



School of Law
UNIVERSITY OF GEORGIA

Digital Commons @ University of Georgia
School of Law

Scholarly Works

Faculty Scholarship

7-1-2009

Book Review of "Populations, Public Health, and the Law," Wendy E. Parmet (Georgetown University Press, Washington, D.C., 2009)

Elizabeth Weeks Leonard

University of Georgia Main Campus, weeksleo@uga.edu



Repository Citation

Elizabeth Weeks Leonard, *Book Review of "Populations, Public Health, and the Law," Wendy E. Parmet (Georgetown University Press, Washington, D.C., 2009) (2009)*, Available at: https://digitalcommons.law.uga.edu/fac_artchop/629

This Book Review is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University of Georgia School of Law. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ University of Georgia School of Law. [Please share how you have benefited from this access](#) For more information, please contact tstriepe@uga.edu.

POPULATIONS, PUBLIC HEALTH, AND THE LAW

WENDY E. PARMET (Georgetown University Press, Washington, D.C., 2009),
304 pages, \$26.95.

*Reviewed by Elizabeth Weeks Leonard, J.D., Lawrence, Kansas.**

INTRODUCTION

Wendy Parmet's new book, *Populations, Public Health, and the Law*, is a provocative, milestone contribution to the growing body of public health law scholarship. The recognition that there is a "body" of scholarship on public health law is noteworthy enough. With Parmet's book, it is as if public health law has graduated from the college term paper to the doctoral dissertation. She provides not merely a generously footnoted, careful description of the field but also a new way of thinking about law more broadly. Like any worthy dissertation, her book clearly defines its thesis and opens the door for discussion and disagreement.

Public health and public health law have experienced a renaissance in the last decade, necessitated by unprecedented international terrorist attacks, devastating natural disasters, and new, virulent strains of contagious diseases. Events such as 9/11, the SARS outbreak, and Hurricane Katrina required communities to band together to treat the victims, address the threats, and rebuild their cities. As a result, the tools of public health and the laws undergirding them, which facilitate collective action to address broad, societal problems, were dusted off and put into regular use. Public health law scholars seized the opportunity to publish comprehensive, copiously researched treatises, compendia, and other descriptive reference manuals on the topic.¹

* Associate Professor of Law, University of Kansas School of Law, Lawrence, Kansas. Address correspondence to Professor Leonard at University of Kansas School of Law, 1535 West 15th St., Lawrence, KS 66045, or via e-mail at eleonard@ku.edu. Editor's Note: The numbers in brackets in the text refer to pages in the reviewed work.

¹ See, e.g., LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* (2d ed. 2008); LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW AND ETHICS* (2002); DAVID ORENTLICHER ET AL., *BIOETHICS AND PUBLIC HEALTH LAW* (2d ed. 2008); KENNETH R. WING ET AL., *PUBLIC HEALTH LAW* (2007); LAW IN PUBLIC HEALTH PRACTICE (Richard A. Goodman et al. eds., 2003); see also Wendy E. Parmet & Anthony Robbins, *Public Health Literacy for Lawyers*, 31 J.L. MED. & ETHICS 701, 701 & n.5 (discussing increasing importance of public health in society and legal practice and urging development of law school curricula).

Much of that scholarship undertook “simply” to define the field to the broader legal academy and public and, accordingly, typically adopted a fairly neutral stance. I say “simply” because it is no small task even to define and describe the laws relevant to the multi-layered, interdisciplinary field of public health, which has been defined by the Institute of Medicine as “what we, as a society, do collectively to assure the conditions in which people can be healthy.”² But until Parmet’s book, none of the public health law literature attempted to frame a comprehensive, generally applicable normative paradigm for legal analysis.³

Wendy Parmet, the George J. and Kathleen Waters Matthews Distinguished University Professor of Law at Northeastern University, proposes a new approach, called “population-based legal analysis” [2]. This approach considers the impact of laws and judicial decisions on the population as a whole, rather than individual parties to a lawsuit. Her starting premise is that protection and promotion of public health is a fundamental objective of the law. Two core principles of the approach are recognition that “[p]opulations, as well as individuals, must be viewed as central targets of the law’s concern” and that “legal analysis must be open to and mindful of empirically gained knowledge as well as probabilistic reasoning” [2]. After defining the paradigm in the opening chapters, Parmet guides readers to reconsider traditional areas of law, including Constitutional Law, Torts, Health Law, and Bioethics, through the lens of population-based legal analysis.

