

**Public Health Law**  
**P8548 – Revised Syllabus**

Mailman School of Public Health  
Columbia University  
Spring 2009  
Tuesdays 5:30pm- 8:30pm  
Hammer 305

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**Course description**

To fully understand the significance of public health policies in a free society, we must consider the legal contexts within which public health initiatives exist and interact with constitutional law. How is the law used to draw distinctions between private health behavior and health behavior that crosses into the public sphere? Most of us accept that government should protect us from others, but how far should government go to protect us from ourselves? It is essential for public health practitioners and policymakers to comprehend and think critically about legal theories and laws relevant to their work. How can government justify paternalism? Why should it? How do we define “freedom” differently in different contexts: freedom from illness; freedom from coercion; freedom from pollution; freedom from ignorance?

In this course we explore constitutional law through the lens of public health policies that rest on and rival constitutional traditions. The public health “agenda” must, after all, operate within the rule of law. We will examine the relationships and tensions between individual and collective concerns. In order to do this, we must be clear about our definitions and descriptions of freedom, paternalism, risk, harm, health and community, for they each vary culturally and over time. We must evaluate and compare various explanations for problems in public health law, and determine which are the most consistent with protecting public welfare and domestic tranquility. Health policies should be based on accurate, logical and empirically sound explanations in order to be effective in legal, clinical, formal and informal domains. To that end, public health law requires multi-disciplinary investigations. In this course we consider each of those multi-disciplinary factors, and how they interact with issues of federalism, morality, economics and the politics of science. Readings include case law and related legal materials, in addition to intellectually stimulating writings by public health practitioners, historians, sociologists, economists and philosophers. Core topics include, among others, constitutional law and major constitutional cases relating to public health, economic analysis in law, tort litigation in public health, historical public health law perspectives, health promotion campaigns, property regulation, privacy protection, various case studies

including immunization, civil commitment, infectious disease, tobacco policy and abortion law with guest speakers.

**Course objectives:**

1. To introduce students to the constitutional foundations of public health measures in the United States.
2. To explore legal theories for and against public health measures which regulate individual behavior.
3. To enable students to identify the many stakeholders in questions of public health law and to recognize and critique the legal arguments they employ.
4. To explain the relationship between law and economics with respect to public health policies, in particular, how theories regarding negative externalities justify government regulation.
5. To enable students to extrapolate legal theories and reasoning essential to careers as public health professionals.
6. To understand the historical contexts in which various public health laws have evolved.
7. To enable students to navigate legal research and literature for the purposes of supporting their own viewpoints related to public health.
8. To develop confidence and competence when debating, addressing and presenting controversial public health policies.

**Course requirements:**

This is a three credit course. The class is based in lecture and discussion format. Everyone will participate in assigned debate topics. There will also be guest lectures by attorneys who are experts in public health law.

1. **Class attendance** is mandatory and **class participation** is required. It is expected that students will come to class prepared for discussion by reading and analyzing assigned materials in advance. If class participation presents particular hardship, please discuss the situation with the professor. More than three class absences will result in lowering of the final grade. If students are having any difficulties with the material in this course it is the student's responsibility to make an appointment, by email, with the professor to discuss the difficulty. Please keep confirmation of sent email.
2. **Paper.** Students are required to write a five to seven page paper on a public health law topic of their choice, subject to approval by the professor. Paper topics are due by email before class starts on **February 10**. Papers are to be double-spaced, 12 point Times font with normal margins. Use legal sources for your paper including laws, cases and legal periodicals as appropriate. Students are encouraged to use Lexis-Nexis Academic. Students are encouraged to develop and refine their positions on a public health law issue. In the paper, you should explore all "sides" of the chosen issue. In addition to substance and content,

- papers are graded on form. Writing style, including citation format, spelling and grammar, is expected to be at graduate level and grades will be reduced as required for substandard work. Papers are due, **in hard copy and email**, at the beginning of class on **February 24**. Further instructions will be discussed in class and posted on Courseworks under “Class Files; Shared Files”.
3. **Debate.** Participation in a class debate is required. Debate topics are decided by the professor and students are randomly assigned to argue for or against a resolution. Debates will be spread over two class sessions (**March 10 and 24**). Debate grades are based on substance and style of oral presentation and a one page written statement, which is to be turned in after, but on the day of, your debate. Failure to honor commitments to one’s debate team will result in lowering of the individual student’s grade.
  4. **Final Exam.** The final exam will be short answer and hypothetical/ essay. The final exam date is **May 12**.

