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A Normative Framework for Public Health Law

by

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This work is dedicated to my beautiful girls, Jordan & Marley.

ABSTRACT

Public health law is in the midst of a crisis of public confidence, which, this paper contends, has resulted from the lack of a thorough normative framework to ground public health law. This paper attempts to fill this gap by articulating a normative framework for public health law, situating it within a rule of law tradition in a limited, democratic state. This paper proceeds in three parts: it begins with a descriptive analysis of public health law; it examines the normative theories of rule of law and liberty; and, it examines public health law in light of the normative theories. This paper concludes that public health law, conceived as government interference, is consistent with rule of law and liberty and that rule of law and liberty help provide public health law with a normative framework.

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TABLE OF CONTENTS

Introduction 1
1. Structure 10
2. Limitations 11

I: Public Health Law – A Descriptive Analysis 17
1. A Working Definition of Public Health Law 18
2. Public, Health and Law 26
A. Public 27
B. Health 38
C. Law 59
3. A Categorical Definition of Public Health Law 73

II. A Normative Foundation: Rule of Law and Liberty 74
1. The Rule of Law and Liberty 77
A. Rule of Law 78
B. Liberty 90
2. Instrumentalism and the Public Good 108

III. Public Health Law: A Normative Analysis 122
1. The Lack of Thorough Normative Justifications 123
2. Public Health as a Legitimate Power of a Limited Government 132
A. The Rule of Law and Government Interference 133
B. Liberty and Freedom of Choice 151

Conclusion 166

Works Cited 168

INTRODUCTION

Public health law contemplates junk food bans in schools, labelling requirements for unhealthful foods and the regulation of products that are aimed at combating obesity[1]; it supports the tobacco control movement through its aims to eliminate second-hand smoke exposure, prohibiting smoking in vehicles containing children, and increasing taxes on the purchase of tobacco[2]; it requires the isolation and quarantine of individuals with contagious diseases[3]; it can order the destruction of plants and animals[4]; and it seeks to regulate new technologies.[5] These are but a few of many more examples that could be scrutinized.[6] Therefore, it is not

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[1] See: Michelle M. Mello, David M. Studdert & Troyen A. Brennan, "Obesity—The New Frontier of Public Health Law" (2006) 354 New Eng. J. Med. 2601; Lawrence O. Gostin, "Law as a Tool to Facilitate Healthier Lifestyles and Prevent Obesity" (2007) 297 Journal of the American Medical Association 87, and; Christopher Reynolds, "Law and Public Health: Addressing Obesity" (2004) 29 Alternative Law Journal 162 [Reynolds].

[2] See: Barbara von Tigerstrom, "Tobacco Control and the Law in Canada" in Tracey M. Bailey, Timothy Caulfield & Nola M. Ries, eds., *Public Health Law & Policy in Canada* (Markham, ON: LexisNexis, 2005) 273; Rajeev K. Goel & Michael A. Nelson, "International Patterns of Cigarette Smoking and Global Anti-smoking Policies" (2004) 28 Journal of Economics and Finance 382, and; World Health Organization, *An International Treaty for Tobacco Control* (2003), online: World Health Organization <http://www.who.int/features/2003/08/en/>.

[3] See: Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* (New York: Milbank Memorial Fund, 2000), specifically "Chapter 8: Restrictions of the Person: Autonomy, Liberty and Bodily Integrity" at 203-236.

[4] See: *Health of Animals Act*, S.C. 1990, c. 21 and *Animal Disease Control Act*, R.S.B.C. 1996, c. 14. For a discussion concerning public health and the environment, see: Jamie Benidickson, "Public Health and Environmental Protection in Canada" in Bailey, Caulfield & Ries, *supra* note 2, 369.

[5] See: Timothy Caulfield, "Genetics and Public Health: Legal, Ethical and Policy Challenges" in Bailey, Caulfield & Ries, *supra* note 2, 477. For a specific exploration of law and an emerging technology, see David Castle & Nola M. Ries, eds., *Nutrition and Genomics: Issues of Ethics, Law, Regulation and Communication* (New York: Elsevier, 2009). For a discussion on the role of public health in this context see: Timothy Caulfield *et al.*, "Framing Nutrigenomics for Individuals and Public Health: Public Representations of an Emerging Field" in Castle & Ries, *ibid.*, 223 [Caulfield *et al.*].

[6] For example, there is increased recognition that "health emergency" has become a distinct area of public health. As Hunter notes, "'[h]ealth emergency' is becoming a powerful frame, a funding magnet for programmatic initiatives, and a rapidly enlarging subfield of knowledge

surprising that matters of public health law are contentious.[7] This is a reflection of the discord concerning public health generally.[8] Although public health law is not a new area of study[9], it nevertheless appropriates the

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within public health" (Nan D. Hunter, "'Public-Private' Health Law: Multiple Directions in Public Health" (2007) 10 J. Health Care L. & Pol'y 89 at 98 [Hunter]). Interestingly, Gostin & Powers argue that "[o]utside of health emergencies, the public does not demonstrate any particular interest in public health as a priority, and this lack of interest shows in chronic underfunding" (Lawrence O. Gostin & Madison Powers, "What Does Social Justice Require for the Public's Health? Public Health Ethics and Policy Imperatives" (2006) 25 Health Affairs 1053 at 1057 [Gostin & Powers]). Nola Ries addresses emergency powers in the Canadian context, using the West Nile virus as a case study to illustrate the controversy over the use of emergency powers in the context of public health, see: Nola M. Ries, "Legal Foundations of Public Health in Canada" in Bailey, Caulfield & Ries, *supra* note 2, 7 at 18-27 [Ries]. Public health is increasingly discussed in the context of health emergencies such as pandemics (see: R. Martin, "The Role of Law in Pandemic Influenza Preparedness in Europe" (2009) 123 Public Health 247) and bioterrorism (see: George J. Annas, "Bioterrorism, Public Health, and Civil Liberties" (2002) 346 New Eng. J. Med. 1337).

[7] As Magnusson notes, "putative expansion of government regulation, by means of public health law, not only brings controversy, it also brings public health in from the sidelines and into the mainstream" (Roger S. Magnusson, "Mapping the Scope and Opportunities for Public Health Law in Liberal Democracies" (2007) 35 J.L. Med. & Ethics 571 at 572 [Magnusson]).

[8] As Magnusson observes, "[d]ebate about the scope of public health law begins with questions about its broad aims and goals, and continues down to the level of the specific processes, laws, and remedies that are appropriate in particular cases. As an applied field, public health law shares the controversy that surrounds public health policy generally" (*ibid.* at 582).

[9] Syrett & Quick note "[p]ublic health law is not a 'new' field .... Indeed, public health law is of venerable heritage .... issues of public health were among the earliest subjects of legal regulation by the state" (K. Syrett & O. Quick, "Pedagogical Promise and Problems: Teaching Public Health Law" (2009) 123 Public Health 222 at 226 [Syrett & Quick]). Coker & Martin observe that governmental interventions to control public health date to the 13th Century, involving repair of sewers, control of nuisance and removal of pigsties (Richard Coker & Robyn Martin, "Introduction: The Importance of Law for Public Health Policy and Practice" (2006) 120 Public Health 2 [Coker & Martin]). Although it is not a new field it has been "marginalized" and "… largely dormant for the best part of a century" (Syrett & Quick, *ibid.* at 226). This has resulted in public health law being described as "antiquated, fragmented, inconsistent and incomplete" (James G. Hodge, Jr. *et al.*, "Transforming Public Health Law: The Turning Point Model State Public Health Act" (2006) 34 J.L. Med. & Ethics 77 at 77 [Hodge *et al.*]). Gostin similarly notes, "[t]here is an irony to the field of public health law. On the one hand, it is perhaps the oldest area of study in the field of health. On the other hand, it has recently been neglected and left in the shadows of health-care law" (Lawrence O. Gostin, "Public Health Law: A Renaissance" (2002) 30 J.L. Med. & Ethics 136 at 140 [Gostin, "A Renaissance"]). This is not without consequence. As Coker and Martin observe, the "[l]ack of parliamentary attention to our public health laws over the past century cannot be said to have created a neutral legal environment in public health. It has, in fact, created a legal environment which is harmful to public health endeavour through its failure to clarify unacceptable sources of health harms" (*ibid.* at 5). Gostin, however, argues that despite the recent neglect, "[p}ublic health law is now emerging as a major field of study" (Gostin, "A Renaissance" *ibid.* at 140). Dawson has similarly observed that despite the troubled

problems associated with modern public health. As a discipline, public health law is often misunderstood[10]; as a legal instrument of the state, this misunderstanding can become disdain.[11] At a minimum, it has been

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relationship public health has had with law, "we can see some hopeful signs for the future" (Angus Dawson, "Commentary on 'The Limits of Law in the Protection of Public Health and the Role of Public Health Ethics'" (2006) 120 Public Health 77 at 79 [Dawson], Dawson is responding to Robyn Martin, "The Limits of Law in the Protection of Public Health and the Role of Public Health Ethics" (2006) 120 Public Health 71 [Martin, "The Limits of Law"]).

[10] There is actually considerable debate concerning whether public health law can properly be understood as a discipline—similar to the debate of whether health law is properly understood as a discipline (for a discussion concerning law as a discipline see: Douglas W. Vick, "Interdisciplinarity and the Discipline of Law" (2004) 31 J.L. & Soc'y 163; for a discussion of law's relationship with other disciplines in the humanities, see: Jack M. Balkin & Sanford Levinson, "Law and the Humanities: An Uneasy Relationship" (2006) 18 Yale J.L. & Human. 155; finally, for a general treatment of health law as a discipline, see Theodore W. Ruger, "Health Law's Coherence Anxiety" (2008) 96 Geo. L.J. 625 [T. Ruger, "Heath Law's Coherence Anxiety"] and Jennifer Prah Ruger, "Governing Health" (2008) 121 Har. L. Rev. Forum 43 [J. Ruger, "Governing Health"]). The debate is not surprising given that public health law is "an inherently multidisciplinary enterprise" (Anthony D. Moulton *et al.*, "Public Health Legal Preparedness for the 21st Century" (2002) 30 J.L. Med. & Ethics 141 at 143 [Moulton *et al.*]). Coker, for example, notes that "[p]ublic health law per se is not considered a subject in its own right" (Richard Coker, "Communicable Disease Control and Contemporary Themes in Public Health Law" (2006) 120 Public Health 23 at 23.) On the other hand, some view "public health law as so fundamental a subject that it be considered a "foundational" body, akin to, for example, tort, contract, constitutional, and criminal law" (Richard Goodman *et al.*, "Other Branches of Science Are Necessary to Form a Lawyer: Teaching Public Health Law in Law School" (2002) 30 J.L. Med. & Ethics 298 at 298). Nevertheless, there are still those who question if "we need a subset of public health law" and if so, wonder "is it really possible to define it?" (J.V. McHale, "Commentary on 'Health and Human Rights'" (2006) 120 Public Health 59 at 60, responding to Christie Chinkin, "Health and Human Rights" (2006) 120 Public Health 52). In part, the misunderstanding is a consequence of antiquated laws dealing with modern public health problems. "When the time came to apply old laws to these new challenges our legislative tools were found wanting …. The public health statues which served us so well in the nineteenth century drawing on 19th century scientific understandings within a 19th century social, cultural and political context, no longer have the capacity to assist us in dealing with contemporary public health concerns" (Robyn Martin & Richard Coker, "Conclusion: Where Next" (2006) 120 Public Health 81 at 87 [Martin & Coker]). As has been noted elsewhere, "[s]ome jurisdictions have not assessed their public health law for decades, if ever" (Hodge *et al.*, *supra* note 9 at 83). Consequently, public health law statutes are "obsolete, inconsistent, and confusing" (*ibid.*). It is precisely for this reason that T. Ruger suggests health law has value. He notes, "scholars ought not strive too hard to shoehorn the unwieldy contours of health law within the neat edges of the standard field coherence paradigm …. This messiness and complexity in legal form and institutional action is part of what makes health law important and unique, and provides fertile terrain for generalized study" ("Health Law's Coherence Anxiety", *ibid.* at 639).

[11] As Gostin notes, "it is not easy to sell population health in the marketplace of idea" (Lawrence O. Gostin, "Law and Ethics in Population Health" (2004) 28 Australian & New Zealand Journal of Public Health 7 at 7 [Gostin, "Law and Ethics"]). Gostin further observes,

observed, "[t]he field of public health is in the midst of a crisis of public confidence."[12] In part, this is a consequence of public health law being a relatively invisible area of study.[13] But it is also a reflection of the paucity of systematic examinations of public health law.[14] As Lawrence Gostin notes,

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"[w]hat is clear is that public health law is not a scientifically neutral field, but is inextricably bound to politics and society" (Lawrence Gostin, "Legal Foundations of Public Health Law and its Role in Meeting Future Challenges" (2006) 120 Public Helath 8 at 10 [Gostin, "Legal Foundations"]). It has been suggested, for example, that "[s]ocial science research has found that substantial portions of the population express concerns that could dissuade them from following the directions of public health officials, especially given significant levels of distrust toward government" (Hunter, *supra* note 6 at 98, Hunter is referring here to the research of Roz D. Lasker, *Redefining Readiness: Terrorism Planning Through the Eyes of the Public* (New York: New York Academy of Medicine, 2004). Part of the problem may stem from the fact that public health law is often confusing. Magnusson observes that "public health law generates its own controversies over whether law is the most appropriate way of achieving health policy objectives" (*supra* note 7 at 582). Furthermore, as Gostin notes, "[l]aws enacted piecemeal over time are inconsistent, redundant, and ambiguous. Even the most astute lawyers in public health agencies or attorney general offices have difficulty understanding these arcane laws and applying them to contemporary health threats" ("A Renaissance", *supra* note 9 at 137; see also: Hodge *et al.*, *supra* note 9 at 79). Recognizing that public health laws have not been "meaningfully reformed" in decades (Hodge *et al.*, *supra* note 9 at 77) Gostin advocates for a reformation of public health law "so that it conforms with modern scientific and legal standards" ("A Renaissance", *supra* note 9 at 137). It also accounts for Dawson's observation that it is advantageous "if law can remain (relatively) neutral about which approach is best" (*supra* note 9 at 79).

[12] Gostin & Powers, *supra* note 6 at 1054. The authors note that the lack of public confidence may stem from the reality that "American culture openly tolerates the expression and enjoyment of wealth and privilege and is inclined to view health as a matter of personal responsibility. Meanwhile, the public has become skeptical of government's ability to ameliorate the harshest consequences of socioeconomic disparities" (*ibid.*).

[13] Consider Benjamin's observation: "It is generally agreed that public health measures have been responsible for the greatest increase in human lifespan, yet this fact has been largely invisible to the public. It is often said that public health has done its best job when nothing happens. In an unpublished survey conducted in 2001, 78 percent of respondents said that they had never used a public health service. Since we all breathe the air, drink the water, eat the food, and have benefited from vaccines and safer automobiles, this notion is clearly false. It does, however, show the average person's lack of understanding of the broader protection and prevention activities that public health achieves every day" (Georges C. Benjamin, "Putting the Public in Public Health: New Approaches" (2006) 25 Health Affairs 1040 at 1041, referring to M. Late, "Coalition Working to Bring Recognition to Public Health: Public Unaware of Public Health's Value" (2001) 31:9 Nation's Health 1). Gostin echoes this sentiment, noting the impact of public health's invisibility: "when public health is working well … its importance is taken for granted" ("Law and Ethics", *supra* note 11 at 7). When it fails, however, it becomes a matter of national scorn. See also: S. Burris, "The Invisibility of Public Health: Population-level Measures in a Politics of Market Individualism" (1997) 87 American Journal of Public Health 1607.

[14] For example, Gostin suggests that a book dealing exclusively with public health law is warranted despite libraries being replete with books dealing with law and health generally

"[p]ublic health cannot function well unless it has strong legal foundations."[15] Three cardinal problems of public health have hindered public health law from successfully establishing a strong legal foundation. The first problem concerns definition; the second is the instrumental and pragmatic use of public health initiatives (legal or otherwise); finally, there are imprecise

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as "the vast majority of these books are concerned principally with medicine and personal health care services" (*Public Health Law*, *supra* note 3 at xvii). A similar observation is made about the situation in Canada: "Just as our public health care system attracts the lion's share of popular attention, so too does it occupy the attention of those interested in health law. Health law texts in Canada generally have little, if any, discussion of legal issues in public health and few relevant articles appear in Canadian academic journals devoted to law, public health and medicine. The purpose of this text is to help fill this gap in Canadian legal and public health literature and provide a needed resource in an under-analyzed area of health law" (Nola M. Ries, Timothy Caulfield & Tracey M. Bailey, "Introduction" in Bailey, Caulfield & Ries, *supra* note 2, 1 at 2). The paucity of research extends into law schools. Numerous commentators have noted that there is a paucity of research and teaching in public health law. Coker & Martin note, "[e]fforts to create a community of public health law expertise … have been rudimentary. Research that has been undertaken on public health law … has been disparate, uncoordinated and isolated …. This invisibility of public health law research and teaching is a barrier to access to knowledge and expertise on public health law" (*supra* note 9 at 6). Syrett & Quick contend that "[p]ublic health law remains substantially neglected as a subject of academic study" (*supra* note at 223). Elsewhere, it has been noted, "the omission of public health from the legal curriculum is almost complete and ubiquitous" (Wendy E. Parmet & Anthony Robbins, "A Rightful Place for Public Health in American Law" (2002) 30 J.L. Med. & Ethics 302 at 303 [Parmet & Robbins]). Coker & Martin note that the focus on individualized medical law in health law has "served to distort the importance of medical law to the detriment of public health law" (*supra* note 9 at 2). "As a consequence of the paucity of scholarship on public health law, the focus and boundaries of public health law have been far from clear" (Martin & Coker, *supra* note 10 at 81). As a result, "[f]ew health law programmes have ventured into the obscure and unbounded terrain of public health law because of the difficulties of knowing where to start, what to include, what to exclude, and what constitutes the essence of public health law" (*ibid.*).

[15] Gostin, "A Renaissance", *supra* note 9 at 136. Hodge *et al*. note that "[l]aws provide the mission, functions, and powers of public health agencies, set standards for their (and their partners') actions, and safeguard individual rights" (*supra* note 9 at 77). They further observe, "[l]aw is a critical component to each of the three key elements of the national public health infrastructure: (1) health data and other factual information; (2) a competent workforce; and (3) systems and relationships" (*ibid.* at 78). It has been suggested that "even the most fundamental of public health tools requires an underpinning of law" (Coker & Martin, *supra* note 9 at 5). Magnusson further notes, "law can play a valuable role by defining the roles of such agencies and ensuring their financial and political independence. Similarly, law can be used in a variety of other ways to legitimize cross-sectoral input, such as public health input into planning processes, in order to shape local environments that facilitate walking, cycling, and physical activity. The underlying point, however, is that law's role in organizing the exercise of government's public health functions is itself and important category of public health law" (*supra* note 7 at 582).

parameters as to the proper purview of public health. Simply stated, there is uncertainty and inconsistency as to the substance, use and scope of public health law.[16] Of these three problems, public health law's potentially boundless scope may ostensibly be the least threatening[17], but nonetheless jeopardizes its legitimacy.[18] The intent of this paper is to attend to this shortcoming and alleviate some of the misconceptions by postulating a legal normative framework that can serve as a foundation for public health law.

A confused understanding of public health law in conjunction with instrumental uses of public health measures occasions the assumption that public health law lacks a normative foundation. Failing to adequately address the problems identified above provides an arsenal of objections to a comprehensive legal understanding of public health. To discuss public health law with any cogency necessitates an understanding of what public health

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[16] Parmet, for example, has argued that the court's use of the term public health is seen "at best as rhetorical and at worst as obfuscatory" (Wendy E. Parmet, "From Slaughter-House to Lochner: The Rise and Fall of the Constitutionalization of Public Health" (1996) 40 Am. J. Legal Hist. 476 at 476 [Parmet, "From Slaughter-House to Lochner"].

[17] The argument being that if public health is adequately defined and a normative framework provided that the parameters will implicitly be set. That said, it has been noted by commentators that, "[p]erhaps the deepest, most persistent critique of public health is that the field has strayed beyond its natural boundaries. Instead of focusing solely on narrow interventions for discrete injuries and diseases, the field has turned its attention to broader health determinants. It is when public health strays into the social/political sphere in matters of war, violence, poverty, and racism that critics become most upset" (Gostin & Powers, *supra* note 6 at 1055).

[18] Magnusson describes public health law as a "layer-cake" consisting of concepts "that range from the general to the specific" (*supra* note 7 at 472). Rothstein contends, a "boundless conception of public health … may actually impede the ability of public health officials to provide traditional public health services" (Mark A. Rothstein, "Rethinking the Meaning of Public Health" (2002) 30 J.L. Med. & Ethics 144 at 148 [Rothstein]). Coker & Martin note that the development of public health law into an "incoherent regulation with no overarching statutory framework" has led "inevitably to inconsistencies and gaps" and has resulted in "measures passed to contain one risk to health serv[ing] at times to create other public health threats" (*supra* note 9 at 3).

law ought to be.[19] Moreover, it is not possible to properly delineate the use and scope of public health law without a definitive understanding of what public health law in fact is.[20] This paper contends that the problems public health law faces are exacerbated by the lack of a normative foundation—or better put, the lack of an articulated normative framework.[21] A normative analysis usually means a "prescription of what *ought* to be the case. A 'normative' perspective on law, thus, could signify the author's idealism as to what the law should be."[22] More properly, a normative analysis contends that one cannot know the "is" of public health law without "inquiring what the law ought to be in the particular case."[23] As Brian Tamanaha notes, "[l]aw is

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[19] Magnusson suggests that the questions public health law scholars must address are both ideological and theoretical. "They are ideological questions because perceptions about the proper boundaries of law's role will shape perceptions of what law can do, in an operational sense, to improve health outcomes. They are also theoretical questions, in the sense that, without closing down debate about the limits of public health law, these questions can be addressed by mapping the range of perspectives on how law might 'go to work' for the public's health" (*supra* note 7 at 571).

[20] Magnusson notes, "[t]he perspective that one holds about the legitimate goals of public health will strongly influence what one regards as the appropriate objects of legal intervention" (*ibid.* at 574). He further notes, the "[d]ebate about the appropriate *goals* of public health intervention lies at the heart of any model of public health law. These goals are translated, in turn, into *definitions* of 'public health' and 'public health law.' One impulse for seeking to clarify the scope of the field comes from the seemingly arbitrary collection of topics making up public health statutes, which reflect the largely reactive approach of legislatures to successive public health crises" (*ibid.* at 572, original empahsis). One's understanding of public health law will also have significant impact on its relationship with other areas of law. As Brownsword observes, "[u]nless we settle what we mean by 'common law' and 'public health', any account of their relationship will be unanchored and unhelpful" (Roger Brownsword, "Public Health, Private Right, and the Common Law" (2006) 120 Public Health 42 at 42 [Brownsword]).

[21] To be sure, scholars have not entirely neglected this area. For example, Magnusson "proposes a framework for conceptualizing the field of public health law, as it is debated within liberal democracies" (*supra* note 7 at 571). As Magnusson notes, "[t]he practice of public health then tends to be conceptualized primarily in terms of the government's function of mediating between private and collective interests as it responds to health threats facing the population" (*ibid.* at 572). However, as will be argued below, pages 123-132, existing attempts to establish a normative framework are inadequate.

[22] Anthony D'Amato, *Jurisprudence: A Descriptive and Normative Analysis of Law* (Boston: Martinus Nijhoff Publishers, 1984) at 221 (original emphasis).

[23] *Ibid.* at 224.

not an empty vessel to be filled in by our leave; rather, law is predetermined in some sense, consistent with what is necessary and right."[24]

It is necessary to identify a legal normative framework for public health law given that law is increasingly recognized as both a necessary and legitimate tool to assist in the promotion and protection of the public's health.[25] "Law sets the structure within which public health officials, regulators, and private citizens act to protect the population's health. Law can impede the process … or it can enhance it …"[26] Law thus is often understood as a fundamental good. However, as Fredrick DeCoste observes, "it is at once and incurably a dreadful good, a menace."[27] Unbridled and

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[24] Brian Z. Tamanaha, "How an Instrumental View of Law Corrodes the Rule of Law" (2006-2007) 56 DePaul L. Rev. 469 at 469 [Tamanaha, "Instrumental View of Law"].

[25] The need for an articulated normative framework is paramount, particularly given the repeated call of public health law scholars for governments and practitioners to "exploit law" (see: B. Bennett *et al*., "Health Governance: Law, Regulation and Policy" (2009) 123 Public Health 207 at 211 [Bennett *et al*.]) and the imminent public health crises, such as swine flu pandemics, that will require the use of legal measures.

[26] Gene W. Matthews *et al*., "Legal Preparedness for Bioterrorism" (2002) 30:3 J.L. Med. & Ethics 52 at 53. Moreover, as Coker & Martin note, the absence of laws where needed "misleads the public as to the seriousness of threats to health, and fails to provide the tools needed to protect and improve the public's health" (*supra* note 9 at 6).

[27] Frederick C. DeCoste, *On Coming to Law: An Introduction to Law in Liberal Societies*, 2d ed. (Markham, ON: Butterworth, 2007) at 140 [DeCoste*, On Coming to Law*]. Law can be both the problem and the solution. Consider Fox-Decent's observation: "Law, and law alone, supplies a sustainable, public and non-violent recourse against naked power" (Evan Fox-Decent, "Is the Rule of Law Really Indifferent to Human Rights?" (2009) 27 Law & Phil. 533 at 561[Fox-Decent]). Hence the vulnerable submit to law, as the weak are unable to defend themselves against the powerful through force. "The willingness of the vulnerable to submit to law is a phenomenon which holds true of such a wide range of nations, classes, ethnicities, communities, workers, groups, religions, individuals, and so on, that virtually the only threat that could be said to unite them is their vulnerability to public or private power which is held in check, if at all, by law alone …. The rule of law supplies the principles and institutional structure that permits legal order to protect the vulnerable from certain forms [of] arbitrary power that could otherwise fill the void, and so the justification of the rule of law runs deeper than merely protection from the abuse of power that law makes possible. Put slightly differently, the rule of law establishes conditions under which secure and equal freedom is possible because under the rule of law we are subject to general rules and principles rather than the will or powers of others" (*ibid.* at 562).

undefined, law is hazardous; it inevitably gives rise to arbitrary power.[28] Critics of public health initiatives and policies are quick to note the hazards associated with legal sanctions aimed at what they deem as the ends of particular interest groups. It is argued that such actions are an offense to liberty and ought not be considered as a legitimate use of law, especially in a liberal democratic state. As Bernard Dickens notes, "public health law appears to test the boundaries of the constitutionally revered concept of limited government."[29] Responding to these charges is not possible without an understanding of the underlying normative theories. If public health is going to use and rely on law, it is vitally important to properly understand the scope and limits of the law. "Law can be an invaluable tool in the implementation of policy, just as it can be a valuable tool in the disruption of policy by those who oppose it, and the role of law in the future of public health will be essential."[30] To properly understand the scope and limits of the law is to inquire about law's foundation. This, in turn, is "[t]o inquire after a force beyond the empirical force of law …. a force that will ground and authorize the violence of law."[31] What is required is, as Friedrich Hayek

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[28] Joseph Raz, "The Rule of Law and Its Virtue" in Robert L. Cunnigham, ed., *Liberty and the Rule of Law* (College Station: Texas A&M University Press, 1979) 3 at 16 [Raz, "The Rule of Law"].
[29] Bernard M. Dickens, "A Tool for Teaching and Scholarship: A Review of Lawrence Gostin's *Public Health Law: Power, Duty, Restraint*" (2002) 30 J.L. Med. & Ethics 162 at 162 [Dickens].
[30] Robyn Martin & Linda Johnson, "Introduction" in Robyn Martin & Linda Johnson, eds., *Law and the Public Dimension of Health* (London: Cavendish Publishing Limited, 2001) xxxiv at xliii [Martin & Johnson, "Introduction"].
[31] F.C. DeCoste, "Smoked: Tradition and the Rule of Law in *British Columbia v. Imperial Tobacco Canada Ltd.*" (2006) 24 Windsor Y.B. Access Just. 327 at 330 [DeCoste, "Smoked"]. DeCoste has the following to say regarding the law's empirical force: "The law's empirical force – which is to say, its force in the real world of administration, enforcement, and adjudication – resides finally in violence, in intellectual violence always and sometimes in

observes, is "a meta-legal doctrine or a political ideal."[32] The rule of law is presented here as the appropriate metal-legal doctrine. It represents the force that legitimizes the law.[33] The rule of law, in turn, aims to preserve liberty. If rule of law were to be conceived of procedurally, liberty would represent its substantive expression. The objective of this paper is to demonstrate that public health law is consistent with rule of law and liberty and also that rule of law and liberty provide a normative foundation for public health law.

1. STRUCTURE

This paper proceeds in three distinct parts. Part I entails a descriptive analysis of public health law. This necessitates defining both "public health" and "public health law." The bulk of Part I will involve an examination of the three interrelated constructs that make up public health law: public, health and law. The intent of this section is to illustrate two things: first, the discord among public health law scholars and legal scholars as to what public health law entails; and, second, to set the stage for the normative analysis of public

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physical violence" (*ibid*. at 330, n. 13).

[32] Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: The University of Chicago Press, 1960) at 206 [Hayek, *The Constitution of Liberty*].

[33] Raz observes, "[t]he law inevitably creates a great danger of arbitrary power—the rule of law is designed to minimize the danger created by the law itself" ("The Rule of Law, *supra* note 28 at 16). Consider also the comments of Backer: "'Rule of law' both as a set of normative principles and as methods of governance, has assumed important institutional global dimensions since the establishment of the contemporary world order after 1945. As a set of normative principles, 'rule of law' has exploded from an understanding of the relationship of law, government, and the individuals who act in the name of either within political States to a search for a universal set of principles that govern the constitution of States. 'Rule of law' is now said to serve an ideology of constitutionalism" (Larry Catá Backer, "Reifying Law—Rule of Law, Government, the State, and Transnational Governance" (2008) 26 Penn St. L. Rev. 511 at 512-513 [Backer]).

health law. Although it is the contention of this paper that the theories postulated and examined in Part I are insufficient, they nevertheless highlight integral aspects of public health law that will be examined later. Part I concludes with the articulation of a categorical definition of public health law. Parts II and III of this paper encapsulate the normative analysis. Part II establishes the theoretical foundation by examining rule of law and liberty. In addition, it will examine the threat posed to rule of law by instrumentalism and confusion over what is meant by "the public good". Part III entails a normative analysis of public health law. In addition to being prescriptive, this section will undertake several tasks. The first task will be to examine the current normative framework – or lack thereof – for public health law. The second task will be to examine public health law in light of theoretical foundation established in Part II. This will involve situating public health law within a rule of law state and demonstrating that it does not necessarily pose a threat to liberty. Specifically, this paper will examine the role for government interference and the impact that such interference has on individual choice. Before proceeding, it is prudent to disclose several of the limitations and assumptions that will guide the following analysis.

2. LIMITATIONS

At the outset it is important to identify some of the necessary limitations of this paper given the breadth and depth of material being reviewed. First, this paper is focused specifically on public health law.

Consequently, the aim here is to present a legal argument. Thus, specific recourse will not be sought from other disciplines such as economics, history or philosophy.[34] While the importance of these areas is recognized, literature from these disciplines will not be extensively relied upon (although it may be referred to on occasion). It is also important to note that "public health law" throughout this paper is vested with meanings and is not synonymous with public health or public health ethics. Although it is recognized that the fields are intimately related, they will be treated as distinct for my purposes. Given this paper's interest in the normative foundation of public health law, it does not focus on statutory measures or case law, nor does it attempt to determine where the proper authority for public health law is vested within the constitutional design.[35] Similarly, there is no attempt here to undertake any systematic or comprehensive analysis of the legitimate aims of public

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[34] This approach is similar to that taken by Ernest Weinrib, *The Idea of Private Law* (Harvard University Press, 1995) [Weinrib, *The Idea of Private Law*]. Weinrib rejects the functionalist approach, where "the content of law cannot be comprehended in and of itself, simply as law" (*ibid*. at 6). In order to prevent this study from becoming "parasitic on the study of nonlegal disciplines (economics, political theory, and moral philosophy…)" (*ibid.*) and to avoid law simply becoming "the authoritative form into which the conclusions of nonlegal thinking [is] translated" (*ibid.*), the consequences of an external evaluation, the aim here is to elucidate an internal understanding, "an account that flows from and captures the law's self-understanding…" (*ibid.* at 16). Arguably, several of the commentators that are examined in detail are not necessarily legal scholars (for example, Hayek is an economist), but they are nevertheless examined from a legal perspective.

[35] Gostin notes, "[t]he law relating to public health can be divided into two overlapping ideas: (1) *public health law*, which is the body of statutes and regulations that provides the foundations for public health agencies – e.g., mission, duties, and powers; and (2) *law and the public's health*, which are those wide-ranging statutes and regulations intended to improve morbidity and mortality rates across the population – e.g., safety rules for motor vehicles, occupational health, and drinking water" ("A Renaissance", *supra* note 9 at 136, original emphasis). In both instances Gostin is conceiving of public health law strictly in terms of existing statutory structures. This paper aims to take a step further back. While recognizing that public health law may be expressed as one of these two overlapping ideas, this paper will explore public health law theoretically.

health law.[36] Where necessary or appropriate, this paper examines initiatives that serve as archetypes of public health law actions.

In a similar vein, it is beyond the purview of this study to comprehensively examine all issues pertaining to the scope and limits of law. The analysis in this paper is limited by the following assumption: that a limited state is the only legitimate state. This assumption limits the study in several ways. First, our analysis will focus on the liberal democratic state situated in the Western legal tradition.[37] While not all of the norms of the liberal democratic state will be reviewed, it is assumed that the norms of this tradition (i.e., democracy, justice) are laudable ends.[38] Second, recognizing

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[36] The approach of this paper may best be described as snowball or purposive sampling. Such an approach was necessary for the purpose of this paper. Attempting to systematically identify all the literature addressing public health law using legal databases, which search legal publications, would fail to identify important literature published in biomedical, socio-political and philosophical journals. Every effort has been made to ensure thoroughness.

[37] DeCoste has argued that one must rely on the "scholarly traditions concerning the foundations of law" and identifies these traditions as political jurisprudence, moral jurisprudence and historical jurisprudence ("Smoked", *supra* note 31 at 332ff, DeCoste attributes the terminology to Harold J. Berman in "The Historical Foundations of Law" Emory University School of Law: Public Law & Legal Theory Research Papers Series: Research Paper No. 05-3). DeCoste further asserts that the first two traditions, more commonly known as legal positivism and natural law, are inadequate for serving as law's foundation (*ibid.* at 333-335). Unlike the other traditions, which proceed from concepts and philosophy, historical jurisprudence proceeds from experience (*ibid*. at 336). It would be erroneous, however, to equate historical jurisprudence with historicism, as the emphasis is not traditionalism but rather tradition. The difference, DeCoste notes, quoting Jaroslav Pelican, is that "[t]radition is the living faith of the dead; traditionalism is the dead faith of the living" (*ibid*. at 336 citing Jaroslav Pelikan, *The Vindication of Tradition* (New Haven: Yale University Press, 1984) at 65). The tradition our law is "devoted to and limited by" (*ibid.* at 337) is the Western legal tradition. According to DeCoste, the legal tradition in the West is characterized by autonomy and aspiration. "Its autonomy resides in the claim that law, as an institution, is separate and independent .... [a]nd its aspiration springs from the view that the law is the embodiment of principles, the observance of which will make good its promise of justice and order" (*ibid.* at 339).

[38] For example, there is suggestion that the doctrine of individual liberty is the "exception, not rule in history – even in West" (see: Isaiah Berlin, "Two Concepts of Liberty" in Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969) 118 at 129 [Berlin, "Two Concepts of Liberty"]). The implications of statements such as this will not be explicitly assessed in this paper. See below, note 393.

that the extent of the limitations on the state is highly disputed, this paper will focus primarily on a minimalist (classical liberal) state. The merits of the varying perspectives of a limited state, from the minimalist state to the social welfare state[39], will not be assessed here.[40] It is the contention of this paper that the most vociferous opposition to public health law from within a limited state perspective is likely to emanate from those who advocate for the minimalist state.[41] The interpretation of rule of law and liberty within a social welfare state is likely to be more permissive and thus it is not difficult to conceive of public health law as a legitimate act of the welfare state. The same cannot be said for the more restrictive understandings of the state. It is presumed that if a normative justification for public health law can be established in a minimalist state, it will necessarily be established in a social welfare state.[42] Additionally, it would not be possible to canvass all legal

[39] See, for example, Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) [Nozick], who advocates for a limited state, and John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, Mass.: Harvard University Press, 1999), who is associated with the social welfare state.

[40] Epstein has observed, "the debate over the proper response to public health offers but one arena to test the relative power of the classical liberal as opposed to the modern social welfare model of the state" (Richard Epstein, "Let the Shoemaker Stick to his Last: A Defense of the 'Old' Public Health" (2003) 46:3(Supp) Perspectives in Biology and Medicine S138 at S157 [Epstein, "Let the Shoemaker"]).

[41] Consider, for example, J. Ruger's observation: "Libertarian theories of justice, as advocated by Robert Nozick, and others, would deny altogether any societal obligation to provide medical care or health insurance to all. Libertarianism takes the principle of liberty as absolute and does not give health or health care special standing" ("Governing Health" *supra* note 10 at 45). Calman similarly observes, "[t]he libertarian perspective finds that the authority of the state is limited to ensuring that members of the population are able to enjoy the 'natural' rights of man, such as life, liberty and property rights, without interference from others. The libertarian state does not see the promotion of the welfare of its population as its proper role" (K. Calman, "Beyond the 'Nanny State': Stewardship and Public Health" (2009) 123 Public Health e6 at e6-e7 [Calman]).

[42] This approach is not without precedent. Consider, for example, Weinrib's defense of private law. Weinrib limits the bulk of his discussion to the treatment of accidental injuries in the common law of torts. He justifies this decisions as follows: "Because the negligent

scholars in this paper, so particular attention is paid to several theorists.[43]

It is recognized that the breadth of this study may be perceived as a weakness, especially given the numerous contentious issues that will be addressed. Notwithstanding, a paper of this nature is necessary. Gostin has suggested "[t]he field of public health law and ethics needs a theory and definition … an assessment of law as a tool to promote the public's health …. and a well-articulated vision."[44] This paper aims to contribute to this vision by establishing a legal normative framework that can be utilized when assessing the use of law as a tool and that will serve as the foundation for the theory of public health law. It is expected that many of the conclusions of this paper will be contentious, particularly given the controversy surrounding many of the concepts that will be examined throughout. As the intent of this paper is to contribute to the ongoing dialogue and evolution of public health law, and not to presumptuously claim to resolve existing disputes, it seems

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defendant's culpability seems morally detachable from the fortuity of injury, liability for negligence poses a particularly severe challenge to the stringent notion of coherence that I shall be developing. If formalism illuminates negligence law, it presumably illuminates less problematic bases of liability as well. At any rate, the prevalent academic assumption that crucial doctrines of negligence law—the standard of care and proximate cause, for instance—are explicable only in functionalist terms should dispel the suspicion that I have chosen to defend the internal approach on the legal terrain that contemporary scholars would initially regard as most favourable to it" (*supra* note 34 at 20).

[43] Considerable attention is paid to Friedrich Hayek, John Stuart Mill, Isaiah Berlin, Brian Tamanaha and G.B. Madison.

[44] Gostin, "Law and Ethics", *supra* note 11 at 7. In a similar vein, Martin has called for "an umbrella piece of legislation" in public health law ("The Limits of Law", *supra* note 9 at 76). She contends that such legislation would set out "our overall public health objectives, our public health priorities, or our public health guiding principles" (*ibid.*) and "establishes the fundamental principles and values of public health endeavors in our society" (Robyn Martin, "Law as a Tool in Promoting and Protecting Public Health: Always in our Best Interests?" (2007) 121 Public Health 846 at 852 [Martin, "Law as a Tool"]).

appropriate to conclude this introduction with the astute observation of Robert Cunningham:

> When two people disagree about whether some policy or other will promote the 'common good' or the 'general welfare' or the 'public interest', the disagreement is not merely verbal or, usually, one that can be resolved by further analysis or explication of the concept. It is not that the term is ambiguous or objectionably vague or remediably imprecise, but, rather, that 'general welfare' is an essentially contested concept, a concept shared by the disputants though there is a disagreement about its correct instantiation. To make unanimity of reference a condition of the success of a concept is to miss the point of concepts like 'general welfare,' and 'due process,' and to make useful discussion and debate impossible.[45]

[45] Robert L. Cunningham, "Conference Discussion" in Cunningham, *supra* note 28, 317 at 325.