THE QUALITY OF LAW

It is an ambitious and at times controversial project. The thesis operates both prospectively and retrospectively. She urges current and future lawmakers to consider the population health impact of their enactments and decisions. She also traces the history of public health-oriented case law to demonstrate that her proposal is not so much a novel departure from current law but a broader application of an already recognized, essential theme in the law. The book is controversial because it challenges conventional views on legal analysis, the role of courts, and purpose of law. To accept Parmet’s thesis requires the reader to accept two underlying assumptions: first, that the law’s aim is the common good of society; and, second, that the common good of society includes promotion of public health. Putting the two together and removing the linking couplet leads to the conclusion that the law’s aim is the promotion of public health.

² INSTITUTE OF MEDICINE, COMMITTEE FOR THE STUDY OF THE FUTURE OF PUBLIC HEALTH, *THE FUTURE OF PUBLIC HEALTH* 1 (1988).

³ Parmet notes that her effort goes beyond the current public health revival by “recognizing that protection of population health is a goal of law itself and not simply of public health law, population-based legal analysis extends its reach beyond those topics and questions that have traditionally been viewed as falling within the boundaries of public health law” [51].

I, for one, do not usually consider population health central to legal reasoning, even though I, perhaps more than others, could be naturally inclined to this view as a teacher of Public Health Law, Health Care Financing and Regulation, and Torts. Even in Torts, I emphasize various policy themes consistent with Parmet's population perspective, including the nature of risk, incentives for safety, and allocation of scarce resources. Moreover, I greatly admire and rely on Parmet's superb body of scholarship on health law, public health law, and constitutional law in my own research.⁴ Yet, I still found myself unsure about Parmet's proposed reorientation.

Struggling with my own dissonance, I described Parmet's thesis to two different people: first, my husband, an artisan baker and organic grain and milling consultant; second, my colleague, a tax law expert. Not surprisingly, I received very different reactions. Parmet's suggestion seemed eminently reasonable to my husband and inherently unworkable to my colleague. The population-based perspective reminded my husband of a baking seminar that he once taught, in which he urged that the "quality" of bread should be defined not simply by the appearance or taste of the loaf but consideration of the bread's place in the community, the way it nourishes the family who consumes it, the impact of the wheat cultivation and harvest on the people and soil that produced it, and the enjoyment and well-being of the bakers who made it. Similarly, Parmet's suggestion that the "quality" of law encompasses protection and promotion of the health of the entire community seems fitting and desirable. Law, if it is done right, will consider not just the effect on one or two individuals before the court but also the rest of the population who shape and benefit from it.

My tax law colleague's reaction was closer to mine, and, I expect, others trained in traditional approaches to the law. Certainly, courts routinely rely on a range of tools to interpret the law and decide cases. Constitutional decisions, despite the urging of some,⁵ look not only to the text, plain meaning, and original intent but also consider the purposes behind the law and current

⁴ Just a small sample of Parmet's scholarship includes: Wilfredo Lopez, Wendy E. Parmet et al., *Due Process and Public Health*, 35 J.L. MED. & ETHICS 33 (2007); Wendy E. Parmet, *Public Health and Constitutional Law: Recognizing the Relationship*, 10 J. HEALTH CARE L. & POL'Y 13 (2007); Wendy E. Parmet, *Free Speech and Public Health: A Population-Based Approach to the First Amendment*, 39 LOY. L.A. L. REV. 363 (2006); Wendy E. Parmet, *Quarantine Redux: Bioterrorism, AIDS, and the Curtailment of Individual Liberty in the Name of Public Health*, 13 HEALTH MATRIX 85 (2003); Wendy E. Parmet, *From Slaughter-House to Lochner: The Rise and Fall of the Constitutionalization of Public Health*, 40 AM. J. LEGAL HIST. 476 (1996); Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 HASTINGS CONST. L.Q. 267, 278-81 (1993).

⁵ See, e.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2005); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38-47 (Amy Gutmann ed., 1997); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 1-5 (1990).

societal values to inform their decisions.⁶ Public policy goals are explicitly embodied in a number of areas of law. In my Torts class, I urge students to justify different rules in different jurisdictions by considering the policies and social goals underlying the law, including public health.⁷ Tax law involves the exercise of government power to require individual citizens to contribute to the collective good and the creation of incentives for business and private action. Those areas of law seem amenable to Parmet's approach. Nevertheless, my colleague and I had a hard time swallowing Parmet's suggestion that public health is or should be a necessary staple of the judicial diet [28]. She clarifies that promotion of population-based legal analysis should not be "considered the only or most privileged legal norm, only that it is among those that are and ought to be woven into the fabric of legal culture and legal decision making" [57]. Parmet merely urges that population and public health be included as part of the conversation.