### **Grade weights and dates**

1. 25% mid-term paper (paper topic due February 10; paper due February 24)
2. 25% debate project (March 10 and 24)
3. 40% final exam (May 12)
4. 10% class participation

### **Required texts:**

Please note the difference below between “Gostin Reader” and “Gostin Text” to avoid confusion. The texts can be purchased at the Columbia Health Sciences bookstore or on Amazon.

1. Lawrence O. Gostin, Public Health Law: Power, Duty, Restraint, Second Edition (2008) (“Gostin Text”)
2. Public Health Law and Ethics: A Reader (Lawrence O. Gostin ed. 2002) (“Gostin Reader”). Note that for assignments in the Gostin reader, you need only read the excerpted cases; articles and other materials; you needn’t read the accompanying Gostin commentary.
3. Reading materials available on Courseworks and so noted in the syllabus.
4. Reading materials which you must access via the internet and so noted in they syllabus.
5. Plus additional materials to be handed out or emailed during the semester.

**Course and study themes:**

Keep in mind the following questions and their answers:

1. Who is the government aiming to protect when it mandates health policy? From what? What kinds of checks and balances are required, in other words, who guards the guardians and how?
2. Is the policy logical and empirically sound, and based on your understanding of the U.S. Constitution?
3. Which constitutional protections do you consider important when analyzing the law or policy at hand?
4. In what ways do public health and constitutional law co-exist or conflict?
5. How well does the legal system (judge, advocate, policymaker, etc.) “comprehend” the public health issues involved?
6. Who is affected by ostensibly “bad” or “harmful” behavior targeted by a policy?
7. Should a person have a right to harm her or himself and how is this decided? Who is acting as “owner” of your body, you or the state?
8. Who are the various stakeholders and what are their investments in various health policies and their consequences?
9. What is the difference between federal and local government action?
10. What is the difference between formal and informal social control?
11. How are individual rights protected and compromised by health policy?
12. When do collective priorities outweigh individual preferences?
13. What would the next logical step for regulation be and how slippery is that slope?
14. How much regulation is too “much”?
15. What sort of cost/ benefit analysis is being made? What value judgments are implicit in those tradeoffs?
16. How and why are private health decisions increasingly becoming public health matters?

**A WORD ON CONDUCT:**

The topics we cover in this course are sometimes controversial. Debate and interaction are encouraged, and we will get to know one another as you develop and refine your views. Respectful discourse is essential to a congenial classroom and to our success as an intellectual unit. Good contact is the appreciation of different points of view.

**A WORD ON PLAGIARISM:**

Plagiarism is not tolerated and will be punished. If you are not certain of how or when to cite reference materials, it is your responsibility to ask the professor for guidance. Violation of these rules will result in failure for the assignment or exam in addition to other available sanctions.

## **Some Useful Information:**

### **How to Brief a Case:**

For some basic tips on how to read legal cases and best prepare those cases for class, please see “How to Brief a Case” posted on Courseworks under Class Files; Shared Files.

### **Paper**

Instructions are posted on Courseworks under Class Files; Shared Files.

### **Debate**

Instructions will be posted on Courseworks under Class Files; Shared Files

### **Useful Public Health Law Websites:**

- [www.publichealthlaw.net/reader](http://www.publichealthlaw.net/reader) (This is a companion website to our texts, with full-text versions of the cases excerpted in the Gostin Reader along with additional material and links related to public health law.)
- Note that [www.publichealthlaw.net](http://www.publichealthlaw.net) is a useful resource (separate from the text companion site.)
- [www.oyez.org](http://www.oyez.org) United States Supreme Court multimedia archive featuring audio of oral arguments and much other useful information.
- CDC’s Public Health Law Program and the Public Health Law News are excellent resources and good places to look for ideas for paper topics.  
<http://www2.cdc.gov/phlp/index.asp>
- The Public Health Advocacy Institute <http://www.phaionline.org/>
- Good general health law and policy resources:
  - [www.kff.org](http://www.kff.org) (Kaiser Family Foundation)
  - [www.rwjf.org](http://www.rwjf.org) (Robert Wood Johnson Foundation)
- Several libertarian/ conservative think tanks:
  - [www.cato.org](http://www.cato.org) (Cato Institute)
  - [www.heritage.org](http://www.heritage.org) (Heritage Foundation)
  - [www.manhattan-institute.org](http://www.manhattan-institute.org) (Manhattan Institute)