I: PUBLIC HEALTH LAW – A DESCRIPTIVE ANALYSIS

Before anchoring public health law normatively, it is necessary to elucidate what public health law means. Thus far, with the exception of providing some examples of issues public health law is currently addressing, no attempt has been made to define public health law. Aforementioned are some of the problems posed by uncertainty and inconsistency for a categorical understanding of public health law. Fortunately, considerable work has already been undertaken to address these problems; unfortunately, there is a widespread polarization between resulting understandings—which can often be differentiated on ideological grounds. The following section will not attempt to reconcile these differences. Instead, it sets out to accomplish two things: to illustrate the discord concerning public health law and to set the stage for the normative analysis of public health law. Thus, the following section is largely descriptive. It will begin by identifying a working definition of public health law that will proceed to examine the three integral and interrelated concepts of public health law: public, health, and law.

Although it is the contention of this paper that the theories postulated and examined in this part are insufficient, they nevertheless highlight integral aspects of public health. Of the varying perspectives of public health law, two factions ultimately emerge: one promotes a more expansive, comprehensive understanding of public health law and the role of government, and the other advocates for a narrower, limited

understanding.[46] The following will examine how these concepts are addressed, relying on representative commentators from each perspective.[47] At the conclusion of this section, relying on the analysis that follows, an intermediate definition will be proposed—the intention being that it will serve as a categorical definition for the remainder of this study. While it may be considered "trite to observe that the starting point for any field of study must be to offer a definition of its subject matter and scope"[48] the importance of definition for our purposes cannot be overstated.

1. A Working Definition of Public Health Law

Although this paper is primarily concerned with public health law, how one defines public health will have significant implications for public health law. It has been observed, "[t]he reach of public health law is as broad as the reach of public health itself."[49] According to Mark Rothstein with greater clarity and consensus about the meaning of public health there will

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[46] Arguably, a third perspective could be examined. Closer to an expansive view, given that it grants considerable latitude to the state, it does not identify the locus of public health explicitly in the state, but recognizes its private law implications. It is beyond the scope of this paper to adequately examine this position and its implications, see note 456.

[47] It should be noted, at the outset, that there is considerable overlap between both the three concepts and the two perspectives, and that a strict demarcation between them is not possible. For example, in discussing "public" one can consider it both as the target (the population) and the responsible party (the state), the latter also subject to examination under "law." Similarly, a commentator may appear to advocate for a limited understanding of public health law but nevertheless grant some flexibility to the state for certain activities, thus giving the appearance of advocating for an expansive understanding. The dividing lines are not neat.

[48] Syrett & Quick, *supra* note 9 at 222. They further note, "[i]n 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" (*ibid*.).

[49] Ruth Roemer, "Comparative National Public Health Legislation" in Roger Detels *et al*., eds., *Oxford Textbook of Public Health*, 3d ed. (New York: Oxford University Press, 1997) 351 at 351.

be an increase in the effectiveness of public health initiatives and an increase in public and political support for public health initiatives.[50] For Mark Hall, "definitional boundaries matter a great deal because the law operates through categories, and classification has huge effects on how legal issues are analyzed."[51] Hall emphasizes the importance of definitional precision in light of the fact that the "public health perspective has transformative power to radically reframe society's attitudes about social issues."[52] Although it is prudent to circumscribe public health so as to avoid a cumbersome understanding and an overly broad treatise, this must not result in an overly restrictive definition that is too confined and may neglect—whether purposefully or not—what constitutes important public health issues for a community. Isaiah Berlin's observation seems appropriate here: "[t]he attempt to make the vocabulary of politics too precise may render it useless. But it is not service to the truth to loosen usage beyond necessity."[53] Stephen Waddams, referring specifically to understanding the complexity of law, has similarly noted, "material that is inherently complex is not better understood

[50] Rothstein, *supra* note 18 at 144.

[51] Mark A. Hall, "The Scope and Limits of Public Health Law" (2003) 46:3(Supp) Perspectives in Biology & Medicine S199 at S202 [Hall]. The idea of classification having an impact on how legal issues are analyzed will be revisited below, see note 455, when examining whether public health law is better understood as a matter of public law or private law.

[52] *Ibid.* at S203. Magnusson similarly observes, "[d]ebate about goals and definition reflects competing claims about the boundaries for the legitimate exercise of political and administrative power" (*supra* note 7 at 572-573).

[53] Berlin, "Two Concepts of Liberty", *supra* note 38 at 158. Berlin also notes the flexibility of language: "[e]nough manipulation with the definition of man, and freedom can be made to mean whatever the manipulator wishes" (*ibid*. at 134).

by concealing its complexity."[54] In order to fully understand public health law, it is necessary to cope with the complexities inherent to public health.

One difficulty with positing a definition that adequately addresses public health law's complexity stems from the reality that public health is an organic and dynamic concept. It is hardly surprising that divergence exists as to the meaning of public health, legal or otherwise, given that public health looms as an all-encompassing concept. Robyn Martin describes the problem smartly: "It would not be possible to include in a definition of public health all of the factors which affect public health, or the definition would read something like a treatise on the meaning of life, and would be for all practical purposes useless."[55] As a result, "[t]oday the health of the public means everything and nothing at all."[56] Dorothy Porter contends the definition of public health has evolved with changing understandings of both health and

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[54] Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge University Press, 2003) at 2 [Waddams].

[55] Robyn Martin, "Constraints on Public Health" in Martin & Johnston, *supra* note 30, 33 at 33 [Martin, "Constraints on Public Health"]. Elsewhere Martin observes: "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" (R. Martin, "Domestic Regulation of Public Health: England and Wales" in Martin & Johnson, *supra* note 30, 75 at 75). Public health, it is suggested, covers everything from "womb to tomb".

[56] Parmet, "From Slaughter-House to Lochner", *supra* note 16 at 477. The breadth of public health has resulted in it becoming highly politicized. As Gostin observes, "[w]hat best serves the population … may not always be in the interests of all its members. And it is for this reason that public health is in fact highly political" ("Legal Foundations", *supra* note 11 at 9). The Institute of Medicine, in its seminal report, suggests that "[b]ecause health is the result of many interacting factors, it stands in the balance between economic, political and social priorities" (Institute of Medicine, Committee for the Study of the Future of Public Health, *The Future of Public Health* (Washington, D.C.: National Academy Press, 1988) at 23 [Institute of Medicine]). Others note that the multidisciplinary nature of public health itself only serves to exacerbate this problem, making it difficult for scholars to know where to start, what to include or exclude and to determining what it at the essence of public health law, see: Syrett & Quick, *supra* note 9 at 224 and Martin & Coker, *supra* note 10.

society.[57] The fragmentation of public health history is seen as a reflection of the fragmentation of social history generally.[58] Elizabeth Fee puts the matter thus:

> When the history of public health is seen as a history of how populations experience health and illness, how social, economic, and political systems structure the possibilities for healthy or unhealthy lives, how societies create the precondition for the production and transmission of disease, and how people, both as individuals and as social groups, attempt to promote their own health or avoid illness, we find that public health history is not limited to the study of bureaucratic structures and institutions but pervades every aspect of social and cultural life.[59]

This sentiment is illustrated in George Rosen's depiction of public health. Considered to have authored the definitive text on the history of public health[60], Rosen held that "[t]he story of public health was … one of triumph of knowledge over ignorance, cultural enlightenment over barbarism and the emancipation of modern society from the primitive bondage of disease."[61] Public health represented the "triumphant emancipation of modern society from the primitive bondage of ignorance."[62]

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[57] Dorothy Porter, *Health, Civilization and the State: A History of Public Health from Ancient to Modern Times* (New York: Routledge, 1999) at 1-4 [Porter, *Health, Civilization and the State*].
[58] Elizabeth Fee, "Public Health, Past and Present: A Shared Social Vision" in George Rosen, *A History of Public Health* (Baltimore: John Hopkins University Press, 1993) ix at xxxix [Fee].
[59] *Ibid.* at xxxviii.
[60] See George Rosen, *A History of Public Health* (Baltimore: The John Hopkins University Press, 1993) [Rosen]. Rosen wrote at a time when public health was viewed as "victorious" given the reduction in mortality rates in the Western world (Porter, *Health, Civilization and the State, supra* note 57 at 1). Porter describes Rosen's work as a grand narrative of progress, "arising from the technological advance of science and medicine and its capacities to combat endemic and epidemic disease" (*ibid.*).
[61] Dorothy Porter, "Introduction" in Dorothy Porter, ed., *The History of Public Health and the Modern State* (Atlanta, GA: Editions Rodopi B. V., Amsterdam, 1994) 1 at 2.
[62] Porter, *Health, Civilization and the State*, *supra* note 57 at 3. The heroic story of public health, however, has been challenged by historical problems. Theorists such as Thomas McKewon and Michel Foucault raised doubts and posited alternative explanations (*ibid.* at 2-

A further difficulty with positing an adequate definition results from a lack of consensus as to the origins of public health. Clearly, how one identifies the locus of public health law will impact definition.[63] As Porter explains, if public health is confined largely to sanitation and the control of infectious disease then, despite its widespread emergence in the nineteenth century, it had been "preconfigured in technological developments stretching back through time, such as the Mosaic Code and Roman baths and aqueducts."[64] Public health is commonly thought to have originated as a response to industrialization.[65] An increasingly dense and localized population brought problems with sanitation and provided an opportune environment for the spread of infectious diseases. It was during this time that John Snow purportedly removed the handle of a water pump on Broad Street in London to contain an outbreak of cholera—a legend that stands as a "landmark in public health intervention."[66] This perspective, which associates the emergence of public health with industrialization, is the product of a Western

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5). Porter refers to the following texts generally: Thomas McKeown, *The Rise of Modern Population* (London: Nuffield Provincial Trust, 1976); *idem*, *The Role of Medicine: Dream, Mirage or Nemesis* (London: Nuffield Provincial Trust, 1976); Michel Foucault, *The Order of Things* (London: Tavistock, 1974); *idem*, *Madness and Civilization* (London: Tavistock, 1971); and, *idem*, *Discipline and Punish: The Birth of the Modern Prison* (London: Tavistock, 1977).

[63] Conversely, how one defines public health will influence where they fix its origins.

[64] Porter, *Health, Civilization and the State*, *supra* note 57 at 2. This is an important consideration, particularly given the divergence in opinion as to what is meant by public, which will be demonstrated below, pages 27ff.

[65] For example, this is the view of Rosen, see: Fee, *supra* note 58 at xxvi and Rosen, *supra* note 60.

[66] National Advisory Committee on SARS and Public Health, *Learning from SARS: Renewal of Public Health in Canada* (Ottawa: Health Canada, 2003) (Chair: Dr. David Naylor) at 44 [*Learning from SARS*].

view of history; in turn, it fixes the origins of public health at a particularly important point in Western history.[67]

In light of these difficulties, it is not surprising that existing definitions for public health reflect various understandings of what is considered to be under the purview of public health. Public health, it is observed, is commonly used as a "general, descriptive term."[68] It has been defined as "[t]he science and art of preventing disease, prolonging life and promoting health through the organised efforts of society."[69] Consider the following three definitions. The *Oxford Textbook of Public Health* contends that public health "ensures the conditions in which people can be healthy."[70] The Institute of Medicine (IOM) in its seminal report, *The Future of Public Health*, defines public health similarly: "Public health is what we, as a society, do collectively to assure the conditions in which people can be healthy."[71] Health Canada offers a more comprehensive and robust definition:

> Public health can be described as the science and art of promoting health, preventing disease, prolonging life and improving quality of life through the organized efforts of society. As such, public health combines sciences, skills, and

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[67] This is not necessarily problematic for our analysis, provided it is recognized that public health, conceptually, is not restricted to the rise of European civilization—indeed, this fact may be advantageous, given that rule of law and liberty are often thought to have emerged from the legal tradition in the Western world.
[68] Rothstein, *supra* note 18 at 148.
[69] Royal College of Physicians of the United Kingdom, "What is Public Health?", online: The Faculty of Public Health <http://www.fphm.org.uk/about_faculty/what_public_healt/default.asp>. Calman uses this definition, *supra* note 41 at e6.
[70] Roger Detels & Lester Breslow, "Current Scope and Concerns in Public Health" in Detels *et al.*, *supra* note 49, 3 at 3.
[71] Institute of Medicine, *supra* note 56 at 1. This definition of public health was reaffirmed by the subsequent updated report, Institute of Medicine, Committee on Assuring the Health of the Public in the 21st Century, *The Future of Public Health in the 21st Century* (Washington, D.C.: National Academies Press, 2003).

> beliefs directed to the maintenance and improvement of the health of all people through collective action.[72]

Despite what may appear to be similarities between the above definitions—which are only a few of many that could be offered—there may in fact be more divergences than convergences, particularly when attempting to articulate who is included in "public" and what is meant by "health."[73] Both are amorphous concepts and, depending on ontological and epistemological assumptions, vary widely. The water is further muddied when attempting to articulate a legal understanding of these concepts.

A commonly referred to definition of public health law has been provided by preeminent health law scholar Lawrence Gostin. He relies on the IOM's definition of public health as a springboard for a legal characterization that attends to the limitations placed on this state. In his view,

> [p]ublic health law is the study of the legal powers and duties of the state to assure the conditions of the 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 protection or promotion of community health.[74]

In articulating his understanding of public health law, Gostin recognizes that he has not posited a narrow definition. He deems public health law a special

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[72] *Learning from SARS*, *supra* note 66 at 46.

[73] For example, Rothstein argues that the definition offered by the Institute of Medicine does not clearly emphasize the health of the public over that of the individual. Syrett and Quick reflect on the differences in definitions: "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'" (*supra* note 9 at 223).

[74] Gostin, *Public Health Law*, *supra* note 3 at 4.

responsibility of the government; thus, "public health law should be seen broadly as the authority and responsibility of government to ensure the conditions for the population's health."[75] Not all agree with Gostin on this point—indeed the extent of disagreement on the breadth of government authority can be seen to differentiate between competing perspectives. Gostin is also acutely aware of the difficulties with positing an appropriate definition:

> If it conceives itself too narrowly, then public health will be accused of lacking vision. It will fail to see the root causes of ill health and fail to utilize a broad range of social, economic, and behavioral tools necessary to achieve healthier populations. At the same time, if it conceives itself too expansively, then public health will be accused of overreaching and invading a sphere reserved for politics, not science.[76]

The following discussion will use Gostin's definition as a starting point.[77] The advantage of doing so is that it is robust.[78] In addition, Andrew Siegel notes

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[75] *Ibid.*

[76] Lawrence O. Gostin, "Public Health, Ethics, and Human Rights: A Tribute to the Late Jonathan Mann" (2001) 29 J.L. Med. & Ethics 121 at 123 [Gostin, "Public Health, Ethics, and Human Rights"].

[77] The reliance on Gostin is justified. Not only is he recognized as the preeminent public health law scholar, Gostin is often used by other commentators as a starting point for their discussions. For example, in a 2002 symposium issue of the *Journal of Law, Medicine & Ethics* that focuses on public health law, Gostin not only provides the opening article, which sets the stage for how public health law will be understood for the remainder of the journal ("A Renaissance", *supra* note 9), he is deferred to throughout by other commentators. For example, Rothstein (*supra* note 18) and Fidler (David P. Fidler, "A Gloablized Theory of Public Health Law" (2002) 30 J.L. Med. & Ethics 150 [Fidler]) specifically refer to Gostin and an entire article by Dickens reviews Gostin's *Public Health Law* (*supra* note 29). In the 2006 and 2009 special issues of *Public Health* dedicated to public health law, Gostin figures prominently.

[78] To be sure, there are inadequacies. For example, Siegel contends that while Gostin's theory is "broad and ambitious" (Andrew W. Siegel, "The Jurisprudence of Public Health: Reflections on Lawrence O. Gostin's *Public Health Law*" (2001-2002) 18 J. Contemp. Health L. & Pol'y 359 at 368 [Siegel]) it is nevertheless not extensive enough as "his account (a) does not allow us to attach appropriate weight to the value of individual liberty and (b) neglects fundamental questions about the scope of the state's responsibility that emerge from a consideration of the social and economic determinants of health" (at 360-361). Fidler is critical of Gostin's

that the central theoretical issues reflected in Gostin's definition are "(a) the state's authority and responsibility to advance the population's health, and (b) the potential conflicts that arise between promoting public health and protecting private rights."[79] Given the objective of this paper, Gostin's definition presents itself as appropriate. Gostin identifies five characteristics of public health law that are expressed through his definition: government power and duty; a population-based perspective; the relationship between the people and the state; the services of the public health system; and the role of coercion and individual rights.[80] Each of these characteristics necessarily informs how one understands and interprets the seminal concepts of public, health and law. In large part, definitions of public health law depend on how these concepts are understood, as well as how they interrelate. The next task is to examine each of these concepts in turn.

2. PUBLIC, HEALTH AND LAW

When attempting to demonstrate that public health law is consistent with rule of law and liberty later in this paper, it will become very clear that whether one is convinced of this will depend in large part on how he or she defines the interrelated concepts of public, health and law. Relying on

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understanding for failing to "connect to one of the most important debates currently underway in public health: the impact of the processes of globalization on the protection and promotion of population health …. Gostin fails to include international law" (*supra* note 77 at 151).

[79] *Ibid.* at 360.

[80] For a more comprehensive treatment see: Gostin, *Public Health Law*, *supra* note 3 at 4-21. For a succinct treatment, see: Lawrence O. Gostin, "Public Health Law in a New Century – Part I: Law as a Tool to Advance the Community's Health" (2000) 283 Journal of the American Medical Association 2837 [Gostin, "Public Health Law in a New Century – Part I"].

Gostin's definition of public health law as a starting point, the following will examine each of these concepts. The following aims to be descriptive; it sets the stage for the final section of Part I, which aims to posit a categorical definition of public health law.

A. PUBLIC

Public health law is obviously concerned with the public. According to Gostin, "[a] systematic understanding of public health law requires a careful examination of what is public."[81] While public health, intrinsically, has a wide purview, given that it is concerned with populations, precisely how far its reach goes, and what issues are rightfully matters affecting the public, are highly contested. It is accepted that a careful examination of what is public is necessary.[82] Where the disagreement arises, however, is who (and, in some instances, what) is part of the public—including the role of the individual in the public.[83] As a legal distinction, "public" has specific meaning. Hall emphasizes this point: "[i]n the legal arena, *public* does not simply mean

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[81] Gostin, "Public Health Law in a New Century – Part I", *ibid.* at 2837.
[82] Gostin, *Public Health Law*, *supra* note 3 at 5; see also Hall, who suggests one of the key elements of public health is the requirement to constrict the proper domain of public, *supra* note 51.
[83] For example, Martin notes, "the status of the individual in society in the context of contemporary public health is less clear with the shift in focus in public health from disease to lifestyle as a cause of ill health. Emphasis on lifestyle has made the individual, particularly the individual in the role of consumer, more prominent in the public health agenda" ("Law as a Tool", *supra* note 44 at 851). Additionally, some contend that a singular understanding of public may be inaccurate. As Heller, Heller & Pattison note, "[t]here is likely to be more than one 'public', which comprises a collection of many demographic subgroups and interests, and more than one way of relating to the 'publics'" (R.F. Heller, T.D. Heller & S. Pattison, "Putting the Public Back Into Public Health. Part I. A Re-definition of Public Health" (2003) 117 Public Health 62 at 65 [Heller, Heller & Pattison, "Part I"]; see also: R.F. Heller, T.D. Heller & S. Pattison, "Putting the Public Back Into Public Health. Part II. How Can Public Health be Accountable to the Public?" (2003) 117 Public Health 66).

'widespread.' It invokes a special set of justifications for government interventions and coercion that rely on concepts that economists refer to as 'public goods.'"[84] The classic concerns of public health Hall identifies are communicable diseases, sanitation, safe foods and other situations that involved "collective action problems."[85] In other words, public health deals with issues that self-regarding individuals would not be able to effectively address. Thus, "[a] public agency is necessary to garner resources needed for collective action and to wield the authority for coercive restrictions on liberty or property."[86]

Gostin has a more extensive understanding of 'public'. It entails two overlapping meanings: "one that explains the entity that takes primary responsibility for the public's health, and another that explains who has a legitimate expectation to receive the benefits."[87] He agrees with the notion of

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[84] Hall, *supra* note 51 at S204, original emphasis. The concept of public goods is examined in more detail below, see page 108ff.

[85] *Ibid.* at S204. Hunter agrees, noting: "The oldest traditional function of public health has been the control of communicable disease. The police powers authority, as applied to public health, originated in the adoption of self-protective policies by which localities sought to defend themselves against the spread of infection" (*supra* note 6 at 93). Coker & Martin observe that the term public health was first legislatively used in Britain in 1848 "when a Central board of Health was established with the powers to oversee street cleansing, rubbish collection, water supply and systems of sewerage" (*supra* note 9 at 3).

[86] Hall, *supra* note 51 at S204.

[87] Gostin, "Legal Foundations", *supra* note 11 at 8 (see also: Gostin, "Law and Ethics", *supra* note 11 at 8). In a similar vein, Martin & Coker note, "'public' addresses both the public nature of the body on which health obligations are imposed, and the public nature of the recipients of health obligations" (*supra* note 10 at 81). A more involved account is offered by Childress *et al.*: "'public' is a complex concept with at least three dimensions that are important for our discussion of ethics. First, public can be used to mean the 'numerical public,' i.e., the target population …. Second, public is what we collectively do through government and public agency — we can call this 'political public' …. Third, public, defined as what we do collectively in a broad sense, includes all forms of social and community action affecting public health—we can call this 'communal public'" (James F. Childress *et al.*, "Public Health Ethics: Mapping the Terrain" (2002) 30 J.L. Med. & Ethics 170 at 171 [Childress *et al.*]).

collective action, noting "[p]ublic health can be achieved only through collective action, not though individual endeavor."[88] The state is concerned with societal intervention, with "organized community efforts"[89], because individuals, acting alone, are unable to ensure the conditions to promote health—this is especially the case in localized communities. In fact, acting alone, individuals are unable to reach even minimum levels of health.[90] While individuals may be capable of securing the necessities of living, it requires collective action to ensure communal health.[91] Gostin observes that the community as a whole has a stake in areas such as environmental protection, sanitation, clean air and surface water, uncontaminated food and drinking water, safe roads and products, and control of infectious disease. Each of these collective goods, and many others he deems essential conditions for health, can be secured only through organized action on behalf of the public.[92] Such activities, however, cannot be organized or implemented unless legitimized by the population.[93] Thus, a public entity "gains its legitimacy through a political process."[94]

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[88] Gostin, *Public Health Law*, *supra* note 3 at 7.
[89] Gostin, "Public Health Law in a New Century – Part I", *supra* note 80 at 2838.
[90] *Ibid*. at 2838. As Gostin & Gostin note, "there are certain goods that can only be achieved through collective state action and which individuals acting alone cannot attain. This is self-evident in the case of infectious disease control, occupational health and product safety, which clearly require state action" (L.O. Gostin & K.G. Gostin, "A Broader Liberty: J.S. Mill, Paternalism and the Public's Health" (2009) 123 Public Health 214 at 219 [Gostin & Gostin].
[91] See also: Gostin, "Legal Foundations", *supra* note 11 at 9.
[92] Gostin, "Public Health Law in a New Century – Part I", *supra* note 80 at 2838.
[93] *Ibid.* at 2838. As Gostin notes, "[t]heories of democracy help to explain the role of government in matters of population health. People form governments for their common defence, security, and welfare. The first thing that public officials owe to their constituents is protection against natural and man-made hazards. Public health is a classic case of a general communal provision because public funds are expended to benefit all or most of the population without any specific distribution to individuals" (Gostin, "Law and Ethics", *supra*

For Gostin, a key characteristic of public health law is the population-based perspective. Public health law is concerned with promoting and protecting the health of the population. He nevertheless recognizes that separating individual and public health interventions is a difficult task. This is a consequence of the "direct relationship … between the health of each individual and the health of the community at large."[95] Nevertheless, population-focused initiatives can be differentiated from individual (and often bio-medical) initiatives: public health benefits the people. This focus, he argues, is not simply grounded in theory but also in the methods of scientific inquiry utilized in public health research.[96] Public health emphasizes cooperation and mutually shared responsibilities. This emphasis "reinforces that people form political communities precisely because the collective entity can best protect and promote the population's health."[97]

Rothstein is critical of a 'population health as public health' perspective.[98] With an ultimate goal of reducing disease and illness among

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note 11 at 11).

[94] Gostin, *Public Health Law*, *supra* note 3 at 5. Gostin notes: "[a] characteristic form of 'public' or state action occurs when a democratically elected government exercises powers or duties to protect or promote the population's health" (*ibid*.).

[95] Gostin, "Public Health Law in a New Century – Part I", *supra* note 80 at 2839.

[96] *Ibid*. Gostin notes: "The analytical methods and objectives of the primary sciences of public health of epidemiology and biostatistics are directed toward understanding risk, injury, and disease within populations. Epidemiology, literally translated from the Greek, is the study (logos) of what is among (epi) the people (demos). Epidemiology examines the frequencies and distributions of disease in the population" (*ibid.*). Gostin & Gostin argue that public health is "based on science and the scientific method" which "may be the best way to arrive at the 'right' answer about health and safety because it is the only generally recognized method that objectively evaluates health behaviours and interventions" (*supra* note 90 at 218).

[97] Gostin, "Public Health Law in a New Century – Part I", *supra* note 80 at 2839.

[98] In his paper, Rothstein differentiates between three approaches to public health—human rights as public health, population health as public health and government intervention as public health—and advocates for the latter perspective, see Rothstein, *supra* note 18.

the entire population[99] he contends that this perspective will embrace more general measures to "improve access to health care" and "prevent injury and illness and reduce morbidity and mortality."[100] He is critical of this definition for being vague and failing to identify the primary objective of public health. Additionally, "it does not explicitly state that public health is concerned with the health of the population rather than individuals."[101] Rothstein identifies three problems with this perspective. First, it is within the province of both the public and private sectors. This is problematic, according to Rothstein, as "[w]ith such a broach approach, there is a risk that the urgency of public health will become diluted, and the public will have an increasingly difficult time in distinguishing public health from public relations."[102] Second, he notes a failure to clearly demarcate between individual and public health. Finally, in contrast to traditional measures (i.e., the containment of infectious disease), there is no justification in a population health perspective for coercive actions on the part of government; failure to undertake health

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[99] As Magnusson observes, "[t]he defining feature of 'population health' approaches to public health is the priority given to 'upstream' socioeconomic and cultural factors over policies targeting individual risk factors and high-risk groups" (*supra* note 7 at 574).
[100] Rothstein, *supra* note 18 at 145.
[101] *Ibid*. Magnusson disagrees, suggesting population health approaches do not simply target individuals or groups with high risk factors but addresses the population as a whole. As he notes, "[a] population health approach … directs policy attention to features of the social and physical environment that affect whole populations and 'shift entire risk factor distributions at the population level not simply the causes of cases at the individual level'" (*supra* note 7 at 575).
[102] Rothstein, *supra* note 18 at 145. There is recognition among many public health scholars, however, that, in light of the fact that health is influenced by numerous stakeholders, that each plays a significant role in public health. "The major stakeholders in society powerfully influence health, including business … employers … academia … the media … and civil society …" (Bennett *et al*., *supra* note 25 at 207). "Various third parties also have a role in the delivery of public health. These may be medical institutions, charities, businesses, local authorities, schools and so on" (Calman, *supra* note 41 at e8).

measures does not jeopardize the health of others.[103] Thus, according to Rothstein, this perspective is "ill-defined, with diverse actors pursuing widely divergent strategies to deal with the same health problems, tackling health problems of varying severity, and often pursuing their own agendas with little coordination or accountability."[104]

Not all proponents of public health are as concerned as Rosthstein with strictly differentiating between individuals and the public. For some, the individual is the proper focus of public health. As James Childress and colleagues note, "[a]lthough public health is directed to the health of populations, the indices of population health, of course, include an aggregation of the health of individuals."[105] Similarly, Linda Johnson contends the individual is the focus of public health regulation and

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[103] This, of course, is a contested statement. Consider, for example, the deleterious health impact of second–hand smoke, which is considered a known human carcinogen. Numerous studies have documented the positive health impact of smoking bylaws that prohibit smoking in workplaces on the health of workers (see: Sean Semple *et al*., "Bar Workers' Health and Environmental Tobacco Smoke Exposure (BHETSE): Symptomatic Improvements in Bar Staff Following Smoke-Free Legislation in Scotland" (2009) 66 Occupation and Environmental Medicine 339).

[104] Rothstein, *supra* note 18 at 146. What is curious is that Rothstein does not engage the discipline of population health. Population health has been defined as: "the health of a population as measured by health status indicators and as influenced by social, economic and physical environments, personal health practices, individual capacity and coping skills, human biology, early childhood development, and health services" (Health Canada, *The Population Health Template: Key Elements and Actions that Define a Population Health Approach* (Ottawa: Health Canada, 2001), online: Population and Public Health Branch <http://www.phac-aspc.gc.ca/ph-sp/phdd/pdf/discussion_paper.pdf> at 2). Integral to a population health perspective is a focus on the determinants of health. According to Health Canada, "[t]he overarching goals of a population health approach are to maintain and improve the health status of the entire population and to reduce inequities in health status between population groups" (*ibid*.). Rothstein's conception of population health, and therefore his criticisms, does not accord with this understanding of population health.

[105] Childress *et al*., *supra* note 87 at 175. It has also be noted that "[t]he core method of public health (a population-oriented discipline) is actually mainly focused on researching causes of disease in individuals and evaluating interventions at the individual-level rather than exploring the value of population-based interventions" (Heller, Heller & Pattison, "Part I", *supra* note 83 at 63).

surveillance.[106] According to Johnson, traditional public health, which aimed to protect and prevent ill health, was based on images of the individual and of hazards to health.[107] She argues, "the individual has remained the focus of public health, but has been reconfigured and not subsumed to the interests of 'the community'."[108] She contends that public health is not based on a Utopian view of society that aims to implement a communitarian model nor will it be brought about by a global free market where autonomous individuals are subject to only a minimal amount of regulation.[109] Rather, "[t]he tension between the interests of the individual and those of the community is ongoing within the health area and is central in the development of the 'new' public health."[110] Johnson identifies a new public health as being global in nature and thus places considerable importance on human rights.[111] The individual remains the focus of public health regulation.[112]

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[106] Martin & Johnson, "Introduction", *supra* note 30 at xxxviii.
[107] Linda Johnson, "Defining Public Health" in Martin & Johnson, *supra* note 30, 1 at 32 [Johnson]. It should be noted that according to Johnson these images are being reconstructed.
[108] *Ibid.* at 17.
[109] *Ibid.* at 31.
[110] *Ibid.* at 17.
[111] Johnson notes, "[a]s the individual, although reconstructed, remains the effective social unit in Western counties, human rights will necessarily be important in a regime of surveillance" (*ibid. at* 32).
[112] Johnson acknowledges that the idea of the individual is more complex than originally contemplated by Kant (*ibid.* at 31), who plays a key role in her earlier analysis and critique of individualism (see Johnson, *ibid.* at 13-17 for a more detailed discussion). Tonsor, in his discussion of collectivism, reminds us that ancient law knew next to nothing of individuals: "It is concerned not with individuals, but with families, not with single human beings but with groups" (Stephen J. Tonsor, "The Conservative Origins of Collectivism" in Cunnigham, *supra* note 28, 224 at 238. Tonsor is quoting Sir Henry James Summer Maine, *Ancient Law, Its connection with the Early History of Society and Its Relation to Modern Ideas* (London: Murray, 1861) at 214, who in turn cites Blackstone).

Although he does not frame it as population health, Hall shares Rothstein's concern with the potentially boundless purview of a public health that aims to ameliorate social ills. "The danger … is that, having gained insights from an epidemiological perspective of medical and social issues, public health officials will feel compelled to use the (*sic*) their vast legal authority to try to solve problems that are not collective action problems."[113] Such a perspective allows for any widespread health problem to be recognized as a matter of public health. "Following seat belts and tobacco, public health officials are turning their attention to obesity. Following this, who knows what?"[114]

Hall contends that an overly broad conception of public health has resulted from the fusion of public health law with public health analysis. He differentiates between public health analysis and public health authority: "Public health officials are charged with two broad responsibilities: (1) advancing understanding and knowledge of the causes and patterns of health conditions in society; and (2) eliminating threats to public health. The first is the domain of public health as a scientific discipline. The second is the domain of public health law."[115] He argues that public health law is more limited than its counterpart, as it is concerned with "enforcing government efforts to promote health … public authority is plenary and sets restraints on this authority only if it invades fundamental interests or is demonstrably

[113] Hall, *supra* note 51 at S205.
[114] *Ibid.* at S206.
[115] *Ibid.* at S202.

unbalanced or excessive."[116] Hall provocatively notes the danger of a more expansive understanding: "Poor parenting has been pointed to as a cause of life-long health problems"[117] and that "the very economic and political fabric of society can be viewed as a health problem."[118] However, Hall does not justify his contention that these are not examples where collective action is needed. After all, the fabric of society is hardly an issue that can be dealt with by self-regarding individuals. Notwithstanding this, Hall's concern that public health officials may overstep their proper bounds is germane, and the distinction between public health law and public health analysis may warrant further consideration.[119]

To be sure, there is considerable controversy over how understandings of public health have resulted in shifting scope and application. Although he embraces a more expansive view, Gostin is nevertheless aware of the dangers associated with broad definitions of public health. A limitless scope may prove to be counterproductive.

> First, by defining it so widely, the field lacks precision. Public health becomes an all-embracing enterprise bonded only by

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[116] *Ibid.* More common than differentiations between public health law and public health analysis are attempts to differentiate public health law from medical law or health law generally. Hall makes the differentiation between public health law and public health analysis/diagnosis/science (he uses all three terms) because the latter is far more limited (*ibid*.). He argues that the differentiation matters given that "law operates through categories, and classification has huge effects on how legal issues are analyzed" (*ibid.*).
[117] *Ibid.* at S206.
[118] *Ibid.*
[119] It is beyond the scope of this paper to address this issue here. For the purposes of the paper, it is recognized that there is necessarily a distinction between public health analysis, which is done by public health scientists in an effort to more fully understand the determinants of health, disease, and health behaviours. Although research topics are broad and varied within public health, it is unlikely that anyone would ever claim that every null hypothesis that gets rejected should become a public health policy, because policy depends on more than whether or not one study shows an association between "X" and health.

> the common value of societal well-being. Second, by adopting such a broad array of behavioral, social, physical, and environmental interventions, it lacks a discrete expertise …. Finally, by espousing controversial issues of economic redistribution and social restructuring, the field becomes highly political.[120]

Others are less concerned with the breadth of scope, recognizing that public health law will simply expand to meet the needs of society.[121] It is irrefutable, however, that public health's scope has expanded. Objections that public health is potentially boundless are more commonly raised by those who advocate a narrow understanding of public health, but even advocates for an expansive understanding of public health law recognize the need to circumscribe the scope of public health.[122] The domain of public health has evolved from sanitation and communicable diseases, which are nearly universally praised and accepted arenas for public health interventions[123], to

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[120] Gostin, "Public Health, Ethics, and Human Rights", *supra* note 76 at 123. Magnusson notes that public health becomes "irreducibly political" when it adopts a population health approach or seeks to "employ the insights of social epidemiology" (*supra* note 7 at 575). There is a current trend in public health, social epidemiology and especially health promotion to be explicit about power differentials, and political and economic forces in health. In other words, although Gostin may see this last point as a potential failure of a broad definition, many in the public health field would say that it is necessary and laudable to locate research within the political spectrum and to contextualize epidemiological findings within a political and social context.

[121] Frank P. Grad, *The Public Health Law Manual*, 3d ed. (Washington, D.C.: American Public Health Association, 2005) at 10 [Grad]. Also see Hunter, who, in considering how the boundaries of a public health system or of public health law are defined, notes: "If public health law consists of the legal doctrine most fundamental to the operation of the public health system, then its scope will change as the system itself changes, becoming reconfigured as emergency and security law and expanding into the private sector" (*supra* note 6 at 118-119).

[122] This is an observation that is more generally made with respect to the utilization of law for public health. As Martin & Coker note, "[l]aw which is jurisprudentially flawed is bad law, and bad law can cause more harm than having no law at all" (*supra* note 10 at 86-87). Thus, despite the potential law has for the benefit of public health, improper use will be detrimental; "law that contravenes societal conceptions of ethics and human rights will not benefit public health" (Martin, "Law as a Tool", *supra* note 44 at 852).

[123] For example, although Epstein advocates for limiting public health law, he acknowledges that "only a knave would protest in principle against the use of public funds, raised by taxes,

"lifestyle" issues, such as tobacco control and obesity. "Some people have argued that any government intervention in these areas is 'nanny statist'—an unnecessary intrusion into people's lives and what they do, eat and drink."[124] This is not a new debate, however. Early public health interventions, some of which lead to the jurisprudence responsible for the early articulations of public health, were not immune to objections of unnecessary interference.[125] As Karen Jochelson observes, "[t]ensions between those favouring an interventionist state to promote the public interest and libertarians preferring a minimal state to ensure individual freedom, weave through the history of public health."[126] Jochelson divides the debate between interventionists and libertarians. "For interventionists, governments promote freedom for individuals by creating opportunities and try to even out inequities in society. For libertarians, minimal government is the best way to protect individual freedom, which is about not being interfered with by others."[127] While this dichotomization may be somewhat crass and simplistic, which Jochelson recognizes, it nevertheless captures the

to support a system of public drainage and sewers, including the London rivers and waterworks involved in Snow's cholera case" (Epstein, "Let the Shoemaker", *supra* note 40 at S144).

[124] Karen Jochelson, *Nanny or Steward? The Role of Government in Public Health* (London: King's Fund, 2005) at 1 [Jochelson].

[125] Perhaps the most infamous example would be that of Jacobson, who in the early 1900s challenged the power of the state to compel him to be vaccinated for smallpox. Jacobson claimed that his family had a history of severe reactions and had himself reacted to his first vaccination. He thus thought it unwise to be vaccinated a second time. The court permitted the state to continue with the program, in part due to the fact that Jacobson could opt for a $5 fine, *Jacobson v. Massachusetts,* 197 U.S. 11 (1905) [*Jacobson*].

[126] Jochelson, *supra* note 124 at 7.

[127] *Ibid.* at 4.

vociferous argument over the proper domain of public health law, including who is included in the public.

In this section, I have outlined the complexity in defining the "public" of public health law. Contested themes include: viewing the public as a population or as a collection of individuals through both scientific investigation and potential public health interventions; the importance of distinguishing between public health analysis and public health action; and, the tension between interventionist and libertarian conceptions of freedom as it relates to public health. Additionally, it was demonstrated that public refers both to the party responsible for public health interventions (generally understood to be the state) and the recipients of said interventions (the entire population).

B. HEALTH

Having identified what "public" encompasses, the next task is to examine the contentious concept "health". Roger Magnusson contends, "health is the hardest area of government: rarely is it free from controversy."[128] How one understands health will clearly influence how he or she will understand public health law. Arguments that public health law is too broad typically concern health[129], whereas others have argued that a

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[128] Magnusson, *supra* note 7 at 571.

