

POPULATIONS, PUBLIC HEALTH, AND THE LAW

By Wendy E. Parmet
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WENDY PARMET IS A CONSTITUTIONAL LAW SCHOLAR WHO HAS worked on health, public health, and disability law issues for many years. Like many constitutional scholars, she believes in individual liberties and is suspicious of public health restrictions imposed on individuals. To her credit, she has remained consistent in her views following the September 11, 2001, terrorist attacks, not succumbing to the siren song of administration funding for those willing to support emergency public health laws. Unusual among constitutional law scholars, Parmet likewise understands and is deeply concerned about statistical lives. She is critical of the United States legal system and health policy apparatus for being overly concerned with individuals, to the detriment of the health of populations and ultimately to the health of the individuals in those populations. *Populations, Public Health, and the Law* presents her theory of population health and of how judges should use it to transform the US legal system.

While the title refers to public health, Parmet uses an all-encompassing definition of public health that includes everything that affects physical and mental health and the ability of individuals to live comfortable lives. This broadens the notion of public health to include housing, education, and income redistribution—in short, whatever is required to eradicate the disparities that lead to unequal health outcomes. The breadth of this definition makes the book less about a theory of public health than about what physicists call a TOE, or theory of everything—in this case, everything to do with health.

As a theoretical construct, this is reasonable. Data strongly support the link between class structure and health outcomes. In the best of all possible worlds, addressing the gestalt of a person's life would be the best way to address health, if health were the only goal of society and resources were unlimited. This is a utopian theory, and ultimately the book must be judged on whether such an analysis constructively advances thinking in the deeply pragmatic and political world of public health. Parmet uses "population" differently from its classical use in public health. She does not belong to the Governor Lamm school of putting sick elderly individuals on an ice floe to protect the resources of the community. Her populations are always aggregates of individuals and are narrowly defined to ensure that the needs of the population are actually the needs of the individual. Thus, while public health and health care policy are often concerned with the tension between the individual and the population, this tension is absent. Parmet never has to sacrifice the individual to the needs of the population, since populations need only what is good for individuals.

This is illustrated in Parmet's analysis of the tuberculosis carrier isolation problem. She is rightly critical of the circus that surrounded the air travel of a lawyer with tuberculosis, in which mismanagement by local officials and a Centers for Disease Control and Prevention consultant was covered up by claiming that states and the federal government needed new laws. She presents a state court case discussing the isolation of a homeless man infected with human immunodeficiency virus (HIV) and, secondary to the HIV, infectious tuberculosis. This individual had already defied public health orders and was more difficult to deal with because of the lack of permanent housing. The court ultimately deferred to the expertise of the public health department, after engaging in an extensive analysis balancing the rights between society and the individual. This case is (in reality) about the general public, who are at lower risk of being infected by this individual than are the other homeless persons near him, oppressing the small population of HIV-infected homeless persons. Thus, Parmet argues that rather than isolating the tuberculosis-infected individual, a court driven by population analysis would require the government to provide all HIV-infected homeless persons with housing, which would reduce their chance of becoming infected with tuberculosis.

The first question is whether this is a population analysis at all. Stripped of the population rhetoric, this is a call for housing homeless persons as a way of reducing the risk of tuberculosis transmission. This has been a laudable goal of public health since the early 1900s. If health were the only priority in society and resources were not limited, society would not have homeless persons. But does saying it really change the argument?

A second example will illuminate the analytical problem. Parmet is a true believer in tort law, and her chapter on tort law advocates changing the rules of evidence and relaxing scientific standards of proof to make it easier for plaintiffs to win tort cases. She argues that if a substance might increase the risk of injury to a population but there is no adequate proof that it injured an individual, the individual should be able to recover based on the possible risk to the population. Thus, the individual claim is bootstrapped by reference to an aggregate risk to the population. In both examples, the ultimate goal is a benefit for the individual and a benefit to the population only through the aggregate of the individual benefits. Contrast this with mandatory vaccinations to create herd immunity to protect a population from a communicable disease. On average, individuals are better off, but some may sustain a vaccine injury, and all sustain a diminution of rights through the mandated vaccine. In Parmet's use of populations, all individuals benefit and none experience harm, the same analytical result as a theory based on individual rights.

