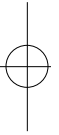
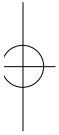


Law and Bioterrorism



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Law and Bioterrorism

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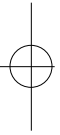
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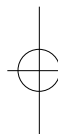
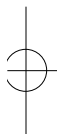
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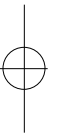


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To my parents





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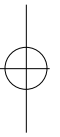
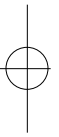


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Foreword

By Lawrence O. Gostin

Who would have imagined that a book on law and bioterrorism would become essential reading in the early twenty-first century? The attacks on the World Trade Center and Pentagon on September 11th, 2001 and the subsequent dispersal of anthrax spores through the U.S. postal system reawakened the public to the threat of biological weapons as a method of conducting war and terrorizing civilian populations. Bioterrorism, of course, is not new, as the pages of this foundational text vividly illustrate. But the potential scope and destructive capacity of bioterrorism seem far greater now that we have witnessed the unconscionable acts of September 11th. We can sense the possibility of even greater devastation, say, with the release of smallpox or a more efficient delivery of anthrax spores.

This book, meticulously crafted by Professor Victoria Sutton, will inform a generation of scholars and policy makers about the nature of the risk of bioterrorism and the necessary governmental response. The book contains carefully selected readings and materials, together with Professor Sutton's incisive descriptions and analyses. Bioterrorism provides a lens to examine issues of public health and safety, criminal investigation and law enforcement, and the appropriate balance between common goods and individual rights. As such, the text will be invaluable to scholars, students, and policy makers concerned with homeland security in all its complexities.

Bioterrorism raises questions of fundamental historical, social, political, and legal significance. What lessons can we learn from the events of September 11th to ensure, for example, a robust public health and criminal justice infrastructure? What value should society place on civil liberties and property rights when faced with powerful threats to national security? What kinds of checks and balances should be in place to ensure that government does not overreach? Which level of government—federal, tribal, state, or local—has primary responsibility? How can law be used as a tool for assuring the public's health and safety? Finally, and importantly, what are the appropriate safeguards of personal and proprietary interests that should be in place? These are the kinds of pivotal questions faced by government and society, which are explicated in this book. It is fashionable to say that public health and civil liberties are synergistic and mutually reinforcing. But, in truth, society faces difficult choices between common goods and individual rights in an age of terrorism. We may have to trade off a little bit of autonomy, privacy and liberty to make the community safer. At the same time, we may have to trade off a little bit of security to ensure respect for civil rights and liberties.

I have some personal experience with the political landmines involved in bioterrorism policy development. In the aftermath of September 11th, the president and Congress began a process to strengthen the public health infrastructure. The Center for Law

and the Public's Health at Georgetown and Johns Hopkins Universities drafted the Model State Emergency Health Powers Act at the request of the Centers for Disease Control and Prevention and in collaboration with members of national organizations representing governors, legislators, attorneys general, and health commissions (www.publichealthlaw.net). Although more than 20 states enacted a version of the Model Act, the process galvanized the public debate. In a country so tied to rights rhetoric, any proposal that had the appearance of strengthening governmental authority was bound to travel in tumultuous political waters.

What is needed to illuminate the public debate, and what this book supplies, is an understanding of the legal tools to combat bioterrorism, the constitutional restraints on the exercise of police powers, and a clear enunciation of the policy choices. Professor Sutton does so by describing the history of bioterrorism; the thorny questions of federalism; the exercise of public health powers over individuals (e.g., quarantine, vaccination, and medical treatment) and property (e.g., nuisance abatement and "takings"); and the legal authority and techniques of law enforcement, including new crimes relating to bioterrorism. Professor Sutton includes materials relating to each of the major fields of legal scholarship as they apply to bioterrorism such as tort law, constitutional law, military law, and international law.

At face value, the methods of preventing and responding to bioterrorism are relatively simple. The United States, and the rest of the world, now realize that governments must meticulously plan for biological events including terrorism and naturally occurring infectious disease; fund a robust public health and security infrastructure; and ensure expeditious communication among front-line agencies (e.g., law enforcement, public health, and emergency management) as well as with the public. Government must have the capacity to prevent bioterrorism through effective intelligence; detect bioterrorism through effective surveillance; contain the spread of infection through effective public health interventions, and identify and prosecute those responsible through effective law enforcement.

In reality, however, the fight against terrorism is much more complex, raising defining issues of public health and civil liberties in a constitutional democracy. Guided by the principles of justice, government has an obligation to act with fairness and toleration towards individuals and groups. As Justice Harlan wrote in the seminal Supreme Court case of *Jacobson v. Massachusetts*, "the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the 'common good.'" The United States must strike such a balance by ensuring a strong, effective, and timely response to bioterrorism, while fostering respect for the dignity and human rights of people from all cultures, races, and religions.

