tobacco) now result in more deaths than communicable diseases in many low-income nations.⁵²

Pedagogically, there are obvious opportunities for a comparative approach here. For example, experiences and outcomes of litigation in the so-called 'tobacco wars' across different legal systems might be analysed. Similarly, the variety of forms of legislative prohibition on smoking in public places can be compared and contrasted.

Patient safety

Safety in health care has become a key public health issue, not to mention one of professional and political importance. It is striking (and encouraging) that attention has moved beyond the classic individualistic medical negligence action, towards searching examinations of policies and processes which offer a more sophisticated understanding of why things go wrong and how patients can be harmed by the very systems which are designed to help. When viewed in this way, various forms of what is generically termed 'iatrogenic' or 'comiogenic' harm⁵³ are clearly 'inner' issues calling for further study and research.

This entails unpacking the notion of responsibility for improvement of patient safety, (including the role which patients

⁹ For a comparable debate in another area of legal study, see O'Leary⁴⁶ and Craig.⁴⁷

¹⁶ A recent example is Part 3 of the Health and Social Care Act 2008, which change in the legal framework for public health in England and Wales responds to the revised International Health Regulations.

themselves can play in this regard), drawing upon research into provision of safer health care and efforts to introduce a 'learning culture' to reduce the rate of error in medicine. Recent revelations about the problems of controlling methicillin-resistant *Staphylococcus aureus* and *Clostridium difficile* infections, and the methods used to contain and reduce infection rates provide a focus for discussion. There is also scope for detailed analysis of the role of key actors, such as the WHO World Alliance for Patient Safety, and comparison of different methods of regulation and approaches to policy making.

Controlling the informational environment

The use and abuse of information is one of the most pressing issues in contemporary public health. In a post-industrial 'knowledge economy', the creation, distribution, diffusion, use and manipulation of information is a significant economic, political and cultural activity. This is especially true of the public health context. Scientific and social scientific knowledge – in the form of evidence-based medicine and related methodologies such as health technology assessment – increasingly forms the basis for policy decisions within health systems, thus connecting information to the notion of power which was identified above.⁵⁴ The mass media possesses the capacity to help or hinder public health objectives by encouraging healthy lifestyles and by running 'scare stories' which might adversely affect behaviour to the detriment of the health of the population.⁴ Particularly important in this regard is health information on the Internet, which can mislead but also empower individuals to take charge of their health status,⁵⁶ and can serve to exacerbate existing inequalities in a manner which runs counter to public health goals and values.⁵⁷ The issue of the accuracy and presentation of information is also pertinent in terms of nutritional information about food products, both in terms of concealing potentially harmful ingredients and also exaggerating potential benefits without adequate evidence (such as organic food and so-called 'super foods').

This part of the course offers a valuable pedagogical opportunity to expand student awareness and critical analysis of the range of regulatory tools beyond formal legal rules. For example, 'soft law' mechanisms operate to provide a degree of control of the quality of health information on the Internet.^f

Paying for public health

One of the most difficult problems facing health systems (both publicly funded and market based) is management of the mismatch between potentially infinite demand and finite resources.⁵⁹ Public health is no exception to this; indeed, the population-based dimension of public health measures serves particularly to highlight the underlying ethical dilemmas which exist in this context, especially the potential incommensurability of individual and communitarian approaches to the allocation of healthcare resources. This part of the course thus addresses issues of priority setting in a public health context, focusing especially on allocative decision making in a public health emergency situation, such as provision of ventilators following an outbreak of pandemic influenza. More broadly, it is important to examine the ethical principles which might underpin such priority setting, one especially

interesting illustration of these being the 'social values' which NICE uses to inform the public health guidance issued to those working in the NHS, local authorities and the public and voluntary sector in England.⁶⁰

Teaching, researching and assessing

Establishment of a course in a relatively unexplored field such as this offers particularly attractive possibilities for maximizing the potential of the relationship between teaching and research. Given the likelihood that external assessments of research achievement and attendant funding consequences will continue to shape the teaching environment, it is vital to remember the benefits of both teaching one's research and researching one's teaching. In the authors' view, academics seeking to (artificially) separate out the two principal parts of their jobs are missing much. Consequently, it is the authors' intention to make explicit the connection between their teaching experiences on this module and their research questions and written outputs.