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The second question about this approach is instrumental: how should Parmet's version of population analysis be implemented? It is not surprising that a constitutional law scholar would focus on the courts. It is surprising that she has no discussion of the role of legislatures and public health agencies. This leads to the core cognitive dissonance in the book: most of the text is taken up with examples of judges making the wrong decisions on these issues, yet she wants these same judges to be born again into her population religion and make the right decisions. As an example, the text presents an extensive attack on the US Supreme Court's limitations of certain state public health laws because they interfered with interstate commerce or free speech. Parmet forcefully argues that the court should respect federalism and leave the states to experiment with their own public health policies. Yet she ignores the reality that many states would implement policies that she would find abhorrent—for example, Louisiana already has laws on the books to protect the population of fetuses from genocide the instant that *Roe v Wade* is overturned.

Parmet argues that the courts should not demand rigorous scientific proof before requiring expensive and broad-ranging policy changes but should instead adopt a weak version of the precautionary principle, one that would not demand rigorous proof but would not do "crazy things." Ultimately, this is yet another call for science courts that would perform their own analysis of scientific evidence and set policy independent of the democratic process. Even if it were possible to turn judges into benevolent overlords, the legal system is based on a balance of powers, not on the constitutional scholar's dream of a country ruled by a resurrected 1960s Supreme Court headed by Earl Warren.

The premise of this text is to encourage society to eliminate class- and race-based disparities, justifying this by their benefit on health. It is hard to argue with this as a goal. It is left to the reader to decide if Parmet's analysis provides results different from those provided by an individual-rights analysis. By not placing her analysis in the context of how US policy is prepared and implemented, she gives little pragmatic guidance to legislatures and governmental agencies that must wrestle with resource constraints, political checks, and powerful interest groups happy with the status quo.

Structurally, this book is academic scholarship in the style of the traditional law review, a form that blurs the notion of scholarly inquiry and advocacy brief. As with a court brief, this book focuses on the cases and scholarship that support its thesis and sometimes overstates its conclusions, as in the claim that "Seventy years have passed since the United States Supreme Court abandoned its traditional police power jurisprudence. . . ." (p 261) Contrary to the book blurb, this is not a history of public health and the law; to mention a single omission, there is no discussion of HIV and the law—one of the pivotal public health law issues of the past 50 years. The reader not familiar with the universe of the omitted public health and administrative law cases will come away with a limited view of public health law.

Populations, Public Health, and the Law is an exemplar of the modern trend in academic public health law writing. It fits well with the agenda of the Centers for Disease Control and Prevention and many private foundations—ie, to push states to enact detailed, standardized public health laws that eliminate agency discretion and that will support extensive review of all public health actions by the courts. At a time when budget cuts make it increasingly difficult for public health agencies to carry out even basic duties, it is difficult to see how ensnaring them in complex legislation and judicial oversight will advance the health of populations. It is appropriate that this theory of public health policy enforced by judges without regard to legislatures started with the mental health deinstitutionalization movement. Ignoring political reality got the mentally ill out of institutions but left them on the street. Care must be taken that utopian dreams do not leave day-to-day public health out in the street as well.

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THE GOOD DOCTORS: THE MEDICAL COMMITTEE FOR HUMAN RIGHTS AND THE STRUGGLE FOR SOCIAL JUSTICE IN HEALTH CARE

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IN THE 1960S, RACIAL DISCRIMINATION WAS AT AN ALL-TIME HIGH in the South. African Americans were refused the right to vote, the right to health care, and the right to organize to end these practices. African American physicians were denied privileges in local hospitals, and most hospitals were segregated, offering separate and inferior health care to African American patients. During that time, attempts to vote, to integrate segregated areas, or to be involved in civil rights activities were met with violence. Civil rights workers from across the country who went south to assist with community organizing and voter registration were not welcomed by those who favored the status quo, and at times they too faced violence. Racial tensions in the South peaked in the summer of 1964, after the murders of 3 civil rights workers in Mississippi. Because of the paucity of sympathetic and willing physicians, civil rights organizers in Mississippi made a nationwide request for a medical presence in their state; in return, the newly established Medical Committee for Human Rights (MCHR) responded by organizing personnel and resources to support the civil rights movement. The MCHR was founded by a collaborative group of physicians in the north and in Mississippi in an effort to offer medical support to members of civil rights organizations including the Stu-