Lawrence O. Gostin
Professor of Law, Georgetown University
Professor of Public Health, the Johns Hopkins University
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(CDC Collaborating Center Promoting Health Through Law)

Preface

As this book goes to press, we have passed the one year anniversary of the 9-11 attacks and the subsequent anthrax attacks, which made us as a nation keenly aware of the threat of bioterrorism. Sadly, we do not know the perpetrator of the anthrax attacks. We do not know if the attacks were from a domestic group, an individual or an international terrorist or someone with or without a political or religious motive. This state of affairs also reminds us of our great responsibility as a nation to protect our homeland and to evaluate and prepare for the threat. This book has been written in order to contribute to the national dialogue that must take place concerning the legal framework within which we must prepare and respond to such a threat.

This book begins with an examination of the history of law and bioterrorism, and events which shaped our currently legal framework both in this country and in the world. This background prepares the reader for the situation in which we find ourselves, as a major world power, in the aftermath of the attacks of 9-11. The second chapter examines the roles of key federal agencies and departments, and their changing responsibilities and missions which have rapidly shifted since 9-11. The proposed Department of Homeland Security is also examined and an analysis of the implications of such a Department is considered. A discussion of the federalism aspect of the post 9-11 world, suggests that a shift in power from the states to the federal government to some degree is inevitable for purposes of national security.

Chapter three begins an examination of the role of the states in the war against bioterrorism. State sovereignty includes police powers in public health, and our first line of biodefense is in local and state governments. The legal framework in which our defenses lie is examined in this chapter—including powers of quarantine, vaccination, as well as applications of state common law to problems in bioterrorism. The proposed Model Public Health Act for states is also discussed in this chapter.

Chapter four addresses the area of federal criminal statutes and new issues in criminal law arise in response to bioterrorism. This area is arguably the most interpreted area of bioterrorism legal issues, because a number of criminal cases have resulted from the biological terrorism statutes, first enacted in 1989. After 9-11, the passage of the USA PATRIOT Act, in 2001, and the Public Health Security Act and Bioterrorism Preparedness and Response Act, in 2002, established new federal crimes to address (among other crimes of terrorism), bioterrorism. Also in this chapter, issues of attorney-client privilege where the defendant is a terrorist, sentencing issues and questions of the application of military law and military commissions in bioterrorism are examined.

Chapter five examines federal law and civil issues which arise as a result of bioterrorism. The application of environmental statutes, the Federal Tort Claims Act, federal labor law, vaccine liability, and private insurance liability are all examined in the context of bioterrorism and biodefense.

Chapter six examines at the first cases to result from 9-11 and the anthrax attacks which followed. The civil cases examined in this chapter have been filed against private individuals and suggest private liability concerns for the future, particularly for hospitals and other health care providers.

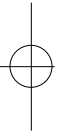
Chapter seven concerns issues of civil rights in a biodefense framework throughout the context of a bioterrorism event, from preparation, to surveillance, to characterization and detection, to response activities. Issues of liability for local and state governments, individuals for a range of constitutional protections, including equal protection and takings issues are considered.

Chapter eight examines the issues of bioterrorism for the United States in context with international law. International treaties and application international law provides a framework for this examination. Also considered are the domestic laws of a selection of countries which have taken various actions to respond to the threat of bioterrorism in their own countries.

Finally Chapter nine, addresses some vital issues for the future in biodefense, and the needed response from the legal community.

As this book goes to press, I am hopeful that it will be read by policy makers, federal lawyers and public health administrators as well as students of law and public health in an effort to better prepare our nation against the threat of bioterrorism through the utilization of an optimal legal framework.

Victoria Sutton
Lubbock, Texas 2002



About the Author

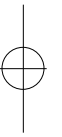
Victoria Sutton is both a scientist and a lawyer, enjoying careers in both fields over the years. She is a graduate of American University, Washington College of Law with a Juris Doctorate degree *magna cum laude*; Old Dominion University with a Master's Degree in Public Administration and The University of Texas at Dallas with a Doctorate of Philosophy in Environmental Sciences. Her undergraduate degrees are a Bachelor of Science in Zoology and a Bachelor of Science in Animal Science, *cum laude*, from North Carolina State University.

Dr. Sutton is Director of the Center for Biodefense, Law and Public Policy and Professor of Law, Texas Tech University School of Law, and is also associated with the Texas Institute for Environmental and Human Health, Texas Tech University. She previously served in the Bush Administration from 1989 to 1993 first in the U.S. Environmental Protection Agency and then as Assistant Director of the Office of Science and Technology Policy, Executive Office of the President. She subsequently held the position of Executive Director of The Ronald Reagan Institute for Emergency Medicine, George Washington University; and Research Associate Professor at the Uniformed Services University for the Health Sciences in Bethesda, Maryland, following her White House service.

During her time in Washington, D.C. she also worked for Judge S. Jay Plager, Circuit Judge for the U.S. Court of Appeals for the Federal Circuit; as well as the Department of Justice, Indian Resources Section. She also served on the National Academy of Engineering, Committee on the PNGV (New Car Initiative).

She is the author of *Law and Science—Cases and Materials* (2001), and numerous articles on constitutional law, environmental law and law and bioterrorism issues. She is a recipient of the Texas Tech University School of Law New Faculty Award and Texas Tech University School of Law Research Award.

Professor Sutton is a member of the District of Columbia Bar and of the Federal Circuit Bar.



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