

Promoting Population Health through Law:  
Lessons from the Development of Public Health Law  
in the United States

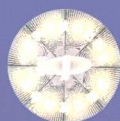
# 用法律保护公众健康

——美国公共卫生法律解读

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主 编 汪建荣 沈 洁 何昌龄

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# **Promoting Population Health through Law:**

## **Lessons from the Development of Public Health Law**

### **in the United States**

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# 前言

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健康是人类共同的愿望，而公共卫生是各国政府为保障人民健康应全力履行的重要职责，公共卫生法律则是实现健康公平与正义的根本保障。

进入 21 世纪，新发和再发传染病流行、非传染性疾病负担加重、人为和自然灾害发生、社会发展不平衡、人口结构改变、国际化加剧等因素相互交织，使原有的全球公共卫生问题更加复杂和严重。

目前，随着中国社会、经济的不断发展，中国卫生事业正在经历快速发展阶段，公共卫生法律不断加强，在“建立基本医疗卫生制度，提高全民健康水平”进程中，公共卫生法制建设面临新的机遇和挑战。

公共卫生问题没有国界，中国的公共卫生法制化建设应该借鉴其他国家的有益经验和做法，在这方面，美国公共卫生法律对中国具有独特的价值。一方面，中国是世界上最大的发展中国家，美国是世界上最大的发达国家，两国已将公共卫生列为外交战略的重要内容之一，推动两国相互熟悉对方的公共卫生法律制度很有必要；另一方面，中国与美国的经济贸易和人员往来数量巨大，两国面临相同的公共卫生威胁，构建以法律为基础的公共卫生共同防线势在必行。

近年来，中国与美国的公共卫生事务日益增多，但公共卫生法律合作与交流的系统性、全面性和深入性都明显不足，与其他领域的合作与交流不相适应。

本书倾注了来自全国人大、卫生部、中国疾病预防控制中心、北京大学、清华大学以及美国天普大学等机构法律工作者的心血。在研究第一手资料和汲取综合研究成果的基础上，从美国法律制度的基本情况入手，系统介绍了美国公共卫生法律体系，精心呈现美国历史上近十个司法案例，引入示范法律的研究形式，追踪美国公共卫生法律发展的最新动态。最后，思考对中国公共卫生法制化进程的启示。

本书具有很好的理论性、知识性和趣味性，填补了我国对国际公共卫生法律研究的一个空白。

愿本书为中国卫生法律的研究者与制定者、公共卫生管理人员与技术人员以及关注公共卫生事业的各界人士打开一扇窗，提供一个参考，以期达到“西为中用”、“以他山之石攻己之玉”的目的！

由于美国的公共卫生法律体系庞大、内涵丰富，本书仅作为一个视角的分析，期待更多研究者的关注、充实本书内容。

编者

2008 年 7 月





## Foreword

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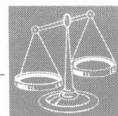
To be healthy is an aspiration common to all human beings. Thus, maintaining the public's health is an essential public good, as well as a basic responsibility of any government. Within this broader framework, public health law sets out the policy and legal lattice which underlies the public health enterprise. Under the basic precepts of health fairness and justice, public health law helps determine the scope, mechanisms, and limitations of society's activity in promoting and protecting the population's health.

In today's interconnected and unsettled world, public health problems are as complex and severe as ever. Emergence and reemergence infectious disease, growing burdens of non-communicable and chronic ailments, the devastating impact of natural and man-made disasters that appear to be growing in scale and number, the shifting demographic and economic patterns within the ever-more globalized human environment all constitute new public health challenges.

In China, radical social and economic development of the last several decades has added a new level of public health law development. As China moves forward in the task of "building a fundamental health system and improving the health of the population," advance of the country's public health law framework has become indispensable.

