1 Introduction

A. M. Viens, John Coggon and Anthony S. Kessel

Public health has long been recognised, even celebrated, as a multidisciplinary field. Both in its theory and its application public health draws from many methodologies, epistemologies, and practical approaches. A fascinating aspect of work in public health, therefore, is the insights it offers into cross-disciplinary and cross-sector discourse. But simultaneously, public health also presents challenges; challenges in communication and understanding, and challenges concerning the legitimacy of governmental authority. Law both enables the coordinated actions required to protect and promote health, and places limits on government agencies' freedoms to interfere with the rightfully private aspects of citizens' lives.[1]

The idea of State involvement into medical matters, for instance through systems of compulsory powers as well as inspection and enforcement mechanisms made available through criminal law, was promoted by physicians such as Johann Peter Frank in the late eighteenth century.[2] This so-called 'policing model of public health', which remained influential in places such as Britain into the nineteenth century, began to give way to more social models of public health with the more formal establishment of public health as a profession in the latter half of that century.

The extent to which criminal law was thought appropriate to be used to advance public health goals has changed over time for a number of reasons. One reason stems from how our beliefs about the nature and scope of the criminal law have changed; especially as views such as legal moralism have become discredited and individual rights have become more prominent. Another reason stems from how different perspectives have been used to approach issues that have traditionally been

[1] Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint*, 2nd edn (Berkeley, University of California Press, 2008), p. 4.
[2] Virginia Berridge, 'The development of the health professions', in Virginia Berridge and Martin Gorsky (eds.), *Public Health in History* (Open University Press, 2011), pp. 58–73, at 64.

conceived as criminal law problems. Many of the issues that were once the exclusive purview of criminal law are now increasingly treated as public health problems.

In many ways, the cover of this volume – William Hogarth's *Gin Lane* – provides an illustrative example of the overlapping considerations between public health and criminal law highlighted in support of legislative efforts that would become the Gin Act.[3] The cover image depicts many of the health and crime problems that were thought to be associated with the consumption of gin. Scenes of poverty, poor housing and environmental conditions, physical and mental illness, starvation and destitution, suicide and infanticide, violence and addiction pervade the piece; an illustration of the moral and medical ills that the law could seek to address. Using criminal law as one way of re-enforcing the shared morality of the community has given way increasingly to harm reduction and social justice approaches that seek to mitigate, identify and rectify the consequences of these problems as well as their causes. Important similarities and connections between criminal law and public health persist and arise, making an examination of their interrelation and effects on each other worthy of greater study.

Public health and criminal justice systems share a primary objective, broadly speaking, of protecting important public goods. Public health, public order and public safety are vital goods that the State has an obligation to protect and promote – along with helping citizens fulfil their obligations in contributing to the production and sustainability of these goods. For this reason, there is a series of considerations that underpins the many ways in which both criminal law and public health can overlap. The public nature of such goods requires forms of collective and coordinated responses to problems that affect the community and its constituents. These responses often seek to prevent or mitigate public health, public order and public safety problems through providing guidance around personal behaviour. In seeking to understand what constitutes a problem for the community and what kind of responses ought to be undertaken to remedy problems, both public health and criminal law rely on concepts such as harm, causation and culpability to evaluate and justify their activities. Nevertheless, both criminal law and public health also diverge in important ways, with their interface potentially leading to negative or counterproductive results. The shared and divergent characteristics between criminal law and public health raise a number of theoretical and practical issues.

[3] Sale of Spirits Act 1750, 24 Geo. II c. 40.

In the scholarly and public policy literature, there is more work starting to be done on the relationship between criminal law and medicine.[4] Much less work has been done, however, on criminal law and public health[5] – and, of this work, a predominant focus has been confined to particular topics, such as HIV transmission[6] and drugs.[7] The sophistication brought to debates on public health policy has also been enriched in recent years through a surge in philosophical interest in the subject. There is still much ground to cover, however, in the developing discourses in public health, philosophy and law.

