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Is Justice for One Justice for All? The Dilemma of Public Health Enforcement in an Interconnected World

*John D. Blum**

Few biblical stories capture the American penchant for individualism better than that of David versus Goliath. The American experience is inextricably linked to the celebration of individuals, who, like David, triumph against all odds. Our history and culture are ripe with examples, which we delight in, extolling the one who triumphs against the powerful, and/or the many. In the context of law, our legal system has been profoundly shaped by its promotion and defense of individualism.[1] Virtually all aspects of American law are highly affected and shaped by a legal commitment to the principles of individualism.[2] The United States Constitution, for instance, is heralded as the linchpin of American jurisprudence. This belief is based largely on the Bill of Rights and its deep commitment to protecting individual liberties. Beyond constitutional law, other fundamental areas of law also manifest a strong tradition of individualism. For example, tort law is rooted in concepts of equity, which demands that the individual who has been wronged be provided with a remedy, often leveling the playing field of life.

Clearly, most American lawyers are staunch advocates of a legal system that extols, protects, and empowers the individual, and would clearly view our commitment to personal liberties as the hallmark of American democracy. It can be argued that the essence of this principle is best reflected in American jurisprudence which supports the concept

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1. M.A. GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (The Free Press, 1991); C. Taylor, *Atomism*, *in* COMMUNITARIANISM AND INDIVIDUALISM 29-50 (S. Avineri and A. De-Shalit eds., Oxford University Press, 1996).

2. *See generally* ROBERT N. BELLAH, ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985) (studying the American ideology of individualism as it is expressed in both public and private spheres); *see also* Michael Dominic Meuti, *Legalistic Individualism: An Alternative Analysis of Kagan's Adversarial Legalism,* 27 HASTINGS INT'L COMP. L. REV. 319, 329–41 (2004) (arguing that America's adversarial legal system developed out of the country's ethic of individualism).

of justice through individual right. At the risk of being labeled a legal heresy, or at least a misguided commentary, this essay posits the notion that our conception of individual rights may not be compatible with a broader vision of justice as a principle of social justice. The framework for the argument is public health, an area of increased attention in the post-September 11 world. This essay argues that a community oriented enterprise, such as public health, is illustrative of how American views of individualism and justice compete, and are thus strained in the face of an endeavor that demands a collective approach and a commitment to community above all else. This piece utilizes two examples from public health to illustrate the tension between individualism and community: (1) drawn from the domestic arena: childhood immunizations; and (2) drawn from the international sector: defining the right to health. These vehicles show how an individualistic vision of justice may not easily equate to a broader notion of collective justice.

PUBLIC HEALTH AND THE LAW: A BACKGROUND

There is an increased awareness of public health matters among our citizenry, driven by the menace of bio-terrorism, and a growing litany of new global communicable (infectious) diseases that have arrived on our doorsteps, as well as a heightened appreciation of the dangers of recurring public health threats such as the flu. From AIDS, to SARS, to West Nile virus, a perception exists that the world has become a more dangerous place.[3] The World Health Organization ("WHO") has noted that since 1970, over thirty new infectious diseases have been identified.[4] Added to the rapid development and burden of infectious disease is the equally alarming growth of non-communicable diseases, spawned by environmental and lifestyle factors.[5] Regardless of the scope and complexity of new and emerging public health threats, this area still remains the underbelly of American health care, consuming only three percent of the total spending in the health care sector.[6] There

3. *See* Lee Jong-Wook, Address at the 57th World Health Assembly (May 17, 2004), *available at* http://www.who.int/dg/lee/speeches/2004/wha57/enl (discussing the broader global awareness of public health threats fueled by both the rapidity of newly emerging health problems and the ease at which threats become realities due to the increased movement of goods and people around the globe).

4. David L. Heymann, *Emerging Infections*, *in* THE DESK ENCYCLOPEDIA OF MICROBIOLOGY 387 (Moselio Schaechter et al., eds. 2003).

