What makes health public?
Introduction

This book is about public health, and the imperatives and responsibilities we might associate with the protection of health. These issues are of central importance in policy, practice, education, and research. They raise and would address a whole range of concerns, whose number and urgency are growing exponentially: for example, how governments should respond to alcohol and tobacco use, the obesity 'epidemics', and the need to care for members of an aging population; whether people should ensure that they eat 'healthy foods', exercise frequently, and contribute to 'herd immunity' by participating in vaccination programmes; why employers should safeguard the health of their staff, why industry should 'educate' consumers about the potential health effects of certain products, and why sports events should not promote or advertise 'unhealthy brands'. To come to useful conclusions from moral, legal, and political perspectives, the crucial task is to establish whether any of such matters are *shared concerns*, and if so, why, or if not, why not. In other words, anyone concerned about health, and about whether, when, how, and why it gives rise to meaningful responsibilities, needs to address the question *what makes health public?*

The significance of exploring this question should not be underestimated. Across the globe, public health is central to major debates in ethics, law, and politics. It has an increasing presence in the academic literature, in university teaching, and for policy, regulatory, and governmental bodies. Greater and greater attention is focused on the good of health, and the ethics relating to public health. Concern is not limited to (public) healthcare systems: the entire social and physical environments are the context of contemporary analysis of 'health law and ethics'. Governments and analysts are concerned with the social determinants of health, and the attendant links to practical health-related responsibilities. There has been much consideration of questions such as the regulation of tobacco, alcohol, and food; resource allocation, especially within healthcare; containment and control of contagious diseases; bioterrorism; and climate change. All of these, and many

other issues, are portrayed as public health problems, demanding public health solutions.

Yet there are important, and often too easily ignored, prior questions that require close analytic scrutiny before defensible conclusions can be reached on any individual, practical, health-related matter. What does 'health' meaningfully denote in policy arguments? It may, for example, be conceived as something that is a foundation, an aspiration, a means to other ends, a discrete facet of the human good, or a value-free scientific concept that just happens generally to correlate with a desirable state. And how can it, and things that affect it, be a 'public' matter? By treating something as public, we invite analysis from political philosophy, and necessarily any substantive response to a public health issue will imply more fundamental points about the nature, basis, and scope of political obligation. Recognition of this allows us to establish and assess what other public concerns legitimately conflict with apparent imperatives concerning health. As the literature on public health law and ethics grows, there is a need for critical, comprehensive analysis of this theoretical landscape, providing the means for analysts and policymakers to understand and explain the import of their concerns. This book is a contribution to such an endeavour.

Structure of the book

Absent a detailed groundwork it is impossible to make sound examination of the salient issues raised in debates on practical health issues, and to move towards a useful understanding of how and why policy should be developed or resisted. *What Makes Health Public?* addresses the conceptual and the analytic framing, other theorists' moral, legal, and political responses, and my own conclusions on the best means of approaching the regulation of public health issues. The book is divided into three parts.

Part I

The first part of the work is directed to a foundational conceptual analysis. It begins with an exploration of the concepts 'health' and 'public'. Throughout the work, each of these concepts receives further attention, in particular where the analysis is directed specifically at their employment in key scholarship in public health law and ethics, and where they bear on issues such as the regulation of smoking tobacco. I argue in Chapter 1 that useful conceptions of health are necessarily value-laden, and that in the relevant literatures we need to be able to account for

'positive' as well as 'negative' accounts of health; i.e. it does not suffice simply to engage with arguments about the absence of disease. I also raise the contentious issue of deciding *who* is given the effective responsibility for deciding what health means: should it be a matter of subjective judgement for the individual, or an externally judged, apparently objective question? This groundwork provides the scope for more substantive conclusions on the use of health in political argument.

Similarly, in Chapter 2 I provide a foundational analysis of the term public, whose implications are then examined in close detail throughout the book. The chapter tests what is meant when people talk about *a* or *the* public, and what it means to describe an issue as being public. In regard to the former, I adopt and defend the use of a non-reified concept of the public, as advocated by Bruce Jennings. The chapter examines the conceptual difficulties associated with treating the public as something other than a collection of individuals, albeit a collection that may be bound by a shared purpose that has important normative implications. As for discussion of things being public, the chapter looks at the public/private distinction, and its relationship to things being 'the law's business'. Amongst the important conceptual considerations are defences of the idea that 'all law is public', that the State is necessarily (though not unproblematically) the final arbiter on whether a matter should be private, and the distinct matters protected by reference to public or private interests. Finally, I present the idea of public as it features specifically in debates on public health, and the perspectives it may be seen to add to these.