[129] Magnusson, for example, acknowledges that there is a propensity to "turn 'life, the universe and everything' into a sub-division of health" (*ibid.* at 574). There are good reasons for health being understood in a comprehensive way. Magnusson refers to what he describes as a "dramatic example" of the consequences of bad health that is provided by Malcolm Gladwell. Although Gladwell is writing in the context of people without health insurance, it

narrow understanding of health has resulted in public health missing several important opportunities. For example, "[e]vents such as 9/11, the anthrax attacks, SARS, Hurricane Katrina, fears of pandemic flu as well as the increase in chronic diseases underscore the need to build the evidence for and the application of legal and regulatory solutions at the federal, state and local levels."[130] A widely accepted definition of health is the one that has been used by the World Health Organization (WHO) since 1948: health is "a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity."[131] A more recent articulation that is widely used is the Ottawa Charter: health is "a resource for everyday life, not the objective of living. Health is a positive concept emphasizing social and personal resources, as well as physical capacities."[132]

An important aspect of "public health" that differentiates it from the Ottawa Charter or the WHO is public health's concern with the health of

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illustrates the importance of health: "People without health insurance have bad teeth because, if you're paying for everything out of your own pocket, going to the dentist for a checkup seems like a luxury. It isn't of course. The loss of teeth makes eating fresh fruits and vegetables difficult, and a diet heavy in soft, processed foods exacerbates more serious health problems, like diabetes. The pain of tooth decay leads many people to use alcohol as a slave. And those struggling to get ahead in the job market quickly find that the unsightliness of bad teeth, and the self-consciousness that results, can become a major barrier" (Malcolm Gladwell, "The Moral-Hazard Myth: The Bad Idea Behind Our Failed Health-care System" *The New Yorker* (29 August 2005)). The situation clearly begins to snowball. Hence, the observation by Bennett *et al*. that "[t]he conditions for the public's health are broad, spanning multiple spheres—informational … environmental … built … and socioeconomic. Public health governance entails direct regulation of businesses … and of individuals …" (*supra* note 25 at 573).

[130] Michelle A. Larkin & Angela K. McGowan, "Introduction: Strengthening Public Health" (2008) 36:3(Supp) J.L. Med. & Ethics 4 at 4.

[131] World Health Organization, *WHO Definition of Health*, online: <http://www.who.int/about/defintion/en/print.html>.

[132] International Conference on Health Promotion, *Ottawa Charter for Health Promotion* (1986), online: <http://www.who.int/hpr/NPH/docs/ottawa_charter_hp.pdf>.

populations, not individuals.[133] It aims to set a standard of health that can be reached by a large proportions of the population, not simply ensuring the best possible health for a few.[134] It is the nature of services provided by public health law that distinguishes it from health care. Health care has an individual, biomedical outlook whereas public health is concerned with "strategies to identify health risks and improve behavioral, environmental, social, and economic conditions that affect the health of wider populations."[135] Although there is no clear boundary between the two – "the dividing line is not neat"[136] – they have distinct methodologies, practices and services. According to Gostin, essential public health services: "monitor community health status and investigate health risks; inform, educate, and empower people about health; mobilize community partnerships; enforce laws and regulations; link people to needed personal health services; and

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[133] As Brownsword has noted, "although the health of a population might be disaggregated so that it is seen as the health of so many particular individuals that make up that population, it is the composite that is the focus for public health …. We might speak about both the state of the public's health and the conditions that contribute to the health of the public" (*supra* note 20 at 43).

[134] Gostin, "Public Health, Ethics, and Human Rights", *supra* note 76 at 122. As Coker & Martin observe, "public health takes a collective rather than individualistic approach to health, and its focus lies not only on the provision of health services to persons who are suffering from illness and disease but also, critically, on the prevention of risk of health to the population as a whole" (*supra* note 9 at 4).

[135] Gostin, *Public Health Law*, *supra* note 3 at 17-18. Novak presents an interesting argument, suggesting that the public health's role in American public law has been obscured by "the modern liberal tendency to separate medicine (like the market and civil society) from the state" (William Novak, *The People's Welfare: Law & Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996) at 194 [Novak, *The People's Welfare*]). Fidler similarly notes, "the attention given to medical law and health-care law often obscures the study of public health law" (*supra* note 77 at 151).

[136] Gostin, *Public Health Law*, *supra* note 3 at 18. Public health has been described as "at best, a subsidiary concern" given that "care of the sick" remains as "distinct from promotion of the health of the population" (Syrett & Quick, *supra* note 9 at 223). Dickens notes that "Gostin draws is between the 'virtually bottomless purse for treating illness' by medical means and the paucity of public provisions to prevent it or to ensure the conditions in which people can be healthy" (*supra* note 29 at 168).

pursue innovative solutions to health problems."[137] Considerable latitude is granted to public health by Gostin in light of the importance he attributes to health:

> Without minimum levels of health, populations cannot fully engage in the social interactions of a community, participate in the political process, generate wealth and assure economic prosperity, and provide for common defense and security. Public health, then, becomes a transcendent value because a fundamental level of human functioning is a prerequisite for engaging in activities that are critical to communities—social, political, and economic.[138]

There is a clear link for Gostin between the health of individuals and the health of the community at large.[139] In light of this, Gostin describes public health as a "transcendent value"[140] and as "a basic right."[141] According to some, the use of the word community is intentional, as 'community' describes "the value of belonging to a society in which each person's welfare, and that of the whole community, matters to everyone."[142] Moreover, there is

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[137] Gostin, "Public Health Law in a New Century – Part I", *supra* note 80 at 2840.
[138] Gostin *Public Health Law*, *supra* note 3 at 8. Health is necessary, Gostin argues, "for much of the joy, creativity, and productivity that a person derives from life" ("Legal Foundations", *supra* note 11 at 9). Magnusson similarly observes, "[a]dequate levels of health at the population level are a pre-requisite to a functioning society, and these levels cannot be achieved through individual efforts or private markets: collective actions are required" (*supra* note 7 at 573).
[139] *Public Health Law*, *supra* note 3 at 12. He has also described health as "an intrinsic and instrumental value for individuals, communities and entire nations" ("Law and Ethics", *supra* note 11 at 10-11).
[140] Gostin, "Public Health Law in a New Century – Part I", *supra* note 80 at 2838. Elsewhere Gostin argues that population health is a transcendent value "because a certain level of human functioning is a prerequisite for engaging in activities that are critical to the public's welfare – social, political, and economic. Health has an intrinsic and instrumental value for individuals, communities, and entire nations" ("Legal Foundations", *supra* note 11 at 9). On numerous occasions Gostin refers to health as "foundationally important because of its intrinsic value and singular contribution to human functioning" (*ibid. note* 11 at 9; see also: Gostin, "Law and Ethics", *supra* note 11 at 10; and Gostin & Gostin, *supra* note 90 at 218).
[141] Gostin, "Legal Foundations", *supra* note 11 at 9.
[142] Calman, *supra* note 41 at e7. Calman here is referring specifically to use of community by the Nuffield Council on Bioethics (Nuffield Council on Bioethics, *Public Health: Ethical Issues*

evidence to suggest that with increased social cohesion there is an increase in a society's health. Thus, "classification of the state of a society's health is not neutral; health is considered a universal good, and ill health is perceived as threatening to the stability and productivity of a society."[143]

Not all support an extensive understanding of health. Recall Hall's skepticism with respect to the wide purview of social issues impacting health. Hall identifies three distinct causes of poor health: pathogenic, behavioral and ecological.[144] Pathogenic health problems are "caused by a specific, identifiable pathogen or discrete causal agent"; behavioral health problems are associated with "chronic conditions that have multiple, complex, or unknown causal agents"; and ecological health problems are derived from the "broader social, economic, environmental, and political milieu."[145] Public health has typically been thought to envelop these three main perspectives on health (sometimes referred to as: biomedical,

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(London: Nuffield Council on Bioethics, 2007). Martin notes, "[a] community is made up of individuals, but the resulting society is greater than the sum of its parts. While individual beliefs and behaviours feed into the formulation of the community, the community also feeds back to individuals to influence the ways in which members of the community behave, and the ways in which they judge acceptability of behaviour" ("Law as a Tool", *supra* note 44 at 849). Public health relies on the organized efforts of society for the protection and promotion of health, and, as Martin observes, "such organized efforts presuppose some commonality of belief, custom and understandings" (*ibid.*). Siegel points out that this is why "Beauchamp affirms public health paternalism and cautions against embracing Mill's individualism in the context of public health: 'By ignoring the communitarian language of public health, we risk shrinking its claims. We also risk undermining the sense in which health and safety are a signal commitment of the common life'" (Siegel, *supra* note 78 at 365, citing from D. Beauchamp, "Community: The Neglected Tradition of Public Health" in Dan E. Beauchamp & Bonnie Steinbock, eds., *New Ethics for the Public's Health* (New York: Oxford University Press, 1999) 57). It is important, however, to not forget that community is an amorphous concept, as Weinrib observes, "more easily proclaimed than articulated" (Ernest J. Weinrib, "Liberty, Community, and Corrective Justice" (1988) 1 Can. J.L. & Jur. 3 at 5 [Weinrib, "Liberty, Community, and Corrective Justice"]).

[143] Martin, "Law as a Tool", *supra* note 44 at 850.

[144] Hall, *supra* note 51 at S206.

[145] *Ibid.*

behavioral, and socio-environmental).[146] A biomedical perspective on health focuses on the 'normal physical state'—specifically, the absence of physical or mental disability, pain or disease, health being a state free of physiological or psychological deviation from the norm. A behavioral definition of health understands health as energy, functional ability and a healthy lifestyle and emphasizes the impact of lifestyle choices (e.g., diet, smoking, and physical activity habits) on health status. Finally, a socio-environmental perspective on health takes into account the social and environmental causes of health, focusing on psychosocial risk factors and socio-environmental risk conditions instead of on high-risk individuals. All three conceptions of health have a role in maintaining the public's health, given that they all help to assure conditions for people to be healthy.

Hall conceives of public health primarily from pathogenic view, contending that a broader view will "misread the history of public health and misunderstand the legal parameters under which public health authority is conferred."[147] According to Hall, early public health interventions operated from a pathogenic model, targeting specific threats. These threats presented a "clear and present danger"[148]—an important distinction to Hall. Only conditions of clear and present danger justify the use of coercive measures. Accordingly, "[i]n classic public health situations, it is possible to have

[146] See: Glenn Laverack, *Health Promotion Practice: Power and Empowerment* (Thousand Oaks: Sage Publications, 2004).
[147] Hall, *supra* note 51 at S207.
[148] *Ibid*.

scientific understanding of causes and cures before authorities intervene."[149] This is juxtaposed with more expansive models of health, where "things are often more unsettled."[150] Causation needs to be clear and the effectiveness of the intervention must be beyond dispute. While Hall commends public health officials for identifying broader, social disparities as having an impact on health status, he nevertheless condemns how social issues viewed as public health threats have resulted in the "highly paternalistic, absolutist, ends-oriented thinking [commonly] associated with public health law."[151] Hence he concludes that public health oversteps its bounds when it attempts to address broad economic and political conditions.[152]

Richard Epstein also adheres to a pathogenic view. He identifies communicable diseases and quarantine as appropriate arenas for the use of state power given that "everyone is a net gainer from behind the veil of

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[149] *Ibid.* at S208. Interestingly, although Epstein frames public health in a similar fashion to Hall, defending what he deems the 'old' public health and situating it largely in matters of communicable diseases, he observes that "the risks of communicable disease are greatest when the threat is unknown .... But the modern view on this subject so magnifies the constitutional rights of intimate association that the public health measures can only be justified by clear showing of disease transmission—by which time it may well be too late" (Richard A. Epstein, "In Defense of the 'Old' Public Health: The Legal Framework for the Regulation of Public Health" (2003-2004) 69 Brook. L. Rev. 1421 at 1459 [Epstein, "In Defense of the 'Old' Public Health"]).

[150] Hall, *supra* note 51 at S208.

[151] *Ibid.*

[152] It is worth noting that despite advances in treatments for pathogens, poor health has remained and the social gradient in health has persisted. Data from the Canadian Institute for Advanced Research indicate that a full 75% of health impact on population health results from the social and economic determinants of health, with biological and genetic factors comprising 15% of the impact and the physical environment comprising 10% (Health Canada, *Health Status: CIAR Estimated Health Impact of Determinants of Health on Population Health Status* (1997), online: <http://www.slidefinder.net/H/Health_Sant_Canada/Canada/1423074/p3>. See also: Robert G. Evans, Morris L. Barer & T.R. Marmor, eds., *Why Are Some People Healthy and Others Not? The Determinants of Health of Populations* (New York: Aldine DeGryter, 1994) [Evans, Barer & Marmor]. Therefore, a purely pathogenic view is a very superficial understanding of population health.

ignorance of the uniform application of quarantine rules."[153] He contends that the old public health has been eclipsed by the new, which "extends regulation into inappropriate areas."[154] Unlike the old model, the new approach makes every social issue relevant for public health. Epstein prefers the old approach where governments chose more focused targets for interventions and demonstrated a greater appreciation for the complex systematic effects—which is to say, "the profound interactions between public health and private wealth creation."[155] This fact leads him to make some bold assertions about public health law, which are exemplified by his discussion of infant mortality rates. He is critical of those that note that the ratio of infant mortality rates between the least and most fortunate has not depreciated in the last 100 years: "[T]o concentrate on income inequalities is to overlook the most mind-blowing feature of the exercise, which is the *overall* decline in infant mortality for all groups, by close to 97 percent!"[156] The fact that the least privileged in society are ten percent less likely to suffer from infant mortality than the most privileged in society a century ago leads Epstein to the absurd proclamation, "[i]f income inequality has produced these overall saving, then relative deprivation becomes a cause of celebration rather than dismay."[157]

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[153] Epstein, "Let the Shoemaker", *supra* note 40 at S145.
[154] *Ibid.* at S139.
[155] *Ibid.* at S158.
[156] *Ibid.* at S157, original emphasis.
[157] *Ibid.*

Of course, Epstein's view is predicated on the view that it is "clear that the gains in longevity [of life] are not all attributable to public health interventions but to the normal progress of technology."[158] In fact, Epstein contends, "the restriction of … principles of freedom of contract has strong

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[158] *Ibid. at* S155. Although technology undoubtedly has played an important role, not all grant it the same role as Epstein. According to Moulton *et al*. gains in longevity in life can be attributed to law. They note: "[i]t is safe to say that the 30-year gain in the average U.S. lifespan from 1900 to 1999 would have been impossible without the critical contribution made by laws" (*supra* note 10 at 141). Indeed, one could argue that while technology may have provided an initial increase in health, more recently technological advances have contributed to decreases. Epstein would seem to agree, as he observes "[i]t is worth nothing that life expectancy increased more rapidly in the first half of the past century than the second" (Epstein, "In Defense of the 'Old' Public Health", *supra* note 149 at 1464). Admittedly, Epstein here is not attributing the decrease in the latter part of the century to technological advances. Any early increase he attributes to have likely resulted from "some combination of public health measures and improved medical treatment. But better roads and cars, safer workplaces, and better and cheaper food also count in the overall figures" (*ibid.*). Decreases in gains he attributes to the new public health: "my own deep suspicion is that the program championed by new public health is likely to reduce overall life expectancy" (*ibid.*). Of course, Epstein's excluding 'lifestyle' diseases as part of a robust public health regime is germane. The technological advances that have contributed to diseases, such as obesity, are well documented—including technology's role in sedentary lifestyles (see: Amy Hillier, "Childhood Overweight and the Built Environment: Making Technology Part of the Solution Rather than Part of the Problem" (2008) 615 Annals of the American Academy of Political and Social Science 56) and food production (see: Marion Nestle, *Food Politics: How the Food Industry Influences Nutrition and Health* (Berkeley: University of California Press, 2003). Although it has not been the focus of significant research at this point, technology no doubt has had an impact on food affordability (an obvious example is the decreased cost of imported foods as a result of advances in transportation and the increased access to inexpensive processed foods) and built environments (the role automobiles, computers and other technological advances have on built environments is clear), both of which impact obesity. Technology's role in public health, and impact on life expectancy, is obviously far from uncontested. What is clear is that how one frames or conceives of public health will influence how they understand technology's role. This is important to recognize, particularly when critiquing Epstein. As will be shown, Epstein attributes gains in public health to gains in private wealth, which in turn corresponds to technological advances. For example, he argues "the restrictions of (19th-century) principles of freedom of contract has strong adverse effects on overall health, by reducing the development and supply of needed vaccines and other pharmaceuticals that will be brought to market" (Epstein, "Let the Shoemaker", *supra* note 40 at S156). Epstein seems willing, even eager, to blame restrictions on the free market for what he deems public health failures; there is a resistance, even outright dismissal of the idea that free markets have contributed to public health problems, such as obesity. In fact, Magnusson notes that Epstein suggests that government has invited the costs of new public health problems "by offering publicly funded services, by refusing to charge premiums that reflect individual risk status, or by failing to introduce disincentives to harmful lifestyle choices" (*supra* note 7 at 573).

adverse effects on overall health."[159] Social disparities fuel improvements in health.[160] Status differentials should be tolerated "because of the benefits that they generate for all people, no matter where they sit in the overall distribution."[161] That is to say, "the rich are prepared to pay handsomely for new technologies that become available to poorer individuals within the next generation at far lower prices."[162] Addressing social inequalities will have the adverse impact of eradicating disposable income to fund technologies that will result in improvements to health.[163] Epstein questions whether egalitarian institutions would have been capable of the massive improvements to health that he attributes to social inequalities. Thus he cautions against slowing down the engine, "for the price of static equality is a slow-down in dynamic progress."[164] Put another way: "[b]y stressing the

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[159] Epstein, "Let the Shoemaker", *supra* note 40 at S156.
[160] There is a vast body of literature on point that would suggest that this is not the case or, at a minimum, that the reality is far more complex. For example, see: Michael G. Marmot, "Understanding Social Inequalities in Health" (2003) 46:3(Supp) Perspectives in Biology and Medicine S9; Richard Eckersley, Jane Dixon & Bob Douglas, eds., *The Social Origins of Health and Well-Being* (Cambridge: Cambridge University Press, 2001); R. Fuhrer *et al*., "Socioeconomic Position, Health and Possible Explanations: A Tale of Two Cohorts" (2002) 92 American Journal of Public Health 1290; L. Hattersley, "Trends in Life Expectancy by Social Class: An Update" (1999) 2 Health Statistics Quarterly 16; Michael Marmot, "The Influence of Income on Health: Views of an Epidemiologist" (2002) 21 Health Affairs 31; Richard G. Wilkinson, *Unhealthy Societies: The Afflictions of Inequality* (London: Routledge, 1996); and, Acheson, *infra* note 181.
[161] Epstein, "Let the Shoemaker", *supra* note 40 at S157. Epstein does not address, however, the abundance of research that would suggest the poor still do not have access to the most basic of necessities for health, see Marmot, *ibid.*
[162] Epstein, "Let the Shoemaker", *supra* note 40 at S157.
[163] *Ibid*. Epstein asks, "[w]ould one prefer to live in 1900 if the infant mortality had been a uniform 175—or even 94—per 1,000, or in 2000, with a range from 3 to 8?" (*ibid.*).
[164] *Ibid.* at S157. Magnusson observes that economic interests were one factor that have historically been used to resist public health efforts. "To the extent that public health reforms did threaten local government autonomy, states' rights, or powerful economic interests, they were resisted: a permanent public health infrastructure developed only slowly" (Magnusson, *supra* note 7 at 572). The rationale for this resistance was not to promote public health, as Epstein would suggest, but to promote economic interests. Any impact on health, positive or negative, was merely incidental.

importance of private wealth creation through private property and voluntary exchange, the classical model gives individuals the resources that allow them to take effective individual measures to ensure and promote their own health."[165] According to Epstein, the new public health's attempt to address social problems may in fact exacerbate public health problems. He explicitly states his suspicion that "the net effect of public health interventions, modern style, is to *reduce* overall life expectancy."[166] What is needed, instead, is the creation of private wealth. This will result in "greater public revenues, at lower tax rates, to create the social infrastructure and environmental control systems needed to contain these public health risks in the first place."[167] It is clear that Epstein is really concerned with the promotion of a particular economic ideology. Hence his assertion that "the new public health is scarcely distinguishable from a general social welfarist position."[168] It is clear that Epstein fails to understand public health—only the uninformed could write as he has.[169]

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[165] Epstein, "Let the Shoemaker"*, supra* note 40 at S157. Gostin & Gostin note that "[c]ritics of state regulation argue that individuals absorb the cost of their own illness, so there is no 'public' issue at play"(*supra* note 90 at 216). Weinrib has argued that "[s]o long as the rights of others are not violated, abstract right imposes no limits on the accumulation of property by any single person. Neither does abstract right insist that every person have sufficient property for subsistence. The point of property is not to satisfy needs or to promote well-being, but to provide an external sphere for the operation of the free will" (Ernest J. Weinrib, "Rights and Advantages in Private Law" (1989) 10 Cardozo L. Rev. 1283 at 1291 [Weinrib, "Rights and Advantages"]).
[166] Epstein, "Let the Shoemaker", *supra* note 40 at S156, original emphasis.
[167] *Ibid. at* S157.
[168] *Ibid.* at S158.
[169] This criticism of Epstein is warranted, particularly given that it is the very thing Epstein has said of John Dewey: "In the history of ideas, nothing is more dangerous than judging the effects of statutes and regulations by the idle speculation of the philosophers who support them. The blunt truth is that John Dewey did not know the first thing about labor (or indeed, any) economics. Only the uninformed could write as he did…" (Epstein, "In Defense of the 'Old' Public Health", *supra* note 149 at 1442). Epstein refers to Dewey's work as "intellectual

Epstein's understanding of public health is quite restricted. Rothstein attempts to provide a more substantial understanding of health, one that balances the private rights of individuals against public interests. While he does not restrict himself to Epstein's economic calculus, Rothstein is nevertheless concerned with what Ilan Meyer and Sharon Schwartz have referred to as the "public healthification" of social problems.[170] The public healthification of social problems involves examining social issues through the prism of health rather than within their appropriate political, social and economic contexts.[171] Meyer and Schwartz warn that public healthification may "inadvertently lead to a focus on the individual, institutionalization of the problem as a public health research problem, and valuation of the social and moral import of the problem solely by its health consequences."[172] However, unlike Rothstein, they do not advocate a retreat to a narrow perspective of public health. They recognize that the broader definition of public health is premised on a realization that public health cannot be

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pabulum" (*ibid.*). The blunt truth is that Epstein egregiously misunderstands public health. Perhaps his sin is more pernicious in that his statements are not made in ignorance, but are attempts to advance an ideological perspective—worse than pabulum, Epstein is willfully blind to the realities of public health. Gostin & Bloche are also critical of Epstein's position, responding specifically to Epstein, "Let the Shoemaker", *supra* note 40, they argue: "Epstein far outruns his empirical supply lines, and his judgments as to when markets do and don't work well rest on unstated moral assumptions" (Lawrence O. Gostin & M. Gregg Bloche, "The Politics of Public Health: A Response to Epstein" (2003) 46:3(Supp) Perspectives in Biology and Medicine S160 at S161 [Gostin & Bloche]).

[170] Ilan H. Meyer & Sharon Schwartz, "Social Issues as Public Health: Promise and Peril" (2000) 90 American Journal of Public Health 1189 at 1189 [Meyer & Schwartz].

[171] *Ibid.* at 1189. Issues that Meyer & Schwartz identify include such things as poverty, discrimination, inequality, homelessness, violence and war. Other commentators have referred to this as the epidemiological perspective. It is important to note that some commentators still recommend a "social understanding" of public health (see, for example, Heller, Heller & Pattison, "Part I", *supra* note 83 at 62). A social understanding of public health should not be confused with the public healthification of social problems.

[172] Meyer & Schwartz, *supra* note 170 at 1190.

separated from its larger socioeconomic context. Moreover, they are sympathetic with public health professionals who are discontent to sit idly by while social ills threaten the public's welfare.[173] A broad perspective is not without merit as it addresses the fundamental causes underlying many public health problems. It has been argued that public health law will only be effective if upstream causes are addressed.[174] More than essential, addressing upstream causes "has historically been the hallmark of public health interventions."[175]

Rothstein, on the other hand, views the public healthification of social issues as a compelling reason for advocating a narrow definition of public health. He cites five interrelated reasons. The first two are material for our discussion:

> First, health-related activities that trigger the coercive power of government raise the most serious and complex legal and ethical issues; only activities falling with a narrow definition of public health can justify the use of this power. Second, the narrow and more specific classification of public health activities indicates the outer limits of coercion for government programs.[176]

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[173] It should be noted that Meyer & Schwartz are concerned that "public healthification may inadvertently lead to a focus on the individual, institutionalization of the problem as a public health research problem, and valuation of the social and moral import of the problem solely by its health consequences" (*ibid.* at 1190). Nevertheless, they suggest that "[p]ublic health should develop capacities to deal in meaningful ways with social problems that warrant research" (*ibid.* at 1191).

[174] See, for example: Bruce G. Link & Jo Phelan, "Social Conditions as Fundamental Causes of Disease" (1995) Journal of Health and Social Behavior 80; Evans, Barer & Marmor, *supra* note 52; and, S. Wing, "Whose Epidemiology, Whose Health?" (1998) 28 International Journal of Health Services 241.

[175] Meyer & Schwartz, *supra* note 170 at 1189. Ironically, "upstream" causes were in fact the root of many early public health problems. Novak, for example, identifies the dead animals that were posing a problem for Chicago's water supply (*The People's Welfare, supra* note 135 at 193). Consider also the impact upstream pollution had in London.

[176] Rothstein, *supra* note 18 at 147.

Although Rothstein advocates all health-related activities, he opposes "the use of term 'public health' as an open-ended descriptor of widely divergent efforts to improve the human condition."[177] Additionally, he contends that a narrower definition of public health will help in allocating responsibilities, setting priorities and avoiding inappropriate activities.[178]

Rothstein rejects what he identifies as the 'human rights as public health' perspective. This perspective contends that health is dependent less on access to health care and focuses instead on the root causes of illness and disease.[179] Identifying the root causes of public health problems may not do anything to address the problem of poor health. "[J]ust because war, crime, hunger, poverty, illiteracy, homelessness and human rights abuses interfere with the health of individuals and populations does not mean that eliminating these conditions is part of the mission of public health."[180] Poverty is commonly identified as an underlying cause of health disparities. Wealth redistribution is recommended as a principal means for eradicating inequalities in health.[181] As Norman Daniels and colleagues contend, "the

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177 *Ibid*.

178 *Ibid.* at 147.

179 Interesting, this perspective is probably advocated by the majority of public health experts.

180 *Ibid.* at 144. As Gostin & Powers note, "[p]erhaps the deepest, most persistent critique of public health is that the field has strayed beyond its natural boundaries. Instead of focusing solely on narrow interventions for discrete injuries and diseases, the field has turned its attention to broader health determinants. It is when public health strays into the social/political sphere in matters of war, violence, poverty, and racism that critics become most upset" (*supra* note 6 at 1055).

181 See: D. Acheson (chair), *Independent Inquiry into Inequalities in Health* (London: Stationery Office, 1998) [Acheson] and Vincent Navarro, "World Health Report 2000: Responses to Murray and Frenk" (2001) 357 Lancet 1701. This is a common view among those that advocate for social justice in public health. As Gostin & Gostin note, "[a] social justice perspective requires the state to identify and ameliorate the common causes of

reduction of income disparity ought to be a priority of government concerned about addressing social inequalities in health."[182] However, as Kenneth Rothman and colleagues assert, "[e]ven if we claimed that poverty is the root cause of all disease, which it surely is not, we would hardly be close to solving the problem."[183] Rothstein affirms criticisms that an overly inclusive notion of public health is counterproductive as it lacks precisions, expands beyond its core areas of expertise and is highly politicized.[184] There is also concern that public health initiatives aimed at reducing socioeconomic inequalities will become "a smokescreen for launching a giant social justice project."[185]

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disease and premature death among the most deprived …. A central tenet of social justice is the obligation to help give everyone a fair chance to live a healthier life" (*supra* note 90 at 218).

[182] Norman Daniels, Bruce P. Kenney & Ichiro Kawachi, "Why Justice is Good for Our Health: The Social Determinants of Health Inequalities" (1999) 128 Daedalus 215.

[183] Kenneth J. Rothman, Hans-Olov Adami & Dimitrios Trichopolous, "Should the Mission of Epidemiology Include the Eradication of Poverty?" (1998) 352 Lancet 810 at 812.

[184] Rothsetin, *supra* note 18 at 145 citing Gostin, "Public Health, Ethics, and Human Rights", *supra* note 76 at 123. Rothstein credits Gostin for these observations, stating: "In a recent article, Larry Gostin describes three main reasons the all-inclusive notion of public health is not only ineffective but counterproductive" (Rothstein, *supra* note 18 at 145). This may be inaccurate on Rothstein's part. While Gostin raises the criticism, stating "[t]o many, this all-inclusive notion of public health is counterproductive" (Gostin, "Public Health, Ethics, and Human Rights", *supra* note 76 at 123), he does so without professing to adhere to this view. In fact, a review of Gostin's understanding of public health reveals that he may adhere to a broader view than the one suggested by Rothstein.

[185] Magnusson, *supra* note 7 at 575. It has been noted that the historic dream of public health is "a dream of social justice" (Gostin & Powers, *supra* note 6 at 1053, quoting from D.E. Beauchamp, "Public Health as Social Justice" in D.E. Beauchamp & B. Steinbock, eds., *New Ethics for the Public's Health* (New York: Oxford University Press, 1995) 105). Advocates for a limited state associate social justice with distributive justice, which they contend is an improper aim of the state. When you consider the following passage, which contemplates what a true commitment to social justice would mean for public health, it is not surprising that limited state advocates are opposed to a social justice perspective: "What would the policy landscape look like if it were informed by a robust conception of social justice? The political community would embrace, rather than condemn, a wide scope for the public health enterprise; value the public good as much as personal and economic liberty; view the public good as involving a commitment to the health and equal worth of all members of the community; …" (Gostin & Powers, *supra* note 6 at 1059-1060). Consider how Coyle depicts the impact social justice will have: "a sustained commitment to free enterprise and laissez-

In the alternative, some commentators have argued, "the fields of human rights and public health ethics may enjoy greater conceptual synergy than currently realized" and thus "should be seen as complementary projects, and should become core precepts of the public health enterprise."[186] It is suggested that together public health and human rights offers a "justificatory framework" for collective action needed to address the need of the global poor. "[T]he combined force of the two approaches offers to resolve some of the deficiencies of either approach taken alone."[187] A similar view was advocated by Jonathan Mann, who understood public health and human rights to be integrally connected.[188] Indeed, it has been suggested, "Mann viewed human rights as the conscience of public health."[189] Mann argued that "[t]he proposal that promoting and protecting human rights is inextricably linked to the challenge of promoting and protecting health derives in part from recognition that health and human rights are complementary approaches to the central problem of defining and advancing human well-being."[190] Gostin recognizes the importance of Mann's contribution, but holds that the reality is more complex than indicated.

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faire economic liberalism … will tend to encourage a view of law as a body of conventional rules and standards which leave as much scope to individual freedom as possible; whereas a strong political concern with issues of social justice will foster a view of law as a body of rules and principles concerned with the systematic protection of individual and group rights and interests" (Sean Coyle, "Positivism, Idealism and the Rule of Law" (2006) 26:2 Oxford J. Legal Stud. 257 at 288). The implications of Coyle's statement will become more apparent below, when discussion rule of law.

[186] Stephanie Nixon & Lisa Forman, "Exploring Synergies Between Human Rights and Public Health Ethics: A Whole Greater than the Sum of its Parts" (2008) (unpublished) 3, 14.

[187] *Ibid.* at 7.

[188] See: Gostin, "Public Health, Ethics, and Human Rights", *supra* note 76.

[189] *Ibid.* at 126.

[190] Johnathan M. Mann *et al*., "Health and Human Rights" (1994) 1 Journal of Health & Human

> Public health itself is conflicted in its mission and functions, while ethics and human rights have only begun to consider problems relevant to public health. The terminology in these fields may be used interchangeably, but there is a lack of clarity, precision, and consistency. Even the relationship among the fields are not as compatible as we have been led to believe.[191]

Rothstein's caution against "annexing human rights into the public health domain"[192] seems well-founded.

In discussing health it is important to note the longstanding history of controversy concerning the science undergirding public health and the determinants of health. Although it is beyond the scope of this paper to address this controversy in detail[193], the matter merits mention as it has been used to challenge the legitimacy not only of individual public health initiatives but of public health overall. Much of the debate concerns causation. A consistent way that public health has been challenged involves questioning the validity of the underlying science. Tobacco companies have aggressively pursued this avenue, attempting to refute any scientific links

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Rights 6 at 19.

[191] Gostin, "Public Health, Ethics, and Human Rights", *supra* note 76 at 128-129.

[192] Rothstein, *supra* note 18 at 145.

[193] See, for example: Wendy E. Wagner, "The 'Bad Science' Fiction: Reclaiming the Debate Over the Role of Science in Public Health and Environmental Regulation" (2003) 66 L. & Cont. Problems 63; Stephanie Zaza *et al.*, "Using Science-Based Guidelines to Shape Public Health Law" (2003) 31:4(Supp) J.L. Med. & E. 65; Beverly Gard, Stephanie Zaza & Stephen B. Thacker, "Connecting Public Health Law with Science" (2004) 32:4(Supp) J.L. Med. & E. 100; Thomas O. McGarity, "Our Science is Sound Science and Their Science is Junk Science: Science-Based Strategies for Avoiding Accountability and Responsibility for Risk-Producing Products and Activities" (2004) 52 U. Kan. L. Rev. 897; David Michaels, "Scientific Evidence and Public Policy" (2005) 95:S1 American Journal of Public Health S5; and Polly J. Hoppin & Richard Clapp, "Science and Regulation: Current Impasse and Future Solutions" (2005) 95:S1 American Journal of Public Health S8. These are but a few of numerous articles that deal with science, law and public health policy.

between tobacco use and disease.[194] It is accepted that challenging or discrediting the scientific basis of public health is an appropriate technique for challenging initiatives—at a minimum, critics of public health may allege that there is insufficient scientific evidence to justify interventions, particularly for the 'new' problems of public health such as genetics, food security and diseases associated with lifestyle.[195]

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[194] It is a tactic that not only proved to be successful but one that has been emulated by other industries, such as fast food and convenience food companies. See: Lissy C. Friedman, Richard A. Daynard & Christopher N. Banthin, "Learning from the Tobacco Industry about Science and Regulation: How Tobacco-Friendly Science Escapes Scrutiny in the Courtroom" (2005) 95:S1 American Journal of Public Health S16; and, Annamaria Baba *et al*., "Legislating 'Sound Science': The Role of the Tobacco Industry" (2005) 95:S1 American Journal of Public Health S20. Recently, another tactic perfected by the tobacco industry was employed by the plastics industry, who, in response to decreased use of plastic bags at grocery stores, commissioned a study to demonstrate the reusable grocery bags may pose a public health threat. Rather than undermine research showing the harms associated with the use of plastic bags, they utilized "scientific" findings to support their case. See: Environment and Plastics Industry Council, *A Microbiological Study of Resuable Bags and 'First or Single-use' Plastic Bags* (Toronto: Environment and Plastics Industry Council, 2009). The study concluded not only that reusable bags can become an active microbial habitat but that they could "pose a significant risk to the safety of the food supply if used to transport food from store to home" (*ibid.* at 7) and that "the drafting of protocols on the hygienic use of reusables should be considered a public health policy priority" (*ibid*.). Tobacco companies are notorious for sponsoring scientific studies to discredit public health research.

[195] The question of evidence is important, as Bennett *et al.* contend, "[l]aw developed without reference to a scientific evidence base, law designed to achieve an objective other than improving population health, or law passed to pander to skewed public and media perceptions of risk, can do more harm than good" (*supra* note 25 at 210). Heller, Heller & Pattison posit a new definition of public health that incorporates the use of evidence: "'Use of theory, experience and evidence derived through the population sciences to improve the health of the population, in a way that best meets the implicit and explicit needs of the community (the public)'"("Part I", *supra* note 83 at 64). In order for law to be an effective tool for public health, "it must be framed on an evidence base derived from public health law research." (Coker & Martin, *supra* note 9 at 2). Gostin & Gostin suggest that science may be the most appropriate way "to arrive at the 'right' answer about health and safety because it is the only generally recognized method that objectively evaluates health behaviours and interventions" (*supra* note 90 at 218). However, it is important to note that it is a two-way street. "The pro-market point about the need for evidence to support public health paternalism is undoubtedly correct. For each proposed intervention, public health professionals must demonstrate a reasonable likelihood of success …. Conservatives are not tolerant of interventions taken under conditions of scientific uncertainty, but they rarely offer rigorous evidence that markets do better in creating overall well-being for society" (*ibid.* at 219). J. Ruger has even gone as far as to suggest that the state may have a "moral duty to draw on the collective scientific resources a society has to offer in providing the rigorous and scientifically grounded evidence base needed to give all individuals the

When addressing perceived theoretical inadequacies, there is an unfortunate tendency for some legal scholars to offer unqualified assessments of the underlying science and theory informing public health initiatives. Consider, for example, Theodore Frank's offhand comments about obesity in the context of obesity litigation.[196] Frank offers a critical perspective on what he contends is the abuse of class action litigation. He diminishes the correlation between environment and obesity, a correlation that a broad array of scientific research has demonstrated. Consider his comments concerning the correlation between children's advertising and obesity. He argues, "[a]dvertisers cannot force consumers to purchase what they do not desire, or we would all be drinking New Coke, Crystal Pepsi, and Zima."[197] While advertisers cannot actually force consumers to purchase their products, a plethora of research has demonstrated that advertising does have an impact on purchase decisions.[198] Frank's comments on causation are also telling: "One looks forward to the suits against the University of Arkansas at Little Rock for their contribution to the obesity problem for their role in publishing this reading material."[199] The fact that Frank makes this comment in parentheses, as if to illustrate his tongue-in-cheek attitude, is

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opportunity to be healthy" ("Governing Health", *supra* note 10 at 44).

[196] Theodore H. Frank, "A Taxonomy of Obesity Litigation" (2005-2006) 28 U.A.L.R. L. Rev. 427.

[197] *Ibid.* at 438-439. Frank, anecdotally, points to his own obesity despite his parents' refusal to purchase sugared cereals, one would suspect, to undermine the correlation between unhealthful foods and rates of obesity. The absurdity of Frank's comment warrant the same criticism levied against Epstein earlier: Frank is clearly uninformed about the science of obesity.

[198] For example, see: Institute of Medicine, *Food Marketing to Children and Youth: Threat or Opportunity* (Washington, D.C.: Institute of Medicine, 2006).

[199] Frank, *supra* note 196 at 438.

indicative of a larger problem—namely, the failure to seriously engage with the underlying science. Frank is by no means the most egregious example of the perfunctory and cavalier attitude towards public health science. What makes Frank a telling example, however, is that his primary argument is compelling and cogent—that for the purpose of civil litigation the causative factors of obesity are currently insufficient to make out legal causation.[200]

While it is not uncommon for those who oppose public health interventions, particularly in controversial realms such as obesity, tobacco control and genetics, to make light of the undergirding science, a more troubling tactic may be the commonplace attempt of otherwise unqualified individuals to proffer themselves as competent arbiters of the science. Epstein falls victim to this self-aggrandizement. For example, Epstein is unequivocal about the use of the term epidemic to describe the current prevalence of diseases such as obesity and diabetes: "'epidemic' is the wrong way of talking about this issue. There are no non-communicable epidemics."[201] Epstein has elsewhere argued that "[t]he constant use of the term 'epidemic' does more to inflame than inform. Whatever the problems with obesity, it is not a communicable disease, with the fears and pandemonium that real epidemics let loose in their wake."[202] To be sure,

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[200] That said, there might be reason to believe that the test for legal causation is unjust in this situation. At a minimum, it is problematic. However, examining the implications of this argument is beyond the scope of this paper.
[201] Epstein, "Let the Shoemaker", *supra* note 40 at S154.
[202] Richard A. Epstein, "What (Not) to do About Obesity: A Moderate Aristotelian Answer" (2005) 93 Geo. L.J. 1361 at 1368.

Epstein is tapping into an ongoing debate in the scientific community.[203] Nevertheless, in making his pronouncement, he not only ignores established medical definitions of epidemic[204], but also proposes that his understanding of epidemic is more informed than such groups as the WHO. According to Epstein, the use of the term epidemic is strategic, used to justify state coercion.[205] The debate concerning science will not be resolved here, but it is important to highlight given that determining what is within the domain of public health law necessitates scientific analysis and interpretation.

In this section I have shown that one's perspective on health, be it biomedical, lifestyle, or socio-environmental, affects how one defines the "health" in public health law. It would appear that while libertarians advocate a pathogenic view of health, interventionists as well as a majority of public health experts would tend to view health from a more socio-environmental perspective. The former seems to support a particular economic ideology, that allows libertarians like Epstein to make statements about social disparities as a cause of celebration for their effect on improving access to health-promoting technologies and decry egalitarian societies for

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[203] There is considerable debate about the appropriateness of the term 'epidemic' for emerging public health issues. What is troubling about Epstein's pronouncement is that it seems to be indicative of a general trend whereby members of the legal profession deem themselves capable of expertise in all matters (Paul Campos, *Obesity Myth: Why America's Obsession with Weight is Hazardous to your Health* (New York: Penguin Books, 2004) is another example). The objection is not that these individuals are attempting to understand the science in order to render informed and appropriate legal opinions; rather, these individuals aim to supplant qualified experts on the basis of ideology.