**Course schedule:**

CLASS NUMBER ONE (Jan. 20): *Introduction and overview of the course: major themes of public health law.*

*Prepare readings below in advance of the first class.* In the first week, we begin to define and describe “public health law,” and are introduced to complementary and conflicting public health perspectives. This week we begin to explore deeply-rooted controversies surrounding public health initiatives. The readings, and our discussion of them, are among the tools we will use to analyze and frame issues throughout the semester.

- Gostin Text: Chapter 1: A Theory and Definition of Public Health Law
- Gostin Reader: Chapter 1
- Courseworks: Thaler R. and Sunstein C. “Introduction” in *Nudge: Improving Decisions about Health, Wealth and Happiness*(2008).

CLASS NUMBER TWO (Jan. 27): *Communitarianism and Libertarianism: two important traditions in public health law: Freedom as freedom from coercion, freedom as freedom from illness; the role of government in achieving these two different definitions of freedom.*

Public health laws are largely justified by considerations of the *population* over the individual. Much of U.S. Constitutional tradition, on the other hand, has tended to glorify the “rugged individualist” ideal in favor of smaller government and freedom from restriction. The struggle, then, for public health law in the United States is to reconcile health promotion goals with our vision of democracy. This week’s readings provide a more nuanced look at intellectual approaches to that tension.

- Gostin Reader: Chapters 2 and 3
- Courseworks: Buchanan JM. Politics and Meddlesome Preferences, in *Smoking and Society: Toward a More Balanced Assessment*, Robert D. Tollison, Ed. Lexington Books, 1986, pp. 335-342.
- Courseworks: Bayer R. and Colgrove J. Public Health v. Civil Liberties. *Science*, 13 September 2002: 297:1811-1813.

CLASS NUMBER THREE (Feb. 3): *Theoretical foundations of public health law: philosophy, risk assessment and economics*

This week we examine theoretical foundations of public health interventions. In particular, our readings focus on philosophical traditions and economic assessment of risk. In class, we consider the variability of outcomes on public health law questions, depending on the mode of analysis used and the resulting necessity for multidisciplinary approaches to health law.

- Gostin Text: Chapter 2: Public Health Regulation: A Systematic Evaluation
- Gostin Reader: Chapter 5

CLASS NUMBER FOUR (Feb. 10): *Public Health and the Constitution: Constitutional Foundations Part I; Paper Topics Due: One brief paragraph explaining your paper*

This week, we begin our intensive exploration of Constitutional law. Over the next four sessions, we will study the constitutional bases for and objections to government action in public health. The goal is to introduce core concepts such that students will extrapolate principles learned in this unit to other circumstances of health policies throughout careers in public health. Initially, we examine the powers and duties of the government to act on behalf of perceived health goals. The cases we read illustrate the delicate analyses required of courts to strike balance between overreaching and reasoned review.

- Gostin Text: Chapter 3: Public Health in the Constitutional Design
- Gostin Reader: Chapter 6
- Handout: The Constitution of the United States of America

CLASS NUMBER FIVE (Feb. 17): *Constitutional Foundations Part II*

Our Constitutional study continues and we narrow our attention to the police powers of government. We trace judicial interpretation of the police powers (which grant authority for many public health initiatives) and distinguish different interpretations of those powers over time. This week's discussion will focus more on the limitations and restraints on public health policy as opposed to the powers and duties discussed in the previous week. We examine *Jacobson v. Massachusetts* and *Jew Ho v. Williamson*, two classic cases in public health law and then move to modern cases and constructions of due process.