5. *See* WORLD HEALTH ORGANIZATION, THE WORLD HEALTH REPORT 2003: SHAPING THE FUTURE 83–99 (2003), *available at* http://www.who.int/whr/2003/en/whr03_en.pdf (Detailing public health challenges stemming from disability related illnesses, traffic related environmental illnesses, etc.).

6. COALITION FOR HEALTH FUNDING, THE U.S. PUBLIC HEALTH SERVICE, *at*

remains a lack of understanding about the structures and processes of public health, and confusion by the public, as well as some policy makers, over how this area differs from the medical care delivery system.[7]

From an application standpoint, public health is largely a series of processes, supervised by government at all levels, designed to apply measures to the population (or subsets of the population) to both address and prevent common threats to health. Unlike medical care, which focuses on the care and treatment of the individual, the patient in the public health context is the population, and much of the focus is directed towards taking the necessary steps to prevent the spread of disease. Public health activities occur in a community setting and employ various strategies, from education to medical preventive measures such as vaccination. Potential solutions to community health issues are derived from evaluation of the distribution and determinant of a disease and an assessment of the risk, based on collection and analyses of data.[8] In reference to the law, public health is an amalgamation of laws at all levels of government, including the local, state, national and international levels. All of these entities use their individual and collective public powers to pursue general population health.

Additionally, there is a strong element of individual right that characterizes public health law. This aspect of public health law reflects the need to recognize that inappropriate or ill-advised uses of government authority can potentially create problems for equal protection and due process of law.[9] Public health law, like other areas of regulation, can be characterized as a less than perfect blend of administrative and constitutional law principles—that is, somewhat paradoxically—equally dependent on both these major areas of the law.

Certainly, the tension between individual right and community interests, which are inherent in public health enforcement, is not unique to this area but can be seen in many other sectors of government regulation, from law enforcement to environmental protection.[10] In

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http://www.aamc.org/advocacy/healthfunding/healthcontinuum.htm (last visited Jan. 4, 2005).

7. Harvey Fineberg, M.D., *The Population Approach to Public Health, available at* http://www.asph.org/document.cfm/page=724 (last visited Jan. 25, 2005).

8. INST. OF MEDICINE, *The Disarray of Public Health: A Threat to the Health of the Public, in* THE FUTURE OF PUBLIC HEALTH 19-20 (2002).

9. *See* Lawrence O. Gostin, et al., *in* LAW IN PUBLIC HEALTH PRACTICE 3, 12–14 (Richard A. Goodman et al. eds., 2003) (discussing the constitutional limits on the government's power to regulate persons, professionals, and businesses to safeguard the common good).

10. *See generally* George Annas, *Terrorism and Human Rights, in* IN THE WAKE OF TERROR: MEDICINE AND MORALITY IN A TIME OF CRISIS (Jonathan P. Moreno ed., 2003) (discussing bioethical issues related to bioterrorism following the events of September 11, 2001); Richard A.

fact, the strain between individual right and government action is, in and of itself, a major theme in American jurisprudence, extending well beyond any one sector of regulation.[11] Nonetheless, public health is particularly noteworthy because the tensions between government enforcement of population health measures and the resulting infringements of individual liberty are suddenly more prescient possibilities in light of threats from bio-terrorism and new, emerging disease agents.[12]

Interestingly enough, in searching for a legal compass to guide us through current and potential civil liberty disputes in the post-September 11 world of public health, our frame of reference, which shapes present day responses, emanates from the Supreme Court opinion of *Jacobson v. Massachusetts*, decided one hundred years ago.[13] Jacobson, a resident of the City of Cambridge, refused to undergo a mandatory small pox vaccine, arguing that a prior vaccine had caused injury and that the compulsory vaccination program violated his federal constitutional rights to due process.[14] The Supreme Court rejected Jacobson's challenge, noting that public health regulation motivated by the interests of the many subordinated the wishes or convenience of the few.[15] The Court in *Jacobson* was not willing to grant the state unlimited powers in public health, but characterized state police power as an area of regulation that needs to be balanced against four principles: necessity, reasonableness, proportionality and harm-avoidance.[16] In essence, by following *Jacobson*, the state has a mandate to act in the public interest, and the requisite authority to do so via the Tenth Amendment. However, the four principles noted remain

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Epstein, *Living Dangerously, a Defense of Mortal Peril*, 1998 U. ILL. L. REV. 909 (1998) (defending the controversial views concerning health care reform expressed by Richard Epstein in an earlier text).