As a corollary to the assertion that, in today's interconnected world, public health knows no borders, this book's premise is that public health law is similarly and necessarily international and inter-cultural. The reorganization of China's legal framework for public health can and should assimilate other countries' experience, in which we believe the U.S. story has particular value. On the one hand, China is the biggest developing country in the world while U.S. is the biggest developed country, and both countries have listed public health as one of their top priorities. On the other, as central travel and trade nodes, China and the US are facing similar public health threats. Aside from the mutual benefit that can flow from shared experience and knowledge transfer, the task of constructing a robust public health system requires cooperation and mutual understanding in today's inter-connected world.

Despite the advances of the last several decades in the field of public health law and the



field's growing importance, cooperation and communication between US and China in this realm has not been systemic. This volume is a concerted step in the effort to establish a firm foundation for this interface and exchange. Pooling legal expertise from the National People's Congress, the Ministry of Health, the Chinese Center for Disease Control and Prevention, Peking University, Tsinghua University in China and Temple University in the US, the book gives a general introduction to the U.S. public health law. This is accomplished through an overview of the basic components of the U.S. legal system as it pertains to public health, synopses of 10 selected cases that illustrate the development of the public health law cannon, a translation of the Model Public Health Act, reflections on the newest trends in the development of public health policy, and some concluding analysis of the application of the US experience to the development of public health law in China.

Overall, the book synthesizes theory, knowledge and general interest topics in an effort to begin filling the gap in the Chinese academic analysis in the realm of international public health law. Our hope is that this undertaking will open a useful window and provide a reference for Chinese public health policy researchers, decisionmakers, administrators and other public health professionals striving toward the stated goal of "making foreign things serve China" and "using other people's positive experience and suggestions to remedy one's own defects."

Using the informative and dynamic experience of the U.S. public health legal system as a starting point, this book will also provide a benchmark for further analysis, feedback and debate on this important topic.

Authors  
July 2008





## 序：

# 公共卫生法律的全球事业

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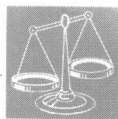
当今的世界很小。公共卫生是全人类的事业，它不仅与我们共同的人性相关，而且不能以危害人民福祉的社会状况、环境损害和病原体来划分国界。在良好的公共健康有赖于国际合作的世界里，本书旨在将美国公共卫生法律的视角展现给中国的法律和公共卫生工作者，成为我们为未来不失时机进行合作与相互学习实际行为。

本书是对美国公共卫生法完整而细致的探寻。作为一名美国法律人士，我有幸并且有责任谨慎地介绍我们美国的公共卫生体系，并且强调在我看来对中国很重要的一些内容。

本书前两章描述公共卫生领域中的美国联邦系统。讨论彰显了我敬佩中国新兴卫生法学者努力超越法律形式主义的特质。法律不能被理解为一系列理想化事物的简单集合，而是在社会制度和实践中发挥作用的一系列事物。因此，尽管形式上美国和中国的制度有所不同，但两个国家在公共卫生法律方面却并不迥然不同。在中国公共卫生体系中，省级和基层疾病预防控制中心的组织机构，与美国各州及地方行政机关对核心卫生权力的划分相对应。与此同时，公众视野中的美国联邦主义的效力通常比实际要少。各州和地方政府依赖于联邦资金，使联邦政府在设置地方卫生政策方面拥有巨大权力，而且，宪法准则关注于联邦法律至高无上的地位，以及联邦政府规制州际事务的权力，意味着各州按照自己方针行事的权力比较有限，即使在卫生事务方面（关于美国公共卫生法律中联联邦主义实践的讨论，参见 Beletsky 等，2008）。好的公共健康和公共卫生法律均需要在国家标准和地方控制之间艰难地寻找平衡。在理想情况下，卫生管制的“良性循环”出现在以下情形：国家政策被地方明确知晓并列于优先；地方的不当管制被国家监管限制，国家法律被有效执行与国家对地方能力的支持分不开（Burris 等，2007）。