With this book, we aim to advance that agenda through a series of original research papers that are dedicated to examining the interface between criminal law, philosophy and public health practice. This volume marks the first contribution to the literature that seeks to provide a varied, yet sustained, examination of the conceptual, normative and practical implications of protecting or promoting public health through criminal law. With contributions representing a variety of disciplines and areas of practical experience, including law, criminology, public health, philosophy, policy, and bioethics, the volume will be, we hope, a crucial reference point for scholars and practitioners interested in understanding how criminal law might improve health policy, how it

[4] See, e.g., Charles A. Erin and Suzanne Ost (eds.), *The Criminal Justice System and Health Care* (Oxford University Press, 2007); Amel Alghrani, Rebecca Bennett and Suzanne Ost (eds.), *Bioethics, Medicine and the Criminal Law Volume I. The Criminal Law and Bioethical Conflict: Walking the Tightrope* (Cambridge University Press, 2013); Danielle Griffiths and Andrew Sanders (eds.), *Bioethics, Medicine and the Criminal Law Volume II. Medicine, Crime and Society* (Cambridge University Press, 2013); Margaret Brazier and Suzanne Ost, *Bioethics, Medicine and the Criminal Law: Medicine and Bioethics in the Theatre of the Criminal Process Volume III* (Cambridge University Press, 2013).

[5] A notable exception includes Zita Lazzarini, Richard A. Goodman and Kim S. Dammers, 'Criminal law and public health practice', in Richard A. Goodman, et al. (eds.), *Law in Public Health Practice*, 2nd edn (Oxford University Press, 2007), pp. 136–67.

[6] See, e.g., Lawrence O. Gostin, 'The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties', (1989) 49 *Ohio State Law Journal* 1017; Simon H. Bronitt, 'Criminal Liability for the Transmission of HIV/AIDS', (1992) 16 *Criminal Law Journal* 85; Richard Elliot, *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper* (Geneva, UNAIDS, 2002); Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Abingdon, Routledge-Cavendish, 2007); James Chalmers, 'The criminalisation of HIV transmission', in his *Legal Responses to HIV and AIDS* (Oxford, Hart Publishing, 2008), pp. 123–48.

[7] See, e.g., Ernest Drucker, 'Drug Prohibition and Public Health: 25 Years of Evidence', (1999) 114 *Public Health Reports* 14; Carlos Dobkin and Nancy Nicosia, 'The War on Drugs: Methamphetamine, Public Health, and Crime', (2009) 99 *American Economic Review* 324; Thomas F. Babor, *et al.*, *Drug Policy and the Public Good* (Oxford University Press, 2010); Alex Stevens, *Drugs, Crime and Public Health: The Political Economy of Drug Policy* (Abingdon, Routledge-Cavendish, 2011).

might affect health outcomes and what limits there are to using criminal regulation in public health. In this opening chapter, we introduce the subject matter of the book and present brief overviews of the chapters.

The aims of criminal law and public health

Public health policies are advanced using different kinds of measures. Familiar measures include statements, practices and interventions, which the law can help to make more effective. Law and regulations, however, should also be seen as public health measures in themselves that seek to reduce the burden of disease, disability or injury within the population. Sometimes the criminal law is used as a direct measure. For example, in many jurisdictions it can be a criminal offence to transmit or expose another person to HIV through unprotected sexual intercourse. On other occasions, criminal law is used as a supplementary measure to complement or shore up non-legal public health measures. For example, we may find restrictions on sale of alcohol to minors as part of a wider health promotion strategy to promote responsible consumption of alcoholic beverages. It should be noted here that criminal law is understood quite broadly to include legal and legislative materials (for example statutes, regulations, civil codes, case law), institutions (for example courts and tribunals) and officials (for example police, judges). As such, this volume is primarily concerned with how different organisations, processes or personnel associated with the criminal law and the criminal justice system might be used as a means of promoting or protecting public health.

To learn how criminal law might be well used in public health policy, it is important to consider the aims and purposes both of criminalisation and of making something a subject of public health policy. It is important, as well, to see how criminal law and health policy, which we have presented as formally separate, cohere and correspond to one another within a wider, complete theory of good law and government. In reality, it is true that there is no universally accepted way of characterising the aims of criminal law. We can, however, reflect on issues that are considered particular to this branch of governance, before presenting some dominant views on the aims of public health.