[204] See Stedman's Medical Dictionary, which defines epidemic as either "a disease attacking many people in a community simultaneously; distinguished from endemic, since the disease is not continuously present, but has been introduced from outside" or "the extensive prevalence in a community of a disease brought from without, or a temporary increase in number of cases of an endemic disease."

[205] Epstein, "Let the Shoemaker", *supra* note 40 at S154.

their purported reduction in overall life expectancy—statements that social epidemiologists and other public health experts would find preposterous based on the vast body of literature supporting the notion that egalitarian societies are in fact a boon to population health. The public healthification of social problems was identified as problematic and merits and limitations of "human rights as public health" were described. Finally, the role of science in law as well as the co-optation of public health science by legal scholars was discussed.

C. LAW

The final concept to be examined in Part I is "law". According to Rothstein, public health is "a legal term of art … refer[ring] to specifically delineated powers, duties, rights, and responsibilities."[206] Frank Grad adopts a similar viewpoint, arguing that "[t]he field of public health is firmly grounded in law and could not long exist in the manner in which we know it today except for its sound legal basis."[207] It has been argued, "a population's health is a critical part of law's social context."[208] However, important as law is, Gostin notes that it is a "perennially neglected … tool in furthering the public's health."[209] K. Syrett and O. Quick suggest that law remains an "alien

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[206] Rothstein, *supra* note 18 at 144.
[207] Grad, *supra* note 121 at 4. It has been suggested that recent global epidemics have reinforced the importance of law for public health. Martin, for example, suggests that the severe acquired respiratory sydrome (SARS) epidemic of 2003 reinforced the importance of law (Martin, "Law as a Tool" *supra* note 44 at 846).
[208] Parmet & Robbins, *supra* note 14 at 302.
[209] Lawrence O. Gostin, "Public Health Law in a New Century – Part III: Public Health Regulation: A Systematic Evaluation" (2000) 283 Journal of the American Medical Association 3118 at 3122 [Gostin, "Public Health Law in a New Century – Part III"].

discipline" to public health.[210] Perhaps the most salient observation in public health law is the role accorded to government, and therefore law. There is widespread recognition among proponents and critics alike that public health law concerns the relationship between the state and the public. "Public health is interested in organized community efforts to improve the health of populations. Accordingly, public health law observes collective action—principally by government through federal, state, and local health agencies—and its effects on various populations."[211] A primary concern of public health law is how the government acts or, as it may be, fails to act, in response to threats to the public's health. J. Tobey observed early in the 20th century that government is "organized for the express purpose, among others, of conserving the public health and cannot divest itself of this important duty."[212] Hence public health is often described as having developed parallel to the state. "From the founding of the republic to the present day, government has assumed responsibility for community well-

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[210] Syrett & Quick, *supra* note 9 at 223. Syrett & Quick (at 223) citing Gostin, "Law in Public Health Practice" in D. Pencheon *et al.*, eds., *Oxford Handbook of Public Health Practice*, 2d ed. (Oxford: Oxford University Press, 2006): "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."
[211] Gostin, *Public Health Law*, *supra* note 3 at 14.
[212] Gostin, "Public Health Law in a New Century – Part I" *supra* note 80 at 2838, citing J.A. Tobey, "Public Health and the Police Power" (1927) 4 N.Y. Univ. L. Rev. 126. Gostin has elsewhere noted that most people recognize that government has "a duty to promote the well-being of its citizens …. [and] has the obligation to provide the best level of health for the population" (Gostin & Gostin, *supra* note 90 at 219). Other commentators have similarly noted that "[p]ublic health practice is premised on the state's responsibility to fulfill its moral mandate to protect its citizens from foreseeable threats of harm" (Coker & Martin, *supra* note 9 at 4).

being."[213] As Wendy Parmet notes, "[i]n the ancient world, the practice of public health depended first and foremost on the establishment of a legal system that could ensure the organization and use of civil authority to proscribe practices thought to threaten health and prescribe practices thought to complement it."[214] The crux of public health, according to Gostin, is a governmental entity possessing both the power and responsibility to ensure the health of the community.[215]

The power to ensure health is typically vested in the government through its enabling constitution. According to Parmet, public health is frequently discussed in the context of constitutional law. [216] She observes that public health is discussed in many of the United States Supreme Court's famous decisions[217] in conjunction with police power, "that elusive power of the states to regulate their internal affairs."[218] This fact, she argues, has been overlooked by many scholars, who have failed to see the importance of public health for constitutional law. Thus, Parmet aims to "challenge the assessment of public health's role in constitution law" and to demonstrate

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[213] Gostin, "Public Health Law in a New Century – Part I", *supra* note 80 at 2838.
[214] Wendy E. Parmet, "Introduction: The Interdependency of Law and Public Health" in Richard A. Goodman *et al.*, eds., *Law in Public Health Practice*, 2d ed. (New York: Oxford University Press, 2007) xxvii at xxxi [Parmet, "Introduction"].
[215] Gostin, "Public Health Law in a New Century – Part I", *supra* note 80 at 2839.
[216] "Public health is one of the most frequently discussed concepts in constitutional law …. In all of those cases, public health is discussed in conjunction with the police power, that elusive power of the states to regulate their internal affairs" (Parmet, "From Slaughter-House to Lochner", *supra* note 16 at 476, the cases Parmet refers to are identified below, see below, note 217). Novak similarly notes, "often overlooked and undervalued in histories and theories of modern state-formation is the crucial role of public health" (*The People's Welfare*, *supra* note 135 at 191).
[217] She refers here to the following: *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 203-206 (1824); *Slaughter-House*, 83 U.S. 36, 61-65 (1873); and, *Lochner v. New York*, 198 U.S. 45 (1905).
[218] Parmet, "From Slaughter-House to Lochner", *supra* note 16 at 476.

that public health, at one point, "had a relatively clear and widely understood meaning, and that it served, for a time, to provide some concreteness to the concept of 'police power.'"[219] Writing from an American perspective, Gostin argues that the government is empowered to protect the public through the American Constitution.[220] Gostin notes, "[n]o inquiry is more important to public health law than understanding the role of government in constitutional design."[221]

It is not unique to American constitutionalism, however. The only Canadian text dedicated to public health law contends that the legal foundation for public health in Canada resides in the Canadian constitution.[222] Other commentators agree. Rothstein contends that public health is only justified if "coercive powers are firmly grounded in constitutional provisions and enabling legislation."[223] Grad sources the authority for public health law more generally in the requirement imposed on society to obey laws. He suggests that a non-technical and descriptive meaning of law "is a set of enforceable commands based on legislative authority and authorized to be carried out by the executive, including the

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[219] *Ibid*.
[220] Gostin refers to the Preamble to the American Constitution, which states: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence [and] promote the general Welfare … do ordain and establish this Constitution." Gostin argues, "[t]he common defense and the general welfare could not have been conceived solely as physical security, for perhaps the principal threat to civil society during the generation in which the Constitution was ratified was epidemic disease" (Gostin, "Public Health Law in a New Century – Part I", *supra* note 80 at 2838).
[221] Gostin, *Public Health Law*, *supra* note 3 at 25.
[222] See: Ries, *supra* note 6.
[223] Rothstein, *supra* note 18 at 149.

administrative branches of government."[224] Nevertheless, law is ultimately grounded by Grad in constitutional authority: "[l]aw in our democratic society are the requirements which are imposed on all of us by the legislature exercising its powers to pass laws in accordance with the constitution."[225] That public health law is situated in constitutional authority is not surprising. Constitutions are conceived as safeguards. Friedrich Hayek observes that the colonists in North America regarded a fixed constitution as fundamental—"a constitution meant limited government."[226] The American constitution historically has been understood as a constitution of liberty as it did more than simply delineate power it aimed to protect individuals from arbitrary coercion.[227]

Limitations on coercion is another motif of Gostin's public health law; so integral to his conception that Gostin refers to the study of coercive power as "a staple" of public health law.[228] The use of coercion is not always necessary, as governments can promote health without resorting to use of force—education programs being an obvious example of non-coercive action.[229] However, threats are not easily ameliorated: "[a]bsent a

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[224] Grad, *supra* note 121 at 5.
[225] *Ibid*.
[226] Hayek, *The Constitution of Liberty*, *supra* note 33 at 178.
[227] *Ibid.* at 182.
[228] Gostin, "Public Health Law in a New Century – Part I", *supra* note 80 at 2841. Gostin also suggests that coercion "should be part of a thoughtful understanding of public health law" (*ibid*. at 2840).
[229] Calman observes, "[p]ublic education and information have a key role in the liberal framework, since they are non-coercive ways of brining about improvements in health. However, long-term behaviour change is a major challenge" (*supra* note 41 at e7). Public health professionals are often quick to argue that information does little to change behaviours. For a relevant example, see the discussion of the impact dietary and genetic information has on food choice in the context of nutrigenomics, see Caulfield *et al.*, *supra*

governmental authority and willingness to coerce, these threats to public health and safety could not easily be reduced."[230] As Gostin observes, "[p]rotecting and preserving community health is not possible without the constraint of a wide range of private activities. Private actors … have incentives to engage in behaviors that are personally profitable or pleasurable, but may threaten other individuals or groups."[231] An example is the sexual behaviours of individuals who, in light of their sexually transmitted infection status, pose a threat to the health of the community; or, less morally charged, the international travel of individuals who may have been exposed to a contagion. Government intervenes where it perceives risk to the public. "Governments are formed not only to attend to the general needs of its constituents, but to insist, through force of law if necessary, that individuals and businesses act in ways that do not place others at unreasonable risk of harm."[232] Gostin's understanding clearly extends considerable latitude to the state.

Rothstein advocates for a more limited understanding of public health law than Gostin[233], what he deems "the government intervention as public health perspective." This perspective "involves public officials taking appropriate measures pursuant to specific legal authority, after balancing

note 5 at 234-238.

[230] Gostin, "Public Health Law in a New Century – Part I", *supra* note 80 at 2840.

[231] *Ibid.*

[232] *Ibid.*

[233] Rothstein associates the population health as public health perspective, discussed above, with Gostin's viewpoint (*supra* note 18). Siegel has been critical for Gostin's commitment to this perspective, contending that the population perspective is problematic as it "precludes his giving due consideration to the value of individual liberty" (*supra* note 78 at 363).

private rights and public interests, to protect the health of the public."[234] Key to this perspective is the role of government, through its police power, to "invoke mandatory or coercive measures to eliminate a threat to the public's health."[235] In order to rely on coercive measures, Rothstein suggests three conditions must be met: the health of the population must be threatened; the government must have unique power or expertise to deal with the matter;in and government intervention must be the more efficient (or likely to be more efficient) action. Absent these conditions, any participation in public health interventions by individuals must be voluntary and not rely on coercive state action.[236] According to the Rothstein, "only public health officials can undertake public health actions because their coercive powers are firmly grounded in constitutional provisions and enabling legislation."[237] Rothstein is cognizant that this narrower and more restricted understanding of public health law may have an impact on priority setting. Accordingly, "top priorities should be those matters requiring mandatory interventions and therefore falling within the narrow definition of public health."[238] The government is responsible for striking a proper balance between private interests and threats to the public good. The use of coercive measures is

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[234] Rothstein, *supra* note 18 at 146.

[235] *Ibid*. Childress *et al.* note, "[g]overnment has a unique role in public health because of its responsibility, grounded in its police powers, to protect the public's health and welfare, because it alone can undertake certain interventions, such as regulation, taxation, and the expenditure of public funds, and because many, perhaps most, public health programs are public goods that cannot be optimally provided if left to individuals or small groups" (*supra* note 87 at 170).

[236] Rothstein, *supra* note 18 at 146.

[237] *Ibid.* at 149.

[238] *Ibid.* at 148.

premised on “the natural law principle of self-preservation applied on societal basis.”[239] The broad power to supersede individual liberties, however, is only accessible to the government in the face of serious threats to the public.

Some attempts to impose limitations and restrictions on public health law extend beyond legal arguments. Consider the argument presented by Epstein. Recognized as “[o]ne of the most persistent and vociferous critics of the new public health regime”[240], Epstein differentiates between old and new public health. His central thesis is that “the ‘old’ public health is superior to the new, whose broad (and meddlesome) definitions of public health spur state actions … that in all likelihood jeopardize the health of the very individuals the new public health seeks to protect.”[241] Epstein aligns the old public health with the maxim, *salus populi suprema lex*: the well-being of the public is the supreme law.[242] Wendy Parmet and Anthony Robbins have critically reflected that, following the lead of O.W. Holmes, the legal profession has rejected maxims and in so doing, the maxim and truth of *salus populi suprema lex*—the health of the people is the highest law—has been lost.[243] According to Epstein, this maxim “represents the general proposition

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[239] *Ibid*.
[240] William J. Novak, “Private Wealth and Public Health: A Critique of Richard Epstein’s Defense of the “Old” Public Health” (2003) 46:3(Supp) Perspectives in Biology and Medicine S176 at S176 [Novak, “Private Wealth and Public Health”].
[241] Epstein, “Let the Shoemaker”, *supra* note 40 at S139.
[242] *Ibid*.
[243] Parmet & Robins, *supra* note 14 at 302. It has been argued that this maxim not only means that “the law [must] serve public health but also that public health is before the law.” See Parmet, “Introduction”, *supra* note 214 at xxxiii. For further discussion about this maxim, see below, pages 112-113 and 135-136.

that individual liberty, especially on matters of public health, must be subordinated to the protection of the common good, so that the state is justified to use public force to achieve that end."[244] Liberty is not a legal absolute, but is subject to the police power of the state. Police power, as embraced by Epstein, is concerned primarily with the market. He notes, "[o]n the question of public health or common good, the original definition was confined (not perfectly, but by and large) to those goods, or bads, that raised serious issues of market failure."[245] Hence his criticism of the modern conception of public health, which "simply invokes the idea of the common good (or the public interest) to allow state regulation on any matter of business or social life that affects a substantial fraction of the community."[246]

This has led Epstein to conclude that old public health "applied only to situations where competitive markets based on strong individual rights of private property could not be relied on to achieve anything close to the social optimum."[247] Epstein's understanding of the police power thus corresponds with an economic theory of laissez-faire. Thus, when assessing public health interventions one needs to be mindful of the key components of a private-rights system: "the exclusive right that all persons have in their own body and property; the dominance of voluntary contract as the means to alter

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[244] Epstein, "Let the Shoemaker", *supra* note 40 at S139.
[245] *Ibid.* at S141.
[246] *Ibid*. This is not surprising. Martin has been noted to say, "political philosophies that are resistant to any interference with the market economy will be hostile to theories of public health law that frame that public's health in terms that include economic, social, and environmental determinants" (Magnusson, *supra* note 7 at 575, referring to Robyn Martin, "Constraints on Public Health" in Martin & Johnson, *supra* note 30, 33 at 45-46).
[247] Epstein, "Let the Shoemaker", *supra* note 40 at S141.

those initial entitlements; and the use of tort remedies to protect against harms that one person inflicts against another."[248] Public intervention makes sense, if it provides increased security for all. "So long as each regards himself as the gainer from this massive social exchange, who should protest about it in the abstract?"[249] Epstein emphasizes that public health initiatives have to contend with the "key building blocks of a private-rights system."[250] Elsewhere they have been succinctly described as persons, property and promises.[251] Accordingly, the pivotal question for public health law is "what forms of public intervention make sense when liberty interests are so clearly implicated[?]"[252] Epstein advocates for the old understanding of public health because it chose more focused targets for interventions and did not attempt to make every social change a health issue, which he contends makes public health indistinguishable from a social welfarist position.[253]

Public health is better served by the creation of private wealth. Epstein is unequivocal about this position. "By stressing the importance of private wealth creation through private property and voluntary exchange, the classical model gives individuals the resources that allow them to take

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[248] *Ibid.* at S143.
[249] *Ibid.* at S143.
[250] *Ibid*.
[251] Epstein writes: "The key building blocks of a private-rights system are the exclusive right that all persons have in their own body and property; the dominance of voluntary contract as the means to alter those initial entitlements; and the use of tort remedies to protect against harms that one person inflicts against another" (*ibid.*). This is reflective of Frederick Bastiat's *The Law*, where he wrote: "What, then, is law? It is the collective organization of the individual right to lawful defense. Each of us has a natural right—from God—to defend his person, his liberty, and his property. These are the three basic requirements of life, and the preservation of any one of them is completely dependent upon the preservation of the other two" (New York: Cosimo Classics, 2006) at 6 (originally published in 1850).
[252] Epstein, "Let the Shoemaker" *supra* note 40 at S149.
[253] *Ibid.* at S158.

effective individual measures to ensure and promote their own health."[254] Private wealth helps to create the infrastructure and systems that are required to control risks that threaten public health. In fact, Epstein contends that the expansion of public health into social change may result in overall losses, "from the failure to create new wealth and maintain higher standards of living."[255] William Novak has summarized Epstein's understanding of old public health as operating only in cases of explicit market failure.[256] He criticizes Epstein for being relentlessly economistic.[257] "Epstein's public philosophy of both individual and common good is almost always subject to an all-pervading and overriding economic calculus."[258]

Novak is also critical of Epstein's understanding of police power, which is cast in terms of economics and market failures. Instead, Novak suggests that in the United States, "the most salient feature of the history of the police power is its relevance to the growth of the modern American state."[259] In fact, Novak is critical of Epstein generally for his use of history, which "artfully deploys a rhetorical and political trope: the idea of a single,

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[254] *Ibid.* at S157. Gostin and Bloche acknowledge the connection Epstein draws between the wealth of the population and health. However, they note, "money by itself does not make people healthy; it works by expanding and improving peoples' possibility and capabilities" (*supra* note 169 at S162, they refer to A. Sen, *Development as Freedom* (New York: Knopf, 1999) to support their position).
[255] Epstein, "Let the Shoemaker", *supra* note 40 at S158.
[256] Novak, "Private Wealth and Public Health", *supra* note 240 at S183-S184. Gostin and Bloche similarly are critical of Epstein's position, noting that the idea of market failure can only be discerned "by reference to some normative conception of what markets are supposed to achieve" (*supra* note 169 at S165). They observe that while Epstein makes many normative judgments in articulating his position, he does not acknowledge them (*ibid.* at S166).
[257] Novak, "Private Wealth and Public Health", *supra* note 240 at S182.
[258] *Ibid.* at S182.
[259] *Ibid.* at S193.

continuous American constitutional tradition that suddenly goes off the tracks in 1937."[260] Contrary to Epstein's story of the pre-1937 period of constitutional laissez-faire, there was actually an expansion of state power.[261] Epstein's understanding may be explained by the observation that pre-1937 the courts were interested in preserving economic opportunity and individual liberty by ensuring private property and laissez-faire economics.[262] However, it has been observed that in the pre-1937 period, "[t]he Court generally accepted, with little analysis, the legislature's judgment of what should be done to protect public health and safety, at least where only individual liberty was affected. In contrast, when state laws regulated commercial businesses and economic relationships, the Court typically required a close fit between goals and means."[263] Post-1937 may have seen an increase in regulation that implicated business, but there was not necessarily a corresponding rise in limitations on liberty. It had long been recognized that police power conferred upon the state the power to pass

[260] *Ibid.* at S188. Novak notes that Epstein prioritizes 1937 as a pivotal moment in American constitutional history "elevates the story of economic regulation over alternative stories of civil rights and civil liberties" (*ibid.* at S187). This ideological use of history is a curious fact, particularly given Epstein's harsh criticism of public health officials who he deems to have used the term 'epidemic' in a purely ideological way. Gostin and Bloche suggest that Epstein creates a "caricature—by spinning the story of public health's evolution and the law's response so as to portray the 'new' and a radical departure from the 'old'" (*supra* note 169 at S163).

[261] Novak, "Public Wealth and Private Health", *supra* note 240 at S187.

[262] Wendy K. Mariner, George J. Annas & Leonard H. Glanz, "*Jacobson v. Massachusetts*: It's Not Your Great-Great-Grandfather's Public Health Law" (2005) 95 American Journal of Public Health 581 at 584.

[263] *Ibid.*

laws to promote the "health, peace, morals, education and good order of the people."[264]

Police power, clearly, is expansive. It is of such broad compass that some have concluded "police power was the essence of governance, the hallmark of sovereignty and statecraft."[265] As Novak notes, "[n]o aspect of human intercourse remained outside the purview of police science."[266] Confusion that exists as to the proper scope of police power, according to Novak, is largely due to modern liberal mythology.[267] Other characterizations of police power are not restricted to matters of economics or state expansion, but represent the power of the government to promote the general welfare. Gostin contends that police power has a 'textured' meaning, far beyond commonly invoked images of an organized civil force charged with maintaining civil order. Accordingly, he defines police power as:

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[264] *Ibid.* at 582. The authors refer here to the following cases: *Barbier v. Connolly,* 113 US 27, 31 (1885) and *Gibbsons v. Ogden*, 22 US (9 Wheat) 1, 73 (1824). The authors also note that the early litigation concerning police power were disputes about which level of government, state or federal, had jurisdiction. They note that *Jacobson*, *supra* note 125, the main case in their analysis, was "a rare case" because it was concerned not with jurisdiction, but "whether the state had overstepped its authority and whether the sphere of personal liberty protected by the Due Process Clause of the 14th Amendment included the right to refuse vaccination" (*ibid.*). It has been noted that the protection of the public's health was an activity of police power (Wendy E. Parmet, "Public Health and Constitutional Law: Recognizing the Relationship" (2007) 10 J. Health Care L. & Pol'y 13 at 15 [Parmet, "Public Health and Constitutional Law"]) and that early laws included in police power "provide[d] powers necessary to counter health threats such as poor sanitation, the adulteration of food, the health consequences of child labour and the epidemic spread of disease" (Coker & Martin, *supra* note 9 at 3). Relevant for our discussion is Coker & Martin's observation that of these laws, "many … pre-date modern scientific causal paradigms" (*ibid.*).

[265] Novak, *The People's Welfare, supra* note 135 at 13. Novak does not explicitly identify who has reached this conclusion.

[266] *Ibid.* at 14.

[267] "Much of the confusion surrounding … police power in the early American polity is owed to the hold of modern liberal mythology. In law, that mythology takes two distinct forms: the public law paradigm of *liberal constitutionalism* and the private law thesis of *legal instrumentalism*" (*ibid.* at 21).

> [t]he inherent authority of the state (and, through delegation, local government) to enact laws and promulgate regulations to protect, preserve, and promote the health, safety, morals, and general welfare of the people. To achieve these communal benefits, the state retains the power to restrict, within federal and state constitutional limits, personal inters in liberty, autonomy, privacy, and expression, as well as economic interests in freedom of contract and uses of property.[268]

Police power thus allows the state to interfere with personal interests, as well as economic interests, in order to promote the common good. Gostin does not intend to grant exclusive jurisdiction to the state, however, recognizing that "private and charitable sectors have played, and continue to play, a vital role in improving the health of the populace."[269]

In this section I have described the seemingly undisputed notion that public health law is grounded in constitutional law. Limitations on coercion with respect to public health law have been discussed, with particular emphasis on Rothstein's three conditions that justify coercion. Epstein's endorsement of old public health instead of new public health has been described as has Novaks' resulting critique of Epstein's economistic arguments. Police power was then described as a mechanism by which public health law operates. The role of the state is uncontested; the breadth of power allotted to the state and the areas where state interference is warranted, however, remain highly contested.

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[268] Lawrence O. Gostin, "Public Health Law in a New Century – Part II: Public Health Powers and Limits" (2000) 283 Journal of the American Medical Association 2979 at 2980 [Gostin, "Public Health Law in a New Century – Part II"].

[269] Gostin, *Public Health Law*, *supra* note 3 at 5.

3. A Categorical Definition of Public Health Law

In light of the preceding discussion, the task now is to proffer a definition of public health law that will be used in the remainder of this paper. As noted, scholars tend to be polarized between two camps, those advocating for a broader understanding, including so-called "lifestyle" issues, and those advocating for a narrower, more "traditional" understanding of public health law. Recognizing that one of the challenges public health law faces is to strike a balance between protecting individual liberties and the public, this paper advocates for an understanding of public health law that could be described as a middle ground approach. It accepts that public health law requires a population health perspective, one that focuses on the broad issues that affect the health of the population. Additionally, it is acknowledged that public health law is the responsibility of the state. While third parties and private actors can certainly aim to improve the public's health, only the state is capable of utilizing the law. To justify the use of the law, however, state action needs to be directed towards problems requiring collective action. Health is identified as a problem requiring collective action. Although individuals retain responsibility for their own health, it is crucial to recognize the "response-ability" of individuals, particularly when health is viewed from a socio-environmental perspective that is based on scientific evidence. Thus, public health law is the responsibility of the state to address collective action problems that affect the health of the population.

II. A NORMATIVE FOUNDATION: RULE OF LAW AND LIBERTY

Part I of this paper was descriptive in that it explored how public health law is currently defined and justified. Part II will lay the foundation for a normative analysis: the final task of this paper, which will explore not what is, but what ought to be the case, in public health law. The emphasis on normative analysis has been described as "[d]istintively contemporary."[270] William Lucy has speculated that one reason why normative analysis has become predominant is a result of de-traditionalization. With the collapse of well-established sources of authority, such as the Church, there is a void—"primarily because appeals to the past or natural superiority are unavailable. Normative argument often fills the void."[271] Another possibility, Lucy suggests, is a result of the "spectre of democracy"—in short, normative arguments legitimize judicial discretion "to decide cases on the basis of the

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[270] Lucy, referring to Aristotle's concern with the questions of intelligibility and normative basis for private law, observes: "Distinctively contemporary, though, is the heavy emphasis upon the second question, for much contemporary philosophy of private law is relentlessly normative. That is, many contemporary philosophers of private law see their prime task as that of articulating the moral and political value of private law (as a whole or parts thereof)" (William Lucy, *Philosophy of Private Law* (Oxford: Oxford University Press, 2007) at 29 [Lucy]). Lucy contends that the jurisprudence textbooks of the 20th century were concerned primarily with questions of intelligibility and not dominated by normative analysis (*ibid.* at 29-30).

[271] *Ibid.* at 32. He notes: "If law in general, and private law in particular, exist in societies that are either de-traditionalized or undergoing that process, then this might count as part of an explanation for the predominantly normative character of some areas of legal scholarship" (*ibid.*). Berlin has suggested that men seek security above all else (hence he asserts Hobbes and not Locke was right) (Isaiah Berlin, "Political Ideas in the Twentieth Century" in Berlin, *supra* note 38, 1 at 19 [Berlin, "Political Ideas"]). This need for security, according to Berlin, leaves humanity when it loses one set of chains inevitably searching for another or even forging new chains themselves (*ibid.* at 20). The Church historically has provided security: "This, of course, is the position of the Gran Inquisitor in Dostoevsky's *Brother's Karamazov*: he said that what men dreaded most was freedom of choice, to be left alone to grope their way in the dark; and the Church, by lifting the responsibility from their shoulders made them willing, grateful, and happy slaves" (*ibid.* at 33).

normative principles that underpin or are implied by legal doctrine"[272] despite the fact that such decisions may appear objectionable given their apparent opposition to the democratic process.[273] Providing a normative framework for public health law, thus, is a legitimizing action.

To satisfactorily posit a normative framework it is necessary to explore the "force beyond force", as described by DeCoste, which serves as the normative foundation for public health law. This paper contends that rule of law is the appropriate theoretical construct. In turn, liberty is identified as an interrelated concept to rule of law. Liberty is the concrete and substantive expression of the procedural guarantees of the rule of law. The rule of law has been described as the mainstay of liberty, "preserving the freedom to do what one pleases outside of what the law prohibits. It is the essence of justice. It is an effective shackle that can keep democracy from becoming tyranny..."[274] Any examination of the rule of law therefore necessitates a discussion of liberty. "[T]he rule of law today is thoroughly understood in

[272] Lucy, *supra* note 270 at 30-31.

[273] As Lucy notes, two assumptions are embodied in the spectre of democracy: "In public affairs we tend to assume, first, that some type of democratic procedure is a good means of determining whether or not a legal development or policy change is good for all, or a contribution to the 'public good'. Second, we assume a democratic procedure *ipso facto* confers legitimacy on any such change. Judge-made law grinds against both assumptions and therefore appears *prima facie* objectionable" (*ibid.* at 30).

[274] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) [Tamanaha, *On the Rule of Law*] at 71, discussing Hayek's conception of the rule of law. Westmoreland suggests that Hayek's conception of the rule of law is central in his effort to make a case for liberty as a supreme principle (Robert Westmoreland, "Hayek: The Rule of Law or the Law of Rules" (1998) 17 Law & Phil. 77 at 83 [Westmoreland]).

terms of liberalism. Above all else liberalism emphasizes individual liberty."[275]

How one conceives of and interprets rule of law and liberty will prejudice any attempt to reconcile public health law in a limited state. Thus, rather than attempt to interpret these foundational concepts in such a manner that will lend credence to public health law, the following aims simply to determine whether public health law is consistent with the understanding of rule of law and liberty in the limited state as articulated in legal jurisprudence. The following will proceed in two sections. The first section will examine rule of law and liberty in general terms, relying on general conceptions, to normatively ground public health law. Given the importance of rule of law for our understanding, the second section will examine how instrumentalism and contested notions of social good threaten the rule of law. This is of particular import for our purposes given public health law's obvious concern with the social good (at a minimum, the social good of health) and the often-levied criticism that public health initiatives are ideological. In other words, public health law may be intrinsically instrumental. It is necessary to address these two matters prior to undertaking the final task of the paper, grounding public health law normatively, that is, within the rule of law tradition.

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[275] *Ibid.* at 32. "Liberalism is a doctrine about what the law ought to be…" (Hayek, *The Constitution of Liberty*, *supra* note 32 at 103) that "flourished during the late 20th century" (Gostin, "Law and Ethics", *supra* note 11 at 11). Shklar suggests that liberalism has one overarching aim: "to secure the political conditions that are necessary for the exercise of personal freedom" (Judith N. Shklar, "The Liberalism of Fear" in Stanley Hoffman, ed., *Political Thought and Political Thinkers* (Chicago: University of Chicago Press, 1999) 3 at 3 [Shklar]).

1. THE RULE OF LAW AND LIBERTY

Legitimizing the state's action, "the central and enduring task of political and legal reflection,"[276] renders it necessary to determine the force beyond force. As noted, inquiring about the force beyond force is to inquire about law's legitimizing foundation. It is inadequate to rely on a state's self-legitimization, via constitutional arguments, as a basis for justification as there is no consideration of underlying principles. Constitutions cannot suffice, according to DeCoste, for the final analysis of constitutions is completely within the state's self-legitimizing power. "To suppose that legitimacy resides in *any* act of the state is to acknowledge that the state is self-validating, and to acknowledge self-legitimation is to award the state what is, in the final analysis, unbridled power over our lives and affairs."[277] The state, and any subsequent laws it imposes, can "only really be grounded, and its power at once legitimated and limited, by some force beyond its reach."[278] Determining the force beyond force requires one "[t]o inquire after a force beyond the empirical force of law."[279] The legitimizing foundation for law cannot be found in the state itself but must be something that is beyond the state. There is a need for an overarching doctrine. The rule of law is the appropriate doctrine.

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[276] DeCoste, "Smoked", *supra* note 31 at 328.
[277] *Ibid.* at 331 (original emphasis).
[278] *Ibid.*
[279] *Ibid.* at 330. Decoste has the following to say regarding the law's empirical force: "The law's empirical force – which is to say, its force in the real world of administration, enforcement, and adjudication – resides finally in violence, in intellectual violence always and sometimes in physical violence" (*ibid.* at 330, n. 13).

A. RULE OF LAW

Hayek suggests that the rule of law serves as the necessary meta-legal doctrine or political ideal to ground law. For our purposes, deferral to the rule of law is logical given that the rule of law is recognized as the defining characteristic of the Western legal tradition.[280] Confusion as to what is precisely meant by rule of law, however, arises from the fact that rule of law is not strictly an ideal of Western, liberal or democratic states. States such as Iran, China and Zimbabwe have explicitly acknowledged the value and importance of the rule of law.[281] Explicating what is meant by the rule of law is thus complicated by the convolution of competing theories and understandings. As Tamanaha notes,

> … the rule of law is an exceedingly elusive notion. Few government leaders who express support for the rule of law, few journalists who record or use the phrase, few dissidents who expose themselves to risk of reprisal in its name, and few of the multitude of citizens throughout the world who believe in it, ever articulate precisely what it means. Explicit or implicit understandings of the phrase suggest that contrasting meanings are held.[282]

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[280] Tamanaha, *On the Rule of Law*, *supra* note 274 at 2.

[281] Tamanaha observes that one of the dangers of "rampant uncertainty" with regards to the meaning of rule of law, is that "rule of law might devolve to an empty phrase, so lacking in meaning that it can be proclaimed with impunity by malevolent governments" (*ibid*. at 114). The use by malevolent states undermines some of the claims used to buttress the importance of rule of law, such as offered by Levy: "A comparison among countries suggests that the rule of law is closely correlated with the well being of citizens. In countries committed to the rule of law, citizens fare better economically, live safer and more secure lives, and enjoy greater civil and political liberties" (Richard E. Levy, "The Tie that Binds: Some Thoughts about the Rule of Law, Law and Economics, Collective Action Theory, Reciprocity, and Heisenberg's Uncertainty Principle" (2008) 56 Kan. L. Rev. 901 at 903, citing Todd J. Zywicki, "The Rule of Law, Freedom, and Prosperity" (2003) 10 Sup. Ct. Econ. Rev. 1). Undoubtedly, commentators such as Levy would contend that countries such as Iran are not truly committed to rule of law.

[282] *Ibid.* at 3. Backer also notes that "for all the agreement about the rule of law, the essential ideas and constructions remain highly contested. Law is either something inherent in communities of people or can spring only from an assertion of their will …. Depending on the

This study will not resolve the ongoing discourse nor will it run roughshod over the rich history of legal and political philosophy that has attempted to clarify what is encompassed by the rule of law. Nor is it the aim here to survey the vast theoretical and philosophical literature pertaining to the rule of law or to review any specific theory is detail. Instead, in light of the aforementioned limitations of this study, the aim will be to illustrate how rule of law is conceived within the limited state.

Hayek is credited with articulating one of the clearest formulations of rule of law: "[s]tripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge."[283] Joseph Raz, in attempting to simplify rule of law, suggests: "Taken in its broadest sense, this mean (*sic*) that people should obey the law and be ruled by it."[284] Raz nevertheless recognizes that even this understanding is vague and, if not properly formulated, can

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basic assumptions embraced (about how law 'works'), the resulting ideas, jurisprudence and conceptual limits of discourse about law, communities, government, and individuals, follows" (*supra* note 33 at 514). Pek notes, "[w]hile the contours of the rule of law as a positive and normative concept remain deeply contested, in its barest sense it must refer to a society—the government as well as its people—that is rule by the law. Thus, the rule of law is associated with certain substantive political values …" (Jane Pek, "Things Better Left Unwritten?: Constitutional Text and the Rule of Law" (1980) 83 N.Y.U.L. Rev. 1979 at 1994). Levy notes, the rule of law "has no material substance and cannot be measured or quantified, yet it is remarkably powerful" (*supra* note 281 at 902). Despite its power, Levy also notes that rule of law is fragile (*ibid*. at 912). The following discussion aims to be mindful of this fragility, and thus will not attempt to force a definition on rule of law or to restrict it within a particular ideology.

[283] Friedrich A. Hayek, *On the Road to Serfdom* (Chicago: University of Chicago Press, 1944) at 54.

[284] Raz, "The Rule of Law", *supra* note 28 at 5.

"amount to an empty tautology, not a political ideal."[285] Positing a definition for rule of law, however, does little to expound rule of law in an intelligible and systematic manner. Tamanaha addresses this problem by distilling rule of law into formal and substantive views and identifying themes that run throughout the rule of law tradition. This establishes a solid foundation for discussing the interplay between rule of law and liberty and thus will be subject to considerable examination here.

Tamanaha begins by differentiating between substantive and formal views of rule of law.[286] A formal understanding of rule of law does not render judgments on the actual content of the law, but is instead concerned with the way the law is promulgated; in other words, the source and form of law. Substantive views are concerned with the content of law, with formal attributes and rights. Within both the formal and substantive views Tamanaha identifies "thinner to thicker accounts," the latter having more requirements than the former.[287] In its thinnest formal account, rule of law holds that the state should conduct its affairs through laws; in other words, rule by law. It is a position that does not speak to limitations on government, "the *sine qua non* of the rule of law tradition."[288] An extreme understanding of this conception holds, "all utterances of the sovereign, because they are

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[285] *Ibid.* at 6.
[286] As the various understandings of both formal and substantive views will not be examined in detail here, see: Tamanaha *On the Rule of Law*, *supra* note 274 at 91-101 (Chapter 7 "Formal Theories") and at 102-113 (Chapter 8 "Substantive Theories").
[287] *Ibid.* at 91.
[288] *Ibid.* at 92.

utterances of the sovereign, are law."[289] Hence this view has been criticized for its compatibility with authoritarian regimes.

While a slightly more rigorous (thicker) formal understanding, the formal legality conception of rule of law—the favoured conception by Western legal theorists, observes Tamanaha[290]—is equally devoid of any notion of what makes good or just laws. It speaks only to law's ability to guide behaviour. Thus rule of law requires that the law be "prospective, general, clear, public, and relatively stable."[291] Rule of law furthers autonomy and dignity, it is argued, as it allows people to plan their activities with an understanding in advance of the legal implications. Because rule of law is "indifferent toward the substantive aims of the law" it is "ready to serve a variety of … aims with equal efficiency."[292] In the liberal scheme, it is understood to be the only thing providing protection both from the threats of others and from the state.[293] If rule of law were to be understood substantively, it is argued, it would require the government to introduce measures to promote various aims, such as distributive justice, which in turn would undermine individual liberty. An additional formal version concerns democracy. Again, the substance of the law is not determined, but only the process (democracy) used in determining the content of law.

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[289] Franz L. Neumann, "The Change in the Function of Law in Modern Society" in William E. Scheuerman, ed., *The Rule of Law Under Siege* (Berkeley: University of California Press, 1996) at 104.
[290] Tamanaha, *On the Rule of Law*, *supra* note 274 at 93.
[291] *Ibid.* at 93.
[292] *Ibid.* at 94.
[293] Novak, *The People's Welfare, supra* note 135 at 22.

Substantive versions of rule of law necessarily incorporate elements of formal rule of law and simply add specific content. At its thinnest, a substantive view involves individual rights and at its thickest promote the social welfare state. An individual rights version of rule of law "assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole."[294] The thicker social welfare view incorporates individual rights and adds an additional dimension, social welfare rights. "In the social welfare conception, the rule of law imposes on the government an affirmative duty to help make life better for people, to enhance their existence, including effectuating a measure of distributive justice."[295] Tamanaha is critical of the more substantive versions for extracting arguments from the political realm and relegating them to the legal sphere. As a consequence, he observes, "[t]he rule of law … serves as a proxy battleground for a dispute about broader social issues, detracting from a fuller consideration of those issues on their own terms, and in the process emptying the rule of law of any distinctive meaning."[296] For the purpose of this paper it is accepted that the proper understanding of rule of law is predominantly formal.[297]

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[294] Ronald Dworkin, "Political Judges and the Rule of Law" (1978) 64 Proceedings of the British Academy 259 at 262.
[295] Tamanaha, *On the Rule of Law*, *supra* note 274 at 113.
[296] *Ibid*. at 114.
[297] Although, I am not convinced that substantive understandings of rule of law empty the rule of law of any distinctive meaning (Tamanaha observes that formal versions are not necessarily void of substantive implications, see: *ibid*. at 92), this paper will focus on the formal understanding of rule of law.

Tamanaha has also identified three themes that run through the rule of law tradition: (1) government limited by law; (2) formal legality; and (3) rule by law, not by man.[298] The first theme is 'government limited by law.' Aforementioned as the *sine qua non* of rule of law, it holds that governments are not only bound by law but also have restraints on their law-making power. Although laws can be circumvented, by amending or eliminating laws standing in the way—including, albeit more difficultly, constitutions—rule of law stipulates that there are certain things a sovereign can never do.[299] The aim of restraining government tyranny, Tamanaha notes, is an idea that has long pre-existed notions of individual liberty.[300] It is only with the rise of modern liberal states that a shift occurred in how rule of law was conceived, towards a perspective more in conformity with formal legality, which is the second theme noted by Tamanaha.