第三章从两百多年来美国公共卫生法律的判例中，选取了令人着迷的案例——案例不可避免地带有主观色彩而有所取舍，但是它体现了法庭在公共卫生法律中可以扮演的角色——从保护基本权利、到教育公众有关风险以及推行有效预防的模式（Burris 和 Gostin，2003）。然而，因为美国经常被错误地认为是法院大肆干涉立法和执法决策的“诉讼社会”，读者应当小心避免过分估计诉讼对美国健康政策的重要性（Jacobson 和 Soliman，2002）。司法决定通常得到相当的重视，然而法院中的争辩通常很少指导公共卫生领域的日常实践。诉讼的戏剧化不应该使政治、立法和行政过程分散注意力，因为后三者才是法律作为公共卫生政策工具的真正引擎。

第四章和第五章审视了目前美国公共卫生法律完善的一些新动向。在联邦体系中的各州层面，第四章回顾了示范法律近期在促进完善公共卫生立法方面的应用。示范法律实际上可以在有



用的形式中体现经验,但本章最重要的发现应该是:示范法律作为一个工具,在设置公共卫生政策议程、调动政治支持和经济资源方面具有重要性。从此角色看,示范法律并未对公共健康产生应有的效果——当我们回顾美国法律结构近些年如何发展时,这一点会更加清晰。在2001年恐怖袭击之后,“战备”抢先占据并且渗入了公共卫生法律。大笔资金被投入到国家、各州以及地方机关,用以发展监测生物或化学攻击的系统,以及准备与大规模灾难相适应的应急反应机制和公共卫生机构。不幸的是,政治和意识形态的战备常常压倒了常识和基本流行病学原则。“9.11”没有改变影响美国发病率和死亡率的主要原因。与死于基地组织攻击的概率相比,人们仍然更容易因为心脏病、癌症、意外事故和毒品滥用而离开这个世界。然而,公共卫生(当然也包括公共卫生法律)的实际资源从传统领域被引导到更加显眼但真实风险更少的目标。卡特琳娜飓风的经历引发了其他问题:尽管战备的关注已经有数年光景,也有成千上万的纸上法规和计划存在,美国体制还是可悲地失败了,并且还会在应对中持续失败。战备,包括法律战备,在司法意义上,是良好的公共健康的一部分,但是当它成为时尚或者意识形态驱使的命令时,是十分危险的。

第六章转而提出中国从研究美国公共卫生法律中可以得到的启示。我已经指出几点,本章也提出了大量重要的观点。在最后,基于我在美国的个人经验和我有幸略微得知中国在卫生领域的一些挑战和努力,我想加上一些自己的看法。

首先,应关注公民社会在公共卫生的至关重要地位。毋庸置疑,为了雇员、公众和环境的卫生而自觉遵守法律和承担责任,商业行为对公共卫生法律的实践效果如何具有相当影响。但是,我想在此强调,非政府组织在既往公共卫生工作与倡导方面发挥了长期和重要的法律作用。在美国,公共卫生和其他领域政策一样,政治性一点也不少。许多需要政府关注和公共资源投入的事情相互竞争,其中不少事情比公共卫生工作、特别是防患于未然的预防,更加引人注目。公共卫生领域的非政府组织能帮助唤醒公众和政府对于重要健康议题的认识,能帮助卫生机构在政府治理的竞争氛围中得到所需的支持,这些作用在国家和国际政策层面中均被证实(Loewenson 2003; Ruhl, Stephens 和 Locke 2003)。同样重要的是,非政府机构作为公共卫生服务提供者的角色。一百多年以来,美国志愿组织提供了健康护理、预防服务、教育和行为干预。这些服务的经费通常来自于慈善捐助,从政府外资金来源的角度看,显著增加了公共卫生领域所有可用资源。在今天的美国,政府通过与非政府组织签约提供健康服务是很典型的,不仅折射出市场个人主义这种有时不成功的思想体系(Burris, 1997),还为州政府直接资助无效果领域提供一种有效率和效果的途径。所有这些意味着,规制着非政府组织、政府合同、慈善组织纳税甚至新闻自由的法律,是公共卫生建设的强有力基础。