In his leading work, *Principles of Criminal Law*, Andrew Ashworth opens with two core ideas: 'Criminal liability is the strongest formal condemnation that society can inflict, and it may also result in a sentence which amounts to a severe deprivation of the ordinary liberties of the offender.'[8] Ashworth goes on to note that the State deprives us

[8] Andrew Ashworth, *Principles of Criminal Law*, 6th edn (Oxford University Press, 2009), p. 1.

of our liberties in other ways too: for example, through taxation. But on Ashworth's analysis, that sort of deprivation is based on 'mutual obligations necessary for worthwhile community living', as opposed to criminal measures, which carry the 'strong implication of "ought not to do"'.[9] With the surging popularity of 'nudges' in governments' health agendas,[10] many scholars will recognise that non-criminal measures can still carry an implication of 'ought not to do' (or at the very least 'better not to do'). Obvious examples here include minimum pricing on alcoholic drinks, health warnings on cigarette packaging or bans on trans-fats. Yet Ashworth is able to draw a distinction, perhaps, between these less profound 'oughts' and the sorts of '*serious* wrong' that criminal law would address.[11] However, he immediately acknowledges that sometimes criminal law is used because it is the most practical means of regulation: many criminal offences give rise to virtually no stigma or social condemnation.[12] Even if, as Ashworth makes clear, we consider criminality to involve offences not just against persons, but also against the State, there is little that we can say about the aims and substance of criminal law that will render its entirety formally distinct from other forms of regulation. We might note, nevertheless, the strong association, at least as a general rule, with moral evaluation of specific acts that are in some ways *public* offences (not merely private ones). We might note, too, that more practical use is sometimes given to criminalisation as an expedient regulatory method.

Moving to public health, the focus on both morality and practicality in regulation provide useful entries to discussion. Two of the most influential definitions of public health have echoes of that given by Charles-Edward A. Winslow in 1920,[13] and hold that public health is:

> [W]hat we, as a society, do collectively to assure the conditions in which people can be healthy.[14]

and

> [T]he science and art of preventing disease, prolonging life and promoting health through organised efforts of society.[15]

[9] *Ibid*.
[10] Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (London, Penguin Books, 2009).
[11] Ashworth, *Principles of Criminal Law*, p. 1, emphasis added.
[12] *Ibid*. p. 2.
[13] See C-E.A. Winslow, 'The Untilled Fields of Public Health', (1920) 51 *Science* 22.
[14] Institute of Medicine, *The Future of Public Health* (Washington, DC, National Academy Press, 1988).
[15] Donald Acheson, *Public Health in England*, Cmnd 289 (London, HMSO, 1988).

In both of these definitions there is widely perceived to be a practical imperative, which enjoins governments to coordinate actors within society to act so that people can be healthy. Of course, for a practical imperative to compel us, it must have some persuasive force, and that need not be moral. Such force may derive, for example, from appeal to economic or prudential interests. But in relation to public health, we find a wide array of arguments about the inherent ethics of public health practice and policy, and arguments about how particular ethical and political theories will improve public health agendas, and endow them with greater legitimacy.[16] In other words, public health is widely perceived to promote an ethical agenda. Equally, criminal measures are often seen to advance a moral agenda. In each case, we therefore find claims, sometimes implicit, about particular obligations held by the State to act in pursuit of a moral end, or at least to ensure that some other agency assumes responsibility to do so.

In terms of regulation, public health law and policy clearly implicate areas well outside of criminal law. In efforts to improve health through the use of law and regulation, it is perhaps best to emphasise the range of necessary means to assure and promote people's health. Such means include environmental regulations, provision of education, provision of health care systems, institution of measures to prevent harms in dangerous public places such as the road network, regulations safeguarding occupational health and measures for food regulation. The scope of matters that fall under the concern of public health is very broad: potentially, public health law is a 'field without boundaries'.[17] From a moral perspective, public health and its rationales supporting the making of public health law are often seen as governed by a utilitarian ethic. Public health is concerned with the health of populations and sub-populations, and requires engagement with government in the development of health policy. The 'population perspective' of public health encapsulates a broad approach, aimed at improving social structures, conditions and capacities, with the goal of improving population safety and health. This can cohere and deviate from the criminal law in important ways.

[16] Cf., e.g., Bruce Jennings, 'Frameworks for Ethics in Public Health', (2003) 9 *Acta Bioethica* 165.