11. *See* Meuti, *supra* note 2, at 329–41 (discussing the role of individualism in the development of American jurisprudence).

12. Lawrence O. Gostin, *The Model State Emergency Health Powers Act: Public Health and Civil Liberties In a Time of Terrorism*, 13 HEALTH MATRIX 3 (Winter 2003).

13. Jacobson v. Massachusetts, 197 U.S. 11 (1905). The case of *Jacobson v. Massachusetts* has served as precedent for many public health decisions since 1905. *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914 (2000) (holding as unconstitutional the criminalization of partial-birth abortion); Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990) (determining that due process does not require a state to withdraw treatment when requested from someone other than the patient); Roe v. Wade, 410 U.S. 113, 143 (1972) (citing *Jacobson* for the limited right to control one's body); Zucht v. King, 260 U.S. 174 (1922) (finding a school regulation requiring vaccination for attendance to be valid).

14. *Jacobson*, 197 U.S. at 13–14.

15. *Id.* at 38.

16. PUBLIC HEALTH LAW AND ETHICS: A READER 215–16 (Lawrence O. Gostin ed., 2002).

as potent restraints on the government's exercise of public health authority.

A Domestic Case in Point: Mandatory Childhood Vaccinations

Few areas in public health regulation represent the clash of individual liberty and the protection of community health better than the current controversies over the efficacy and safety of mandatory childhood immunizations.[17] Public health interventions in the form of childhood vaccinations are not inconsequential. It is estimated that of the 11,000 babies born daily in the United States, each will receive eleven vaccines for preventable diseases, requiring sixteen to twenty injections, by the age of two.[18] This aggressive approach to childhood disease inoculations through state law mandates has had a very measurable and dramatic impact on reducing the rates of preventable illnesses, and has been heralded as one of our nation's major accomplishments in public health.[19] But with the disappearance of certain diseases, there is a growing complacency about the need for vaccinations, even though the viruses and bacteria causing these diseases are still present.[20] This sense of complacency has combined with growing fears fueled in the press, and via the Internet, that preventive treatment in the form of a vaccine may pose serious dangers.[21] There are increasing numbers of accounts about childhood illnesses allegedly caused by the negative effects of vaccinations.[22]

The most controversial of the ongoing debates concerning childhood vaccines involves the link between mercury (thimerosal containing

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17. Ross O. Silverman & Thomas May, *Private Choice Versus Public Health: Religion, Morality, & Childhood Vaccination Law*, 1 U. OF MD. MARGINS 505 (2001).

18. CHILDREN'S HOSP. OF PHILADELPHIA, SABIN VACCINE INSTITUTE, INFANT IMMUNE SYSTEM IS STRONGER THAN MANY PARENTS THINK (Jan. 7, 2002), *at* http://www.sabin.org/news_jan7.htm.

19. *See* Samuel L. Katz, Representing the American Academy of Pediatrics and the Infectious Disease Society of America, Statement Before the Committee on Government Reform, U.S. House of Representatives (Aug. 3, 1999) ("Immunizations have reduced by more than 95 to 99 percent the vaccine-preventable infectious diseased in this country . . . ."), *available at* http://www.aap.org/advocacy/washing/test8039.htm.

20. *Vaccines—Finding the Balance Between Public Safety and Personal Choice*, 106th Cong. 18 (1999) (statement of Rep. Shay).