最后,将公共卫生法律深深根植于社会及社会—流行病的环境中非常重要(Berkman 和 Kawachi, 2000)。良好的公共卫生不仅简单取决于对具体健康危害的控制,它要求维护导致健康的社会和生理环境。社会公平,被我们法律人士称做社会正义,今天被一致视为任何社会获得最大健康水平和分布的关键因素。因此,广义上讲,公共卫生法律涵盖了所有影响社会状况和结构的法律表现形式:劳动法、税法、反歧视法、刑法等等(Burris, Kawachi 和 Sarat, 2002)。尤其是,我们应当注意把法律作为推动流行病学的力量进行界定和研究:法律和法律的实施能直接影响人口健康。如,对隐性毒品使用的控制会意外导致毒品使用者感染艾滋病危险的上升(Burris 等)。因此,像公共卫生工作者所面对的其他社会手段一样,法律可被研究和用于干预。

本书是中国公共卫生法律重新兴起的最新证据。中国公共卫生面临的挑战是令人吃惊的,但中国政府和人民的能力也同样如此:其中一种能力就是向其他国家学习经验。作为一名美国公共卫生方面的法律人士,我希望本书能够帮助我的中国同行重复我们的成功,避免我们的失败。

于美国费城

2008年6月

(参考文献见英文序)



## Preface:

# The Global Enterprise of Public Health Law

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Senior Associate, Johns Hopkins Bloomberg School of Hygiene and Public Health

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The world is very small now. Public health is a project of all the globe's people, a function not merely of our common humanity but the irrelevance of national boundaries to the social conditions, environmental damage and pathogens that threaten our collective well-being. In a world in which good public health will depend upon international cooperation, this book's effort to bring insights from U.S. public health law to Chinese lawyers and public health workers, it is a timely example of the cooperation and mutual learning our future depends on.

This volume is a thorough and careful survey of U.S. public health law. It is by no means uncritical, but as an American lawyer I have both the privilege and the responsibility to introduce a few cautious words about our U.S. system, and to highlight what I see as some important points for consideration in China.

Chapters One and Two describe the U.S. federal system in public health, on the surface so very different from the classic centralism of the Chinese state. The discussion exemplifies one of the things I admire most about China's new health law scholars: their commitment to transcending legal formalism. Law must be understood not simply as a set of ideal types, but as a functioning set of social institutions and practices. Thus it is clear that, while the US is *formally* federalist, the two countries are not as far apart as they appear. In China, the organization of public health authority through provincial and local CDCs mirrors the distribution of core health powers in US state and local agencies. Meanwhile, there is often less to U.S. federalism than meets the eye. The dependence of state and local governments on federal funding gives the federal government enormous power to set local health policy; and constitutional doctrines concerning the supremacy of federal law and the power of the federal government to regulate interstate commerce mean that even in matters of health states may be quite limited in the extent to which they can follow their own course. (For a discussion of the practice of federalism in U.S. public health law, see (Beletsky et al. 2008), good public health and public health laws require striking the difficult balance between national standards and local control. Ideally, a "virtuous circuit" of health governance is created in which national policies are well-informed by local knowledge and priorities, local mis-rule is constrained by national oversight, and effective implementation is accomplished by national support for local capacity (Burris et al. 2007). Chapter Three is a fascinating sampling from more than two hundred years of court cases in U.S. public health law. The presentation is inevitably partial and impressionistic, but it demonstrates the roles that courts can play in public health law, from protecting basic rights to educating the public about risks and effective modes of prevention (Burris and Gostin 2003). Yet because the United States is so often mischaracterized as a "litigious society" in which courts profligately interfere with legislative and executive



decision-making, readers should be careful not to overestimate the importance of litigation in American health policy (Jacobson and Soliman 2002). Judicial decisions often get considerable attention, but disputes in court generally tell us little about the day-to-day practice of public health. The drama of litigation should not divert attention from the political, legislative and administrative processes that are the true engines of law as a tool of public health policy.