- Gostin Text: Chapter 4: Constitutional Limits on the Exercise of Public Health Powers
- Gostin Reader: Chapter 7

CLASS NUMBER SIX (Feb. 24): *Public Health and the Regulation of Property; Papers Due; Begin Discussing Debates*

Public health agencies, created by the legislative branch of government, regulate a wide variety of economic and property interests. The administrative agencies operate using powers delegated by the legislature and those powers are limited. The judiciary reviews the exercise of administrative authority by deferring to public health expertise or, alternately, scrutinizing administrative action where congressional intent or constitutional questions are raised. This week, we study the balance of government powers, the tools of public health administrative action and the challenges of (and to) direct regulation of economic interests.

*Guest speaker: Tom Merrill, General Counsel of the New York City Department of Health and Mental Hygiene to discuss calorie labeling and related current litigation by the restaurant industry in New York*

- Gostin Text: Chapter 5: Public Health Governance: Direct Regulation for the Public's Health and Safety; Chapter 12: Economic Liberty and the Pursuit of Public Health (Excerpt)
- Gostin Reader: Chapter 8

- Courseworks: K McColl. “The fattening truth about restaurant food” *British Medical Journal*, November 18, 2008.
- Visit and read: New York city calorie posting legal timeline: [http://www.nyc.gov/html/doh/html/cdp/cdp\\_pan-calorieupdate.shtml](http://www.nyc.gov/html/doh/html/cdp/cdp_pan-calorieupdate.shtml)

CLASS NUMBER SEVEN (March 3): *Tort Litigation and Public Health*

In this class we see how courts review and decide on public health issues in the context of tort litigation. We pay particular attention to the balancing tests and economic analyses used in judicial decision-making. Because litigation is a public health tool distinct from legislation or regulation, we pay special mind to the uniquely judicial ways in which courts handle questions of causality and epidemiologic data. We will discuss the effectiveness and desirability of tort litigation as a vehicle for promoting public health and discuss obesity as a new issue facing the courts.

- Gostin Text: Pages 181- 203; 216- 228 from the chapter Tort Law and the Public’s Health: Indirect Regulation
- Gostin Reader: Chapter 9
- Courseworks: *Pelman v. McDonald’s Corporation*, 237 F.Supp. 2d 512 (S.D.N.Y. 2003)

CLASS NUMBER EIGHT (March 10): Case Study: *Tobacco and Smoking; Debates Begin (Groups 1 and 2)*

Should the elimination of smoking be a goal in a free society? How does your answer vary depending on your views of addiction? In this unit, we explore laws regulating the sale of tobacco products and restricting smoking. Tobacco policy will be put in historical context and the stakeholders in the smoking debate will be discussed. We will pay particular attention to economic theories of externalities and recent tobacco litigation.

- Gostin Text, pp. 204-215: “The Tobacco Wars: A Case Study”
- Internet visit: Please skim <http://www.tobacco.neu.edu/> and the sites of the tobacco industry linked thereto.
- Courseworks: Daynard RA. Regulating Tobacco: The Need for a Public Health Judicial Decision-Making Canon. *Journal of Law, Medicine & Ethics*, 2002; 30: 281-288.
- Courseworks: Sullum J. “Appropriate Remedial Action” and “Ten Myths of the Anti-Smoking Movement” in *For Your Own Good: The Anti-Smoking Crusade and the Tyranny of Public Health*, New York: The Free Press, 1998, pp. 40-81; 277-280 (and non-paginated photos).
- Courseworks: Goodin RE. *No Smoking*, Chicago: The University of Chicago Press, 1989, pp. 15-30 (“Do Smokers Voluntarily Accept the Risks”).
- Courseworks: Proctor R. The anti-tobacco campaign of the Nazis: a little known aspect of public health in Germany, 1933-45. *British Medical Journal* 1996; 313: 1450-1453.
- Courseworks: Smoking Now Permitted Only In Special Room in Iowa. *The Onion*. 17 March 1998.

March 16-20 (No Class, Spring Break)

CLASS NUMBER NINE (March 24): *Privacy; Debates (Groups 3 and 4)*

An important function of the public health system is the collection, storage, use and dissemination of health information. Because so much of that information is personally identifiable and sensitive in nature, public health goals often conflict with individual privacy interests. In this unit, we explore how privacy considerations are balanced against the value of health data. We consider mandatory reporting of injuries and diseases, research programs and partner notification as well as the institutions that administer those efforts.