Following those two more general conceptual analyses, Chapter 3 is directed to understanding quite what 'public health' itself might mean. My aim in this chapter is ambitious: by looking both at how the term is defined and how it is used, I present what I take to be a comprehensive means of categorising the different 'faces' of public health. I suggest that there are seven such faces, and explain how and why I have met this conclusion. In some senses the categorisations seem rough or imperfect; for example, at times there may be uncertainty about whether something should be classified under one heading or another. Nevertheless, I suggest that it is important for analysts to be aware of, and able to account for, the distinct ways that public health features in the literature, from a highly directive, value-driven concept, to a scientific shorthand for health distribution or prevalence within or between populations. It is not ultimately my aim to present a strong defence of one understanding of public health over the others. Rather, I seek to demonstrate how variously the term is used and the implications of this, and to provide others with a 'tool' to assist their own analyses of

matters that are advanced under the heading of, or in the name of, public health.

Chapters 4 and 5 explore these concepts in the contexts of practical regulation and academic study. First, Chapter 4 explains what it might mean to describe something as a 'public health policy'. It presents the practical and normative natures of policy and regulation, and the breadth of interventions that regulators may choose to employ in response to perceived public problems. Chapter 5, by contrast, explains what scholars and analysts are engaging in when they study 'public health law and ethics'. An important upshot of each of these chapters is a recognition that the fields described are potentially without boundary, or within the competence of any single government department: prior to analysis, it is hard to see what might not be of concern or relevance to someone interested in the public health implications of some law, policy, or practice. Issues as diverse as tax and town planning may all be seen to raise potential 'public health issues'. In Chapter 6, these and other conclusions from Part I are brought together, and I highlight their pertinence to analyses of matters that are said to be public health issues.

Part II

The second part of the book develops and defends the work's core thesis: that if we are to produce a coherent means for undertaking normative evaluations of public health policy (and non-policy) we need a complete political theory. Notably, this framing seems to run counter to two alternative approaches that are also dominant in the literature: first, that to establish normative conclusions we should look simply to the ethics 'of' public health; or second, that we should assess public health issues according to a theory of morality. Notwithstanding these distinct framings, I seek to demonstrate first that our concern should be political, and second that other analysts working in public health ethics should already be regarded as working within political theory. To make this case, Part II is split into two substantive chapters, followed by a short concluding chapter.

Chapter 7 addresses what I mean by describing something as a political issue, and distinguishes this from moral and legal framings. I recognise that this is just one way of advancing these different approaches: i.e. some would suggest that political philosophy is just a part of moral philosophy; others may suggest that what I describe as political philosophy is a branch of legal theory. Nevertheless, I present substantive reasons for the separations I propose. The approach distinguishes the following under the heading 'political': *universalist ideal type* theories

that are based on claims of unitary liberal rationalism and the best means of protecting it in a community of 'substandard' agents; *pluralist ideal type* theories that are based on claims of equally legitimate, diverse, incommensurable accounts of the good and the best means of protecting these in a community; and *anti-ideal type* theories that are based on amoral considerations of facts about the world, people, and power relations. I argue that analysis has to be able to account for and respond to matters raised by each of these three approaches.

The argument then moves to an engagement with establishing the basis, nature, and scope of political normativity. It engages with the literature on philosophical anarchism, suggesting that analysts may find their answers to questions of legitimacy in relation to (public health) policy by exploring their reasons (should they exist) for shunning anarchy. The development of defensible political theory is what gives the crucial insights needed in assessments undertaken in public health law and ethics. Chapter 7 ends with a short discussion of two issues that are taken to be of particular pertinence in regard to public health: paternalism and the 'population perspective'. Regarding paternalism in a policy context, I emphasise the particular importance of 'collateral paternalism', suggesting that the strength of a policy can not be assessed by reference to individual cases that alone present a non-ideal application of principle. In regard to the population perspective, I note that whilst this may (rightly) be viewed as affording insights to scholars in law and ethics, we should not lose sight of the fact that policy-makers will naturally take such a perspective. Its adoption is thus less controversial than some analysts may wish to suggest.