In particular, one goal is to publish a text and materials book on public health law and policy for the UK market (since no such text currently exists), and it is anticipated that delivery of this course, and in particular classroom discussions, will greatly assist in the preparation of this text. Although writing at a time when questions are being raised both about the role and need for legal textbooks,⁵ the practice of testing out materials on cohorts of students in advance of publication is, of course, an established, albeit under-utilized, strategy. With consent, the authors would seek to draw upon the skills and experiences of students in their group (mainly legal and medical/public health professionals) to assist in identifying areas for fruitful discussion and enable greater understanding of the debates around the role of law in securing public health. It is hoped that by explicitly involving students in helping to shape the textbook, they will become more active partners in the learning process which will enhance the overall teaching and learning experience.

With regard to assessment, law has long lagged behind other disciplines with reference to innovation and imagination, all too often 'playing safe' with standard unseen examinations and coursework essays.⁶¹ Happily, the study of public health law lends itself to the utilization of different and, hopefully, more stimulating forms of assessment for students and teachers alike. In particular, the use of disease scenarios and incident responses affords the opportunity to stretch student understanding of a range of relevant issues. For example, students could be required to draft a document providing legal and ethical guidance to public health practitioners tasked with managing an outbreak of an infectious disease. Here, inspiration might be drawn from the assessments designed for membership of the Faculty of Public Health, whose Part B examinations, while carrying no direct legal content themselves, are scenario based, and include examples such as '*contact investigations for tuberculosis*'.^{8,62} Assessment might also take the form of a piece of legislative drafting, for example of a new model Public Health Act designed to address the public health problems of contemporary society.⁶³

More conventional options are offered by the critical evaluation of existing or proposed public health measures from a legal perspective; for example, the UK and European Union pandemic influenza preparedness plans or the International Health Regulations. Ample scope also exists for students to compare the legal

^q Such as uptake of immunization programmes.⁵⁵

^r See Health on the Net Foundation,⁵⁸ providing a self-applied code of conduct label to websites. This is one of the mechanisms identified by the European Commission as a means of implementing quality criteria for health-related websites in the European Union: see COM (2002) 667.

⁵ Note, in particular, a 1-day conference sponsored by the UK Socio-Legal Studies Association on 'Examining textbooks' (03/10/2007), with a follow-up session on 'Reimagining Textbooks' at the Association's Annual Conference (19/03/2008).

framework of public health laws in different countries, and to examine the nature and relationship between approaches to legal regulation of public health issues at differing governmental levels.

Aims and objectives

This article will finish by briefly setting out suggested aims and learning outcomes for courses in public health law and policy. In the authors' view, students successfully completing any unit in public health law should be able to:

- appreciate the significance of and the struggle for pursuing public health;
- understand the legal and policy arena surrounding public health;
- understand and analyse the role of government (local, regional, national, supranational and international) and agencies in ensuring public health;
- appreciate the power of law to protect, improve and sometimes impinge upon public health;
- evaluate the tension between individual liberty and state protection within the public health context; and
- understand contemporary public health debates and the inter-relationship between law and policy within these.

With regard to learning outcomes, by the end of such a unit, the student will be able, to a degree commensurate with the level at which the unit is taught, to:

- demonstrate understanding of the legal regulation of public health issues;
- evaluate the limits and potential for law to act as a mechanism through which public health goals may be pursued;
- identify and discuss the policy and legal choices facing decision-making actors in the areas covered in the unit;
- bring together materials from primary and secondary sources dealing with topics presented in the unit and present them coherently;
- integrate non-legal concepts, theories and developments into legal discourse; and
- comprehend the sociopolitical environment in which law functions within this policy field.

Conclusion

In the authors' view, public health law is a crucial field of study. Rather than ignoring the contribution made by law, as has tended to be the case in the past, public health practitioners and policy makers should be arguing for its reform to render it fit for contemporary purpose.¹ This is particularly necessary given the evolution of new public health threats. However, that task is hindered significantly by the relative invisibility of public health law as a subject of study on the academic curriculum. It is the authors' ambition to address this deficiency and thereby to contribute, in some small way, to the process of updating and reform of the legal framework.

As this article has sought to demonstrate, there are considerable challenges in terms of delivery of units in public health law, not least those occasioned by the need to engage with its multidisciplinary nature and to fix upon an appropriate and coherent syllabus design. However, there are also clear and numerous pedagogical benefits which may be reaped, and the authors would accordingly urge their colleagues not to be overly daunted by the undoubted obstacles which they will confront. Establishing public health law

as a recognized subject of study is essential in seeking to generate a critical mass of students and scholars in this important, yet hitherto largely neglected, area. It is to be hoped that this article will assist in adding impetus to the growing momentum for evolution of an academic community of those interested in the interface between public health and law, and that it can serve as a valuable point of reference for those who are contemplating offering courses in this exciting and challenging field.

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