Chapters Four and Five examine current initiatives to improve U.S. public health law. Chapter Four reviews the recent use of model laws in promoting better public health legislation at the state level in the U.S. federal system. Model laws can indeed embody experience in a useful form, but the chapter's most important observation may be the importance of model laws as tools to set the public health policy agenda and mobilize political support and economic resources. In this role, model laws are not necessarily good for public health. This is clear as we step back to look at how the legal infrastructure has developed in recent years in the United States. After the terrorist attacks of 2001, a preoccupation with "preparedness" crept into public health law. Significant funds were directed to national, state and local agencies to develop systems for monitoring biological or chemical attacks, and to ready emergency responders and public health agencies to cope with mass disasters. Unfortunately, the politics and ideology of preparedness have often overcome common sense and basic epidemiology. September 11 has not changed the main causes of morbidity and mortality in the US; people are still far more likely to die of heart attacks, cancers, accidents and drug overdoses than they are from an Al Qaida attack, yet substantial resources in public health (and certainly attention in public health law) have been directed away from traditional targets towards more salient but less real risks. The experience of Hurricane Katrina raises other questions: in spite of several years of attention to preparedness, and the existence of literally thousands of pages of rules and plans, the U.S. system miserably failed and continues to fail in its response. Preparedness, including legal preparedness, is, in judicious amounts, *part* of good public health, but is dangerous when it becomes a fashion or an ideologically-driven imperative.

Chapter 6 turns to the task of drawing lessons from U.S. public health law for China. I have already alluded to several, and the chapter makes a variety of important points. In closing, I want to add a few of my own, based both on my experience in the US and the privilege I have had of getting to know a little about China, its challenges and its struggles in health.

The first concerns the vital role of civil society in public health. Of course, business, by the degree of voluntary compliance and responsibility towards health of workers, the public and the environment, has a considerable influence on how well public health laws actually work in practice. But I want to highlight here the legal implications of the long and important tradition of public health work and advocacy carried on by non-governmental organizations. In China no less than the U.S., public health is, like all other areas of policy, political. There are many competing demands for government attention and public resources, many of them more dramatic than public health work, particularly prevention—which succeeds when nothing happens. Non-governmental organizations in public health can help awaken public and government consciousness of important health issues, and can help health agencies get the support they need in the competitive environment of governance. This is true within the country and on the international policy scene (Loewenson 2003; Ruhl, Stephens, and Locke 2003). Equally important has been the role of non-governmental agencies as *providers of public health services*. For more than a century, U.S. voluntary organizations have provided health care, preventive services, education and behavioral interventions. Frequently they fund this work by charitable donation, tapping a source of extra-governmental funding that adds significantly to the overall resources available for public health work. They also use public funds. In the United States today, it is typical for government to offer health services through contracts with NGOs, a reflection not simply of the sometimes unfortunate ideology of market individual-



ism (Burris 1997) but also often an efficient and effective means to reach communities that may not respond to offers of assistance from the state. All this means that laws regulating NGOs, government contracts, taxation of charitable giving and even the freedom of the press are instrumental to a robust public health infrastructure.

Finally, it is important to put public health law firmly into a social- and social epidemiological- context (Berkman and Kawachi 2000). Good public health does not simply depend upon control of specific health threats; it requires the maintenance of a social and physical environment conducive to health. Social equality, which we lawyers may speak of in terms of social justice, is seen now clearly as crucial to attaining an optimal level and distribution of health in any society. Thus, in a broad sense, public health law encompasses all the forms and manifestations of law that influence social status and social structure: labor laws, tax laws, laws on discrimination, criminal law and so on (Burris, Kawachi, and Sarat 2002). In particular, we should be attentive to conceptualize and study law as an epidemiological force: laws and law enforcement practices can directly influence population health (for example, where control of illicit drug use has the unintended result of increasing HIV risks for drug users (Burris et al. 2004). Law can therefore be studied and targeted for intervention like any other social practice that public health workers confront.

This volume is the latest evidence of a resurgence of public health law in China. The challenges facing public health in China are formidable, but so are the capacities of China's government and people. Not least of these capacities is that of learning from the experiences of other nations. As an American public health lawyer, I hope this book will help my Chinese colleagues repeat our successes and avoid our failures.

Philadelphia, June 2008

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