Chapter 8 demonstrates the plausibility of my thesis, and exemplifies how pervasive it is by applying it to key works in the field. My argument maps politically the positions of some of the most noted and influential scholars in public health law and ethics. The chapter moves from an extreme of small State libertarianism, through different presentations of the 'middle ground', to an extreme of 'health theocracies'. At each stage several approaches are examined, with a view to ascertaining various points: in particular, I demonstrate why the theories should be categorised as political; what manner of reasoning underpins each of them; what they imply for health policy, and – where this is clear – what their authors take 'health' to mean. It is possible to distinguish ideal and non-ideal theories, and theories that are bound by side-constraints (e.g. people's 'natural rights' to be free from State interference) and theories that are grounded on consequentialist concerns (e.g. political systems that are defended for being conducive to the best achievable equality of human flourishing). A key point that the chapter emphasises is that

once an analyst accepts the idea of the State, it is equally important to be able to defend both policy and failures to make policy. Some analyses suggest favour for a 'liberty bias', wherein it is necessary to justify any manner of regulation. However, once it is accepted that some regulation is better than no regulation, even the most 'liberty-friendly' theory presents a base concern for something other than non-regulation, and thus States' omissions as well as their acts must be equally open to critical scrutiny.

Chapter 9 concludes Part II, highlighting the principal points made, and relating them to the whole area of public health law and ethics. At this stage, the arguments have clearly presented and defended the position that public health law and ethics are political fields of inquiry, and that analysis of a public health problem can not be undertaken without a complete background political theory.

Part III

Parts I and II of the book offer substantive and methodological points that are of general application to normative work relating to public health. It is my argument that analysts ought to find persuasive the thesis developed in these parts of the book, regardless of their particular moral and political commitments. In Part III, my project is distinct; here I develop and defend a particular theory of political liberalism.

Chapter 10 constructs this theory. The work assumes a critical, self-reflective mode, considering each stage of the argument as it develops. The controversy and contestability in *any* political theory naturally beset my own position. Given this, I have presented the discussion in such a way that even a reader who is not persuaded by the argument itself might see the distinct stages of difficulty that must be overcome when producing a practically applicable, normatively robust, theory. In particular, it is necessary to overcome problems of establishing who is included in (and thus who is excluded from) the political community, establishing how to allow values to underpin policy measures in a system of moral pluralism, and accounting for claims against people's liberty in the name of political obligation. The theory I defend falls into the tradition of Millian liberalism, and works around a central 'harm and benefit principle'. To illustrate how it might function, the chapter ends with a practical, step-by-step presentation of the claims it gives rise to, using the example of a law that deems it obligatory to wear a seatbelt when travelling in a car. Chapter 11 then discusses this idea of political liberalism in relation to problems in public health law and ethics. I argue that a concept of health is best conceived as an aspect

of welfare, and that this wider concept should be crucial to normative evaluations of proposed and actual health policy. I explore the complexity of endorsing ideas about welfare in a system of pluralism, and relate this also to the difficulty of accommodating both 'internalist' and 'externalist' accounts of health; i.e. establishing who should have the (legal) right to decide whether the effect of some policy is good or bad for health, and to what extent that matters. To explore how the theory provides access to the salient insights into policy, the chapter employs short examples from alcohol and tobacco regulation.

Chapter 12 gives a brief conclusion to the whole book. It stresses the important point that it is wrong-headed to presume that health and health-related issues will either always or never be public. Instead it reiterates the view that knowing that something relates to health does not, of itself, answer the question of whether it is a shared concern. Thus, analysts and policy-makers need to establish in any given case why health is or is not public, and work from there to a practical conclusion on what would form defensible regulation. They need a political theory, and in coming to this they will present an account that tells us what responsibilities exist in relation to health, whether these are enforceable, and if not, whether they are nevertheless the sound and appropriate basis for non-coercive policy.