21. *See, e.g.*, Alan Cantwell M.D., *Are Vaccines Causing More Diseases Than They Are Curing?*, *available at* http://www.curezone.com (last visited Jan. 4, 2005) (questioning the safety of vaccination against infectious diseases).

22. Andrea Rock, *Toxic Tipping Point*, MOTHER JONES, Mar.–Apr. 2004, at 70–72 (alleging that government regulators and pharmaceutical companies knowingly withheld information about the potential harm of mercury in childhood vaccines); *see* Neil Munro, *Missing The Mercury Menance*, National Journal, Jan. 3, 2004, at 36 (discussing the growing controversy over the high mercury levels in certain vaccines).

vaccines, TCVs), used as a vaccine preservative, and the dramatic increase in autism. A baby who receives his/her recommended vaccines at two months is injected with an estimated 62.5 micrograms of mercury, 118 times the Environmental Protection Agency's limit for daily exposure.[23] Some in the scientific community, as well as parents of autistic children, argue that exposure to thimerosal among infants born with a heightened sensitivity to mercury, or the inability to excrete it, may be a contributing factor in the current autism epidemic.[24] The Centers for Disease Control, however, based on a much-publicized study in the medical journal, *Pediatrics*, has taken the position that there is no consistent link between thimerosal and autism.[25] The stages in this debate not only impact the current national childhood vaccine program, but also have profound implications for government science policy generally, and could spark an avalanche of civil litigation, rivaling that in asbestos and tobacco.[26]

From the standpoint of the law, the question becomes one of ascertaining how the legal system can deal with the pressures to allow exceptions to mandatory vaccination policies in the face of parental objections that may be either real or speculative in nature.[27] There is a growing body of state statutory law that allows for exceptions to mandatory childhood vaccines.[28] These statutes were first developed to recognize religious and later philosophical exceptions to mandatory vaccine programs, as well as medically based exceptions.[29] In light of the growing concerns over vaccinations and the complacency over their benefit previously noted, this continues to be an active area of

23. Rock, *supra* note 22, at 72.

24. Neil Munro, *Missing the Mercury Menace*, NATIONAL JOURNAL, Jan. 3, 2004, at 36–37.

25. Leslie K. Ball, et al., *An Assessment of Thimersol Use in Childhood Vaccines*, 107 PEDIATRICS 1147, 1147 (2001).

26. There are numerous plaintiff-oriented law firms that are involved in thimerosal litigation. *See, e.g.*, Maglio Law Firm, *Thimerosal Vaccine Injury Litigation*, *at* http://www.sarasotalaw.com/sarasotalaw/vaccines/thimerosal.php (last visited Jan. 4, 2005). It is also noteworthy that the U.S. Homeland Security Act involved a rider requiring state claims alleging harm from thimerosal be filed under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10–300aa-34 (2000). The rider was repealed by Congress in the 2003 Omnibus Appropriations Bill, Pub. L. No. 108-7 (2003).

27. *See* King v. Aventis Pasteur, Inc., 210 F. Supp. 2d 1201 (D. Or. 2002) (remanding a claim concerning vaccine contamination to state court).

28. *See generally* Ross D. Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*, 12 ANNALS HEALTH L. 277 (2003) (discussing the legal and political foundations of non-medical exemptions and the current application of those exemptions). All states except Missouri, West Virginia, and Arkansas offer some form of religious exemption from school immunization. *Id.* at 283.