[17] See further John Coggon, *What Makes Health Public? A Critical Evaluation of Moral, Legal, and Political Claims in Public Health* (Cambridge University Press, 2012), ch. 5.

Criminal law and public health: similarities and differences

We might start by contrasting criminal law as a deontological system – punishing wrongs – and public health as engaging a utilitarian, or consequentialist, agenda – maximising health. However, even our brief introduction has indicated that whilst these may be general truths, criminal regulation can often be employed simply as the most effective way to achieve an end regardless of particularly meaningful moral condemnation of an act itself. Likewise, some in public health may consider 'the health of the people to be the highest law', but they also recognise side-constraints on what constitutes legitimate governmental action. Health is one value amongst several (perhaps many). And even in arguments that advance health as a foundational value, it is clearly recognised that legitimate governance does not obtain in doing whatever it takes just so long as maximum health outcomes are achieved.[18]

Is it possible, then, that there are similarities as well as differences, and perhaps even synergies between criminal law and public health practice? The answer necessarily depends on various factors, such as how we conceive of legitimate criminalisation and legitimate public health governance. As is evidenced in this volume's chapters, theorists differ on these points.

We might begin by presenting here a similarity that is widely recognised, if not always obvious: neither criminal law nor public health exists in a vacuum. Each is contained within a wider system. No legal regime is exhausted by its criminal laws or criminal justice system. Likewise, governments have concerns beyond public health, even when that term is broadly conceived. In sum, whilst public health and criminal law may provide discrete areas of study, neither can be coherently dissociated from a broader political system. Ultimately it is the wider political system that will define legitimate criminalisation and acceptable public health practices.[19]

In a more general sense, questions about the legal authority or legitimacy of using the law and regulations to advance public health are relatively uncontroversial. In many jurisdictions, public health law

[18] Lawrence O. Gostin and Lesley Stone, 'Health of the people: the highest law?', in Angus Dawson and Marcel Verweij (eds.), *Ethics, Prevention, and Public Health* (Oxford University Press, 2007), pp. 59–77.
[19] Coggon, *What Makes Health Public?*, Part II.

grants broad authority to officials at national, regional and local levels to protect public health. Both rule-making and rule-enforcing authority provides public health practitioners with powers to use their technical knowledge and expertise to undertake those measures necessary to reduce the burden of disease within the population. What can be controversial, however, is the scope of such powers. This is so not only with respect to how far public health practitioners should be allowed to, for instance, interfere with our freedom to make personal choices, but also just what choices are fair game for intervention in the first place.

A second similarity is that morality has an important role to play in philosophical analysis of both crime and public health. Where this is presented at its bluntest, there is tension: criminal law condemns 'wrongful' acts and (by implication) promotes rights; public health aims to minimise (risks of) harms and promote benefits. But increasingly it is recognised that a more ethically defensible public health would derive its norms from a system of social justice, which at once aims for equity but also recommends constraints on ends that might be pursued.[20] Equally, as suggested above, criminal law is not just about society expressing condemnation. In a wider sense, questions about the moral authority or legitimacy of using the law to advance public health will require an analysis that contextualises the various ways in which the harms (material and non-material) and wrongs we seek to address using different approaches or measures can be justified. In this way, we might say that criminal law and public health tend to lead to different *emphases* within legitimate political morality (one emphasising wrongs, the other emphasising harms). It is important to recognise that some apparent differences can be attributed to this, and that it leaves open the possibility of more compatibility than might at first appear between criminal measures and public health measures. It does not necessarily follow, of course, that criminal law should be used to advance public health ends, but this option is at least presumptively there. Thus, in addition to arguments being made for the permissible use of criminal law to advance public health, what is needed are arguments for why such a use would also be desirable in the circumstance.

A final, more abstract similarity is that criminal law and public health are both designed institutionally to safeguard important social interests. This may imply a level of automatic harmony between the two, but we must remember too that within disciplines, fields and sectors particular wisdoms come to dominate. In this sense, the similarity is possession

[20] See Anthony Kessel, *Air, the Environment and Public Health* (Cambridge University Press, 2006).

of the dominant philosophy. The difference is the substance of that philosophy. Ultimate assessment of these questions is made easier by considering practical questions; evaluating how criminal law might be employed to advance health interests and assessing the benefits and legitimacy of this. Some of these considerations can be illustrated by briefly touching on some of the benefits and barriers of using criminal law to advance public health goals.