APPLYING THE NEW PARADIGM

Setting aside my initial discomfort, I was anxious to be convinced by Parmet's adept legal reasoning and encyclopedic research. In the heart of the book, she applies her rubric to traditional legal doctrine. Parmet is a highly respected, prolific constitutional scholar, whose expertise is evident in her chapters on "Population Health and Federalism: Whose Job Is It?," "Individual Rights, Population Health, and Due Process," "A Right to Die? Further Reflections on Due Process Rights," and "The First Amendment and the Obesity Epidemic." Even if the reader remains unconvinced about the relevance of the population-based perspective, the book is a highly engaging intellectual exercise.

With respect to federalism, Parmet concludes that objectives of population-based legal analysis are better achieved at the state rather than federal level [85]. Public health promotion is consistent with the states' traditional Tenth Amendment reserved police powers to protect the health, welfare, and safety of citizens. The preference for state law also promotes the goal of increased reliance on empirically gained knowledge and probabilistic reasoning. States may serve as "laboratories,"⁸ experimenting with different approaches to social and public health problems and generating usable data to inform other states and federal lawmakers about public health interventions, health reform, and social policy.

⁶ See generally Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535 (1999); Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165 (2008); Frederick Schauer, *The Occasions of Constitutional Interpretation*, 72 B.U. L. REV. 729 (1992).

⁷ See Elizabeth A. Weeks, *Beyond Compensation: Using Torts to Promote Public Health*, 10 J. HEALTH CARE L. & POL'Y 27 (2007).

⁸ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting).

Parmet acknowledges that federal intervention may be appropriate when interstate solutions to increasingly complex and cross-border social, economic, environmental, health, and security problems are needed [89]. Empirical evidence can help here, too, she suggests. Courts should consider the nature of the risk and probable effect to decide the core federalism question: whether authority for any particular government action is best allocated at the state (for example, solid waste disposal or traffic safety) versus the federal (for example, airborne infectious diseases) level. It is a radical suggestion that courts should “dare to face the empirical world of epidemiology and public health” [103] to resolve not only substantive legal questions but also structure of government dilemmas.

In the individual rights chapter, Parmet discusses early Supreme Court cases bearing on public health to show that, at least historically, the Court often upheld states’ broad police powers against challenges by individuals. But the Court gradually shifted toward the contemporary, individual rights-favoring orientation, beginning with the enactment of the Fourteenth Amendment [118]. The Civil Rights Amendments aimed primarily at protecting rights of newly freed men from infringement by states, but have been given much wider application, in many cases tying the hands of states from effectively protecting the public’s health. Parmet paints a striking, population-based picture of canonical constitutional law cases, including the *Slaughter-House* cases,⁹ *Lochner*,¹⁰ *Carolene Products* (and its famous footnote four),¹¹ *Lawrence v. Texas*,¹² and *Washington v. Glucksberg*,¹³ suggesting in each case how the Court could have, failed to, or did apply population-based legal analysis [119–27].

The recasting is intriguing and provocative. For example, she suggests that the *Carolene Products* Court’s protection of “discrete and insular minorities” is consistent with her approach. “Justice Stone seemed to recognize, as a judge using population-based legal analysis would, that laws can target particular groups” [125]. I had an easier time accepting her normative suggestion about the relevance of population health in some individual rights cases than in others. For example, I wholeheartedly agree that the public health effects of allowing terminally ill individuals to short-circuit the FDA new drug approval process should be considered.¹⁴ But I have trouble seeing the relevance of the

⁹ 83 U.S. (16 Wall.) 36 (1873).

¹⁰ *Lochner v. New York*, 198 U.S. 45 (1905).

¹¹ *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938).

¹² 539 U.S. 588 (2003).

¹³ 521 U.S. 702 (1997).

¹⁴ Elizabeth Weeks Leonard, *The Public’s Right to Health: When Patient Rights Threaten the Commons*, 86 WASH. U.L. REV. ... (forthcoming 2009), available at <http://ssrn.com/abstract=1234542> (discussing *Abigail Alliance for Better Access to Experimental Drugs v. Von Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007) (en banc)) (last visited June 4, 2009).

broader population in the decision to strike down laws criminalizing sodomy between consenting adults [125–26].