29. *Id.* at 282–84.

legislation.[30] In the case of medical exceptions, requests for exclusion have been evaluated based on the application of the CDC's Advisory Committee on Immunization Practice's guidelines on pre-established vaccine contraindications, as opposed to the opinions of individual doctors.[31]

Exceptions to mandatory public health measures that are put in place to address population health concerns can be problematic. There is a well-known public health concept, referred to as herd immunity, which promotes the principle that for a population group to be protected from disease, all the members of that group must undergo preventive treatment, and those infected within a group must be isolated from the whole.[32] Thus, allowing individuals to exercise autonomy is in conflict with the principle of herd immunity, and is particularly harmful in the context of infectious diseases. The scientific rationale is the most problematic rationale for exclusion from a mandatory program. Allowing parents to opt out for religious or philosophical reasons is a question of values that is a clear exception to the dictates of science but is permitted in light of larger societal considerations. A medical exception, on the other hand, must be founded on a supportable scientific basis, and in the context of public health, that basis must be rooted in sound epidemiology. However, the reality of public health and science policy is that there are no absolute certainties, and that elements of risk are inherent in most physical interventions. In terms of law, scientific proof is evolving, as can be seen in the litigation area with the ongoing controversies over the adequacy of evidence.[33] Compounding problems of scientific uncertainty is our strong sense of individualism and a general skepticism of the governmental authorities that create population-wide mandates, particularly those that entail physical intervention. These conflicts are highly problematic, and often become classic battlegrounds between individuals and government.

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30. Munro, *supra* note 24, at 36–37.

31. CDC NATIONAL IMMUNIZATION PROGRAM, GUIDE TO CONTRAINDICATIONS TO VACCINATIONS, *available at* http://www.cdc.gov/nip/recs/contraindications.htm (last visited Jan. 5, 2005). *But see* Assemb. B. 10328, 227th Ann. Legis. Sess. (N.Y. 2004), *available at* http://assembly.state.ny.us/leg/ (last visited Jan. 5, 2005) (evidencing an emerging trend allowing a given physician the ability to determine whether an exception to a mandatory vaccine is appropriate beyond the application of generic guidelines). This trend is evident in proposed New York Assembly Bill A10328 dealing with mandatory immunizations for students. *Id.*

32. Abi Berger, *How Does Herd Immunity Work?*, BRIT. MED. J., Dec. 4, 1999, at 1462.

33. *See generally* AMER. BAR ASS'N, SECTION OF SCI. & TECH., ABA, SCIENTIFIC EVIDENCE REVIEW: ADMISSIBILITY AND USE OF EXPERT EVIDENCE IN THE COURTROOM, Monograph No. 6 (Cynthia H. Cwik & John L. North eds., 2003) (discussing the role of expert evidence in federal court).

Shifting public health disputes, such as the childhood vaccine controversy, from the level of policy debates over mandatory inoculations at the micro level, into the more rarified spectrum of jurisprudence, can result in a clash between concepts of individual and collective justice. On the one hand, it is arguable that exposing a child to the potential adverse effect of a vaccine, which could result in far greater harm than the disease it is designed to prevent, could be characterized as unjust. Parents with justified fears should be able to protect their children from the potentially ill effects of reckless public policy, and their inability to do so is an affront to principles of individual justice. Population-wide health programs that fail to respect individual concerns are inherently flawed, as respect for personal rights is as essential as scientific justifications. Juxtaposed against the case for individual and parental rights is the argument that effective public health policy demands universal cooperation. Thus, if individuals, in this case parents, are allowed to undermine an enforcement scheme as a result of personal bias, the viability of government population health programs is called into question, and the actions of the few may put the many at greater risk: an affront to the broad concept of social justice. The controversy over childhood vaccine mandates, in broad terms, is a familiar struggle, pitting parents against government in a debate over how best to safeguard the interests of the child. Unlike other areas where mandatory government programs affecting children are challenged by parents, the mandates in public health have ramifications that could more directly impact the physical well being of an entire population and have long-range impacts on the health care delivery system.[34]

As noted, the debate between those espousing parental choice versus proponents of universal immunization is confounded by the uncertainty of science, and the reality that a seemingly objective case can be posited for both sides of the argument. At a philosophical level, this clash of rights may be insoluble, but from a practical standpoint a resolution to the dilemma of mandating childhood vaccines can be garnered from the nearly-Century old *Jacobson* analysis.[35] Under the *Jacobson* formula, the question becomes whether mandatory childhood vaccine programs are necessary, reasonable, proportional, and safe for the participants. While the four-part test taken from *Jacobson* must be vetted against the backdrop of science, it is helpful in providing an analytical tool to balance the rights of individuals against general population risks and

34. *Supra* at n. 19.
35. *Supra* at n. 13.

future burdens. Because the health of the general public is at issue, a careful airing of the scientific issues and related evidence is vital, and a rigorous analysis of the positions of parents and government authorities alike is warranted. Moreover, the need for such a process becomes a matter of social justice in and of itself.