Health and politics

Against a backdrop of moral pluralism, this book therefore offers a fundamental addition to the wide and sometimes disparate literature on public health. The analysis works within a liberal political paradigm for a practical and a principled reason, both of which are explored and defended. Practically speaking, the frameworks the book addresses *are* found in liberal political States, and thus demand consideration, at least to begin with, on these terms because they are relevant to them. At the level of principle, political liberalism represents a defensible means of grounding regulation and interference with individuals' freedom to act. Whilst many things beyond these ideas are considered along the way, the central thread of political liberalism is, I argue, what holds together – and should hold together – contemporary debates that claim to speak to public health law and public health ethics. It is true that the work can be seen in places to uphold a 'presumption of liberty', which seems to preoccupy so many engaged in debates on liberalism. But, through the analysis of anarchism and what would lead us to accepting the authority of a State, I argue that this presumption misplaces an emphasis that is core to political debates, and thence to establishing the

legitimacy or otherwise of measures instigated or debarred in the name of health. Although liberty may be a natural default – no one should defend a government that makes policy randomly, negligently, or capriciously – non-regulation is not the presumption underpinning political liberalism, even where this is seen as the system needed to *maximise* or *optimise* the net amount of liberty that citizens can enjoy. The real presumption is that a sound conception of the public good can be established, and that *it* will be protected and promoted. We thus need an inquiry into this, and an articulation of its implications, if we are to understand when, how, and why health may be made public.

The following chapters give the groundwork to analyse the debates on responsibility and public health, and offer my own critique of them. I demonstrate that the arguments are about politics, that consciousness of this allows us better to understand them, and that that enables easier moves to practical, defensible outcomes. Given the strong focus on politics, a reader flicking through the book may think that 'public health' is only engaged in about half of it. Superficially this is true, but the crucial point is that *all* of the analysis is engaged *in* public health law and ethics, whether tacitly or explicitly. While some readers might not be convinced by the theory of liberalism that I defend in Part III, I hope that it will at least provoke useful further engagement in fields concerned with public health, and debates in moral, legal, and political philosophy, and that it sits well with other theories considered and presented in this book. The literature around these issues is expanding rapidly. Although there is a lot of disagreement, I have sought to draw out similarities as well as differences, and emphasise places where apparently contradictory approaches can be combined coherently. Part of my own presentation of an overall theory is aimed at advancing that project. Both in its separate parts, and taken as a whole, I hope that the book will be a useful, worthy, and valuable contribution to a fast-growing literature, and more importantly to a crucial subject of considerable personal and governmental concern.

Part I

Basic concepts in public health
Introduction to Part I

The conceptual framing and critical analysis undertaken throughout this book are directed to investigating normative claims made in relation to public health. My central argument is that the meaningful studies that would apply practical philosophy to this are in politics. They should be informed by works from disciplines including moral philosophy, law, economics, and sociology, but the interesting and important health-related responsibilities – of States, private companies, and individuals – are political. Ideological differences, concerns for competing goods, and distinct forms of partiality at the base of disputes in political theory are therefore the relevant sources of contention. And it is in answers to these disputes that questions on public health are meaningfully answered. Some might suggest that this book should have explored the question "What makes health private?"; they might argue that I beg the question and presume a 'liberal bias'. Others might contend that I beg the question by presuming that health could even be a public matter. In what follows I seek to vindicate my analysis against such accusations. In brief, I contend that it is wrong to take it that everything relating to health can just be either 'private' or 'public'. I also argue that most theorists agree with this, and that all policy-makers do. However, our reasons for doing so differ. Thus my analysis lends itself to various important tasks. The first of these is to provide a conceptual and analytic 'groundwork' to understand the nature and scope of arguments in public health ethics and law. This is the purpose of Part I of the book.

The first chapter provides an overview of the key disputes concerning concepts of health, presenting three dichotomies that present themselves: normative/naturalist; positive/negative; and internalist/externalist. I suggest that any useful concepts of health are normative, but that this need not denote political normativity. I then, in Chapter 2, consider the ideas of publics and things being public. Although it is not possible just to assess the terms health and public independently and then come to an understanding of the term 'public health', this conceptual exploration is fundamental, and leads to Chapter 3, where I describe seven

distinct faces of public health. In Chapters 4 and 5 I reflect on the meanings of public health policy, and the areas of public health law and ethics. This conceptual work allows me to conclude that we do not find useful answers to public health problems *in* public health, and must instead engage in a wider analysis if the answers we come to develop can be related to defensible practical outcomes.