'Formal legality' speaks to the form and procedure of determining the content of law, not law's substance. It ensures predictability by allowing people to know in advance the implications of their actions. Thus, it "emphasizes rule-bound order established and maintained by government."[301] Formal legality, as noted above, is an understanding of rule

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[298] *Ibid.* at 114-126. Tamanaha uses these themes to discuss rule of law at an international level, a task that will not be undertaken here, see: *ibid.* at 127-136. It has been suggested that considering the rule of law through these themes "sheds sufficient light to assess the nature and vitality of the commitment to some of the major ideas associated with the rule of law" (Marc O. DeGirolami, "Faith in the Rule of Law" (2008) 82:573 Saint John's L. Rev. 573 at 576 [DeGirolami]).
[299] Tamanaha, *On the Rule of Law*, *supra* note 274 at 118.
[300] *Ibid.* at 115.
[301] *Ibid.* at 119. Fox-Decent notes, "[t]he basic idea that compels allegiance to formal rather than substantive constraints is that to go beyond the formal is to confuse the rule of law with

of law favoured by legal theorists.[302] Hayek, for example, is a proponent of this view. Tamanaha notes that it is "the dominant understanding of the rule of law for liberalism and capitalism."[303] This is because formal legality requires laws to adhere to the formal qualities of generality, equality and certainty. As Tamanaha notes, "public, prospective laws, with the qualities of generality, equality of application, and certainty, are well suited to facilitating market transactions because predictability and certainty allows merchants to calculate the likely costs and benefits of anticipated transactions."[304] Beyond providing security for markets, however, formal legality is championed for eliminating insecurity and uncertainty for citizens generally.[305] Formalism's

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the rule of *good* law. We should not give credit to the rule of law – nor cloak political arguments with rule of law apparel – when liberal political values such as equality are the values doing the heavy lifting" (*supra* note 27 at 535, original emphasis).

[302] Weinrib suggests that formalism is a "term of opprobrium" (Weinrib *The Idea of Private Law*, *supra* note 34 at 22). "Formalism is like a heresy driven underground, whose tenets must be surmised from the derogatory comments of its detractors. Everyone known's that legal formalism asserts the distinction of law and politics. The curiosity of this distinction makes formalism seem at best as pathetic escape from the social relevance of law, and at worst a vicious camouflage of the realities of power" (*ibid*).

[303] Tamanaha *On the Rule of Law*, *supra* note 274 at 119.

[304] *Ibid.* at 119. Tamanaha notes: "A growing body of evidence indicates a positive correlation between economic development and formal legality that is attributable to these characteristics" (*ibid*.). Waldron notes, "[t]here may be no escaping legal constraints in the circumstances of modern life, but freedom is nevertheless possible if people know in advance how the law will operate, and how they must act to avoid its having a detrimental impact on their affairs. Knowing in advance how the law will operate enables one to plan around its requirements. And knowing that one can count on the law to protect certain personal rights and property rights enables each citizen to deal effectively with other people and the state" (Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43 Ga. L. Rev. 1 at 6 [Waldron]).

[305] Although it is beyond the scope of this study, it is important to note that not everyone stands to benefit from formal legality equally. Tamanaha notes: "The close connection between formal legality and capitalism contains an important lesson that ought to be made explicit, one well understood by classical liberals. While all members of society enjoy some benefit from formal legality, it is property owners who stand to benefit the most: their property is protected and they are most likely to enter into contracts. They can hire lawyers to vindicate their rights. A society in which property ownership is universal is one in which all enjoy the fullest benefit offered by formal legality" (*ibid.* at 122). This reality is, in part, responsible for criticisms that rule of law and liberty "amounts to rule by and in the interests of the economic elite, all the while claiming to be neutral" (*ibid.* at 75) and that "liberalism

priority of the formal over the substantive will be important for our analysis below.

The final theme Tamanaha identifies is 'rule by law, not by man.' This theme is grounded upon a fundamental distrust and fear of others. "The inspiration underlying this idea is that to live under the rule of law is not to be subject to the unpredictable vagaries of other individuals."[306] Abuse is inherent in power, particularly power to rule others. The difficulty, of course, is that humans inevitably rule; law requires human actors for interpretation and application. Hence the important rule of the judiciary: "the judge *becomes* the law personified."[307] The ideal judge is one who is unbiased, impartial, neutral, free of passion and loyal only to the law. It is also the impetus behind the independent judiciary. Tamanaha recognizes the danger of rule of law becoming rule by judges.[308] In spite of the danger, he notes that the world over there are government officials and judges who, rather than subjecting individuals to their whim and fancy, are complying with their duty to apply the law.[309]

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liberates some – those with economic power – to dominate others – those without" (*ibid.*). Shklar suggests that property left with individuals "is an indispensable and excellent way of limiting the long arm of government and dividing social power, as well as of securing the independence of individuals" (Shklar*, supra* note 275 at 13) and that "[n]othing gives a person greater social resources than legally guaranteed proprietorship" (*ibid*.). However, this does little to aid those who do not have property.

[306] Tamanaha *On the Rule of Law*, *supra* note 274 at 122.

[307] *Ibid.* at 123, original emphasis.

[308] *Ibid.* at 124.

[309] Tamanaha does not address the criticism here that law favours the wealthy and the privileged and, even when it may not favour them, access to the law is disproportionately available to the wealthy and privileged. As a consequence, rule by law may be perceived as the source of abuse and the reason for distrusting others in the first place. Judges, after all, are almost exclusively from a single socio-economic class, are usually appointed by like-minded partisan officials, are human beings and thus are likely to encumbered with bias and

Given that rule of law aims to protect citizens, limit government and foster predictability and certainty, it has been argued that a rule of law state can be described as a moral agent.[310] It is so because it is concerned primarily with ensuring the good of people. DeCoste notes, "[t]he end of Rule of Law … is the good of the governed, of the people who are the constituents of political community."[311] The legitimacy of such a state depends on how it treats the people it rules. Put otherwise, a "government by Rule of Law is government according to those principles of institutional design, practice, and limitation which serve the good of the governed."[312] Fuller similarly views the rule of law state as a moral good given its concern with the good of the governed and the enhancement of individual autonomy.[313] The rule of

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passion, and no doubt have ulterior loyalties whether to individuals or principles. Fox-Decent, however, notes that the powerful may shun law: "[c]ertainly the powerful will often take advantage of law to the extent that they can, and may do what they can to bend law to achieve their aims. However, history is littered with countless instances in which the powerful resist law because law provides a forum in which public reason can operate as a check against concentrated and otherwise unaccountable power" (*supra* note 27 at 561, n. 49). This issue will not be explored in detail here, suffice it to say that this theme may be better described as: rule by law by man.

[310] DeCoste asserts that rule of law is also a political morality and, as such, "only concerns the institutions of political community and the nature of the offices and practices defined by those institutions and their limitations" (*On Coming to Law*, *supra* note 27 at 159). There are, of course, other institutions associated with liberal societies—free markets and universities being two examples—but "the requirements of the Rule of Law trump other principles and ends which the liberal state may pursue and practices of other institutions which characterize liberal society" (*ibid*. at 161). This observation is particularly important for consideration here for two reasons: not only does rule of law take precedent over the state, should the state act in an inconsistent manner with the former, but it also takes priority over any liberal institution, including free markets.

[311] *Ibid.* at 159.

[312] *Ibid.* at 160.

[313] Tamanaha, *The Rule of Law*, *supra* note 274 at 95, referring to Lon L. Fuller, *The Morality of Law*, 2d ed.. (New Haven: Yale University Press, 1969) 209-210. The idea that the rule of law is a moral good has been disputed. Raz has argued that rule of law is morally neutral. "A good knife is, among other things, a sharp knife. Similarly, conformity to the rule of law is an inherent value of laws, indeed it is their most important inherent value. It is of the essence of law to guide behavior through rules and courts in charge of their application … Like other instruments, the law has a specific virtue which is morally neutral in being neutral as to the

law state can only be devoted to "moral equality"[314] through the institutionalization of the state to constrain power.[315]

A rule of law state is also concerned with justice. Individuals under rule of law are secured from arbitrary power as a condition of being treated equally.[316] As James Torke has observed, rule of law "promises individual freedom to pursue, within relatively clear limits, one's own ends rather than reducing its subjects to serve as means for the purposes of others."[317] For Torke, two promises are offered by rule of law. The first is that it will act as a "palliative" to the coercive power of the state by promising that "only legal commands, that is, rules authoritatively promulgated, are obligatory."[318] The individual, therefore, is protected from the arbitrary will of the state. In addition, government officials are subject to "known, public laws" and, should one's interests be threatened, the rule of law ensures that a fair and

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end to which the instrument is put" (Joseph Raz, "The Rule of law and Its Virtue" in *The Authority of Law* (Oxford: Clarendon Press, 1979) at 225-226). Tamanaha notes, "[l[ike a knife, which is neither good nor bad in itself, but can be used to kill a man or to slice vegetables, the morality of law is a function of the uses to which it is put" (*On the Rule of Law*, *supra* note 274 at 95).

[314] DeCoste, *On Coming to Law*, *supra* note 27 at 260.

[315] Four propositions are offered by DeCoste to demonstrate that the constraint of power is associated with moral equality. First, if individuals are, as persons, equal despite the many differences between them, they are due equal care and respect by the institutions of communal life. Second, to treat individuals in that way is to treat them as beings who are responsible for their own lives. Third, it falls then to political community to secure for its members, as conditions of treating them equally, personal autonomy. Finally, since autonomy is lost when others, collectively or individually, interfere with one's moral independence, treating persons equally requires that the power to interfere be constrained (*ibid.* at 161). It is beyond the scope of this paper to examine this issue further.

[316] Gostin recognizes this, noting "[p]erhaps the most important aspect of justice is non-discrimination – treating people equitably based on their individual characteristics rather than membership in a socially distinct group such as race, ethnicity, sex, religion, or disability" ("Legal Foundations", *supra* note 11 at 10).

[317] James Torke, "What is this Thing Called the Rule of Law" (2001) 34 Indiana L. Rev. 1445 at 1447.

[318] *Ibid.*

rational process be available to seek the protection of one's rights.[319] The second promise of rule of law is that individuals will be provided with the latitude to pursue their own ends without being forced to serve as means in the plans of others. As Torke notes, this promise is one of "[l]egitimacy, constraint, autonomy, and ample room for the pursuit of happiness."[320]

Rule of law, therefore, guarantees "minimum rules in society to enable man to fulfill his life-plan according to law, but with the minimum interference of law."[321] Albert Dicey argues that rule of law guarantees this by manifesting itself in three ways: it lacks arbitrariness and retrospectivity; ensures equality under the law; and protects rights under common law.[322] Hayek has similarly noted that rule of law requires a definitive conception of what is meant by law.[323] He contends that law must be general, certain and equal. Laws are to be general in the sense that they are abstract: "referring to yet unknown cases and containing no references to particular persons, places, or objects."[324] In other words, laws cannot contemplate individual persons or particular actions. Accordingly, "a law may provide that there

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[319] *Ibid*.
[320] *Ibid*. Berns has noted that liberalism denies that there can be knowledge of a principle of happiness, hence the liberal state does not take an official position on its nature. The goal of the liberal state is to "secure the inalienable right of everyone to pursue what he idiosyncratically defines as happiness" (Walter Berns, "Privacy, Liberalism, and the Role of Government" in Cunningham, *supra* note 28, 208 at 218 [Berns]). Shklar has similarly noted, "[n]o form of liberalism has any business telling the citizenry to pursue happiness or even to define that wholly elusive condition. It is for each one of us to seek it or reject it in favor of duty or salvation or passivity, for example. Liberalism must restrict itself to politics and to proposals to restrain potential abusers of power …" (*supra* note 275 at 13).
[321] Hilaire Barnett, *Constitutional & Administrative Law,* 4th ed. (London: Routledge, 2002) at 81.
[322] See: Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* (ed., Roger E. Michener) (Indianapolis: Liberty Fund, 1982).
[323] Hayek, *The Constitution of Liberty*, *supra* note 32 at 207.
[324] *Ibid.* at 208.

shall be privileges, but it must not name the persons who are to enjoy them: the law may create several classes of citizens and even designate the qualifications which will give entry into each class, but it must not nominate for admission such and such persons…"[325] In addition, laws cannot be retrospective in their effect.

Certainty of law suggests that "the decisions of the courts can be predicted, not that all the rules which determine them can be stated in words."[326] According to Hayek, the certainty of the law has contributed significantly to the prosperity of the West.[327] Finally, laws need to be equal. Hayek recognizes that this requirement is more difficult to define. It is aimed at "equally improving the chances of yet unknown people but incompatible with benefiting or harming known persons in a predictable manner."[328] In addition, equal application of laws includes those who govern. This fact, Hayek observes, makes it improbable that oppressive rules will be adopted.[329]

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[325] *Ibid.* at 194. As Westmoreland notes, "[e]nd-independent rules of action allow individuals to pursue their own, often non-egoistic ends, exploiting particular skills and local knowledge inaccessible to any central authority. Such rules are constitutive of individual liberty" (*supra* note 274 at 81).
[326] *Ibid.* at 208
[327] *Ibid.* at 208. Hayek argues that "the certainty of the law must be judged by the disputes which do not lead to litigation because the outcome is practically certain as soon as the legal position is examined. It is the cases that never come before the courts, not those that do, that are the measure of the certainty of the law"(*ibid*.). This observation is particularly interesting in the context of public health litigation. For one, innumerable cases may never come before the courts for a variety of reasons, social, economic, or political. For example, Martin contends that Britain's Human Rights Act "enables an inappropriate exercise of public health powers to be challenged, but only by those with the resources to initiate a challenge."(Martin, "Law as a Tool", *supra* note 44 at 849). A further argument could be made that even relatively certain laws have nevertheless been challenged in the public health context given ideological positions.
[328] Hayek, *The Constitution of Liberty*, *supra* note 32 at 210.
[329] *Ibid.* at 210.

B. LIBERTY

Overall, the requirements of rule of law help to protect against state infringements of individual liberty. Aforementioned is the intimate relationship between rule of law and liberty. The rule of law is the mainstay of liberty, preserving freedom for individuals to do as they wish, a shackle that keeps democracy from becoming tyranny.[330] It allows the government to fulfill its primary task of creating "a framework within which individuals and groups can successfully pursue their respective aims."[331] John Stuart Mill has presented the classic depiction of liberty. In *On Liberty*, Mill aims to establish that the only ground for interfering with the liberty of another is self-protection. He notes, "[t]hat the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[332] This idea is predicated on the notion that individuals should be free to pursue whatever they like, even if it is perceived to be foolish or perverse, provided that they do not harm others. As Mill famously noted, "[t]he only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it."[333] Important for our purposes is the next line: "Each is the proper guardian of his own health,

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[330] Tamanaha, *On the Rule of Law*, *supra* note 274 at 71.
[331] F.A. Hayek, *Law, Legislation and Liberty: The Political Order of a Free People*, vol. 3 (London: Routledge, 1979) at 139 [Hayek, *Law, Legislation and Liberty*].
[332] John Stuart Mill, "On Liberty" in John Stuart Mill, *On Liberty and Utilitarianism* (New York: Bantam, 1993) 3 at 12 [Mill].
[333] *Ibid.* at 16.

whether bodily, or mental and spiritual."[334] Individuals are responsible for their own happiness. Liberalism is predicated on the notion that there is no definitive understanding of happiness. Walter Berns contends that this is why "the liberal state eschews any official position on its nature, but it does secure the inalienable right of everyone to pursue what he idiosyncratically defines as happiness."[335] As Hayek observes, liberty provides "some assured private sphere."[336]

Liberty, according to Mill, ensures that individuals are free to act out their lives, to pursue their conception of happiness[337], without hindrance. The only proviso is that their actions must be at their own risk or peril. In other words, "[a]cts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavourable sentiments, and when needful, by the active interference of mankind. The liberty of the individual must be thus far

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[334] *Ibid.*

[335] Berns, *supra* note 320 at 218.

[336] Hayek, *The Constitution of Liberty, supra* note 32 at 13.

[337] What constitutes happiness is something that only the individual can determine. As Siegel notes, "[a]ccording to Mill, persons must be free to define their own conception of the good and act on it where doing so poses no serious risk of harm to others. Any government regulation of such conduct constitutes an unwarranted and oppressive use of state power" (*supra* note 78 at 364). Liberal scholars suggest that if individuals understand the hazards of their actions, they should be free to engage in any activity, irrespective of risk, if it provides them with personal satisfaction (Gostin & Gostin, *supra* note 90 at 215).This poses a problem for public health law, Gostin & Gostin note, which also aims to determine what is 'good'. There is no congruence between them. They note: "Mill's argument assumes that what is 'good' is inherently subjective, but public health is positivistic and objective. It seeks answers based on science and the scientific method" (*ibid*. at 218). Additionally, some scholars contend that happiness cannot be attained outside of community. Novak argues, "[m]an's natural state was not to be found outside of community or in isolation from others but *in society*. For 'in a state of lonely separation from the rest of his species, he cannot attain his great end—happiness.'" (*The People's Welfare, supra* note 135 at 29).

limited; he must not make himself a nuisance to other people."[338] This notion is a constant refrain in Mill's work. It has been described as the "harm principle."[339] Harm is noted as marking the boundary between public and private spheres. "Unless they harm another, an individual's actions are private. They cannot be a proper matter for collective deliberation and control and must, instead, be left entirely to the individual's discretion."[340] Mill's harm principle has been criticized, his notion of harm having been described as an ambiguous term.[341] Moreover, it has been argued that there

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[338] Mill, *supra* note 332 at 65.
[339] DeCoste, *On Coming to Law*, *supra* note 27 at 146.
[340] DeCoste, *On Coming to Law*, *supra* note 27 at 146. Mill's account of liberty would suggest that classical public health regulation is inappropriate. As Gostin & Gostin note, impermissible regulation would include: "mandatory motorcycle helmet and seatbelt laws, gambling prohibitions, criminalization of recreational drugs, and fluoridation of drinking water. Taxes on unhealthy products such as cigarettes or alcoholic beverages also have a paternalistic quality because they create marked disincentives for self-regarding behaviour. Even professional licensing and Food and Drug Administration drug approvals prevent customers from purchasing products and services when they are informed about the risks and willingly assume them" (*supra* note 90 at 214). Calman nevertheless suggests that while Mill would likely stand in strong opposition to public health programmes that coerce people to lead healthy lives, Mill would likely "support programmes which seek to 'advise, instruct and persuade' them so that they can make informed decisions about, for example, what to eat, how to exercise and so on" (*supra* note 41 at e7). Additionally, "Mill recognized that the state can rightfully intervene to protect children, and other similar vulnerable people who require protection from, for example, damaging their own health" (*ibid.*).
[341] For example, Gostin & Gostin note "harm to others, or in economic terms '*negative externalities*', can be found in almost any activity" (*supra* note 90 at 216, original emphasis). DeCoste dispels the idea that the idea of harm is too illusive, noting that for Mill, "a harm exists where *other-regarding conduct causes real damage to some identifiable legal person*" (DeCoste, *On Coming to Law*, *supra* note 27 at 147, original emphasis). DeCoste argues: "This simple definition is pregnant with meaning. That self-regarding conduct is excluded as harm at law prohibits legal paternalism; that the damage caused by other-regarding conduct must be sustained by legal persons excludes constructive harms from law; and that the damage must be real, and not a matter of mere offence at the conduct, prohibits legal moralism. *Legal paternalism* is the view that prevention of physical, psychological or economic harm to an actor him- or herself is a good reason to interfere with that individual's choices and conduct. *Constructive injuries* are those which are thought to be sustained, not by "assignable" individuals, but by abstractions, such as society generally or some class or category of individuals within society, say the poor or women or the religiously devout. *Legal moralism* is the view that, even where it causes neither harm nor offence to the actor or to others, individual conduct might yet be a legitimate object of interference and control if the conduct in question can be shown to be inherently immoral" (*ibid.*, original emphasis). Thus, DeCoste

can be great difficulty in "distinguishing between actions that affect only the actor and those that have a discernible impact on others."[342] Indeed, it has been noted that there are few actions in life that do not, in some way or other, impact others.[343] As G.B. Madison observes, "[w]here the line is to be drawn between the two is a difficult and complex matter which increases in complexity as a society becomes more complexly organized. The problem is thus a much more difficult one today than it was in Mill's time."[344] For Mill, when an individual's conduct has a prejudicial impact on the interests of others, it becomes a societal matter.[345] The state has no jurisdiction over the actions that influence only individuals, acts injurious only to one's self. However, "[w]henever … there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law."[346] Some, such as Raz, have extended Mill's harm principle. According to Raz, "the harm

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argues that "the legal definition of harm excludes from law's domain a very large swath of human activity and complaint" (*ibid.*).

[342] Alan M. Dershowitz, "Mill, On Liberty" in Mill, *supra* note 332, vii at x [Dershowitz]. Dershowitz notes that Mill recognized that actions that cause harm to the individual create ripples that impact others (*ibid.* at xvi). He argues, "Mill is not at his best in dealing with such matters of degree. Nor is it clear how Mill would have applied his principle to somewhat more complex and multifaceted problems than those he discussed" (*ibid.*).

[343] As Berlin has noted: "[e]ven Mill's strenuous effort to mark the distinction between the spheres of private and social life breaks down under examination. Virtually all Mill's critics have pointed out that everything I do may have results which will harm other human beings" ("Two Concepts of Liberty" at 155).

[344] G.B. Madison, *The Logic of Liberty* (New York: Greenwood Press, 1986) at 76 [Madison].

[345] Mill, *supra* note 332 at 87. As Calman notes, Mill's harm principle "suggests that state intervention is primarily warranted where an individual's actions affect others, i.e., coercion is legitimate where it acts to avoid harm to third parties" (*supra* note 41 at e7).

[346] Mill, *supra* note 332 at 94. Westmoreland observes, however, that an argument could be made against Mill's position here, namely the idea that custom is often "more penetrating and effective than law" (*supra* note 274 at 89). Thus, "if it is important to use legal coercion only to prevent immediate infringements of individual liberty, it is important to use the state to undermine the influence of customs that informally enforce pefectionistic standards" (*ibid.*).

principle should not restrain the 'pursuit of moral goals by the state', but should indicate 'the right way in which the state could promote the well-being of people' …. [and] is thus designed to advance the positive liberty of enhancing autonomy and therefore promoting the good life."[347] It has been suggested that Raz's expansion of the harm principle is important for public health law as it recognizes a certain level of health as necessary for self-sovereignty.[348]

Mill does recognize that there will be self-regarding acts of individuals that may be perceived as harming society or others. He refers to such cases as matters of "constructive injury" to society, where an individual neither violates any duties to the public nor causes any perceptible harm to any individual except himself.[349] According to Mill, such inconveniences "society can afford to bear, for the sake of the greater good of human freedom."[350] He thus distinguishes between punishment by opinion and punishment by law.[351] The former allows individuals, and society as a whole, to vary feelings and conduct towards individuals; to express distaste and to stand aloof. "He may be to us an object of pity, perhaps of dislike, but not of anger or resentment; we shall not treat him like an enemy of society: the worst we

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[347] Gostin & Gostin, *supra* note 90 at 215. They note, "Joseph Raz offers a more expansive conception of individual liberty … 'an adequate range of options'. In his view, paternalistic regulations are acceptable, even required, if they ultimately enhance autonomy by, for example, preventing the use of damaging narcotics that diminish a person's decision-making capacity" (*ibid*. 215, referring to Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988).
[348] *Ibid.* at 216.
[349] Mill, *supra* note 332 at 94.
[350] *Ibid.*
[351] *Ibid.* at 87.

shall think ourselves justified in doing is leaving him to himself, if we do not interfere benevolently by showing interest or concern for him."[352]

Mill points to legislation in the United States that aimed to prevent intemperance as an example of the state attempting to prevent constructive injury. Such legislation, he argues, promotes a theory of social rights—"that is the absolute social right of every individual, that every other individual shall act in every respect exactly as he ought; that whosoever fails thereof in the smallest particular, violates my social right, and entitles me to demand from the legislature the removal of the grievance."[353] To Mill, this principle is monstrous and represents a far greater danger than single interferences with liberty.

> [T]here is no violation of liberty which it would not justify; it acknowledges no right to any freedom whatever, except perhaps to that of holding opinions in secret, without ever disclosing them …. The doctrine ascribes to all mankind a vested interest in each other's moral, intellectual, and even physical perfection, to be defined by each claimant according to his own standard.[354]

The danger is that individuals become accountable to society for actions that are purely self-regarding. The individual is recognized as the person with the greatest interest in their own well-being; others, whether individually or as a community, are not warranted in directing another how they ought to live their life.[355] This is not to say that individuals cannot have influence on others. Mill acknowledges that society can advise, instruct, persuade or avoid

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[352] *Ibid.* at 91.
[353] *Ibid.* at 103.
[354] *Ibid.*
[355] *Ibid.* at 88.

others as ways to express dislike or disapproval of their conduct.[356] Mill also recognizes that individuals are to be equally free to consult with others, to exchange opinions, and give and receive advice.[357] Ultimately, however, the individual is to be left to make his or her own choices, irrespective of how such decisions are perceived.

Preserving liberty, of course, can have a multitude of understandings. Alan Dershowitz observes that Mill's principle has been so influential that there have been "repeated efforts of those who would compel a given action protesting individuals to *rationalize* such force by reference to the rights of *others* rather than by reference to the good of the compelled individual."[358] In other words, acts aimed at controlling the conduct of individuals have been defended by appealing to the liberty of others.[359] To help better understand what is meant by liberty, Tamanaha has identified four themes of liberty in the modern liberal democratic state: political liberty, the self-rule of individuals; legal liberty, the freedom from coercion and legal interference; personal liberty, restricting the government from infringing on personal

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356 *Ibid.* at 108.

357 *Ibid.* at 114. Mill notes that it becomes problematic when "the instigator derives a personal benefit from his advice; when he makes it his occupation, for subsistence or pecuniary gain, to promote what society and the State consider to be an evil. Then, indeed, a new element of complication is introduced" (*ibid.*). Mill also contends, "[a]ll attempts by the State to bias the conclusions of its citizens on disputed subjects, are evil" (*ibid.* at 123).

358 Dershowitz, *supra* note 342 at x, original emphasis.

359 Dershowitz refers to mandatory seatbelt laws as an example, *supra* note 332 at xiff. Lawrence Tribe rejected arguments that only seatbelt wearer's welfare was at stake, arguing instead that third-parties are endangered (see: Lawrence Tribe, "The Seat-Belt Law Does Not Intrude on Freedom" *The Boston Globe*, March 22, 1986, p. 11). Dershowitz contends that, while he favours mandatory seatbelt laws, he recognizes that support for such "paternalistic legislation requires a compromise with Mill's principle" (*ibid.* at xi). Dershowitz contemplates two exceptions to Mill's principle, which he calls "the light pinky of the law" exception and the "thanks, I needed that" exception, see: *ibid.* at xi-xv.

autonomy; and institutionalized preservation of liberty, preventing any accumulation of total power.[360] Individuals are free under law, Tamanaha argues, by offering a combination of these four themes of liberty.

> In a democracy citizens create the laws under which they live (political liberty); government officials take actions against citizens in accordance with these laws (legal liberty). In the first respect they rule themselves; in the second they are ruled by the laws which they set for themselves. Citizens, therefore, are at no point subject to the rule of another individual. Moreover, citizens possess a specially protected realm of individual autonomy that restricts the reach of law (personal liberty). Liberal democracies typically carry out this combination by utilizing some form of separation of powers, in particular with an independent judiciary (institutionalized preservation of liberty).[361]

The congruency liberty has with rule of law, particularly as discussed by Tamanaha, is clear. Liberty, like rule of law, allows individuals to pursue their own vision of what is good.[362]

For Hayek, liberty entails allowing individuals to choose what is good. Hence the greatest threat to liberty is coercion. It is "control of the environment or circumstances of a person by another that, in order to avoid greater evil, he is forced to act not according to a coherent plan of his own

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[360] See: Tamanaha, *On the Rule of Law*, *supra* note 274 at 33-36.
[361] *Ibid.* at 36.
[362] *Ibid.* at 41. It is worth noting, as it will be relevant to our discussion below, that Tamanaha does not object to the state encouraging certain social goods. What is important is that the liberal state remains neutral. "That is, it cannot adopt and promote as the state sanctioned good or religion one vision over others, with the important caveat that it may prohibit or sanction those that perpetuate violence on others or threatens the survival of the liberal state" (*ibid.*). Competing ideas of what constitutes the good are permitted. Indeed, Tamanha notes, "[l]iberal tenets are not offended, at least not in most versions of liberalism, when the state utilizes subsidies or education to encourage certain social good, like art and music, or actively promotes or inculcates in youth liberal values like tolerance and individual autonomy, but the state may not apply coercion on behalf of any particular set of values" (*ibid.*).

but to serve the ends of another."[363] It is deemed an evil because it "eliminates an individual as a thinking and valuing person and makes him a bare tool in the achievement of the ends of another."[364] Attempting to limit coercion of individuals by others thus is the chief concern in Hayek's *The Constitution of Liberty*.[365] Coercion, however, is recognized by Hayek to be unavoidable, as the only way in which to prevent coercion is by threats of coercion. This is why, Hayek notes, society has given the state a monopoly over coercion.[366] The coercive power of the state must be limited; coercion "is deprived of its most harmful effects by being confined to limited and foreseeable duties, or at least made independent of the arbitrary will of another person."[367] For Hayek, limiting the state's use of coercion, but permitting coercion according to known and general rules, allows it to become "an instrument assisting the individuals in the pursuit of their own ends and not a means to be used for the ends of others."[368] General laws do not subject an individual to the will of another.[369]

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[363] Hayek *The Constitution of Liberty*, *supra* note 32 at 20-21. According to Hayek, true coercion arises in only "very exceptional circumstances" where the sole control of a service or resource that is essential is conferred upon another (*ibid.* at 136). Hayek's understanding of coercion is somewhat limited. Consider the following excerpt: "Even if the threat of starvation to me and perhaps my family impels me to accept a distasteful job at a very low wage, even if I am "at the mercy" of the only man willing to employ me, I am not coerced by him or anybody else. So long as the act that has placed me in my predicament is not aimed at making me do or not do specific things, so long as the intent of the act that harms me is not to make me serve another person's ends, its effect on my freedom is not different from that of any natural calamity…" (*ibid.* at 137). According to Hayek, such an individual may have acted under great pressure, but not under coercion (*ibid.*).
[364] *Ibid.* at 21.
[365] *Ibid.* at 11.
[366] *Ibid.* at 21.
[367] *Ibid*.
[368] *Ibid*.
[369] Hayek notes, "when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are

Like Mill, Hayek also argues that if individuals are to be left free to pursue their own ends they must bear the consequences of their decisions. "Above all … we must recognize that we may be free and yet miserable. Liberty does not mean all good things or the absence of all evils. It is true that to be free may mean freedom to starve, to make costly mistakes, or to run mortal risks."[370] In addition, Hayek emphasizes the burden of liberty: responsibility. He deems the two concepts to be inseparable. "A free society will not function or maintain itself unless its members regard it as right that each individual occupy the position that results from his action and accept it as due to his own action."[371] Meaningful change in individuals can be effectuated by letting them bear the consequences of their decisions.[372] There is no such thing as collective responsibility, according to Hayek, unless the members of a group, through concerted action, make themselves individually and severally responsible.[373] Although he acknowledges that

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therefore free" (*ibid.* at 153).

[370] *Ibid.* at 18.

[371] *Ibid.* at 71.

[372] Hayek notes: "[w]e assign responsibility to man, not in order to say that as he was he might have might have acted differently, but in order to make him different" (*ibid.* at 75). Further, "[i]f we allow men freedom because we presume them to be reasonable beings, we also must make it worth their while to act as reasonable beings by letting them bear the consequences of their decisions" (*ibid.* at 76). Liberty requires individuals to have both "the opportunity and the burden of choice" as well, "it also means that he must bear the consequences of his actions and will receive praise or blame for them" (*ibid.* at 71). Freedom, however, implies capacity. "The idea that legal subjects are free implies that they can engage in purposive action. The capacity to engage in purposive action implies that persons can obey or disobey – the basis of legal responsibility - depends on her being able to know what the law is. A necessary (though not always sufficient) condition of her knowledge of the law is that the law be made public and knowable to her. A failure to make the law public is an affront to her dignity as a free and self-determining person because it denies her the ability to give herself the law as one of her purposes …. To hold a person legally responsible for her actions, she must be capable of brining her actions into conformity with the law" (Fox-Decent, *supra* note 27 at 556-557).

[373] Hayek, *The Constitution of Liberty*, *supra* note 32 at 83. This leads Hayek to the following

general dissatisfaction that modern society has with this notion[374], he nevertheless maintains that in a free society the individual is solely responsible for his or her own fate.[375]

This position, however, is predicated on the assumption that individuals are indeed free to choose.[376] According to Hayek, an individual's

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conclusion: "[w]hile we can feel genuine concern for the fate of our familiar neighbors and usually will know how to help when help is needed, we cannot feel in the same way about the thousands or millions of unfortunates whom we know to exist in the world but who individual circumstances we do not know. However moved we may be by accounts of their misery, we cannot make the abstract knowledge of the numbers of suffering people guide our everyday action. If what we do is to be useful and effective, our objectives must be limited, adapted to the capacities of our mind and our compassions. To be constantly reminded of our "social" responsibilities to all the needy or unfortunate in our community, in our country, or in the world, must have the effect of attenuating our feelings, until the distinctions between those responsibilities which call for our action and those which do not disappear. In order to be effective, then, responsibility must be so confined as to enable the individual to rely on his own concrete knowledge in deciding on the importance of the different tasks, to apply his moral principles to circumstances he knows, and to help to mitigate evils voluntarily" (*ibid.* at 84). There is much in this statement that can be disputed but which is beyond the scope of our current study. What is particularly disturbing about this statement is the exclusive reliance on one's own circumstances to determine the legitimacy of responsibilities. It smacks of willful blindness. A criticism often levied against the wealthy, and the West generally, is the pervasive ignorance of poverty, and the impacts of poverty, on developing and third-world nations (not to mention the poverty within developed nations!). One cannot help but wonder if Hayek would be dissuaded from this argument given the increased awareness of the circumstances of others, in part from globalization and advances in modern technology but also due to the rejection by many of the very attitude Hayek advocates. In any event, Hayek contends, "[g]eneral altruism … is a meaningless conception. Nobody can effectively care for other people as such; the responsibilities we can assume must always be particular, can concern only those about whom we know concrete facts and to whom either choice or special conditions have attached us" (*ibid.* at 78-79).

[374] *Ibid.* at 80. Hayek recognizes that the belief in individual responsibility has declined. "Responsibility has become an unpopular concept, a word that experienced speakers or writers avoid because of the obvious boredom or animosity with which it is received by a generation that dislikes all moralizing" (*ibid.* at 71-72). He further argues that "[t]he sense of responsibility has been weakened in modern times as much by overextending the range of an individual's responsibilities as by exculpating him from the actual consequences of his actions" (*ibid.* at 83).

[375] Hayek rejects the contention that the belief that a person is solely responsible for their own fate is one held only by those that are successful. Instead, he argues "the connection is the other way round and that people are often successful because they hold this belief …. whereas the more a man indulges in the propensity to blame others or circumstances for his failures, the more disgruntled and ineffective he tends to become" (*ibid.* at 82-83). It is unclear how Hayek supports this position, other than his own speculation.

[376] Indeed, it could be argued that the proceeding discussion is contingent on several assumptions that, were they not to be accepted, would raise serious questions as to the

freedom to choose depends solely on his or her ability to act in accordance with present intentions, and not the intentions of others.[377] Hayek does not consider the range of choice available to an individual to be related to the question of freedom of choice.[378] Berlin, observing that "not all choices are equally free, or free at all"[379], contests the idea that the existence of alternatives is sufficient to grant individuals freedom of choice. It is important to note, however, that Berlin contends "[y]ou lack political liberty or freedom only if you are prevented from attaining your goal by human beings. Mere incapacity to attain your goal is not lack of political freedom."[380] Berlin goes further than Hayek by acknowledging conditions are necessary for individuals to make free choices.[381] Berlin's comments are made in the

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veracity of the conclusions. For example, Gostin & Gostin suggest this to be the case for Mill's argument. They note: "Mill, in effect, uses a series of simplifying assumptions. Provided the reader accepts each of them, his argument is neatly unassailable. However, when one recognizes that these assumptions are far from simple or true, then it requires further thinking about Mill's claims" (*supra* note 90 at 216).

[377] Hayek notes, "[w]hether he is free or not does not depend on the range of the choice but on whether he can expect to shape his course of action in accordance with his present intentions, or whether somebody else has power so to manipulate the conditions as to make him act according to that person's will rather than his own" (*The Constitution of Liberty*, *supra* note 32 at 13). Berlin has observed that there is nothing worse for autonomous beings to be treated as if they were not autonomous, "played on by causal influences, creatures at the mercy of external stimuli, whose choices can be manipulated by their rulers, whether by threats of force or offers of rewards" ("Two Concepts of Liberty", *supra* note 38 at 136-137). He further notes, "to manipulate men, to propel them towards goals … is to deny their human essence, to treat them as objects without wills of their own, and therefore to degrade them" (*ibid.* at 137).

[378] Hayek notes, "[w]hether or not I am my own master and can follow my own choice and whether the possibilities from which I must choose are many or few are two entirely different questions" (*The Constitution of Liberty*, *supra* note 32 at 17). Similarly, he argues that "[w]hether or not a person is able to choose intelligently between alternative, or to adhere to a resolution he has made, is a problem distinct from whether or not people will impose their will upon him" (*ibid.* at 15).

[379] Berlin, "Two Concepts of Liberty", *supra* note 38 at 130, note 1.

[380] *Ibid.* at 122. Berlin does acknowledge the position that "political liberty is useless without the economic strength to use it … [and] that economic opportunity is of use only to politically free men" (Berlin, "Political Ideas", *supra* note 271 at 27).

[381] For example, Berlin notes, "[t]he extent of my freedom seems to depend on (*a*) how many

context of his discussion of what is meant by liberty. He distinguishes between two conceptions: negative liberty and positive liberty. Negative liberty refers to the conception of liberty discussed above. It is the idea that individuals are free in that no one is permitted to interfere with their activity; it is "the area within which a man can act unobstructed by others."[382] A person is coerced if they are subject to deliberate interference by another. Positive liberty, on the other hand, represents the wish of the individual to be his or her own master. It represents the wish that "my life and decisions to depend on myself, not on external forces of whatever kind …. to be the instrument of my own, not of other men's, acts of will …. to be somebody, not nobody; a doer—deciding, not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing."[383] The two concepts have been summarized as follows:

> Whereas "positive liberty" represents the triumph of one's so-called authentic, or "higher" self over passion and selfish interests that encumber our inferior self, negative liberty is "the possibility of fulfilling our projects without coercion." Positive liberty, then, speaks to giving persons the capacity to be what others judge they *can* be, while negative liberty speaks to permitting persons the power to be what they *wish themselves* to be.[384]

possibilities are open to me ….; (*b*) how easy or difficult each of these possibilities is to actualize; (*c*) how important in my plan of life … these possibilities are when compared with each other; (*d*) how far they are closed and opened by deliberate human acts; (*e*) what value not merely the agent, but general sentiment of the society in which he lives, puts on the various possibilities" (Berlin, "Two Concepts of Liberty", *supra* note 38 at 130, note 1).

[382] *Ibid.* at 122.

[383] *Ibid.* at 131.

[384] Ubaka Ogbogu & Russell Brown, "Against Doctor's Orders: The Force and Limits of Personal Autonomy in the Health Care Setting" (2007) 15 Health L.J. 515 at 521, original emphasis.