EXPLORING THE INTERNATIONAL LEGAL RIGHT TO HEALTH

Another example of the tensions between individual right and collective good in public health that illustrates the split between individual and collective views of justice is a very fundamental legal question in the realm of international health. The question concerns the way in which national governments, as well as international legal bodies, characterize the legal concept of the right to health. While American law does not recognize a per se right to health,[36] such a right is widely recognized in the domestic law of most countries and is a firmly established principle in international law, found in the International Declaration of Human Rights, and is a core principle in the Constitution of the World Health Organization ("WHO").[37]

Few would quibble with the global consensus that health is a basic right of all human beings, and certainly from the standpoint of justice, it would appear that such a right is compatible with most interpretations of that fundamental principle. The difficultly in this area is not in achieving consensus that health care is a right, but rather there is not a universal agreement on what such a concept really means in practical terms. The difficulty resides both in defining the concept of health, and in determining what reasonable legal protections underpin that concept.[38]

The most active public international organization in the health care arena is the WHO, which was adopted into the United Nations system under Article 57 of the U.N. Charter in 1948. As noted earlier, the WHO Constitution contains a provision that makes health a right.[39] The WHO's establishment of the right to health, as a matter of international law, is primarily an endorsement of a legal concept. Unfortunately, this endorsement fails to articulate what such a right actually means beyond

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36. GEORGE J. ANNAS, THE RIGHTS OF PATIENTS 7–8 (3d ed. 2004).

37. WHO CONST. pmbl., *available at* http://whqlibdoc.who.int/hist/official_records/constitution.pdf (last visited Jan. 5, 2005).

38. The practical implications of the right to health as a population entitlement is an underlying concern in the American context, as explicitly making health a right could lead to a flood of demands and an agonizing series of controversies over coverage that would need to be addressed by the courts.

39. WHO CONST., *supra* note 37.

a general affirmation, and thus does little to clarify rights. To effectuate the WHO Constitution's right to health, there needs to be both an understanding, on the part of its member states of what health is and a requisite consensus of how to apply the law to actualize such an understanding. Certainly in reference to health, the WHO concept can be ascertained generally through its source documents, but such documents tend to be general, characterizing health broadly

The WHO's vision of health fosters a concept of health care and the manner in which the organization approaches specific projects.[40] Clearly the issues that dominate the WHO agenda—which include communicable diseases, non-communicable diseases, sanitation, safety, among others—reflect a strong focus on basic public health. In contrast, the developed world's focus on health matters tends to be far more focused on science and technology, and the applications of new knowledge at the micro level. While Western governments clearly recognize differences in health needs across the globe, the developing world's population-oriented view of health, akin to the WHO position, does not accurately reflect what health care initiatives should focus on in wealthy nations. Undoubtedly, how a nation characterizes health is a reflection of national wealth and population wellness measures. A country such as Sudan, caught in the grips of poverty and civil war, will have a far different vision of health than the United States. In other words, a conceptualization of health is a relative concept shaped by national and regional realities.

If health is seen as relative to specific situations, the attempt to actualize a globally agreed upon legal right to a "moving target" presents considerable challenges, and leads one to the conclusion that such a right will not be uniform around the world. In the West, the right to health is inextricably linked to a legal framework that has emerged in the context of health care services at the delivery level.[41] There is a strong emphasis in American health law on patient rights such as autonomy, informed consent, privacy, and the right to seek redress for negligent injuries, which becomes a more powerful legal imperative than the right to a particular type of service.[42] It is thus natural that the American view of health, as a right applied elsewhere in the world, is colored by our strong bias toward individual autonomy in this context.