Parmet next strides confidently into the thorniest of public health and constitutional law controversies: the inherent (my word, not hers) tension between individual rights and the public good. *Jacobson v. Massachusetts*¹⁵ is the classic case, in which the Supreme Court declined to recognize the right of one person to refuse a smallpox vaccination against the public's interest in preventing the spread of a virulent, deadly contagious disease. Parmet flags the issue but then challenges the underlying premise that public health protection necessarily impairs individual liberty [113]. In her view, seemingly restrictive public health laws may actually promote individual rights and create otherwise unavailable choices [114–15]. Some government interventions, such as mandatory quarantine, which appear to restrict individual rights may enhance liberty and benefit certain subpopulations. Perhaps the infected individual and others like her are unable to adhere to a treatment regime because of social conditions or special risk factors beyond their control. Applying Parmet's population-based spin on *Carolene Products*, the rights of a "discrete and insular minority" merit government protection—though perhaps not in the conventional way. Rather than thinking of quarantine as a government intrusion that severely restricts individual freedom of movement, Parmet suggests that it may actually enhance the patient's and her community members' rights by enabling them to get treatment, become healthy, and return to their usual activities [132–33]. In thinking about rights, Parmet suggests, "the question that must be asked is not whether there is a less restrictive way to reduce the risk posed by any one individual, but whether any feasible intervention is less restrictive of negative liberty and more supportive of positive liberty" [134].

The theme of positive versus negative rights is woven throughout the book. The traditional view of constitutional rights is negative, meaning protecting individuals from government interference, as opposed to positive, implicating an affirmative duty on government to provide health, education, and other services for citizens.¹⁶ The population perspective more easily accommodates positive rights than traditional individual rights doctrine, a point that Parmet has argued elsewhere.¹⁷ In Parmet's view, positive rights, by addressing

¹⁵ 197 U.S. 11 (1905).

¹⁶ See *Barksy v. Board of Regents*, 347 U.S. 442, 472-73 (1954) (Douglas, J.) ("The Bill of Rights does not say . . . what government must give, but rather what it may not take away"); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.) (noting that "the Constitution is a charter of negative rather than positive liberties," and that "[t]he men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them"); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2273 (1990); Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 886 (1986).

¹⁷ Wendy E. Parmet, *Health Care and the Constitution*, *supra* note 4, at 271-77.

population-based risk factors, discrimination, and other disadvantages may be essential to individuals' fully realizing their own liberty [115–16].

That view also informs the chapter on bioethics. The landmark right-to-die cases, *Quinlan*¹⁸ and *Cruzan*,¹⁹ operate from a negative rights perspective, recognizing that individuals have a right to refuse having things done to their bodies, including life-sustaining treatment. But the negative right to be free from unwanted intrusions, or the right “to be let alone,” is a far cry from an affirmative right to have things done or affirmatively provided to an individual, including the right to physician-assisted suicide in *Glucksberg*.²⁰ Parmet rebukes the absence of affirmative rights as “demonstrat[ing] vividly constitutional law’s failure to appreciate the reciprocal and interdependent nature of negative and positive rights” and that “individuals live in, face health risks in, and die in populations” [154–55]. The refusal to recognize affirmative rights limits states’ abilities to protect the health of their populations and effect meaningful choices for individuals.

Parmet suggests that courts have failed to protect individual rights by conceiving of end-of-life choices as autonomous rather than the result of interdependent socioeconomic conditions. Individual health status, chronic disease, and risk of serious injury (a car accident, in *Cruzan*’s case) may also be caused or exacerbated by factors that individuals cannot control. For example, she suggests that the Court failed to consider Nancy *Cruzan*’s “right to live more safely” and thereby “face a lower risk of traumatic brain injury following a car accident” [159]. Traditional constitutional law protects her freedom to drive on risky roads and terminate medical care once she has been mortally injured, but not her right to drive more safely, which “would have been essential to the full vindication of her autonomy” [159]. In Parmet’s view, the rights protected in bioethics decisions “help too few and come too late” [159].

Similarly, the Court’s robust protection of free speech rights may expose vulnerable populations, especially children, to misleading information or deprive them of useful information essential to promoting positive liberty and individual choice. In her chapter on the obesity epidemic, Parmet begins by describing the pressing population problem of childhood obesity. She then shifts, somewhat abruptly for my reluctantly reorienting mind, to the role of commercial and compelled speech on the obesity epidemic [171]. Once I made the leap, though, I found her discussion another useful, if less firmly grounded, example of how courts could (and arguably should) decide cases with the population’s health in mind. The remaining chapters reconsider Health Law, Torts, and International Law in light of population-based legal

¹⁸ *In re Quinlan*, 355 A.2d 647 (N.J. 1976).

¹⁹ *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261 (1990).

²⁰ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

analysis, urging the reader to reconsider the law's overly individualistic orientation and recognize the interdependence of rights, choices, and risks within populations.

CONCLUSION

Although I still mostly judge the quality of my morning toast by the taste, texture, and appearance of the bread, I am grateful to my husband for expanding my appreciation for the process of bread-making and the effect of my food choices on our community. Likewise, I still differ with some of Wendy Parmet's views on the scope of public health law, judicial recognition of positive rights, the role of individual choice, and the near-universal relevance of population health to legal decisions. But my perspective and the quality of my public health law scholarship are undeniably enriched by her stimulating contribution.