They note that this bifurcated understanding of liberty does not make positive and negative liberty counterpoints. Instead, they are mutually dependent; "positive liberty can be understood as the condition that makes negative liberty universally possible."[385]

According to Berlin, "every interpretation of the word liberty, however unusual, must include a minimum of what I have called 'negative' liberty."[386] This is because no society suppresses all liberties.[387] The fathers of liberalism, however, want more than a minimum: "they demand a maximum degree of non-interference compatible with the minimum demands of social life."[388] Berlin contends that this demand has likely never been met, aside perhaps from a "small minority of highly civilized and self-conscious human beings."[389] In fact, Berlin argues that throughout history humanity has been prepared to sacrifice the attainment of the greatest degree of liberty for other goals, such as security, power or fraternity.[390] This is because human beings "live by positive goals, individual and collective, a vast variety of them, seldom predictable, at times incompatible."[391] To Berlin this is not surprising, as he notes that liberty is not intrinsic to human beings,

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[385] *Ibid.* at 523.
[386] Berlin, "Two Concepts of Liberty", *supra* note 38 at 161.
[387] Berlin argues that if a society did suppress all liberties it would prevent beings from existing as moral agents, "and could not either legally or morally be regarded as a human being" (*ibid*.).
[388] *Ibid*.
[389] *Ibid*.
[390] *Ibid*. Berlin specifically states the other goals as: "security, status, prosperity, power, virtue, rewards in the next world; or justice, equality, fraternity, and many other values which appear wholly, or in part, incompatible with the attainment of the greatest degree of individual liberty…" (*ibid*.).
[391] Berlin, "Political Ideas", *supra* note 271 at 40.

but is instead a modern idea.[392] If anything, "[t]he domination of this ideal has been the exception rather than the rule, even in the recent history of the West. Nor has liberty in this sense often formed a rallying cry for the great masses of mankind."[393]

Madison has similarly differentiated between negative and positive conceptions of freedom. Similarly to how negative liberty has been defined above, Madison understands negative freedom as freedom from coercion. It is "freedom from". It is "what makes possible and what guarantees a sphere of personal inviolability and moral integrity, an area in which is recognized one's right to organize one's life as one sees fit, in light of beliefs of one's own choosing."[394] There is a danger, however, in conceiving of negative freedom as synonymous with a minimal state, the doctrine of *laissez-faire* or the absence of legal restraint. "The idea of negative freedom actually entails a positive conception of the State" which means "the State has a definite role to play in the economic and social life of the nation and that State intervention in these areas … violates no liberal principles and is fully compatible with a 'negative' conception of freedom."[395] Indeed, Madison argues that without

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[392] See Isaiah Berlin, "Introduction" in Berlin, *supra* note 38, viii at xxxvii where he notes political liberty has had a historical growth and is "an area bounded by frontiers." See also: Berlin, "Two Concepts of Liberty", *supra* note 38 at 129, where he notes: "the doctrine is comparatively modern. There seems to be scarcely any consciousness of individual liberty as a political ideal in the ancient world." For a more detailed discussion see Berlin, "Introduction", *ibid*. at xl-xli.

[393] Berlin, "Two Concepts of Liberty", *supra* note 38 at 129.

[394] Madison, *supra* note 344 at 74.

[395] *Ibid.* at 74.

the state to regulate the actions of individuals, freedom would not be enjoyed.[396]

Positive freedom, alternatively, can be understood as "freedom to". Madison has identified positive freedom with Karl Marx's notion of "real liberation" or "liberation from reign of necessity." According to Marx, "[p]eople on the whole cannot be liberated so long as they are unable to obtain food and drink, shelter and clothing in adequate quality and quantity."[397] While Madison concedes that the starving individuals in a free society are not likely to place much value on various civil liberties that membership in the society afford, he nevertheless contends "[t]hat certain members of a free society are not in a position to make active use of their constitutional liberties does not mean that these liberties are, in themselves and so far forth, worthless" but "retain their intrinsic value even when there are those who cannot enjoy them."[398] It is not clear, however, that those who

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[396] Madison notes: "Freedom is freedom from coercion, not the absence of legal restraint, for the law that restricts my activity is precisely that which makes me free. The reason is simple, and the paradox is only apparent. If other people have the unrestricted right to interfere in my personal affairs, I enjoy very little freedom. Thus, by limiting and regulating the action of individuals on one another, the law is precisely that which provides for their freedom. Liberalism does not advocate a 'minimal' State if this be taken to mean a weak and all but non-existent government. It advocates a *limited* government, and a limited government can, within the sphere allotted to it, be very strong and active indeed" (*ibid.*, original emphasis).
[397] *Ibid.* at 76-77, quoting Karl Marx, "The German Ideology" in L. Easton and K. Guddat, eds., *Writings of the Young Marx on Philosophy and Science* (New York, 1967) at 437.
[398] Madison, *supra* note 344 at 77. Madison also notes: "[a]nd they are of the utmost value to those who are not materially destitute (it should not be forgotten that throughout history those societies which have been relatively free have generally been relatively prosperous, which is to say that an overwhelming number of their citizens have concretely profited from these liberties). To them, civil liberties and political freedom are of supreme importance (they are quite "real"), and this is not way altered by the fact that there are those who are both economically unfortunate and (elsewhere, in other societies) politically enslaved" (*ibid.* at 77). Madison continues to argue that it would be "the most fallacious piece of reasoning" to suggest that "a certain percentage of people in a free society are not in an economically satisfactory position alter the intrinsic value of the civil liberties enjoyed by those who are"

advocate for positive freedoms would consider liberties useless[399], a point Madison recognizes.[400] However, he does contend that providing for material needs is no guarantee for civil liberties. In fact, he contends, "to subordinate negative freedom to positive freedom is to subordinate politics to economics

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or "the fact that a majority of the world's population lack many of the necessities of life alter the value of freedoms enjoyed by those living in the more fortunate (and more industrious) countries of the world" (*ibid.*). Although Madison does not define "economically satisfactory position" he nevertheless contends that the vast majority in the West fall into this position. It is unclear, however, how Madison would contend with data that suggests that this is, in fact, not the case. In 2007, for example, 12.5% of the US population (representing 37.3 million Americans) were living in poverty as defined by the U.S. Census Bureau, (see: <http://www.census.gov/hhes/www/poverty/poverty07/pov07hi.html>) Moreover, poverty has been found to be consistently higher among certain subgroups (e.g., 24.5% of Blacks and 21.5% of Hispanics were living in poverty in 2007; 18% of children under the age of 18 also were living in poverty in 2007, *ibid*.). Madison argues that it is possible that "developed nations owe their prosperity to the existence of these freedoms and that the lesser developed nations would do well to emulate them in this regard if they too wish to enjoy a higher standard of living" (*supra* note 344 at 77). There is nothing to suggest that this sentiment is anything more than conjecture.

[399] Indeed, it could be argued that the importance of positive freedoms is precisely because it is allows individuals access to negative freedoms, although it is beyond the scope of the current endeavor to pursue this argument further.

[400] *Ibid.* at 78. However, he does contend that positive freedom renders "economic welfare" as greater worth than formal liberties. This requires that "one must make a choice as to what one values more: equality or freedom. If one values equality over everything else, then one must be prepared to sacrifice freedom if this should prove to be the means of achieving this goal. But one cannot then pretend (as the critic would like to, if only for rhetorical purposes) that liberation from necessity is a means of achieving (or will of itself make for) political freedom, for we know that in no country where the "dictatorship of the proletariat" has been instituted in order to achieve "liberation from necessity" has it given rise to free government (and, as we are becoming increasingly aware, in most cases it has not even made for significant progress towards the economic goal). On the other hand, if one is committed to freedom, one will not be prepared to sacrifice it for equality but will rather hope to see others attain to a level of material welfare sufficient to make use of the freedom one enjoys oneself" (*ibid.* at 78). What Madison does not address here is that those who value freedom may be willing to sacrifice equality. Thus, the freedom of some may result in the inequality of the many. In fact, there is good reason to suggest that this is often the case. Consider Berlin's observation: "[m]en are largely interdependent, and no man's activity is so completely private as never to obstruct the lives of others in any way. 'Freedom for the pike is death for the minnows'; the liberty of some must depend on the restraint of others. 'Freedom for an Oxford don', others have been known to add, 'is a very different thing from freedom for an Egyptian peasant'" ("Two Concepts of Liberty", *supra* note 38 at 124). Similarly, Berlin notes, "[w]hat is freedom to those who cannot make use of it? Without adequate conditions for the use of freedom, what is the value of freedom?" (*ibid*). He further notes, "[w]hat troubles the conscience of Western liberals is not, I think, the belief that the freedom that men seek differs according to their social or economic conditions, but that the minority who possess it have gained it by exploiting, or, at least, averting their gaze from, the vast majority who do not" (*ibid.* at 125).

and thereby to destroy it; it is to destroy civil and political freedoms."[401] Freedom is rather a legal idea: "[o]ne's freedom is indeed coterminous with what one is allowed by law to do (regardless of whether one possesses the means of actually doing so and regardless of whether one even desires to do so)."[402]

In this and the preceding section, I have described the rule of law and liberty. I have provided an overview of the force beyond force (that is, rule of law) while recognizing the substantial and ongoing legal and philosophical debate about rule of law. I have defined thinner (i.e., focused more on individual rights) and thicker (i.e., representative of a social welfare state) accounts of rule of law and have identified three themes posited to represent rule of law: government limited by law; formal legality; and rule by law, not by man. I have explained that rule of law aims to protect citizens, limit government, foster predictability and certainty, and promote justice. I have described Mill's conception of liberty as well as the harm principle, and have presented liberty as a contested concept. Further, I have outlined the nature of the relationship between liberty and responsibility and have described negative liberty (i.e., freedom from) and positive liberty (i.e., freedom to). Prior to examining these concepts in the public health law context, it is first

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[401] Madison, *supra* note 344 at 80.
[402] *Ibid.* at 90. He notes: "To characterize the liberal idea of freedom, even in a "simplified" form, as the ability to obtain what one desires, as does the English conservative thinker Roger Scruton, is not only simplistic but perverse. To conceive of freedom as the absence of frustration is, as another English writer appropriately remarks, to indulge oneself in an 'infantile concept of freedom'" (*ibid.*, Madison is referring to Roger Scruton, "Freedom and Custom" in A.P. Griffiths, ed., *Of Liberty* (Cambridge: Cambridge University Press, 1983) and K.R. Minogue, "Freedom as a Skill" in Griffiths, *ibid.*).

necessary to contend with the threat instrumentalism poses to rule of law. As will be shown, public health law may exacerbate this threat.

2. INSTRUMENTALISM AND THE PUBLIC GOOD

The rule of law, despite being a foundational doctrine grounding law, is only influential if it is accorded proper respect. Tamanaha has identified what he considers potentially damaging to rule of law: instrumentalism. According to Tamanaha, "[a]n instrumental view of law means that law—encompassing legal rules, legal institutions, and legal processes—is *consciously* viewed by people and groups as a *tool* or *means* with which to achieve *ends*."[403] Law, therefore, is not viewed as an end in itself, but becomes teleological, a means to an end: thus, law becomes an instrument.[404] The threat to rule of law necessarily threatens liberty. Instrumentalism is not presented as a new phenomenon. Tamanaha spends considerable time demonstrating how 'instrumental strains of thinking about law' can be found throughout legal history.[405] It is also important to recognize that Tamanaha does not necessarily reject all instrumental views of law; he recognizes that there is truth to the observation that law is always instrumental in the sense

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[403] Brian Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press, 2006) at 6, original emphasis [Tamanaha, *Law as a Means to an End*]. See also, Tamanaha, "Instrumental View of Law", *supra* note 24. For critical treatment of Tamanaha's thesis, see: DeGirolami, *supra* note 298 and Ofer Raban, "Real and Imagined Threats to the Rule of law: On Brian Tamanaha's *Law as a Means to an End*" (2008) 15 Va. J. Soc. Pol'y & L. 478 [Raban].

[404] Gostin & Gostin note that "Mill's principle of liberty purports to be instrumental. It is put in place to promote personal autonomy, which Mill believes transforms society in a way that promotes utility (i.e. happiness). However, if utility is the purpose, what are the instrumental effects of social policies that champion selfish individualism and the undeterred entrepreneur?" (*supra* note 90 at 220).

[405] See Tamanaha, *Law as a Means to an End, supra* note 403 at 6.

that it advances particular interests.[406] What is problematic is the rampant use of and misunderstanding about how law is an instrument. "The solution to the problems identified … lies not in repudiating the view that law is an instrument, but in setting limits and restraints on this view, in recognizing the situations in which it is inappropriate, and in recognizing that certain uses of this instrument are dangerous and must be guarded against."[407] Early instrumental understandings of law had a specific focus: law was seen as an instrument to serve the social good.[408] According to Tamanaha, "[t]he crucial twist is that in the course of the twentieth century, the first half of this proposition swept the legal culture while the second half became increasingly untenable."[409] The disintegration of idea of a 'social good' has had serious consequences for law. "Rather than represent a means to advance the public welfare, the law is becoming a means pure and simple, with the ends up for grabs."[410] Given the use of law by public health to promote a particular end – the health of the population – public health law exposes itself to being criticized as an instrumental use of law.

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[406] *Ibid.* at 5. He notes, "[e]ven when it was characterized in non-instrumental terms, law regularly originated in and change through instrumentally motivated contests" (*ibid.*), although he notes that this is not the whole story. See especially Chapter 3 (*ibid.* at 41-59), which Tamanaha states "shows that legislation and the actual practice of law in the nineteenth century were seen in largely instrumental terms, notwithstanding the many non-instrumental accounts of law repeated during this period" (*ibid.* at 5). Tamanaha does not advocate for a "wholesale rejection of the idea that law is an instrument …. [as] this view of law is here to stay" (*ibid.* at 6). Waldron suggests that law's instrumentalism is aspirational, in that it aspires to promote the public good (Waldron notes, "we might say that nothing is law unless it *purports* to promote the public good, i.e., unless it presents itself as oriented in that direction. This is an aspirational or orientational idea, not a substantive one", *supra* note 304 at 32 (original emphasis)).
[407] *Ibid.* at 6.
[408] *Ibid.* at 4.
[409] *Ibid*.
[410] *Ibid*.

Significant effort has been made to determine what is properly within the ambit of the public good. While some reject the very notion of a public good existing at all, or at least have "no confidence that the public good can be identified with certainty, or agreed upon"[411], refrains for protecting the public good have been consistent throughout history.[412] One of the problems Tamanaha identifies is that what constitutes the public or social good is highly contested. He observes, "[i]n situations of sharp disagreement over the social good, when law is perceived as a powerful instrument, individuals and groups within society will endeavor to seize or co-opt the law in every way possible; to fill in, interpret, manipulate, and utilize the law to serve their own ends."[413]

According to Hayek, "[i]t would scarcely be an exaggeration to say that the greatest danger to liberty today comes from the men who are most needed and most powerful in modern government, namely, the efficient expert administrators exclusively concerned with what they regard as the

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[411] *Ibid*. at 223. Raban notes that there is skepticism concerning the common good, including debate about whether there is a single common good and suspicions towards any authoritative claim as to the common good entails (*supra* note 403 at 482).
[412] By way of example, consider the examples provided by Tamanaha (*ibid.* at 219-220): Plato asserts that law should be "for the sake of what is common to the whole city" (see: Plato, *Law*, trans. by T. Pangle (New York: Basic Books, 1980) 715b). Aristotle notes that "true government" must have just laws, which are oriented towards the "common interest" (see: Aristotle, *The Politics*, trans. by E. Barker (Cambridge: Cambridge University Press, 1988) 68-69), and; John Locke similarly notes that, legislative power "in the utmost bounds of it, is limited to the public good of society" (J Locke, "Second Treatise on Government" in Peter Laslett, ed., *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988) at Chap. XI, Section 135).
[413] Tamanaha, *Law as a Means to an End*, *supra* note 403 at 1. Berlin observes that how we determine good (and evil) is dependent on moral, religious, intellectual, economic and aesthetic values, themselves "bound up with our conception of man, and of the basic demands of his nature" ("Two Concepts of Liberty", *supra* note 38 at 169).

public good."[414] Considerable effort has been put forward by private interests to influence legislators and administrators to their own benefit—an activity so pervasive and entrenched that Tamanaha contends it is thought to constitute "an integrated structural aspect of the governing system on both the state and federal levels."[415] In fact, through lobbying and the flow of money there are compelling reasons to be skeptical when officials suggest that a particular initiative is in the public's interest. Although he identifies the difficulties involved in demonstrating a link between legal action and the exchange of money between government and private interests[416], Tamanaha

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[414] Hayek, *The Constitution of Liberty*, *supra* note 32 at 262. Hayek contends, "we are much too ready to leave the decision to the expert or to accept too uncritically his opinion about a problem of which he knows intimately only one little aspect" (*ibid.* at 4). Arguably, in *On Liberty* Mill adopts a similar position. As Gostin & Gostin note, "Mill's is an argument about fallibility, that no state official is in a better position to determine personal good than the individual him- or herself" (*supra* note 90 at 218).

[415] Tamanaha, *Law as a Means to an End*, *supra* note 403 at 195. He notes: "[t]he major players seeking to influence or control the law can be roughly divided into financial interests and ideological interests, with significant overlap, fuzzy cases, and strategic mutual support. Financial interests take three basic forms: individual corporations, associations (corporate trade groups as well as labor unions), and institutes. Ideological interests—women's rights groups, consumer groups, religious groups, libertarian groups, etc.—mainly to take the form of advocacy groups" (*ibid.*).

[416] Tamanaha notes: "Demonstrating a casual link between official legal actions and the flow of money from private interests to public officials is notoriously elusive. It is not enough to surmise that the parties collectively expending billions of dollars in this endeavor must be getting something for their largess. It is not enough to wonder skeptically whether administrative officials would act contrary to the desires of their once and future employers in industry. It is not enough to raise the obvious question: How likely is it that politicians would vote against the desires of a group or interest that supplies them tens of thousands of dollars in direct campaign contributions, that sponsors fundraising events that generate tens of thousands of dollars more, that independently airs supportive campaign ads, that showers them with fancy dinners and trips, that employs their wife or husband or son or daughter as a lobbyist or consultant, and that might employ them at remuneration many times their current pay upon leaving office? Under such circumstances, truly virtuous public officials would not be influenced, and such officials exist, but the cumulative inducement to favor supportive interests is mighty. Compelling as such innuendo might be, it is still innuendo" (*ibid.* at 205). It is not clear that Tamanaha is correct in his characterization here, but a further examination is beyond the scope of this paper.

nevertheless acknowledges that actions framed as public goods are often shown to advance private interests:

> A number of studies have identified official actions in different areas that appear to benefit industry to the detriment of the public. Agency actions have increased the risk to the flying public, have increased pollution and allowed private exploitation of public resources, and have loosened meat regulation while raising the risk of bacterial contamination, among other instances of questionable actions. In each situation, officials offer a colorable explanation for why their actions further the public interest.[417]

Tamanaha also notes how scientific studies are slanted to favour industry and advisory boards and senior governmental positions are occupied by individuals with industry ties.[418] Thus, it is not clear how to discern when actions are legitimately undertaken for the public welfare.

Novak has extensively examined what is meant by the public welfare.[419] Exploring what he deems "the neglected public side of the American rule of law"[420], Novak examines the common law maxim, *salus populi suprema lex est*, the welfare of the people is the supreme law.[421] This

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[417] *Ibid.* at 204. Tamanaha refers to the following articles: Marc C. Niles, "On the Hijacking of Agencies (and Airlines): The Federal Aviation Administration, 'Agency Capture,' and Airline Security" (2002) 10 Am. U.J. Gender Soc. Pol'y & L. 381; Patrick Parenteau, "Anything Industry Wants: Environmental Policy Under Bush" (2004-2005) 6 Vermont J. Environmental L. 2; Dion Casey, "Agency Capture: The USDA's Struggle to Pass Food Safety Regulations" (1998) 7 Kan. J.L. & Pub. Pol'y 142; John Shephard Wiley, "A Capture Theory of Antitrust Federalism" (1986) 99 Harvard L. Rev. 713, and; Mark Seidenfeld, "Bending the Rules: Flexible Regulation and Constraints on Agency Discretion" (1999) 51 Admin. L. Rev. 429.

[418] Tamanaha, *Law as a Means to an End*, *supra* note 403 at 201-203, 205-209. See above notes on science above, notes 193-195.

[419] See: Novak *The People's Welfare*, *supra* note 135.

[420] *Ibid.* at 12.

[421] *Ibid.* at 9. He contends that this maxim is "one of the fundamental ordering principles of the early American polity" (*ibid*.). This maxim is attributed to Cicero during the reign of the Roman Empire. Cicero's use of this maxim is invaluable for understanding how public health has historically factored into the state's obligation to its people. As Mackie & Sim note, "[a]gainst such an uncertain background, it is perhaps surprising that Cicero sought to

maxim "culminated in the open-ended obligation of government to pursue the people's welfare above all else."[422] Although it is beyond the scope of this paper to examine each in detail here, Novak identifies five areas that are encompassed by the public welfare: public safety, public economy, public ways, public morality and public health.[423] What is important to note is that for Novak the public welfare was not contrary to the rule of law. In fact, at the conclusion of his text he contends that in American legal history "there was no people's welfare without a rule of law, and there was no rule of law without a due regard for the common good. When *res publica* (the public things) and *salus populi* (the people's welfare) become mere functions of

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provide for the common good of the people. He recognized that it was the business of good government to protect and sustain the public's health and that those with power had responsibilities for those who were powerless" (P. Mackie & F. Sim, "Ollis Salus populi suprema lex esti" (2009) 123 Public Health 205 at 205).

[422] Novak, *The People's Welfare, supra* note 135 at 46. Novak also examines the common law maxim, *sic utere tuo ut alienum non laedas*, use your own so as not to injure another. "These two maxims were the common law foundation for American police regulation" (*ibid*. at 42). Of course, there is considerable debate about the meaning of such maxims. Not surprisingly, how one interprets the maxims is dependent on their ideological understandings. Consider, for example, how Weinrib interprets *sic utere*: "[t]he court of appeal, cognizant that disadvantaging is not equivalent to wronging, reversed with the observation that 'the maxim sic utere tuo ut alienum non laedas … means only that one must his property so as not to injure the lawful rights of another.'" (Weinrib, "Rights and Advantages", *supra* note 165 at 1285). Arguably, Weinrib is founding his position on historical evidence. The same is true for Novak, however. According to Novak, "[*s*]*ic utere tuo* was the common law standard by which government established regulations and restrictions to prevent one individual's liberty and property from injuring another. It was the essence of civil liberty—liberty regulated by common law." (Novak, *The People's Welfare, supra* note 135 at 44). Furthermore, he notes "[*s*]*ic utere tuo* was always secondary to 'the more general rule, which require[d] that all actions of individuals be so directed as to promote the good of the whole." (*ibid.* at 45). The difference between Weinrib and Novak is not likely to be explained away due to one (or both) completely misinterpreting history (although, this kind of argument has been proffered by the likes of Epstein), but illustrates the difficulty of determining what is right – ideological constraints prevail.

[423] Each of these is subject to an entire chapter in his text, *The People's Welfare*, *ibid*.: see: "Chapter 2: Public Safety: Fire and the Relative Right of Property" at 51-82; "Chapter 3: Public Economy: The Well-Ordered Market" at 83-114; "Chapter 4: Public Ways: The Legal Construction of Public Space" at 115-148; "Chapter 5: Public Morality: Disorderly Houses and Demon Rum" at 149-190, and; "Chapter 6: Public Health: Quarantine, Noxious Trades, and Medical Police" at 191-234.

individual interests, economic formulas, and political expediency, we have only law of men, not government."[424] This is not surprising, given Novak's understanding of rule of law. He notes that it is "a distinctly public and social idea" one that "dominated most thinking about governance in the nineteenth century."[425] According to Novak, public health is subsumed as part of public's welfare and thus rule of law.[426]

Upon review of the descriptive analysis above, it would be difficult to suggest that public health law is concerned with anything other than utilizing law to achieve a specific end: improving the health of the public. Dickens notes, "to societies as to many individuals, health is less a purpose in itself than an instrumental means of achieving or facilitating the goals that give life its enjoyment and significance, and that health is often most valued for its own sake only when lost."[427] Public health law, then, may be a *prima facie* instance of permissible instrumentalism. Public health initiatives, however, may not escape unscathed, given the discord concerning what it means to secure health for the public. There is sure to be disagreement about whether uses of public health law are in fact aimed at improving social goods—hence

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[424] *Ibid.* at 248.
[425] *Ibid.* at 12. Novak asserts that the rule of law as a social idea antedates both Lockean liberalism and Machiavellian civic humanism.
[426] Novak contends that public health has often been overlooked and undervalued in legal history (*ibid.* at 191). He notes, "[p]ublic health was so vital to nineteenth-century American governance that it sometimes served as a raison d'etre for political organization" (*ibid.* at 193). "The 'welfare of society' demanded not only individual cures and preventive habits, but the 'medical police of cities,' including street cleaning and paving, improved water supply, temperance, prohibitions on noxious slaughterhouses and manufactures, the regulation of burials and building, and the efficient administration of hygienic regulations" (*ibid.* at 195).
[427] Dickens, *supra* note 29 at 169.

public health initiatives being classified as nanny statist or paternalistic.[428] Even if the desired outcome represents a good for some, commentators have argued that they do not constitute a social good, but rather a good for a particular subset of the population. Moreover, some public health aims may arguably be contrary to the public's welfare, despite the benefit provided to a discernible sub-population.[429] For example, population health screening,

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[428] Gostin & Gostin note that public health paternalism is colloquially known as 'the nanny state' (at 215) Calman observes, "[t]he idea of a 'nanny state' is often rejected, but the state has a duty to look after the health of everyone, and sometimes that means guiding or restricting people's choices. On the other hand, the state must consider a number of key principles when designing public health programmes, including Mill's harm principle, caring for the vulnerable, autonomy and consent (although the latter two may be of lesser importance in public health than in clinical medicine)" (*supra* note 41 at e9). It has been observed that "the public often laments the 'nanny state' where government engages in paternalistic policies that appear to tell people how they should live their lives, even if their behaviours affect primarily themselves" (Bennett *et al., supra* note 25 at 207). It is no wonder that public health is often looked upon disfavourably, given, as Jochelson contends, "[a]lmost every government intervention in the public health arena has been criticised by critics of the time as a sign of tyranny, nanny statism, or the end of individual freedom" (*supra* note 124 at 29). This should not dissuade governments from using what is perceived as paternalistic measures: "[i]f the collective benefits are high and the individual burden are low, the rhetorical assertion that a policy is paternalistic should not operate as a political trump. Public health paternalism that markedly improve health and well-being within the population offers a 'broader freedom'" (Gostin & Gostin, *supra* note 90 at 215). The controversy will not likely dissipate, however, given that "[p]ublic health paternalism is concerned primarily with overall societal welfare rather than individual preferences. It is intended to benefit the community as a whole rather than any given person. It purports to save statistical, rather than individual, lives" (*ibid.* at 217). Berlin contends that paternalism is despotic: "it is an insult to my conception of myself as a human being determined to make my own life in accordance with my own (not necessarily rational or benevolent) purposes, and, above all, entitled to be recognized as such by others" ("Two Concepts of Liberty", *supra* note 38 at 157). Not all reject paternalism, nor do they contend that it necessarily has to conflict with liberalism, see: Richard H. Thaler & Cass R. Sunstein, "Libertarian Paternalism" (2003) 93:2 AEA Papers and Proceedings 175 and Cass R. Sunstein & Richard H. Thaler, "Libertarian Paternalism is not an Oxymoron" (2003) 70 U. Chi. L. Rev. 1159. This paper does not expressly examine the notion of paternalism, for detailed discussions, see: Thaddeus Mason Pope, "Is Public Health Paternalism Really Never Justified? A response to Joel Feinberg" (2005) 20 Okla. City U.L. Rev. 121; Calman, *supra* note 41; Jochelson, *supra* note 141, and; Richard B. Saltman & Odile Ferroussier-Davis, "The Concept of Stewardship in Health Policy" (2000) 78 Bulletin of the World Health Organization 732.

[429] Berlin's observation seem appropriate: "Today the very virtues of even the best intentioned paternalistic state, its genuine anxiety to reduce destitution and disease and inequality, to penetrate all the neglected nooks and crannies of life which may stand in need of its justice and its bounty—its very success in those beneficent activities—have narrowed the area within which the individual may commit blunders, and curtailed his liberties in the

particularly for diseases or illnesses that are localized in a specific population (e.g., screening Ashkenazi Jews for Tay-Sachs disease), does not necessarily constitute a benefit to the public generally, particularly if the entire population is required to undergo screening.[430]

Although some commentators suggest that public health is a "classic 'public good'"[431], there remains some dispute as to whether it is properly understood as a public good.[432] Siegel notes, "even if we accept that we have robust positive duties to secure the collective good, there is reason to question whether promoting health in the population is necessarily

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interest (the very real interest) of his welfare or of his sanity, his health, his freedom from want and fear. His area of choice has grown smaller not in the name of some opposing principle—as in the Dark Ages or during the rise of the nationalities—but in order to create a situation in which the very possibility of opposed principles, with all their unlimited capacity to cause mental stress and danger and destructive collisions, is eliminated in favour of a simpler and better regulated life, a robust faith in an efficiently working order, untroubled by agonizing moral conflict. Yet this is not a gratuitous development …. So the remedy grows to be worse than the disease …. The dilemma is logically insoluble: we cannot sacrifice either freedom or the organization needed for its defence, or a minimum standard of welfare. The way out must therefore lie in some logically untidy, flexible, and even ambiguous compromise. Every situation calls for its own specific policy, since out of the crooked timbers of humanity, as Kant once remarked, no straight thing was ever made" (Berlin, "Political Ideas", *supra* note 271 at 38-39).

[430] Another example is population screening through newborn bloodspots for sickle cell disorder, which is predominantly thought to be found in African-American populations Although not necessarily as limited in scope, the same might also be said for HIV/AIDS screening, which is increasingly viewed as a subfield of public health law, see Mary Anne Bobinski, "HIV/AIDS and Public Health Law" in Bailey, Caulfield & Ries, *supra* note 2, 165 and L. Gable, L. Gostin & J.G. Hodge, Jr., "A Global Assessment of the Role of Law in the HIV/AIDS Pandemic" (2009) 123 Public Health 260.

[431] Fidler argue, "the protection of the population's health is a classic 'public good,' the production of which requires governmental action because the incentives for private actors to produce such goods are insufficient" (Fidler, *supra* note 77 at 156).

[432] The dispute does not necessarily arise strictly on ideologically grounds. As Rolf Sartorius has observed, even the most dedicated proponent of "laissez-faire economics" admit that there is no invisible hand that will ensure the provision of public goods and that "the strong guiding hand of government will typically be required to lead individuals to make decision whose collective effects will be mutually advantageous rather than mutually detrimental" (Rolf Sartorius, "The Limits of Libertarianism" in Cunningham, *supra* note 28, 87 at 104 [Sartorius]).

tantamount to promoting the collective good."[433] There are certain goods that individuals are unable to attain on their own; ones that require collective action. It has been observed, "[t]his is self-evident in the case of infectious disease control, occupational health and product safety."[434] Siegel however cautions against abstracting the "good of the policy" from the "good of the persons the policy is meant to protect." [435] He is critical of the population health perspective, suggesting it is myopic, as "it excludes the particular values and interests of individuals from its field of vision. It fails to recognize that the collective good is derivative of the good of the individuals who form the collective."[436] By blurring the distinction between self-regarding and other-regarding acts, a population health perspective "falsely assumes that all acts that pose a risk to the population's health constitute a threat to the collective good."[437] Although Siegel may be right, Gostin nevertheless advocates viewing health risks as common to the collective rather than individuals as it "helps foster a sense of collective responsibility for the mutual well-being of all individuals."[438] Moreover, it is extremely difficult to determine when a risk transcends the barrier between the individual and the collective.

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[433] Siegel, *supra* note 78 at 366.
[434] Gostin & Gostin, *supra* note 90 at 219.
[435] Siegel, *supra* note 78 at 367.
[436] *Ibid*. "Thus, if we are to give due consideration to individual liberty, we must banish the communitarian premise from the province of public health law. We need to temper the population perspective so that it is sensitive to the plurality of values of the individuals who form the collective" (*ibid.*).
[437] *Ibid.*
[438] Gostin, "Legal Foundations", *supra* note 11 at 10. Additionally, Gostin has argued contrary to Siegel, noting: "[t]he field of public health would profit from a vibrant conception of 'the common' that sees public interests as more than the aggregation of individual interests" (Gostin, "Law and Ethics", *supra* note 11 at 8).

An often cited example of a risk that may be improperly conceived as a collective risk is mandatory helmet laws.[439] Responding to an editorial by Susan Baker concerning mandatory helmet laws for motorcyclists in 1981[440], Richard Perkins laments "unwarranted institutional infringements on personal prerogatives."[441] In his opinion, "[t]he momentum of institutional expansions for the social good seems to be capable of overrunning the public's impression of its own good."[442] He rejects Baker's contention that the repealing of mandatory helmet laws represents an example of how special interest groups subvert the public good.[443] She argues:

> Freedom not to wear a helmet. Freedom to have a handgun. Freedom to choose unsafe products. Each of these "freedoms" is extolled by special interest groups in pursuit of their own objectives. They ignore the fact that each would entail important *losses* of other people's freedoms. It is long past time for public health professionals to put a stop to these losses, especially when freedom from injury and disease.[444]

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[439] Although mandatory helmet laws will be examined here, one could choose other examples. A closely related example is mandatory seatbelt laws. Gostin & Gostin note, "seatbelts … in truth, rarely benefit any given individual, but the collective benefits of seatbelt laws are thousands of lives saved each year. The prevention paradox, in turn, creates a sociopolitical problem because individuals are less likely to accept and support interventions that offer them little personal advantage" (*supra* note 90 at 219).
[440] Susan Baker, "On Lobbies, Liberty, and the Public Good" (1980) 70 American Journal of Public Health 573 [Baker].
[441] Richard J. Perkins, "Perspective on the Public Good" (1981) 71 American Journal of Public Health 294 at 294 [Perkins].
[442] *Ibid.* at 294.
[443] Baker contends "[t]he general public will share the burden of deaths and injuries in a variety of impersonal ways: by paying for acute and long-term care and rehabilitation, and through increased demands on limited resources, such as blood supplies and emergency services. In more personal ways, the families and friends of the injured motorcyclists will also be affected: in addition to their emotional and financial involvement, they will be called upon to meet the needs for physical care of those disabled, to help their dependents, and to make other commitments that may extend over long periods of time" (*supra* note 440 at 574).
[444] *Ibid.* at 574, original emphasis.

Perkins not only rejects this argument, he maintains "[t]he assertion that by not wearing a helmet the cyclist is reducing the freedom of other people is so ridiculous as to be ammunition for the anti-helmet law forces."[445] Additionally, he finds the call for public health to put a stop to injuries and diseases resulting from the exercise of individual freedom "quite disturbing."[446]

What makes Perkin's criticism of mandatory helmet laws particularly interesting is how Siegel treats the issue. Although Siegel laments the blurring of self-regarding and other-regarding acts, he is prepared to acknowledge that "even if we suppose that the choice to wear seat belts or motorcycle helmets is for each individual essentially a self-regarding choice, the aggregate effect of persons choosing not to wear seat belts and motorcycle helmets is thousands of preventable deaths and injuries in the population."[447] Siegel is perhaps unaware of Perkin's warning that the public's understanding of the good was in danger of being overrun by the expansion of what constitutes the social good. More likely, Siegel recognizes the utility of mandatory helmet laws. Not only do they reduce deaths[448], but

[445] Perkins, *supra* note 441 at 295.
[446] *Ibid*. Perkins would no doubt decry the advancement of public health law into the realm of injury prevention. Injury has been described as public health's "neglected epidemic" (see: Louis Hugo Francescutti, Tracey M. Bailey & Trevor L. Strome, "Injuries: Public Health's Neglected Epidemic" in Bailey, Caulfield & Ries, *supra* note 2, 219 at 219). "Injury is a disease that kills more people under 45 years of age, and causes more years of potential life lost, than any other disease" (*ibid*.).
[447] Siegel, *supra* note 78 at 365.
[448] "For example, more than 4000 Americans died on motorcycles in 2004; an increase of more than 85% from 1997. Reduced helmet use, due to repeal or relaxation of many state helmet laws, is the primary factor in the rising death rates" (Gostin & Gostin, *supra* note 90 at 217, referring to National Highway Traffic Safety Administration, *Motorcycle Helmet Use Laws* (2004), online: National Highway Traffic Safety Administration

as L. Gostin and K. Gostin observe, the idea of a self-regarding individual is often a myth:

> Thinking and speaking in terms of 'the right to take risks' ignores the fact that it is a rare driver, passenger or biker (or smoker) who does not have a child, a spouse or a parent. It glosses over the likelihood that if the rights-bearer comes to grief, the cost of his medical treatment, rehabilitation or long-term care will be spread among many others. The independent individualist, helmetless and free on the open road, becomes the most dependent of individuals in the spinal injury ward.[449]

When considering that public health law is ultimately concerned with public welfare, and the proper instrumental use of law is the advancement of public welfare, it would seem to bolster public health law as a legitimate instrumental use.

Although resolving the ongoing debate about how to properly define "public good" is beyond the scope of this paper, in this section, I have defined instrumentalism and have described proper ways to proceed with instrumental uses of the law. I have shown that concern with the public good is not inherently contradictory to the rule of law. I have subsequently noted that while public health law may indeed represent an appropriate instrumental use of the law through its ultimate concern with public welfare, not all public health initiatives will necessarily be legitimate. Further, I have provided the example of mandatory helmet laws to illustrate the difficulty in

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<http://www.nhtsa.dot.gov/people/injury/New-fact-sheet03/MotorcycleHelmet.pdf>).

[449] Gostin & Gostin, *supra* note 90 at 216. Gostin & Gostin refer to the oft cited passage from *Simon v. Sargent*, 346 F. Supp. 277, 279 (D. Mass. 1972): "From the moment of the [motorcycle] injury, society picks the person up off the highway; delivers him to a municipal hospital and municipal doctors; provides him with unemployment compensation if, after recovery, he cannot replace his lost job, and, if the injury causes permanent disability, may assume the responsibility for his and his family's continued subsistence. We do not understand a state of mind that permits plaintiff to think that only he himself is concerned."

determining when risks transcend the barrier between the individual and the collective. These issues will come to bear in the next, and final part, of this paper, where a legal normative foundation for public health law is established.

III. PUBLIC HEALTH LAW: A NORMATIVE ANALYSIS

In the first two parts of this paper, public health law has been descriptively assessed and the normative theories that will be used to provide a framework for public health law—the rule of law and liberty—have been examined. It is clear that an ongoing debate exists with respect to rule of law and liberty. While some legal scholars promote a thinner account of rule of law and correspondingly advocate limited government and increased personal liberty, others promote thicker accounts, advocating a social welfare state to promote equality. How one conceives of and interprets rule of law and liberty can prejudice any attempt to reconcile public health law in a limited state. The contention of this paper is that rule of law and liberty, properly understood, do not stand in opposition to public health law. In fact, as will be shown, public health law's legitimacy in a limited state is afforded through these principles. The final task of this paper is to demonstrate public health law's congruence with these normative theories. This will be accomplished in two sections. The first section will examine existing normative arguments (or lack thereof) for public health law. The final section will assess public health law in light of the normative theories examined in the first section. Although this discussion could progress in a number of ways, it will focus on two areas: government interference and choice.

1. THE LACK OF THOROUGH NORMATIVE JUSTIFICATIONS

Before establishing a normative framework for public health law it is necessary to address the current normative framework or lack thereof. It would be misleading to argue a complete absence of normative arguments, or attempts to establish a normative foundation, in public health law jurisprudence. It has been noted that "[t]he history of American public health is punctuated by controversies over the extent to which government may legitimately impose restrictions on liberty in the name of the common good and over the extent to which protection of the public's welfare has served as a pretext for erosion of fundamental rights."[450] Moreover, there is continual recognition among public health law scholars that public health law invariably encroaches on civil liberties and the rights of individuals.[451] It would, however, be accurate to suggest that insufficient and inadequate attention has been given to public health law's normative basis.[452] There are two reasons identified here for this deficit. First, public health law is often

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[450] Ronald Bayer & James Colgrove, "Public Health vs. Civil Liberties" (2002) 297 Science 1811 at 1811.

[451] A few examples: Gostin & Powers note, "[p]ublic health powers encroach on fundamental civil liberties such as privacy, bodily integrity, and freedom of movement and association. Sanitary regulations similarly intrude on economic liberties such as freedom of contract, pursuit of professional status, and use of personal property" (*supra* note 6 at 1055); Sir Liam Donaldson notes that public health law involves "the perennial balancing act of protecting individual liberties whilst securing public well-being" ("Preface" (2006) 120 Public Health 1 at 1); Martin notes, the "dilemma of public health is determining the appropriate balance between public good and individual rights" ("Law as a Tool", *supra* note 44 at 851).