40. *Id.*

41. John D. Blum et al., *Rights of Patients: Comparative Perspectives from Five Countries*, 22 MED. & L. 451 (2003)

42. ANNAS, *supra* note 36. It is only in the context of specific entitlement programs such as the U.S. Medicaid program that legal arguments are made to secure particular services, or to access to health services. Generally, these arguments are based on statutory grounds. *Id.*

On the other hand, health as a right in the third world context is driven more by a notion of fundamental human need, and as such, the law is viewed as providing a foundation for an entitlement both to services, and to developing the requisite conditions that are necessary to enhance health, such as clean water, proper sanitation and adequate housing.[43] While it is unlikely that there would be a disagreement on the part of third world jurists that patients should be extended individual rights, recognition of such rights are secondary to a scheme of law that supports attainment of basic services that are needed to achieve a fundamental level of health.[44]

This conceptual split over health, and the commensurate legal right to health, between the developed and the developing world, can be cast into the dichotomy, noted previously in the article, over concepts of justice. From the American jurisprudential view, the international right to health care, is cast as a human right that respects the individual and provides the person with protections against abuses of the health system; thus, justice in this vision of right is highly personalized. Contrasting that view is the position of the third world which looks at the right to health as a legal lever that mandates basic services and is directed toward the greater good of the population: a recognition of profound collective needs that is underscored by a vision of social justice.[45]

The split in perceptions over health and right noted is not without real controversy, and complexities that extend far beyond this essay's limited reach. For example, in Botswana, the nation with the world's highest HIV rate, there is controversy over the government's aggressive policy of routine AIDS testing.[46] The current government of Botswana has been praised for the distribution of free antiretroviral treatment, but criticized for its heavy-handed policy on testing by western health advocates who have argued that the government policy is simply forced testing and violates human rights and individual privacy.[47] The president of Botswana, Festus Mogae, counters the criticism over testing with a recitation of grim statistics of the AIDS epidemic, which on average kills one person every ten minutes (in a country of 1.7

43. Johnathan M. Mann et al., *Health and Human Rights*, HEALTH & HUMAN RIGHTS 7 (1999), *reprinted in* PUBLIC HEALTH LAW AND ETHICS: A READER, 106–113 (Lawrence O. Gostin ed., 2002).

44. *Id.*

45. *Id.*

46. Tom Carter, *Botswana's leader defends AIDS testing*, THE WASH. TIMES, May 10, 2004, at A01. Forty percent of Botswana's adult population has tested positive for HIV. *Id.*

47. *Id.*

million), and has resulted in the drop of life expectancy from sixty-seven years to possibly as low as thirty-three years.[48] Botswana's AIDS plight may be extreme, but health statistics drawn from the developing world generally paint a bleak picture of profound basic human need, coupled with the growing "double burden" of diseases simultaneously triggered by both poverty and changing life styles.[49]

While individual human rights should not be characterized as a secondary concern, it may be more equitable to argue that the right to health, in the face of profound need is first and foremost a matter of meeting that need, and that a collective sense of social justice should drive a national vision of health and the nature of this right. There is also a strong imperative to allow individual nations to fashion their own concept of the right to healthcare, particularly in the third world. A Western vision of such a right, based on individualism, can be seen, rightly or wrongly, as yet another way to foster the structural poverty of the third world.[50]

Unlike the domestic dispute over mandatory childhood vaccines, there is no legal template that can be applied to decipher how best to interpret the right to health in the international context. Approaching this matter from the standpoint of justice may result in an illumination of the ongoing split between an individualistic and a collective vision of the concept, but does little to resolve the dilemma of how to interpret health as a right. Perhaps the best way to achieve some resolution is to move the question out of a legal context, recognizing that the legal right to health care is only significant if it can act as a lever to achieve the goal of enhancing health. Thus, the right to health must first and foremost be viewed as a tool, which can mobilize actions that respond to human needs. Further, application of the right to health must be guided by the particular nation-state where the specific health needs being addressed are at issue. A specific application of the right to health, and the commensurate accountability for implementation of health measures, will vary across borders. Individual liberties must not be ignored in formulating the elements of the right to health, but rather such a focus becomes only one factor in a broad strategy to achieve measurable improvements in population health.