The law has played a critical role over centuries in helping to improve the health of the public. With regard to hygiene, for example, the English Sanitary Act 1388 prohibited the casting of animal filth and refuse into rivers or ditches, and sanitary laws in the second half of the nineteenth century were instrumental in many western countries in terms of reducing mortality from infectious diseases. In the area of atmospheric pollution, the law has been similarly key as a vehicle of health benefit. An Ordinance in 1273 prohibited the use of coal in London as being prejudicial to health, and a Royal Proclamation in 1306 forbade the use of coal by artificers (one offender was apparently executed). In Britain, Public Health Acts in the nineteenth and twentieth centuries legislated against the consumption and production of smoke. The famous Clean Air Acts of 1956 and 1968 controlled factory emissions and created smoke-control areas, playing a part in reducing population morbidity from air pollution.

Policy makers have used the powers and processes of the law (and related regulations) to directly enhance population health, but such laws have also enabled public health professionals to deliver interventions that can extend deeply into the choices and activities that compose our public and private lives. The use of the law by health policy makers and those involved in public health practice has thus resulted in betterment in: measures related to the poor and under-housed; incarceration conditions for prisoners; child labour; workplace safety; pollution and environmental protection; terrorism and bioterrorism; firearms control; road traffic accidents; seat belt and motorcycle helmet use, domestic violence; and consumption of intoxicating substances, such as drugs and alcohol. Various interventions, either directly or indirectly, have made use of criminal law and criminal justice systems in order to effect structural changes or influence behaviour to improve individual and population health.

Despite such successes, there have also been circumstances in which the use of criminal law has either been a hindrance to public health efforts or its use to promote public health has been ineffective or counterproductive. This has been particularly clear in jurisdictions where the criminalisation of the possession or distribution of syringes, or the

availability of safe injection sites, have prevented practitioners from being able to mitigate the incidence or prevalence of blood-borne diseases, such as Hepatitis C and HIV.[21] While some of these barriers are being reduced in places such as the United States and Canada, following the lead of many countries in Western Europe, there still remains some resistance and calls for the reinstatement or strengthening of restrictions.

Overview of the contents

The volume begins with Roger Brownsword's chapter, which examines criminal law, regulatory frameworks and public health. He begins with the powerful observation that: 'Unless there is a reason for thinking that it is *never* appropriate to make use of the criminal law for public health purposes (and I know of no such reason), it will be for regulators to assess whether, in each particular case, such a strategy passes muster as both legitimate and effective.'(p. 19) As is clear, Brownsword takes seriously the importance of assessing effectiveness. However, the burden of his chapter is an analysis of legitimacy. He introduces the discussion by contrasting two perspectives that would have distinct bearings on questions of legitimacy. A 'public health perspective' would seek to promote health, with general utility being the indicator of when use of criminal law is justified. A 'cautious liberal criminal lawyer', by contrast, would be more restrictive and defensive of individuals' presumed freedom to choose. Brownsword's argument is for a regulatory response that accounts for concerns of both perspectives. His chapter works through two main lines of reasoning. First, he demonstrates well the breadth of methods employed in 'modern regulatory environments'. Apparently benign, non-criminal, non-coercive measures abound, and may be no less offensive to the concerns of the 'liberal' than criminalisation. Furthermore, people's behaviour is subject to many non-legal regulatory controls that are in many ways invisible. As such, liberals should look at a much broader regulatory environment, and ask both what regulators are aiming to achieve and how they seek to do so. In the second part of his chapter, Brownsword aims to establish that people would rationally

[21] See, e.g., Scott Burris, Kim M. Blankenship, Martin Donoghoe, Susan Sherman, Jon S. Vernick, Patricia Case, Zita Lazzarini and Stephen Koester, 'Addressing the "Risk Environment" for Injection Drug Users: The Mysterious Case of the Missing Cop', (2004) 82 *Milbank Quarterly* 125; Lawrence O. Gostin and Zita Lazzarini, 'Prevention of HIV/AIDS Among Injecting Drug Users: The Theory and Science of Public Health and Criminal Justice Approaches to Disease Prevention', (1997) 46 *Emory Law Review* 587.