[452] For example, consider the following: when discussing Gostin's theory of public health law, Fidler suggests that Gostin "cites constitutional doctrine, legislation, and regulations as sources of public health law" (*supra* note 77 at 152-153). Fidler later suggests that Gostin's theory arises from "constitutional and statutory law as well as from the fundamental 'social contract' upon which most governments rest" (*ibid.* at 156).

founded on constitutional arguments.[453] As will be shown, it is common for normative analysis in public health law treatises to culminate in constitutional arguments.[454] The second reason is the positioning of public health law in the realm of public law.[455] Although there are good reasons for considering public health law as a matter of public law, there are compelling arguments for considering public health law as being situated within private law.[456] A detailed examination of the relegation of public health law to public

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[453] See above at pages 61-63.

[454] "Public health has had a long and venerable relationship with constitutional law" (Parmet, "Public Health and Constitutional Law", *supra* note 264 at 14).

[455] Interestingly, those opposed to reconsidering public health's law classification suggest that what is needed is "… a constitutional settlement for public health and we need it quickly" (Brownsword, *supra* note 20 at 48). In other words, it is a call to further restrict public health law as a matter of public law.

[456] Despite its title, there is good reason to consider public health law as a matter of private law. Although it is recognized that "[p]rivate law is for the adjustment of private relations" (Brownsword, *ibid.* at 44), it is not clear that the demarcation between private and public law is always appropriate or useful. Novak, for example, suggests that common law "denied the clear separation of the private from the public—a hallmark of the modern liberal state" (Novak, *The People's Welfare, supra* note 135 at 237). Legal taxonomy, to be sure, is crucial. However, it has been observed that formalist or doctrinalist views of legal taxonomy is "both mistaken and unfortunate" (Hanoch Dagan, "Legal Realism and the Taxonomy of Private Law" (2006), online: Social Science Research Network <http:..ssrn.com/abstract=940913> at abstract). Indeed, it has been observed, that there is considerable overlap in taxonomy: "The doctrinalist version of legal taxonomy is not only misguided because it fails to account for the dynamism of law. It is also perilous, because it contributes unduly to one of the most important risks of legalese idenfitied by realists: the 'thingification' of legal concepts" (*ibid.* at 7). Commentators, such as Hayek, have lamented the way in which public law has replaced private law. Hayek was wary given that he viewed private law as an aid to liberty whereas public law threatened liberty (see: Gottfried Dietze, "The Necessity of State Law" in Cunningham, *supra* note 28, 74 at 84 [Dietze]). The demarcation between public and private is deemed necessary. "Legal systems are unified and integrated but they are also functionally differentiated, having both public and private dimensions. According to modern functionalists, the specialized task of the common law is to correct the private wrongdoing; the common law is about correct justice" (Brownsword, *supra* note 20 at 44). Hence, according to Brownsword, the regulation of public health is a task for public law not for common law" (*ibid.* at 45). This view, however, is not uncontested: "Brownsword's view … that the population-wide, policy-based goals of public health are better regarded as the stuff of public, not private, law …. is not unproblematic. In common law jurisdictions … public law has – at least until relatively recently – lacked a distinct identity and institutional structure" (Syrett & Quick, *supra* note 9 at 224). A distinct identity of private law has been suggested by Weinrib, suggesting private law "is a normative framework for claims arising out of human interaction" ("Rights and Advantages", *supra* note 165 at 1286). While this may not seem to pose a problem for public health, which concerns the interactions between humans, Weinrib

law rather than private law, and the consequences of this taxonomical categorization, is beyond the scope of this paper. Suffice it to say that many perceived normative shortcomings are undoubtedly a consequence.[457]

The nature of the first problem was illustrated in the above descriptive analysis. In determining what "law" in public health law entailed, there was an almost universal gravitation towards constitutional arguments. Perhaps the most salient examples of the reliance on constitutions are found in texts explicitly dedicated to discussions of public health law. In the only Canadian text dedicated explicitly to public health law, the first chapter, which purports to lay the legal foundations for public health in Canada, is limited to an examination of the Canadian constitution.[458] Similarly, *The*

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does argue that "private law construes the litigating parties as immediately connected to each other. Interaction so conceived is categorically distinct from that of public law, which relates persons only indirectly through the collective goals determined by state authority" (*The Idea of Private Law*, *supra* note 34 at 8). The difference, according to Weinrib, is really between misfeasance and nonfeasance (see, for example, "Right and Advantages", *supra* note 165 at 1293; *The Idea of Private Law, supra* note 34 at 10, and; Ernest Weinrib, "The Case for a Duty to Rescue" (1980) 90 Yale L.J. 247). This difference is critical: "the difference between misfeasance and non-feasance that lies at the heart of private law and that precludes the existence of a general obligation to respond to another's need or promote another's good" (Weinrib, "Liberty, Community, and Corrective Justice", *supra* note 142 at 6). Nevertheless, it is not clear that the distinction is always clear or useful. At a minimum, it is important to remember the dynamism of law (see: Dagan, *ibid*. at 16). To immediately dismiss public health as private law does little to respect the importance of classification, and instead approaches the matter dogmatically. Unfortunately, it is beyond the scope of this paper to address this matter sufficiently.

[457] For example, there has been considerably more attention paid to establishing the normative basis for private law than for public law. Additionally, many legal scholars – most of whom would likely advocate for a narrower understanding of public health law – do not regard public law in the same light as private law. Consider Brownsword's observation: "Private entitlement is paramount and private law is at the heart of any legal regime …. The underpinning ideology of the common law is one that privileges private entitlement and, at the same time, restricts the State to a minimum role, adding an extra layer of security for the protection of private interests. To treat it as the business of the common law to advance public health objectives is to view the relationship between the public and the private in a wholly back-to-front way. The common law is a red light, not a green light, for public health projects" (*supra* note 20 at 47).

[458] See Ries, *supra* note 6.

Public Health Law Manual sources the authority for public health law in the United States in the American constitution, suggesting public health law entails enforceable commands based on legislative authority to be carried out by the executive and administrative branches of government.[459] In *Public Health Law*, Gostin highlights the importance of the American constitution for public health – the second chapter is dedicated to exploring public health within the constitutional design – suggesting that no inquiry is more significant for public health law than understanding "the role of government in constitutional design."[460] Rothstein, who explicitly binds legitimate public health actions as government interventions, contends that public health is justified if "coercive powers are firmly grounded in constitutional provisions and enabling legislation."[461] Parmet decries the deconstitutionalization of public health, citing it as a key reason for public health's diminishing importance in society.[462] Gostin perhaps sums up it best:

> [P]ublic health is empowered to restrict human freedoms and rights to achieve a collective good, but it must do so consistent with *constitutional* and *statutory* constraints on state action. The inherent prerogative of the state to protect the public's health, safety, and welfare (known as the police powers) is limited by individual rights to autonomy, privacy, liberty, property, and other legally protected interests.[463]

Relying on the constitution for establishing a normative basis is not without precedent nor unmeritorious. As noted above, constitutions are

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[459] Grad, *supra* note 121 at 5.
[460] Gostin, *Public Health Law*, *supra* note 3 at 25.
[461] Rothstein, *supra* note 18 at 149.
[462] See: Parmet, "From Slaughter-House to Lochner", *supra* note 16.
[463] Gostin, "Legal Foundations", *supra* note 11 at 10, emphasis added.

safeguards that ensure the state is limited. Constitutions protect individuals in a broad sense by restricting the legislature.[464] "Constitutionalism means that all power rests on the understanding that it will be exercised according to commonly accepted principles, that the persons on whom power is conferred are selected because it is thought that they are most likely to do what is right, not in order that whatever they do should be right."[465] Hence constitutions can be in accordance with the aim of determining what law ought to be. As William Letwin has observed, "[t]he Constitution does not mention the rule of law in so many words, yet the idea is implicitly present in the concept of 'enumerated powers.'"[466] It has been demonstrated above that the rule of law is more than constitutionalism. Rule of law "requires that all laws conform to certain principles"[467]; constitutions are no exception. Constitutions need not regard underlying principles (although they most certainly can, and often do). As noted, constitutions cannot suffice given that they are self-legitimizing acts and do not address law's foundation. Relying wholly on a constitution as the framework for legitimizing public health law

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[464] Hayek recounts Alexander Hamilton's argument against the inclusion of a bill of rights as being "not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers not granted, and on this very account would afford a colourable pretext to claim more than were granted" (Hayek, *Constitution of Liberty*, *supra* note 32 at 185, citing A. Hamilton, *Federalist,* no. LXXXIV, ed. Beloff, pp. 439ff.) As Hayek observes, "the Constitution was intended to protect a ranger of individual rights much wider than any document could exhaustively enumerate and that any explicit enumeration of some was likely to be interpreted to mean that the rest were not protected" (*ibid.* at 185-186).

[465] *Ibid.* at 181. Pek observes, "[a] written constitution allows a society to impose constraints upon itself: The conflict is not between what the *government* wants versus what the *people* want, but between what the *people now* want versus what the *people then* wanted" (Pek *supra* note 282 at 1989, original emphasis).

[466] William Letwin, "Economic Due Process in the American Constitution and the Rule of Law" in Cunningham, *supra* note 28, 22 at 22.

[467] Hayek, *Constitution of Liberty*, *supra* note 32 at 205.

is to contend that the authority for public health law resides in legislative authority alone. The paucity of normative justifications other than the 'self-legitimization of the state' is a serious impediment.

It should be noted that Gostin's understanding of public health law does not exclusively rely solely on constitutional argument. Although the contention of this paper is that Gostin does not sufficiently address normative arguments for public health law, he nevertheless begins his exploration of public health law by establishing a theoretical base. Gostin is also acutely aware of the importance of establishing a normative framework.[468] In a series of articles published in the *Journal of the American Medical Association*[469] he recognizes that "[p]ublic health interventions need justification because they intrude on individual rights and incur economic costs."[470] Hence, "[g]overnment … should not carelessly or gratuitously interfere with either personal or economic freedoms."[471] Gostin advocates for an "analytic framework to find an appropriate balance between the public's health and individual interests in personal and economic freedoms."[472]

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[468] For example, consider how Siegel depicts Gostin's work in public health law: "[Gostin] both describes the conflicts between public health regulation and private rights in several areas of public health practice and develops an account of the conditions under which it is permissible to sacrifice civil liberties to safeguard the population's health" (*supra* note 78 at 360).

[469] See Gostin, "Public Health Law in a New Century – Part I", *supra* note 80; Gostin, "Public Health Law in a New Century – Part II", *supra* note 268, and; Gostin, "Public Health Law in a New Century – Part III", *supra* note 209.

[470] Gostin, "Public Health Law in a New Century – Part III", *supra* note 209 at abstract.

[471] Gostin, "Public Health Law in a New Century – Part II", *supra* note 268 at 2983.

[472] *Ibid*.

In addition, throughout *Public Health Law* he examines various issues with normative content, such as liberty, including an explicit, albeit brief, examination of the normative value of economic liberty.[473] Gostin is acutely aware of the conflict between public health law and civil liberties. Notwithstanding this, Gostin does not adequately address law's legitimizing force. The rule of law, for example, is not explicitly discussed in *Public Health Law*. When rule of law is mentioned by Gostin, it is often in passing.[474] When Gostin does propose an analytical framework, his normative analysis consists of examining three general justifications: risk to others, protection of incompetent persons, and risk to self.[475] The bulk of his examination, however, is focused on how to systematically evaluate interventions. [476] In

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[473] Gostin, *Public Health Law, supra* note 3 at 265-267. His conclusion: "Government, to be sure, ought not carelessly or gratuitously interfere with economic freedoms. If government has a reason, however, based on averting a significant risk to the public's health, then there appears nothing in the nature of economic liberty that should prevent the state from intervening, nor is there any reason why the state should provide compensation for regulating private commercial activities deemed detrimental to the communal good" (*ibid.* at 267).

[474] For example, consider the comment offered by Gostin & Powers: "Finding an appropriate balance is not easy and is fraught with controversy. What is most important to justice is abiding by the rule of law, which requires modern public health statutes that designate clear authority to act and provide fair processes. Policymakers, therefore, should modernize antiquated public health laws to provide adequate power to reduce major risks to the population but ensure that government power is exercised proportionately and fairly. Fairness requires just distribution of burdens and benefits to all, but also procedural due process for people subjected to compulsory interventions" (*supra* note 6 at 1055). The rule of law is not explicitly discussed further.

[475] See Gostin, "Public Health Law in a New Century – Part III", *supra* note 209 at 3118-3119.

[476] Arguably, Gostin contends with economic and ethical normative arguments. The distinction between these and legal normative arguments may appear arbitrary. However, as suggested by Weinrib, to suppose that law relies on external justifications suggests that law's authority can only be found within other disciplines (see above, note 34). See also Lucy, *supra* note 270 at 41: "Within general legal philosophy, the divide between methodological approaches that are sensitive and that are dismissive towards the views of the participants whose conduct constitutes the practices and institutions in question has been characterized … as one between 'internal' and 'external' approaches." With respect to private law analysis Lucy notes that "[m]ost contemporary philosophers of private law think the external, purely caused-based approach is mistaken" (*ibid*.).

the end, Gostin returns to constitutional arguments.[477] Other scholars have attempted to articulate a normative foundation, but they tend to focus on ethical arguments. The absence of legal normative analysis is regrettable. If public health law can be shown to have a normative justification, it would serve not only to bolster it as a legitimate area of law and, when necessary, aim of the state, but it would also serve to silence (or at least respond to) many of the critics who rely on arguments of liberty to defeat or oppose public health initiatives.

Public health law has also not factored into much of the historical debate concerning rule of law or liberty. That is to say, no general attempts have been made by legal theorists to equip public health law with a normative framework. In more recent discussions, it has been identified as an area where uncertainty abounds, although theorists have not explicitly discussed matters pertaining to public health law. When mentioned, it is often simply as a perfunctory remark. Consider the comments offered by Berlin: "we recognize that it is possible, and at times justifiable, to coerce men, in the name of some goal (let us say, justice or public health), which they would, if they were more enlightened, themselves pursue, but do not, because they are blind or ignorant or corrupt."[478] Although public health is

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[477] Consider how Gostin frames the following statement: "Achieving a just balance between powers and duties of the state to defend and advance the public's health and constitutionally protected rights poses an enduring problem for public health law" ("Legal Foundations", *supra* note 11 at 10). If the balance is between the public's health and *constitutionally* protected rights it suggests that the source of liberties that public health must not arbitrarily infringe exist only in light of the constitution rather that the force that legitimizes law itself. The problems with this perspective were noted above.
[478] Berlin, "Two Concepts of Liberty", *supra* note 38 at 132-133..

recognized by Berlin, he does not explore the implications of his comment in any detail. What the goal of public health law in fact is, or the extent to which coercion would be justified, is not made clear. Without more thorough analysis, Berlin's comment offers little assistance. Commentators have also attempted to locate public health within the broader theories, but often with little success. Rolf Sartorius, for example, notes that even in the minimal state, as contemplated by Robert Nozick, there is a need for certain responsibilities to be transferred voluntarily from the citizen to the state. While he considers certain public health programs as examples, including sanitation measures to prevention of contagious diseases,[479] he is nevertheless unsure how Nozick would handle public health cases.[480] Siegel contends that the minimalist view of the state by Nozick can "endorse some public health measures."[481] Despite its apparent absence, upon closer examination it is clear that public health law can be accorded a place within a limited state devoted to rule of law and liberty.

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[479] Sartorius, *supra* note 432 at 119.

[480] *Ibid.* See J. Ruger's comments above, note 41, where she suggests that Nozick would deny any societal obligation to provide medical care or health insurance. She further notes, "[t]he libertarian approach in rights scholarship pertaining to health generally endorses the fulfillment of negative rights (civil and political rights), but fails to endorse the fulfillment of positive rights. This perspective rejects social, economic, and cultural rights" ("Governing Health", *supra* note 10 at 45).

[481] Siegel notes, "Robert Nozick's libertarian view, for example, would presumably allow the isolation and quarantining of persons to control infectious diseases, since he holds that we may use 'force in defense against another party who is a threat, even though he is innocent and deserves no retribution'" (*supra* note 78 at 359, citing Nozick, *supra* note 39 at 34). Westmoreland contends, "[a]ll libertarians accept state provision of some public goods, else they would be anarch-capitalists, not libertarians. Nozick's conception of public goods in the broad sense is the most limited: the state may only enforce those rights that derive from his notion of self-ownership, rights that cannot be enforced effectively by private institutions" (*supra* note 274 at 94). What is problematic, he observes, is that libertarianism has not "devised an adequate conception of public goods" (*ibid*.).

In this section I have demonstrated the lack of attention paid by legal scholars to providing a normative basis for public health law. I have shown that the most common justifications for public health law – those located within constitutional law – are insufficient because they do not address the rule of law. Premised on the above discussion, the argument that follows will contend that public health law is of fundamental importance to rule of law and liberty.

2. Public Health as a Legitimate Power of a Limited Government

While public health law is largely absent in discussions pertaining to rule of law and liberty, it is possible to consider whether public health law is consistent, in spirit and in practice, with rule of law and liberty. The following will assess public health law in light of these two theories by examining two things: government interference and choice. The basic argument will be as follows: public health law, conceived as government interference (which is required although not necessarily desired), is permissible if it is consistent with rule of law and that the substantive impact of such interference is reconcilable with liberty if it has the overall objective of facilitating freedom of choice.

A. THE RULE OF LAW AND GOVERNMENT INTERFERENCE

If rule of law, properly understood, is formal, and can best be understood as involving formal legality, then rule of law cannot be concerned with the substantive aims of the state. Rule of law provides guarantees as to the form, not substance, of law. The fact that law pertains to public health should be of no consequence, provided that it adheres to the prescribed formalities. Public health law is conceived of here as government interference aimed at collective action problems. It is not useful to describe public health law in any other way: it is the state interfering, whether directly or indirectly, with the lives of its citizens. This is not problematic, with respect to rule of law, provided that such interference is legitimate. As Hayek notes, "[t]he important criterion was not the aim pursued, however, but the method employed."[482] Provided laws adhere to the prescribed formula of being general, certain and equal, the extent of state activity may be irrelevant. Which is to say, "it is the character rather than the volume of government activity that is important."[483] To be sure, this assertion will be troublesome to those that adhere to the ultra-minimalist state, such as Nozick. Nevertheless Hayek maintains that an inactive government doing the wrong things may cause more harm than a more involved government.

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[482] Hayek, *The Constitution of Liberty*, *supra* note 32 at 221. In fact, Hayek asserts that those who attempt to justify state action in terms of aims will face serious impediment. "Those who attempt to delimit the functions of government in terms of aims rather than methods thus regularly find themselves in the position of having to oppose state action which appears to have only desirable consequences or of having to admit that they have no general rule on which to base their objections to measures which, though effective for particular purposes, would in their aggregate effect destroy a free society" (*ibid.* at 259).
[483] *Ibid.* at 222.

This is not to suggest that Hayek is unconcerned with state action. He expresses grave concerns, particularly when state actions are in pursuit of a specific aim. Hayek contends that state actions with a specific aim necessarily prevent such actions from being general, certain or equal. They inevitably "involve arbitrary discrimination between persons."[484] This is the root of Hayek's rejection of distributive justice. "Distributive justice requires an allocation of all resources by a central authority; it requires that people be told what to do and what ends to serve …. those who pursue distributive justice will in practice find themselves obstructed at every move by the rule of law. They must, from the very nature of their aim, favor discriminatory and discretionary action."[485] Public health law is often associated with distributive justice[486], and thus it would seem that Hayek would oppose public health law. However, public health law can adhere to the procedural criteria established by Hayek. Richard Coker and Robyn Martin suggest, law is a "particularly appropriate" mechanism for public health regulation given that it "works as a collective response to threats of harm in that it addresses populations rather than individuals, and it imposes general obligations."[487] Public health law avoids the pitfalls of specific aims. In fact, they suggest the

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[484] *Ibid.* at 227.
[485] *Ibid.* at 232.
[486] Consider how Gostin describes distributive justice: "fair disbursement of common advantages and sharing of common burdens (fair allocations of risks, burdens, and benefits). This form of justice requires that officials act to limit the extent to which the burden of disease falls unfairly upon the least advantaged and to ensure that the burden of interventions themselves are distributed equitably" ("Legal Foundations", *supra* note 11 at 10). In light of the earlier discussion it is not surprising that the aims of public health law are often associated with distributive justice.
[487] Coker & Martin, *supra* note 9 at 5.

population health perspective satisfies the requirement of generality as it aims to benefit as much of the population as possible and does not strive to provide any specific benefits to individuals or groups.[488] According to Angus Dawson, any adequate account of public health must focus interventions on "unspecified individuals."[489] The danger is when public health attempts to serve specific ends.[490] According to Hayek, this danger has been exacerbated by misconceptions of the earlier mentioned maxim "*salus populi suprema lex esto*"[491]

> Correctly understood, it means that the end of the law ought to be the welfare of the people, that the general rules should be so designed as to serve it, but *not* that any conception of a particular social end should provide a justification for breaking those general rules. A specific end, a concrete result to be achieved, can never be a law."[492]

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[488] Gostin & Gostin, *supra* note 90 at 218. Undoubtedly Gostin & Gostin would recognize, as Hayek has, that some actions inevitably provide benefit to specific individuals. There is only reason for concern, however, when it is the intention of said action to provide specific individuals with benefits. At this point the action ceases to be general.

[489] Dawson, *supra* note 9 at 77. This is the first of three key features Dawson identifies. "Second, public health action requires collective effort in the sense that improvements in public health cannot be brought about by any single individual acting alone. This is one reason why much public health activity must be the preserve of the state. Third, public health activity is primarily focused on reducing or eliminating the risk of harm" (*iibd.* at 78).

[490] Hayek notes, "[c]oercion can assist free men in the pursuit of their ends only by the enforcement of a framework of universal rules which do not direct them to particular ends, but, by enabling them to create for themselves a domain protected against unpredictable disturbance caused by other men—including agents of government—to pursue their own ends. And if the greatest need is security against infringement of such a protected sphere by others, including government, the highest authority needed is one who can merely say 'no' to others but has itself no 'positive' powers" (*Law, Legislation and Liberty, supra* note 331 at 131). Interestingly, Hayek also notes that in addition to providing a framework for individuals to successfully pursue their aims it is also the task of the state to "use its coercive powers of raising revenue to provide services which for one reason, or other the market cannot supply" (*ibid*. at 139).

[491] Hayek suggests that it is properly understood as: "the welfare of the people ought to be – not is – the highest law" (*The Constitution of Liberty*, *supra* note 32 at 159).

[492] *Ibid.* at 159 (original emphasis).

Hayek is supportive of state activities that provide "a favorable framework for individual decisions" actions that "supply means which individuals can use for their own purposes."[493]

Arguably, public health law aims to establish such a favourable framework. Rather than attempt to control behavior, public health law makes a statement about the "acceptability of behaviour".[494] As Gostin and Gostin note, the task of public health law scholars, then, "is to empower them to make the right decisions and choices. Government has to encourage and inform; if necessary, in a tougher way than ever before."[495] A problem arises, however, when public health initiatives attempt to guide specific behaviours. Specific state aims are deemed inappropriate as they invariably interfere with an individual's ability to act according to their own desires and plans. They impose upon individuals the agenda of the state; it amounts to control over the individual through coercive means. As noted above, coercion is understood as an evil. Thus it is not surprising that the use of coercive means to promote the public's health is "the most controversial aspect of public health law."[496]

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[493] *Ibid.* at 223.
[494] Coker & Martin, *supra* note 9 at 5. They also note that the absence of laws "serves to send messages about acceptable behaviours" (*ibid.* at 5). Hodge *et al.* note, "[i]ndividuals use or implement the law in two principal ways: (1) they do what they are explicitly told to do, putting everything else aside; or (2) they do anything they have not explicitly been told not to do until someone stops them" (*supra* note 9 at 7).
[495] Gostin & Gostin, *supra* note 90 at 220.
[496] Siegel, *supra* note 78 at 362. Siegel notes, "This is because coercive public health practices can conflict with interests in liberty, bodily integrity, privacy, and property" (*ibid.*).

For Hayek the aim is not to eliminate coercion but rather to restrict coercive state activities through the rule of law.[497] In fact, with the exclusion of the state's coercive powers over individuals, Hayek is prepared to concede that there are areas where an administration "must be free to act as it sees fit."[498] The government is also granted considerable latitude to provide services for citizens, "from national defence to upkeep of roads, from sanitary safeguards to the policing of the streets."[499] In order to establish a favourable framework Hayek allows for the state to provide desirable services, services that would otherwise not be supplied by competitive enterprise[500], such as sanitary and health services. He also allows those activities described by Adam Smith as "those public works, which, though they may be in the highest degree advantageous to a great society, are, however, of such a nature, that the profit could never repay the expense to any individual or small number of individuals."[501] It would seem, then, that public health measures that are advantageous to society generally, and that do not require the state to use its coercive powers, would not be contested by Hayek. Moreover, Hayek would not likely oppose those activities that, while coercive, aim to profit the public. Hence it would seem that Hayek would not necessarily oppose public health

[497] Hayek notes, "[i]t is equally important to remember that the rules of law restricts government only in its coercive activities" (*The Constitution of Liberty*, *supra* note 32 at 206).
[498] *Ibid.* at 211.
[499] *Ibid.* at 215.
[500] Hayek notes that such services are not likely to be provided by competitive enterprise as it would be "impossible or difficult to charge the individual beneficiary for them" (*ibid.* at 223) and "because it is not possible to confine the benefits to those prepared to pay for them" (*ibid.* at 222).
[501] *Ibid.* at 223, referring to Adam Smith, *The Wealth of Nations* (London: W. Strahan & T. Cadell, 1776).

law. As Martin observes, early public health legislation was premised on 19th Century values that assumed "private rights could be over-ridden whenever it was thought necessary to do so for the public good."[502] However, it was also recognized that infringements of liberty "must always be a last resort."[503] Much, of course, is contingent upon what activities are deemed to be coercive. In general, Hayek permits two types of government interference: the regulation and/or certification of activity (goods and services) as well as provision of services that require collective action.

Hayek explicitly discusses the general regulation of economic activity, including regulations governing techniques of production.[504] He does not

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[502] Martin, "Law as a Tool", *supra* note 44 at 848.
[503] *Ibid.* at 849.
[504] Gostin refers to such regulation as "direct regulation" (Gostin, "A Renaissance", *supra* note 9 at 138). Although it will not be explicitly examined in this paper, there is considerable discussion concerning "indirect regulation"—civil litigation. "Litigation has been used as a tool of public health to influence manufacturers of automobiles, cigarettes, and firearms …. litigation may be anti-democratic and unfair" (*ibid.* at 138). Civil litigation is able to redress many kinds of public health harms (Gostin, "Law and Ethics", *supra* note 11 at 10). As Magnusson notes, "[t]he Gostin model recognizes that while the tort system addresses private complaints, the capacity for individuals to seek redress can have broader, systemic effects, motivating defendants to adopt practices and policies at the population level that prevent harm or injury" (*supra* note 7 at 577). However, "civil claims, unlike legislation, are directed at only a subset of the factors – typically those relating to marketing and corporate misrepresentations concerning tobacco products – that need to be addressed to assist people to quit" (*ibid.* at 577). Gostin suggests that the goals of tort law are often consistent with public health law. "Civil litigation, therefore, can provide potent incentives for people and manufacturers to engage in safer, more socially conscious behaviour" (Gostin, "Law and Ethics", *supra* note 11 at 10). Reynolds notes that while generally the product of statutes and legislation, civil actions fill the regulatory vacuum where governments refuse to regulate (*supra* note 1 at 164). Reynolds further notes, "[t]he civil proceedings can fill a void that the public health regulations may have chosen not to occupy" (*ibid.* at 165). Martin & Coker similarly contend that a limited role for the state in public health, "the common law gives power to the people to initiate their own public health legal measures" (*supra* note 10 at 84). Not all agree that civil litigation to advance public health is appropriate. Brownsword argues, "it is not the business of the common law to advance public health objectives" (*supra* note 20 at 42) and, furthermore, "it is not the function of the common law to promote the background conditions of public health" (*ibid.* at 44-45). According to Brownsword, "[t]he reason why public health will rarely be the business of the common law is simply, that is will not work. To rely on the common law, which characteristically operates reactively an ex post, will almost certainly offend the canons of effective, efficient, and economical regulation.

exclude regulations in the free system, provided, of course, they are consistent with the rule of law and are "laid down in the form of general rules specifying conditions which everybody who engages in a certain activity must satisfy."[505] The question is not whether such regulations are wise (which Hayek suggests will rarely be the case[506]), but if they are in accordance with the rule of law. That is to say, such regulations are permissible if they embody the requirements of generality, certainty and equality. If so, the rule of law state is able to adapt itself to virtually any general prohibition or regulation.[507] Hayek provides numerous examples. Consider the following: "But if, for instance, the production and sale of phosphorous matches is generally prohibited for reasons of health or permitted only if certain precautions are taken … the appropriateness of such measures must be judged by comparing the over-all costs with the gain; it

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There is an array of public law measures available to regulate for the sake of public health objectives …. In an ideal world, in a community that is committed to the protection and promotion of human rights, it will fall to public law, not to the common law, to set and secure the delivery of the State's public health obligations …. In non-ideal circumstances, where there is regulatory failure, the common law might be pressed into service as a responsive compensatory or corrective mechanism, not for private wrongdoing but for public failure" (*ibid.* at 47-48). Any impact civil litigation does have on public health is deemed to be a secondary effect (*ibid.* at 44). Despite his skepticism about the use of civil litigation, Brownsword nevertheless acknowledges that "[t]here is a great deal of unfinished business in thinking through the relationship between public health and the common law"(*ibid.* at 48).

[505] Hayek, *The Constitution of Liberty, supra* note 32 at 224.

[506] *Ibid.* at 224. He notes, such regulation 'will always limit the scope of experimentation and thereby obstruct what may be useful development. They will normally raise the costs of production or, what amounts to the same thing, reduce over-all productivity" (*ibid.*). In addition, "when the state does so, the result is usually not only that those advantages soon prove illusory but that the character of the services becomes entirely different from that which they would have had if they had been provided by competing agencies" (*ibid.* at 261). Gostin suggests that "[m]ost people recognize the value of public health regulation, but coercive government action inevitably interferes with personal or economic liberty. Public debate frequently centers on paternalistic regulation such as water fluoridation or burdensome and costly regulation that interferes with free enterprise" ("A Renaissance", *supra* note 9 at 138).

[507] Hayek, *The Constitution of Liberty*, *supra* note 32 at 228.

cannot be conclusively determined by appeal to a general principle."[508] Another example: "it is probably undeniable that in some instances, such as where the sale of poisons or firearms is involved, it is both desirable and unobjectionable that only persons satisfying certain intellectual and moral qualities should be allowed to practice such trades."[509] Provided that regulations are in accordance with the rule of law, Hayek is willing to recognize that a considerable range of government activity can be reconciled in the limited, liberal democratic state.

Madison similarly recognizes that the liberal approach does not entail eliminating regulation. Rather he notes that the liberal approach is concerned with "devising a regulatory policy consistent with liberal principles of action, with, in other words, the limited role a liberal State must play in pursuing economically, or socially desirable ends."[510]According to Madison, regulation that concerns industry, which he also deems specific regulation, should not "favor particular business concerns over others in such a way as to eliminate or impede the competitive mechanisms of a free market."[511] Non-industry regulation, also called specific, general social regulation, should avoid stifling initiative and productive growth.[512] In this latter category Madison includes such things as environment, work safety, and health. It is his contention that this type of regulation should generally

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[508] *Ibid.* at 225.
[509] *Ibid.* at 227.
[510] Madison, *supra* note 344 at 122.
[511] *Ibid*. He notes, "it is a well-known fact that regulatory agencies of this sort tend to become the captive instrument of the very industries they are supposed to regulate" (*ibid*.); cf. Tamanaha note 416.
[512] *Ibid*.

operate via “indirect incentive mechanisms” and not “direct command and control dictates.”[513] Similarly, its benefits should be shown to outweigh any costs in the long term.[514] Madison is an advocate for deregulation. He contends, “[g]reater freedom in the marketplace means a greater degree of self-regulation, and when people are obliged to regulate themselves, they can be expected to develop a greater sense of responsibility.”[515] Indeed, Madison argues that if government is successful in encouraging citizens to be self-governing, “people will realize that acting in a civically and politically virtuous way, with moderation and restraint and with a concern for the common good, is the best way of furthering their own self-interests.”[516]

It is clear that Madison proposes a framework that aims to facilitate the creation of a dynamic economy[517], one that aims to benefit everyone. It is his contention that such an economy will benefit freedom: “Freedom will

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[513] *Ibid*.

[514] *Ibid*. Gostin & Gostin note, however, that “cost alone may not be a sufficient justification for over-riding personal liberty” (*supra* note 90 at 216).

[515] Madison, *supra* note 344 at 123. It is not clear that this is the case, however.

[516] *Ibid.* at 125. If this can be brought about, Madison contends “it will have been demonstrated … that there need be no contradiction between a liberal society, wherein people are self-governing and self-regulating and possess a sense for the common good, and a consumer society, wherein people are preoccupied with their private, material welfare. Freedom, as the ancients knew, is noble and desirable in its own right, but there is no reason for moderns not to assume that the freest of peoples will not also be the wealthiest of nations” (*ibid.* at 125). Liberal societies, according to Madison, are consumer societies, consequently the citizen’s “prime concern is their own private material welfare and its improvement” (*ibid.* at 124). The prime responsibility of governments, then, is to ensure continued economic growth. “[I[t goes without saying that liberal governments must continue to be pre-occupied with the economy and with the material well-being of their citizens … [however], they must do so in a way that is consistent with the basic principles of liberalism, in particular with the principles of political freedom … and free enterprise” (*ibid.* at 124).

[517] Madison notes that if liberal government adheres to regulation done in accordance with basic liberal principles, the result will be “a dynamic economy which can only benefit everyone and which for moderns would be the living proof of the superiority of liberal government over all other forms of government” (*ibid.* at 124-125).

never be more highly valued as when everyone realizes that it brings with it its own monetary reward."[518] Despite this optimism, however, he nevertheless is cognizant that, lip-service aside, there is an unwillingness among local governments and corporations to relinquish government administration in favour of deregulation. The result is "a decline not only in political freedom but in economic productivity as well."[519] Governments should be wary of excessive regulation and the regulation of the "conflicting demands" of its citizens. The latter, through measures such as income redistribution, will bring an end to republican virtue, and thus citizens will cease to be free.[520] The former is similarly detrimental to freedom, but also counter-productive economically. Madison notes, "while business extols the virtues of a free market, the bigger and more established the business, the more likely it is to press for government protection against competing industry."[521] In fact, he alleges that 'Big Business', often denounced by socialists, is a consequence of 'Big Government': "[t]he age of corporate capitalism is not yet one of socialized industry, but is one of socialized risk; the government leaves the private sector with its profits … while at the same

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[518] *Ibid.* at 125.

[519] *Ibid*. He notes that the aim of citizens to be "left alone to pursue their own lives" in conjunction with the expectation of "governments to guarantee them their private pleasures" has resulted in the emergence of "special interests groups" with an aim to increase bureaucracy (*ibid.*).

[520] *Ibid*.

[521] *Ibid.* at 122. The result, Madison notes, "is to limit competition, and all well-established, large corporations, in fact, welcome this. The fact of the matter is, however, that what is good for a particular business is not necessarily good for the United States. The excessive regulation that business actually welcomes—since it reduces risks—is not only detrimental to political freedom—since it makes for a dominating bureaucracy—but is also counter-productive economically in the long run" (*ibid.*). Madison refers to this as the 'contradiction of corporate capitalism.'

time it absorbs their risks … laying the costs on the back of the general taxpayer."[522]

It is not clear, however, that regulation necessarily does (or has to) favour big business.[523] Similarly, it is not clear that Big Government would be any more pernicious than a small, but improperly motivated, government. Recall Hayek's contention that it is the character, not the volume, of government activity that is important. "[A] government that is comparatively inactive but does the wrong things may do much more to cripple the forces of a market economy than one that is more concerned with economic affairs but confines itself to actions which assist the spontaneous forces of the economy."[524] Accordingly, economic freedom is "freedom under the law, not the absence of all government action."[525] Again, what is concerning about regulation is not the aim, but rather the method employed. Regulation, like any act of government, must be general and cannot be aimed at a specific purpose.[526] In fact, Hayek asserts that in addition to regulation, certification and licensing can be advantageous to consumers, particularly when certification pertains to the quality of goods and services.

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[522] *Ibid.* at 122-123.
[523] Madison does not provide any evidence that, in fact, Big Business has co-opted Big Government.
[524] Hayek, *The Constitution of Liberty*, *supra* note 32 at 222.
[525] *Ibid.* at 220. Hayek identifies this notion with John Stuart Mill and Adam Smith. He notes that while they opposed interventions by government, they were largely misunderstood. "The 'interference' or 'intervention' of government which those writers opposed as a matter of principle … meant only the infringement of that private sphere which the general rules of law were intended to protect. They did not mean that government should never concern itself with any economic matters. But they did mean that there were certain kinds of governmental measures which should be precluded on principle and which could not be justified on any grounds of expediency" (*ibid.* at 220-221).
[526] *Ibid.* at 221.

> It can hardly be denied that the choice of the consumer will be greatly facilitated, and the working of the market improved, if the possession of certain qualities of things or capacities by those who offer services is made recognizable for the inexpert though it is by no means obvious that only the government will command the confidence required. Building regulations, pure food laws, the certification of certain professions, the restrictions on the sale of certain dangerous goods (such as arms, explosives, poisons and drugs), as well as some safety and health regulations for the processes of production and the provision of such public institutions as theatres, sports grounds, etc., certainly assists intelligent choice and sometimes may be indispensable for it. That the goods offered for human consumption satisfy certain minimum standards of hygiene, as for example that pork is not trichinuous or milk not tuberculous, or that somebody who describes himself by a term generally understood to imply a certain competence, such as a physician, really possesses that competence, will be most effectively assured by some general rules applying to all who supply such goods or services.[527]

All that is required for satisfaction in a rule of law state is that supply not be regulated, that all who are able to meet the prescribed standards have a legal claim to the required certification.[528] Hayek also recognizes the need for regulation or minimum standards for health and safety. Such regulation, he notes, are "undoubtedly necessary" for facilities provided by the government.[529] And while he is cautious about extending this type of regulation to "so-called public places which are provided commercially by private enterprise" he nevertheless recognizes that it is desirable that individuals frequenting such places "may presume that certain requirements

[527] Hayek, *Law, Legislation and Liberty*, *supra* note 331 at 62.
[528] *Ibid.* at 62. "All that is required for the preservation of the rule of law and of a functioning market order is that everybody who satisfies the prescribed standards has a legal claim to the required certification, which means that the control of admissions authorities must not be used to regulate supply" (*ibid.*).
[529] *Ibid.* at 48.

of safety and health are met."[530] Thus, while privately owned enterprises, such as theatres, factories, stores, etc., are not "public" in a strict sense, the public is invited to use them. Regulation "will not be determined by the purpose of the institution" but will aim "merely to protect the persons using its facilities."[531]

In addition to regulation and certification, Hayek is willing to recognize that state action is necessary to provide services that will otherwise not be provided by the free market. They are considered by Hayek to be "collective of public goods proper."[532] They are the kinds of services that, "once they are provided, are normally sufficient for all who want to use them. The provisions of such services has long been a recognized field of public effort, and the right to share in them is an important part of the protected sphere of the individual."[533] Among the services that Hayek explicitly identifies are: sanitation[534], dangers from foreign enemies and internal insurrection[535], natural disasters (which Hayek identifies as "storms, floods, earthquakes, epidemics and the like")[536], the upkeep of roads[537], the

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[530] *Ibid*.
[531] *Ibid.*
[532] *Ibid.* at 44.
[533] Hayek, *The Constitution of Liberty*, *supra* note 32 at 141. Westmoreland notes that Hayek allows a substantial role for the state in providing public goods (*supra* note 274 at 94).
[534] Hayek, *The Constitution of Liberty*, *ibid.* at 141; see also *ibid.* at 215, 223.
[535] Hayek, *Law, Legislation and Liberty*, *supra* note 331 at 54. See also, Hayek, *The Constitution of Liberty*, *supra* note 32 at 215. War may an exceptional case: "Even the most fundamental principles of a free society, however, may have to be temporarily sacrificed when, but only when, it is a question of preserving liberty in the long run, as in the case of war" (*ibid.* at 217). Such exceptional cases, however, threaten the rule of law. Hence Hayek argues that such cases should be defined by rule, "so that their justification does not rest on the arbitrary decision of any authority but can be reviewed by an independent court" (*ibid.*).
[536] Hayek, *Law, Legislation and Liberty, supra* note 331 at 54.
[537] Hayek, *The Constitution of Liberty*, *supra* note 32 at 141, 215.

policing of the streets[538] and health services.[539] In order to accomplish such tasks Hayek asserts that the state is allowed definite means.[540] The question that must be addressed is whether the benefits of providing services that would otherwise not be provided by competitive enterprise are worth the costs.[541] Although too much direct control of economic activity by the state is perceived as a threat to liberty[542], legitimate activities undertaken by the state are recognized by Hayek to "provide a favorable framework for individual decisions; they supply means which individuals can use for their own purposes."[543] In other words, the provision of such services, much the same as the regulation of economic activity, can serve to enhance liberty.