- Gostin Text: Chapter 8: Surveillance and Public Health Research: Personal Privacy and the “Right to Know”
- Gostin Reader: Chapter 10
- Note the easy assignment for NEXT week’s class below: start looking now!

CLASS NUMBER TEN (March 31): *Risk communication, public health education campaigns and free speech.*

Public health authorities prioritize the dissemination of health information and significant public health resources are expended accordingly. Educational campaigns are justified as a method to “level the playing field” of information thrust at the public. Commercial entities enjoy both free speech and strong influence over consumer decisions. Some argue, however, that government’s benign relay of information too often becomes an onslaught of paternalistic propaganda. This week, we examine health promotion campaigns and free speech goals while focusing on principles of autonomy.

- Gostin Text: Chapter 9: Health, Communication, and Behavior: Freedom of Expression
- Gostin Reader: Chapter 11
- Assignment: notice a public health message in New York City and remember it- be prepared to share it with the class. What, if any, are its legal implications?

CLASS NUMBER ELEVEN (April 7): *Controlling Infectious Disease*

Three major biological approaches to controlling infectious disease are immunization, screening and treatment. This week, we discuss compulsory vaccination and the major court decisions that flesh out the unavoidable tension between community and individual rights in the context of immunization. We also review the ethical and legal issues surrounding screening and examine mandatory treatment of tuberculosis and AIDS.

- Gostin Text: Chapter 10: Medical Countermeasures for Epidemic Disease: Bodily Integrity
- Gostin Reader: Chapter 12

CLASS NUMBER TWELVE (April 14): *Restrictions of the person: civil confinement in the name of public health*

Throughout U.S. history, the state has invoked power to confine persons to protect the public's health. What legal hurdles must be crossed before a person can be confined against their will? Are our confinement policies just? Are they effective? How does the criminal justice system address intentional spread of communicable disease? In this class, we will consider these questions and discuss related legal and policy implications. We will also discuss quarantine and involuntary civil commitment from two angles: legal standards and liberty interests.

- Gostin Text: Chapter 11: Public Health Strategies for Epidemic Disease: Association, Travel and Liberty
- Gostin Reader: Chapter 13
- Read: <http://www.szasz.com/freeman17.html> Szasz, T.S. (2006). Psychiatry: A branch of the law. *The Freeman* 56: 18-20 (December).

CLASS NUMBER THIRTEEN (April 21): *Abortion Law; Guest lecture by Stephanie Toti, attorney from Center for Reproductive Rights (one of the world's leading litigation centers for reproductive rights law) to discuss their current abortion docket.*

The right to abortion is rapidly being eroded in the United States. In the last three years, 38 abortion bans have been introduced in 17 states. Recent Supreme Court cases, namely *Gonzalez v. Carhart*, have significantly limited reproductive rights and many believe *Roe v. Wade* will soon be overturned. Justice Sandra Day O'Connor's retirement and replacement by Justice Samuel Alito signaled a new era of reproductive rights jurisprudence. Why has the right to abortion in this country been established through the courts rather than the legislature? How do courts expand and reduce access to abortion? How does the right to abortion rest on an amorphous right to privacy? In this class, we review *Roe* and the post-*Roe* decisions that reveal the vulnerability of access to safe and legal abortion in the United States. We will discuss the many politicized laws that regulate medical (as opposed to surgical) abortion including "physician-only" laws, "TRAP" laws and forced parental involvement and mandatory delay laws.

- Visit and read through [www.reproductiverights.org](http://www.reproductiverights.org), the website of the Center for Reproductive Rights. In particular, read closely all of the documents in the "In the Courts" section and all of the case briefs therein. See also <http://www.aclu.org/reproductiverights/index.html>
- Visit and read through [www.aul.org](http://www.aul.org) the website of Americans United for Life. In particular, read closely the items under "Abortion" in the "Issues" tab. Also visit [www.nrlc.org](http://www.nrlc.org) National Right to Life.

CLASS NUMBER FOURTEEN (April 28): *Guest Speaker, Benjamin Mason Meier, on Global Health Law and the Rights Based Approach to Public Health; Closing discussion*  
Readings to be distributed in advance of the class.

May 12: Final Exam