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48. *Id.*

49. *See generally* Heyman, *supra* note 4 (detailing statistics concerning communicable diseases in emerging countries).

50. *See* PAUL FARMER, PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS AND THE NEW WAR ON THE POOR 160–78 (2003) (arguing that an individualized view of health care leads to a market-based approach that marginalizes the poor).

CONCLUDING THOUGHTS ON JUSTICE

Tensions in public health policy that pit individual rights against the common good, reflected in the discussions concerning mandatory childhood vaccination and the international right to health, spark three observations about the principle of justice. First, drawn from the two areas noted, is that, justice is not a unitary concept. In either of the public health examples a case can be made for policies which support an underlying concept of justice that is linked to adherence to the concept of individualism, and an equally compelling case can be made that justice in the public health matters presented is best represented by principles which support the collective good. The perspective one takes on justice may not, on its face, be a value judgment, but clearly the individual or group perspective will shape the applications of the principle.

Second, while a core concept such as justice is fundamental, it is not necessarily absolute. The examples presented here demonstrate that perspectives on what is just will fluctuate from individual to group, and will vary depending on situations and needs. Variables and biases will skew views of justice, and even within given systems of law, uniformity of views on the essence of justice will be difficult to achieve.[51]

Third, this multi-faceted view of justice emerging from public health is a concept profoundly affected by the growing interconnections in our world. While it is important never to lose sight of the need for individual rights in the delivery of health care at the micro level, the nature of health and disease, in an increasingly smaller world, compels considerations of justice at the macro level to be thought of more broadly as social justice. Concern for the whole should not be a license to overlook the need to respect the individual. The dangers of supporting legal depravations in the name of the common good are quite real, as can be seen often in public health, as well as in other areas, such as homeland security, where there are many concerns surrounding the U.S. Patriot Act.[52]

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51. Political commentator Tim Russert in his book, *Big Russ & Me* (2004) recalls how a Jesuit priest, Father John Sturm reacted to young Tim when he was acting out of line at Canisius High School in Buffalo, N.Y. According to Russert he was caught "in the act" by Father Sturm, the Prefect of Discipline. The priest threw Russert into one of the lockers and the boy cried out, "Father, have mercy!" To which the priest replied, "only God grants mercy, I administer justice!" Being a contemporary of Russert's at Canisius H.S., and a frequent recipient of such discipline, I can well relate to this very old fashion concept of justice. It is, indeed, a relative principle.

52. *See* Donald A. Downs & Erik Kinnunen, *A Response to Anthony Lewis: Civil Liberties in a Time of Terror*, 2003 WIS. L. REV. 385, 387–90 (2003) (criticizing aspects of the Patriot Act that diminish civil liberties).

What justice requires, in public health, is a greater sense of balance that results in a better awareness of the implications of policies on individuals, as well as on whole populations, nationally and internationally. While the state must be zealous in promoting individual rights, efforts in this area should never be viewed only in reference to their implications for the individual, but must be balanced against collective needs. On the international stage, proponents of public health need to voice their positions with a careful eye toward promoting strategies which first and foremost address human needs, and the nations where health problems predominate should be allowed to take the lead in formulating such strategies to meet local needs. In the twenty-first century, Lady Justice must remove her blindfold, and develop a keen sense of sight, which will allow for deliberate vision calculated towards an application of principles of social equity. To more appropriately meet changing national and international public health realities, a departure from traditional American legal norms may need to occur, or at the least, those norms must become only one element in a broader construct of the justice principle.