Thus far a considerable range of public effort activities that the state can undertake has been permitted by Hayek, and the areas he explicitly identifies – although he does not address the intricacies and nuances of these areas (i.e., what is captured by "health services") – are not exhaustive. He concedes that it is not possible to foresee all circumstances in which the state may have to act. The manner in which the state acts, however, can be made

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[538] *Ibid.* at 215.
[539] *Ibid.* at 223.
[540] *Ibid.* at 215.
[541] *Ibid.* at 222. Hayek notes, "our chief assurance that those necessary infringements of the private sphere will be allowed only in instances where the public gain is clearly greater than the harm done by the disappointment of normal individual expectations" (*ibid.* at 218).
[542] *Ibid.* at 224. "Despite its undoubted value, public health regulation of commercial activity is highly contested terrain .... public health advocates are opposed to unfettered private enterprise and suspicious of free-market solutions to complex social problems" (Gostin, "Law and Ethics", *supra* note 11 at 9). Gostin & Gostin note "critics of state regulation argue that individuals absorb the cost of their own illness, so there is no 'public' issue at play" (*supra* note 90 at 216).
[543] *Ibid.* at 223.

predictable to a high degree.[544] One danger that remains, however, is that once a legitimate aim has been identified, it may be assumed or deemed acceptable to use means contrary to the rule of law and principles of freedom.[545] As Siegel notes, with public health law "the unfettered use of state power to advance the public's health would raise the specter of unwarranted infringements of liberty and property interests."[546]

Hence Hayek urges patience in solving problems, rather than turning over monopolistic or exclusive powers to the state.[547] He provides several examples of unforeseen circumstances that might require state intervention:

> The destroying of a farmer's cattle in order to stop the spreading of a contagious disease, the tearing-down of houses to prevent the spreading of a fire, the prohibition of an infected well, the requirement of protective measures in the transmission of high-tension electricity, and the enforcement of safety regulations in buildings undoubtedly demand that the authorities be given some discretion in applying general rules.[548]

Of course, Hayek is by no means advocating unfettered discretion over these areas. Rather, the discretion allotted to the state here is itself subject to general rules and judicial review.[549] "In all such instances the decisions are derived from general rules and not from particular preferences which guide the government of the moment or from any opinions as to how particular people ought to be situated. The coercive powers of government still serve

[544] *Ibid.* at 225.
[545] *Ibid.* at 260.
[546] Siegel, *supra* note 78 at 359.
[547] Hayek, *The Constitution of Liberty*, *supra* note 32 at 260.
[548] *Ibid.* at 225.
[549] *Ibid.*

general and timeless purposes, not specific ends."[550] State action that will be excluded in principle by rule of law are those actions that, "of necessity, involve arbitrary discrimination between persons."[551] He notes, "[f]reedom is critically threatened when the government is given exclusive powers to provide certain services—powers which, in order to achieve its purposes, it must use for the discretionary coercion of individuals."[552] The intent should be to protect against risks that are common to all, either by reducing the risk or providing assistance to individuals. State actions, however, should not determine the material position of individuals or enforce distributive justice.[553] Thus, Hayek distinguishes between limited security and absolute security: the former "can be achieved for all and which is, therefore, no privilege" whereas the latter "in a free society cannot be achieved for all."[554]

While Hayek is opposed to assuring an absolute security, he does recognize a need to provide a minimum level of security for some people, those who are unable to make a living in the market. Identified as another "class of common risks" are the "sick, the old, the physically or mentally defective, the windows and orphans—that is all people suffering from adverse conditions which may affect anyone and against which most

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[550] *Ibid.* at 226.
[551] *Ibid.* at 227.
[552] *Ibid.* at 289-290.
[553] *Ibid.* at 231.
[554] *Ibid.* at 259. Absolute security pertains to a standard of life. The distinction is really "between the security of an equal minimum income for all and the security of a particular income that a person is thought to deserve .... Insofar as this means that the coercive power of government are to be used to insure that particular people get particular things, it requires a kind of discrimination between, and an unequal treatment of, different people which is irreconcilable with a free society" (*ibid.* at 259-260).

individuals cannot alone make an adequate provision."[555] Society has sufficient wealth, according to Hayek, to provide a uniform minimum for all who are unable to provide for themselves.[556] The state must not, however, attempt to make certain that every individual obtains a certain standard, as doing so will require individuals to be deprived of choice.[557] "Thus the

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[555] Hayek, *Law, Legislation and Liberty*, *supra* note 331 at 54-55. Hayek notes, "[i]n the Western world some provision for those threatened by the extremes of indigence or starvation due to circumstances beyond their control has long been accepted as a duty of the community" (*Constitution of Liberty*, *supra* note 32 at 285). Similarly, he notes, "[a]ll modern governments have made provision for the indigent, unfortunate, and disabled and have concerned themselves with questions of health and the dissemination of knowledge" (*ibid.* at 257).

[556] Hayek laments that "endeavors to secure a uniform minimum for all who cannot provide for themselves has become connected with the wholly different aims of securing a 'just' distribution of incomes" (*Law, Legislation and Liberty*, *supra* note 331 at 55). Hayek labels social justice as "pseudo-ethics" and argues that it "fails every test which a system of moral rules must satisfy in order to secure a peace and voluntary co-operation of free men" (*ibid.* at 135) Nevertheless, Hayek admits the necessity of some form of public assistance or relief is unquestioned—"be it only in the interest of those who require protection against acts of desperation on the part of the needy" (*Constitution of Liberty*, *supra* note 32 at 285). The danger, which he contends has actualized (and he identifies as the "crisis of social security"), is that the "apparatus designed for the relief of poverty has been turned into an instrument for the redistribution of income, a redistribution supposedly based on some non-existing principle of social justice but in fact determined by *ad hoc* decisions" (*ibid.* at 302-303). The consequence is that in the attempt to eliminate social evils we now suffer from the effects of the remedies. "The difference is that, while in former times the social evils were gradually disappearing with the growth of wealth, the remedies we have introduced are beginning to threaten the continuance of that growth of wealth on which all future improvement depends" (*ibid.* at 305). While laudable goals may have been reached, including an increase in the "conquest of want, disease, ignorance, squalor, and idleness" Hayek contends "we may in the future do worse even in that struggle when the chief dangers will come from inflation, paralyzing taxation, coercive labor unions, an ever increasing dominance of government in education, and a social service bureaucracy with far-reaching arbitrary powers—dangers from which the individual cannot escape by his own effort and which the momentum of the overextended machinery of government is likely to increase rather than mitigate" (*ibid.*). That said, it should be noted that provisions against risks common to all are, according to Westmoreland, considered to be "categorically different" to Hayek than the pursuit of social justice (*supra* note 274 at 102). Westmoreland notes: "Public charity with its severely limited aim, make for more predictable and limited and thus more lawlike coercion than social justice" (*ibid.* at 103).

[557] He is also cautious, recognizing that public assistance may induce some to neglect providing for themselves. "It seems only logical, then, that those who will have a claim to assistance in circumstances for which they could have made provision should be required to make such provision themselves. Once it becomes the recognized duty of the public to provide for the extreme needs of old age, unemployment, sickness, etc., irrespective of whether the individual could and ought to have made provision themselves, and particularly once help is assured to such an extent that it is apt to reduce individuals' efforts, it seems an

welfare state becomes a household state in which a paternalistic power controls most the income of the community and allocates it to individuals in the forms and quantities which it thinks they need or deserve."[558] Provided this can be avoided, Hayek asserts that government can provide a minimum level of sustenance without doing any harm.[559]

The preceding discussion is important for our purpose for several reasons. First, there is an explicit recognition of legislative actions that could easily be framed as public health measures. Certainly, sanitation, health services, emergency services, protection against epidemics, destruction of livestock to prevent contagious diseases, control over contaminated water, and safety regulations of all types, are all part of a robust public health regime—and these are only the types of state action that Hayek specifically identifies. One need not look very hard to find repeated calls for state action and intervention to ensure the health and safety of the public in these areas.[560] Whether Hayek wittingly relied heavily on examples of recognizable

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obvious corollary to compel them to insure (or otherwise provide) against those common hazards of life" (*The Constitution of Liberty, ibid.* at 286).

[558] *Ibid.* at 260.

[559] Hayek notes, "[i]t can hardly be denied that, as we grow richer, that minimum of sustenance which the community has always provided for those not able to look after themselves, and which can be provided outside the market, will gradually rise, or that government may, usefully and without doing any harm, assist or even lead in such endeavors" (*ibid.* at 257-258). Westmoreland suggests that Hayek condemns the welfare state not because it provides services, but simply because it does so outside of the bounds of the rule of law (*supra* note 274 at 97). Thus, it is not inconsistent for Hayek to accept what may appear as social welfare initiatives, provided they accord with the rule of law. This means: "in providing services, the state must benefit all, either by providing public goods that benefit everyone equally, or … by providing non-public goods to particular groups only if certain wants of taxpayers who do not benefit from the service in question are also tax-supported" (*ibid*).

[560] A perennial objection to public health law, that these areas represent an amalgam of distinct legal topics, is often raised here. A distinct discipline of public health law, arguably, is not needed given that existing areas (tort, contract, property) are adequate to address any

public health measures is not clear. Second, it is clear that, at a minimum, governmental activity is not necessarily contrary to rule of law. In fact, Hayek is willing to describe it as indispensable for individual decision-making. In other words, self-regarding individuals rely on regulation, certification and licensing to make informed decisions. Similarly, state action in the public's interests, provided that collective action is required, is not antithetical to rule of law, with the important caveat that such activity is in accordance with rule of law principles. It would appear that public health law is not intrinsically opposed to rule of law. Given our above discussion about what rule of law means, this is not entirely surprising. Moreover, as Raz recognizes, rule of law "is meant to enable the law to promote social good" and thus "one should be wary of disqualifying the legal pursuit of major social goals in the name of rule of law."[561]

B. LIBERTY AND FREEDOM OF CHOICE

Despite the apparent congruency between rule of law and public health law, it is often assumed that there is an unsolvable conflict with civil liberties given that public health law restricts the freedom of individuals. This is particularly the case when relying on the understanding of liberty as espoused by Mill. No doubt being mindful of public health law, Gostin and Gostin suggest the Millian logic that unfettered exercises of discretion are necessary for individuals to be happy is unconvincing. They note:

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problems that might emerge.

[561] Raz, "The Rule of Law", *supra* note 28 at 21.

> This logic is particularly unpersuasive when seen from the perspective of millions of decisions, taken by millions of individuals, leading to pervasive illness and death. It just may be possible counter to all prevailing liberal tradition and political posturing that people gain greater comfort when asked to forego a little bit of freedom in exchange for a healthier and safer community.[562]

Alan Dershowitz briefly contemplates the congruency between public health measures and the protection of liberty articulated by Mill.[563] If the power can be rightfully used to prevent harm to others, intuitively it would seem that this includes public health measures. The fact that Mill also considers it necessary, at times, to protect individuals from themselves, seems to provide more additional credibility to the claim that public health measures are not necessarily antithetical to liberty. Dershowitz, however, contends, "there is a crucial difference between a brief one-shot act of compulsion such as preventing the distraught person from jumping out the window or taking poison, and a long-term, life-style-changing compulsion such as that required to make a person stop smoking, overeating, or not exercising."[564] Clearly, Dershowitz considers some of the more controversial public health measures of late to be an affront to liberty. He notes, "[t]he state should be far more reticent about enforcing long-term, life-style-changing compulsions on unwilling adults than it should be to risk not being thanked for a brief one-

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[562] Gostin & Gostin, *supra* note 90 at 220.
[563] See: Dershowitz, *supra* note 342.
[564] *Ibid.* at xv.

shot interference with an adult's liberty that may well be appreciated in retrospect."[565]

The soundness of this argument, however, is not immediately apparent. After all, the individual who wishes to cause harm to him- or herself with a drastic measure, such as jumping from a window, has potentially given considerable thought to their action – or, at a minimum, has the requisite intent to commit the act. Although it would be inaccurate in many instances to suggest that individuals choose to smoke, overeat or lead sedentary lifestyles[566], in only very rare circumstances can it be said that people deliberately choose the consequences of said actions. In fact, many are unaware of the adverse long-term impact of their immediate choices. As Gostin and Gostin observe, "[m]ost people cannot begin to assess the level of harm or risk in their decisions, nor can they process complex scientific information to arrive at an informed choice."[567]

An appropriate example for our purposes is eating. Robyn Martin and Richard Coker have argued that, "[m]ore than most other areas of law, food laws are caught up in philosophical arguments about liberty and choice."[568]

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[565] *Ibid.*
[566] Consider, for example, the ecological approach prevalent in health promotion, which views individual health and behavioral outcomes as nested within social, organizational, community, societal and supranation levels (see: Gerjo Kok *et al.*, "The Ecological Approach in Health Promotion Programs: A Decade Later" (2008) 22 American Journal of Health Promotion 437 and L. Richard *et al.*, "Assessment of the Integration of the Ecological Approach in Health Promotion Programs" (1996) 10 American Journal of Health Promotion 318). In other words, "choices" are seen as constrained by different levels of determinants of behaviours, most of which are beyond the control of any one individual and which interact with the individual to produce certain behaviours or health outcomes.
[567] Gostin & Gostin, *supra* note 90 at 216-217.
[568] Martin & Coker, *supra* note 10 at 83. In reference to Tim Lang, "Food, the law and Public Health: Three Models of the Relationship" (2006) 120 Public Health 30, Martin & Coker note:

This is a reflection of the belief that food choice is an intimate and highly individualistic decision. Considerable research, however, suggests that this might not be the case. Although the individual may choose to consume prepared food items due to convenience, preference, taste[569], she may not be aware of the deleterious health impacts of such products, and certainly could not be said to choose the various morbidities that are associated with such consumption. Moreover, factors external to the individual such as food affordability, food availability and food acceptability interact to constrain food choice, thereby elevating a widely regarded "lifestyle choice" from the realm of the individual to the realm of the environment.[570] Furthermore, as research continually has demonstrated, not only are people unaware of the adverse impacts, but producers intentionally mislead, misinform and distract consumers. "Subtle, but ubiquitous, cultural influences on risk behaviour are seen in billboards and the media, in corporate logos and advertising, in the utterances of celebrities and government officials, and in norm-influencing

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"Lang concludes that food sits at the intersection of a complex relationship between public health and law, and one in which the role of human rights has not yet been clarified …. The acceptance of some public responsibility for the food market, through both purchasing power and private litigation, puts the 'public' back into public health law" (*supra* note 10 at 83).

[569] See, for example, Karen Glanz *et al*., "Why Americans Eat What They Do: Taste, Nutrition, Cost, Convenience, and Weight Control" (1998) 98 Journal of the American Dietetic Association 1118. These are only a few of the reasons for food choice. For example, religion and culture, geographic proximity and family size are also important contributing factors.

[570] See, for example: Simone A. French, Mary Story & Robert W. Jeffery, "Environmental Influences on Eating and Physical Activity" (2001) 22 Annual Review of Public Health 309; Marion Nestle *et al*., "Behavioral and Social Influences on Food Choice" (1998) 56 Nutrition Reviews S50; Kim D. Raine, "Determinants of Healthy Eating in Canada - An Overview and Synthesis" (2005) 96 Canadian Journal of Public Health-Revue Canadienne De Sante Publique S8, and; Mary Story, Dianne Neumark-Sztainer & Simone A. French, "Individual and Environmental Influences on Adolescent Eating Behaviors" (2002) 102 Journal of the American Dietetic Association S40. See also, note 158.

laws and regulations."[571] As Magnusson observes, health risks are often spread by behaviours that "powerful multinational corporations have an economic interest in perpetuating."[572] Is it truly less offensive to liberty to restrict the one-time actions of a self-regarding individual who wishes to act in such a way as to end their life than to restrict the misinformed and arguably coerced (certainly constrained, at the very least) choices of individuals that, incrementally, will lead to long-term negative consequences that are either unforeseen or undesired? While both limit liberty, the latter does not involve restricting the free choice of self-regarding individuals. Certainly with respect to public health initiatives, as will be demonstrated below, it is often not the individual who is restricted, but rather producers. It is simply a matter of shifting the available choices, not eliminating the opportunity to choose. The same cannot be said for the former example of interference.[573]

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[571] Gostin & Gostin, *supra* note 90 at 217.
[572] Magnusson, *supra* note 7 at 580. This statement remains contentious, although it is not clear why this is the case. "Lifestyle choices are ubiquitous, deeply rooted and a central element of human existence; what one eats, drinks, smokes and the activities of daily life. 'To oversee these decisions would require a larger bureaucracy than anyone has yet conceived and methods of surveillance bigger than big brother'" (Gostin & Gostin, *supra* note 90 at 219). Sugarman has addressed the issue of industry responsibility in some detail, see: S. Sugarman, "No More Business As Usual: Enticing Companies to Sharply Lower the Public Health Costs of the Products they Sell" (2009) 123 Public Health 275 [Sugarman]. Sugarman notes that the industry's response is often that of the personal responsibility of the individual (*ibid.* at 575). His solution is to adopt performance-based regulation.
[573] As Gostin & Gostin note, "it follows from Mill's harm principle that the state should not exercise power to prevent or ameliorate harms that individuals inflict on themselves. Mill's central point was antagonistic to paternalism – the protection of competent adults irrespective of their expressed desires – because it is 'better for them'" (*supra* note 90 at 214). How is one to determine when they are preventing the one-shot act of compulsion by the distraught and not the calculated actions of a rational agent? Berlin suggests that it is in accordance with Mill to prevent a man from crossing a bridge "if there is not time to warn him that it is about to collapse, for I know, or am justified in assuming, that he cannot wish to fall into the water" ("Two Concepts of Liberty", *supra* note 38 at 149). Is it certain that the

Dershowitz acknowledges that Mill's conception of liberty may offer limited support for public health measures such as tobacco control.

> Today we know that smoking hurts not only the lungs and hearts of smokers, but also the health of nonsmokers. That might well have led Mill to conclude that adults have the right to *inhale* but not to *exhale*—at least not in the presence of nonconsenting adults or children. Just as your right to swing your fist ends at the tip of my nose, so, too, your right to puff a cigarette ends at the edge of my nostrils.[574]

While certainly not an unqualified approval for measures to limit second-hand smoke exposure, consider the implications of Dershowitz's comments when attempting to reconcile public health with preservations of liberty. If the right to exhale stops at the nonconsenting adult's nostril, given that it is a source of harm to the other, what about second-hand smoke or even third-hand smoke? Research in recent years has demonstrated that second-hand smoke has a detrimental impact on health even when it is not detected.[575] If avoidance of harm to the other is the aim, the right to puff on a cigarette does not end at the edge of one's nostrils, as Dershowitz suggests, but may end at the moment that the resulting second-hand smoke may, at some point presently or in the future, impact the health of nonconsenting adults. In effect, it would limit smoking in public places considerably. This illustration

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man is unaware that the bridge is about to collapse or that they are not wishing to fall into the water? Arguably, the man in Berlin's example would be able to inspect the bridge (at a minimum, much of it would be visible to him), and is accepting the risk of crossing. If intervention can be justified here, is it not even more justified when the individual is unable to assess the risk properly (for example, in tobacco use)?

[574] Dershowitz, *supra* note 342 at xvi, original emphasis.

[575] See note 103 above. Ontario Campaign for Action on Tobacco suggests that since 1986 there have been more than 100 major studies that have examined the health effects of second-hand smoke, with at least 63% finding evidence of harm (*Health Effects of Second-hand Smoke Exposure* (2009), online: Ontario Campaign for Action on Tobacco <http://www.ocat.org/heatheffects/index.html>). There is considerable research that discusses the impact of passive smoking.

exemplifies some of the difficulties that must be overcome when considering public health law in the context of liberty. It is also the reason, suggests Siegel, why the population health approach does not morally distinguish between self-regarding and other-regarding health risk, given that "both kinds of risk can substantially affect the population's health."[576]

The debate about the extent that one's actions impact another – and the corresponding responsibility for that impact – will not be resolved here, supposing that a resolution is indeed possible. However, it is clear that individual actions can have an impact on the collective. Gostin observes that individuals or organizations often act rationally for their own interests and, in so doing, "adversely affect communal health and safety."[577] Moreover, private actors can stand to profit from activities that harm the rest of society.[578] Novak proffers an alternative understanding of individual rights. Rather than establish individual rights as primary, he suggests rights and

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[576] Siegel, *supra* note 78 at 365.
[577] Gostin, "Legal Foundations", *supra* note 10 at 9. Gostin's comment is important. Often it is assumed that rational actors would see the utility in not harming others. For example, Berlin notes the common belief that, "[r]ational men will respect the principle of reason in each other, and lack all desire to fight or dominate one another. The desire to dominate is itself a symptom of irrationality, and can be explained and cured by rational methods" ("Two Concepts of Liberty" *supra* note 38 at 146). That this is the case is not clear. Indeed, Berlin has observed that men are interdependent and thus recognizes that the liberty of some depends on the restraint of others (see note 400). It is also is why Berlin recounts Tawney's reminder that "the liberty of the strong, whether their strength is physical or economic, must be restrained" (*ibid.* at 170). Hayek has also observed that rational unintentionally harm others by not contributing to the public good. When it comes to the provision of goods and services that the market will not provide, "wholly rational considerations will lead each individual, while wishing that all the others would contribute to refuse himself to do so" (*Law, Legislation and Liberty*, *supra* note 331 at 44). In other words, rational individuals can not only affect health, but will often refrain from contributing to the collective good, although they hope (expect) that others will.
[578] Gostin, "Legal Foundations", *supra* note 10 at 9.

liberties as secondary to larger social obligations.[579] In fact, he suggests that the rights and liberties of the individual are derived from social obligations. "All rights were defined by and subject to the larger society from which they sprang, particularly the coincident rights of others and the superior rights of the whole."[580]

There is also considerable debate about the extent to which individuals have the ability to make choices. Although this idea was discussed above, in the context of public health it becomes more pressing, particularly when considering so-called lifestyle diseases. Criticisms that lifestyle diseases do not belong in the realm of public health law are not ignored by public health law scholars. Gostin and Gostin observe "[o]ur public health problems are not, strictly speaking, public health questions at all. They are questions of individual lifestyle …. These are not epidemics in the epidemiological sense. They are the result of millions of individual decisions at millions of points in time. These individual actions lead to

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[579] Novak, *The People's Welfare, supra* note 135 at 34.
[580] *Ibid.* at 34. He notes, "[r]ights such as personal liberty, personal security, and private property universally resulted 'from the social relations' and had their roots in the 'social nature of man'. A natural or legal right was not something to be exerted against society, but was intimately connected to the duties and moral obligations incumbent on social beings" (*ibid.* at 33). Accordingly, "[r]ights were thus not only social (as opposed to individual) and affirmative (as opposed to defensive), they were also distinctly relative (as opposed to absolute)" (*ibid.* at 34). Man is linked with and defined by society, thus, "the existence, welfare, and improvement of that public took precedence over the concerns of private individuals" (*ibid.* at 46) Novak further notes, "[t]hough its antidespotic thrust is often mistaken for liberal individualism, local self-government conceived of liberty and autonomy as collective attributes—badges of participation, things achieved in common through social and political interaction with others" (*ibid.* at 10). Thus, "[a]n overarching public concern with police and well-orderedness trumped legal-political arguments about individual liberties and inalienable rights" (*ibid.* at 240).

collective costs."[581] Lifestyle diseases are increasingly recognized as proper subjects for government interference.[582]

There is no question that Mill would reject public health law's attention to lifestyle diseases.[583] In fact, the wholesale rejection of lifestyle interventions by public health law is nearly universal for libertarians. "Those who choose unhealthy or risky path are deemed 'responsible' or 'at fault' for their own condition, and unworthy of state assistance or protection. These antipaternalists, of course, want individuals to 'internalize' all the consequences of their immoral behaviour"[584] This suggests that individuals are able to take responsibility for their actions. As noted above, this idea can be contested. To be sure, people can take responsibility for themselves, but only within the limits of their knowledge.[585] As Martin observes, contemporary society is a 'risk society', "a society of technological complexity that absolutely no-one completely understands, and which gives rise to a range of possible futures."[586] There are both external risks that remain outside of our control, such as earthquakes and drought, but increasingly the population is subjected to manufactured risk: "risk which we have ourselves

[581] Gostin & Gostin, *supra* note 90 at 220.
[582] Syrett & Quick note that diseases such as obesity and smoking-related illnesses governmental attention "not least because of the pressure which they may place upon finite resources for health care" (*supra* note 9 at 222).
[583] Recall Gostin & Gostin's assertion that Mill's account of liberty would reject classic public health regulation, thus it seems certain that Mill would be diametrically opposed to lifestyle interventions.
[584] Gostin & Gostin, *supra* note 90 at 219.
[585] David Feldman, "The Contribution of Human Rights to Improving Public Health" (2006) 120 Public Health 61 at 62.
[586] Martin, "The Limits of Law", *supra* note 9 at 73.

have created through the expansion of science and technology."[587] The notion of responsibility thus becomes far more complicated than suggested by theorists such as Mill and Hayek. The idea of responsibility for adverse outcomes is a social construct, not an absolute.[588]

Liberalism is predicated on the assumption that individuals should be granted extensive freedom to make their own choices and to bear the consequences of the risks they take.[589] Tibor Machan presents such an argument:

> Obviously the prospect of living better are greater when people attend to their own circumstances, because they are in a better position to know what they require …. It [is] highly probable though certainly not guaranteed that free individuals will make better decisions and the entire system will be more rational than one in which the few try to accomplish that which they cannot do—namely, learn the limits of suitable conduct and aspirations for all.[590]

However, it has been argued that passivity on the part of the state, which would allow individuals to choose as they wish, would "almost certainly perpetuate health disparities."[591] Without question, it would certainly have a

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[587] *Ibid.*

[588] Gostin & Gostin note, "[q]uestions of fault are malleable and socially constructed" (*supra* note 90 at 219).

[589] Although beyond the scope of this paper, it is necessary for public health law scholars to reconsider who is actually responsible for the risk. Dershowitz argues that Mill would not likely have objected to a system that imposed the costs of risk taking directly on the risk takers, provided that the risk taker retained her freedom (Dershowitz, *supra* note 342 at xx), so why not impose the burden of the risk on the party who reaps the rewards? More often than not, the individual bears only the costs—both immediate and long-term costs. Determining the party that ought to bear the risk would be a task relegated to the state. See: Sugarman, *supra* note 572.

[590] Tibor R. Machan, "Reason, Morality, and the Free Society" in Cunningham, *supra* note 28, 268 at 292.

[591] Gostin & Gostin, *supra* note 90 at 218. They note, "seen from the population health perspective, moving the activities of millions of people in the direction of behaviours guided by rigorous science will almost certainly improve overall health" (*ibid.*). J. Ruger notes,

disproportionate impact on the poor and the weak in society[592], including the potential of reinforcing stigmas of minority groups.[593]

Because of the emphasis placed on freedom, liberalism champions the market place. The market is seen as a mechanism for safeguarding freedom. One of the reasons for this, according to J. Lucas, is because it allows individuals to have a "veto." [594] It grants individuals choice. But this is not

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"[r]ather than having individual rights against State interference determine policy, my approach would seek to bolster the scientific process and standards, applying safety, efficacy, medical necessity, and medical appropriateness to the assessment of an experimental drug to determine whether it should be made publicly available. Furthermore, allowing negative rights to trump the scientific process undermines the theoretical and policy justifications offered above involving the moral duty to draw on a society's collective scientific resources and medical knowledge to provide all individuals with the opportunity to be healthy" ("Governing Health", *supra* note 10 at 54).

[592] "Simply to say that the interventions are unwarranted because the harm is self-inflicted does not do justice to the claim that there are profound effects on the population, particularly the poor" (Gostin & Gostin, *supra* note 90 at 219-220).

[593] Martin, notes the "potential for re-inforcing stigma of minority groups whose lifestyles are perceived to be a contributory factor to ill health and to the failure to achieve a 'good' health culture, and thus to be a drain on state resources" ("Law as a Tool", *supra* note 44 at 851). The adverse impact on the poor and weak is a primary reason why many public health scholars advocate a social justice perspective. A social justice perspective not only aims to address the health concerns of the least fortunate in society (Gostin & Gostin, *supra* note 90 at 218), it also grants considerable room for public health initiatives to address lifestyle disease. "The justice perspective shows why health is a matter of public concern, with the state having a role not only in the traditional areas of infectious diseases and sanitation, but also in emerging areas such as chronic diseases caused by diet, lifestyle, and the environment" (Gostin & Powers, *supra* note 6 at 1055). Lifestyle diseases, not surprisingly, are more likely to afflict the poor in society than the wealthy.

[594] Lucas notes, "[t]he great merit of the market, so far as liberty is concerned, is that it safeguards freedom. Certain things cannot happen without my consent. On the decisions which concern me most—what job I shall take, where I shall live, whom I shall marry—I have a veto" (J.R. Lucas, "Liberty, Morality, and Justice" in Cunningham, *supra* note 28, 146 at 158). That this is the case, however, is not entirely clear. Lucas acknowledges that the veto may be costly, in that the exercise of it could cost an individual their job or that others may act exploitatively, taking advantage of their position and, through use of their own veto, harm other (*ibid.*). However, Lucas is quick to dismiss any complaints about "original sin" (that is, the selfish nature of humanity) to theology and not political economy (*ibid.*) and suggests that the "market economy is preferable to all available alternatives" (*ibid.* at 159). Lucas suggests that it is the system under which bad men are able to do the least amount of harm (*ibid.* at 165). This may be the case, but it does not suggest that it is the system under which the least amount of harm may come about. For example, an argument could be made that through the market economy, where profit-motive rules the day, good and otherwise well-intentioned individuals (or, perhaps, indifferent individuals) may do the most harm, whether intentional or not. Lucas would not likely agree with this statement, given his

entirely true. Consider the example of eating, identified above. Individuals do not necessarily purchase a particular item of food because they in fact choose to do so. There may be a sincere desire to opt for healthier foods but for a number of reasons, which were identified above, individuals are prevented. It is for this reason that public health law scholars, such as Gostin, contend: "If it is simply more difficult to choose the healthy option (whether it is healthy food, exercise or some other beneficial activity), then only the government can make the choice easier."[595] Before suggesting that this amounts to coercion, consider how Raz has described manipulation: "One manipulates a person by intentionally changing his tastes, his beliefs, or his ability to act or decide. Manipulation, in other words, is manipulation of the person, of those factors relevant to his autonomy that are internal to him."[596] It would seem abundantly clear that businesses are manipulating and coercing individuals, but not simply with respect to food choice. Curiously, however, this does not seem to upset libertarians. Christopher Reynolds neatly describes the problem that emerges:

> Notions of personal responsibility shift liability from industry. Yet in emphasizing the responsibility of the consumer they are, ironically, denying any responsibility on the part of those whose advertising and marketing and general inducements to consume more, and consume more often, distorts and colours

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argument that "[b]usiness may be bad, but they cannot be corrupt, as bureaucrats can" and that it is better to legitimize the profit-motive "and have some people honestly out to maximize their own profits than have them feather their own nests dishonestly in the course of official business" (*ibid*. at 159). Given the large number of scandals, frauds and illegality in business over the past decade, one cannot help but wonder if Lucas would write with the same conviction.

[595] Gostin & Gostin, *supra* note 90 at 219.

[596] Raz, "The Rule of Law", *supra* note 28 at 14.

> the environment in which parents and their children are expected to make responsible nutritional choices.[597]

This is not to suggest that individuals cannot be responsible for their actions, but it does call into question the "response-ability" of individuals—that is, the ability of the individual to respond appropriately to life situations. It also elucidates the need for the state to provide better social control.[598] Berlin has observed that even liberals, at times, have admitted the need for the state to control social life "if only to mitigate the inhumanity of unbridled private enterprise, to protect the liberties of the weak, to safeguard those basic human rights without which there could be neither happiness nor justice nor freedom to pursue that which made life worth living."[599] Moreover, he notes, "the premature lifting of social controls might lead to the oppression of the weaker and the stupider by the stronger or abler or more energetic and unscrupulous."[600] It also puts into sharper perspective the goal of public health law—the primary objective is to protect the individual, even if from herself. As Gostin and Gostin argue, "the potential disutility of particularly hazardous activities may be immeasurably greater than the utility of exercising autonomy in the small sphere."[601] They also note, "some limits on behaviour now may result in greater liberty and happiness for years or

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[597] Reynolds, *supra* note 1 at 165-166.
[598] This is not to suggest simply that industry needs to comply with regulation. Calman notes, "[i]n the same way that one would not judge the ethical acceptability of actions of individuals by merely assessing whether or not they have broken the law, it is reasonable to argue that commercial companies have responsibilities beyond merely complying with legal and regulatory requirements" (*supra* note 41 at e8). Social control suggests a far more participatory and active role for the state in the health of the population.
[599] Berlin, "Political Ideas", *supra* note 271 at 11.
[600] *Ibid.* at 30-31.
[601] Gostin & Gostin, *supra* note 90 at 220.

decades to come, affording a wider freedom" [602] It has also been astutely observed, "how real is the autonomy of the individual in the face of public health threats?"[603]

There is no dispute that public health law recognizes liberty as an important value that needs to be protected. In fact, public health law scholars often identify themselves as champions of liberty.[604] Dawson, however, notes that it is not clear that liberty should be prioritized over other values: "[r]especting people's autonomy is an important ethical principle, but it is only one amongst many."[605] Gostin notes that theorists have given insufficient attention to the "equally strong values of partnership, citizenship, and community."[606] He suggests, "[w]e need to recapture a classic republican tradition that emphasises communal obligations as well as self-importance."[607] And while it may be necessary, as has been suggested, to revisit the initial liberal framework in order to make it less individualistic so that it may accommodate the value community,[608] it is also important to remember that our understanding of liberty is dynamic. As B. Bennett notes,

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[602] *Ibid.* at 217. There is, in fact, some suggestion that too much liberty may actually result in "an unnecessary source of destructive tension" (Ronald Dworkin, "We Do Not Have a Right to Liberty" in Cunningham, *supra* note 28, 167 at 174 [Dworkin]). Dworkin refers to the work of the psychologists such as Laing, "who argue that a good deal of mental instability in modern societies may be traced to the demand for too much liberty rather than too little" (*ibid.*).

[603] Bennett *et al.*, *supra* note 25 at 209.

[604] The argument being that they wish to protect the individual's true liberty, to protect their freedom to not be harmed by the acts, whether intentional or not, of others, collectively or individually.

[605] Dawson, *supra* note 9 at 79. Hayek suggests that "liberty is not merely one particular value but that it is the course and condition of most moral values" (*The Constitution of Liberty*, *supra* note 32 at 6).

[606] Gostin, "Law and Ethics", *supra* note 11 at 11.

[607] *Ibid.*

[608] Calman, *supra* note 41 at e7.

"[o]ur perceptions of individual liberty and individual rights have undergone considerable evolution since most of our public health laws were originally introduced. Today, the public is likely to have high expectations about the preservation of individual liberty and freedom of movement."[609] Ronald Dworkin contends that every law in an infraction on liberty – although the bulk of these laws can be justified on utilitarian grounds as they are enacted in the general interest of society – but that "we have a right to be protected against only fundamental or serious infractions."[610] Whether it is the outright restriction of choices or simply the shifting of available choices, "liberty is compatible with not being allowed to do specific things"[611] This is the case even if we do not fully understand the rationale for the law.[612] Even Hayek recognizes that true freedom under law cannot exist without protection of some law(s).[613] This is not an abandonment of liberty. Rather, as it has been suggested Hayek recognizes, "libertarians have forgotten that liberty is part of a complex political tradition."[614]

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[609] B. Bennett, "Legal Rights During Pandemics: Federalism, Rights and Public Health Laws – A View From Australia" (2009) 123 Public Health 232 at 234.
[610] Dworkin, *supra* note 602 at 171, he aligns this position with that of Bentham. Cunningham, however, notes, "if we reject intervention only when evils are exactly predictable, too few will be rejected" (Robert L. Cunningham, "Complexity, Change, and Control" in Cunningham, *supra* note 28, 294 at 311, referring to Hayek).
[611] Hayek, *The Constitution of Liberty*, *supra* note 32 at 19.
[612] For example, public health officials often have a difficult time attempting to convey the rationale for initiatives. The experience of public bans on smoking is a good example. Many conceived of public bans as attempts to control smokers when, in fact, the aim was to reduce harms to non-smokers. Hayek observes, "[w]e have thus no choice but to submit to rules whose rationale we often do not know, and to do so whether or not we can see that anything important depends on their being observed in the particular sense" (Hayek *Law, Legislation and Liberty*, *supra* note 331 at 50). Hayek also notes, "there is still need for initiative in many areas whose importance is not yet generally recognized and where it is not possible or desirable that government take over" (*ibid.* at 66-67).
[613] Dietze, *supra* note 456 at 80.
[614] Westmoreland, *supra* note 274 at 95. In the same way, it has been argued that rule of law,

CONCLUSION

Public health law is in the midst of a crisis of public confidence, a crisis that this paper contends stems from a lack of a thorough normative framework. Additionally, this paper has identified some of the pernicious problems that public health law faces, including discord amongst public health law scholars, criticisms that it exceeds its proper bounds, and suggestions that it is incompatible with both liberty and laissez-fair economics. These problems are not likely to be solved in totality in the near future; the evolution of public health law is far from complete. As became apparent during the SARS epidemic in 2003, we are only beginning to understand the effects globalization has on public health. With scholars increasingly calling for governments to "exploit laws" in order to protect the public's health, it is critically important that the public's confidence in public health law be fostered. The aim of this paper was to dispel misconceptions that public health law is specious and without justification.

Suggesting that public health law is the responsibility of the state to addresses collective action problems that affect the health of the population, this paper demonstrated that public health law indeed has a normative framework that is consistent both with the rule of law and liberty. This paper has not attempted to identify which public health laws and initiatives are

in some circumstances, must yield to other considerations: "the rule of law's prescriptions are not trumps in a normatively heteronymous universe. That the rule of law must sometimes yield to other moral considerations is evidence for rather than against its moral character because such circumstances reveal that moral arguments must be given to justify deviations from it" (Fox-Decent, *supra* note 27 at 570).

needed or wise; instead, it suggests that even in a limited state, public health law is an appropriate arena for state activity. Public health law may be a 'logically untidy, flexible, and even ambiguous compromise'[615], but it does not intrinsically represent an illegitimate use of state power. Collective action problems certainly extend beyond the 'clear and present' dangers that some suggest public health law should be restricted to, and include increasingly complex issues, such as lifestyle diseases. Provided that public health law is firmly based in scientific evidence and that the state acts in accordance with the rule of law, public health law is justified in a limited, democratic state.

Consequently, this paper aims to stifle criticisms about the acceptability of public health interventions and expose them as veiled attempts to promote a specific (and, inevitably, relentlessly economisitic) ideology. As public health law begins to address the complexity of lifestyle diseases, this paper is confident that, with proper deference to its normative framework, public health law will succeed. Perhaps the next generation of public health scholars will look upon criticisms of contemporary public health law's expansion into lifestyle diseases with the same disbelief that we now have for the 1848 *Times* editorial that read: "the English people would prefer to take the chance of Cholera, rather than be bullied into health."[616]

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[615] See Berlin, note 430.
[616] Magnusson, *supra* note 7 at 572, citing Rosen, *supra* note 60 at 199-200, see Epstein's comments above, note 123.

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