May 28, 2008

Theoretical Perspectives on Public Law, Administration and Public Health History

Lydia C. Stewart Ferreira
Theoretical Perspectives on Public Law, Administration and Public Health

Introduction
The struggle between authority and liberty, the tyranny of the majority, the prevention of harm, unlimited state control, the necessary rights belonging to citizens, and the establishment of constitutional checks by a consent community – is the theory and practice of public health.

Public health refers to the well being of the whole community. Public health is involved in the addressing and preventing disease epidemics, such as the plague and cholera, in the community. To ensure the well being of the whole community, the majority of the given population – most often represented by the State – will take steps to address or prevent disease. The steps that the State takes to address or prevent disease may – and usually does - impact on the rights of individuals. Today, many historic disease epidemics, such as the plague and cholera, have been brought under control by modern medicine. Occasionally today, the State-individual rights debate involves public health - most often it does not. Today the ongoing discussion of State actions vs. individual rights is often determined by unelected judges involved in Canadian Charter cases. The debate about rights appears to have evolved beyond public health diseases – perhaps because there are few public heath diseases requiring State intervention. Whatever the reason, the evolution of State versus individual rights has, according to this author, has its roots in the history of mass epidemics. Astonishingly very little considered or written about the effect of mass epidemics on public and administrative law theory.

Focus of this Essay
This essay seeks to explore the interaction of mass epidemics and public and administrative law theory. The author argues that the theoretical perspectives of Locke and Mill regarding State rights and individual rights were shaped by the real world events of public health disease epidemics. More specifically, this essay explores how the 1665 Great Plague of London demonstrated State rights versus individual rights and may have influenced John Locke and his ideas outlined in “The Second Treatise on Civil Government [1690]. This essay also explores the London cholera epidemic of 1854 in terms of State vs. individual rights which may have influenced J.S. Mill perspective outlined in “On Liberty”. The “thick” version of the Rule of Law ascribed to Locke and

---

1 This is not the case for Developing countries which still struggle with vector borne diseases. It would be interesting to study the relationship in developing counties, which are still dealing with disease epidemics such as plague and cholera, and the role of State and individual rights. It is assumed by the author that such countries have decreased individual rights compared to developing countries without disease epidemics.

2 Cases such as HIV-AIDS transmission and the forced medication and quarantine of infectious TB patients have appeared before Ontario Courts.

3 The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

4 The author has done extensive research to find very little on the influence of public health epidemics on the theoretical perspectives of historical legal and political figures.
Mill – the connection between procedural and substantive justice – is a vision of social justice\footnote{Allan C. Hutchinson and Patrick Monahan, “Democracy and the Rule of Law” in A.C. Hutchinson and P. Monahan, Eds., The Rule of Law: Ideal or Ideology, (Toronto: Carswell, 1987), 119-127.} that must include an examination of the public health context.

John Locke (1632-1704)

“The period of European history between 1650 and 1800 has a quality all of its own.”\footnote{Charles-Edward Amory Winslow, The Conquest of Epidemic Disease: A Chapter in the History of Ideas, (Wisconsin: The University of Wisconsin Press, 1980 at 176.}

Locke lived in a time of brilliant minds – characterized by Shakespeare, Rembrandt, Bacon, Galileo, Descartes and Newton – where medicine was in its infancy and the laws of disease contagion, germ theory and preventative public health measures had not yet come to fruition. The Church and Monarch dominated individuals and individual rights. The Church and the Monarch were paternalistic overseers which ruled the masses with near absolute power. This near absolute rule was met with deference and obedience by these lower orders who had few opportunities for wealth and education. Plague and war were a constant menace.\footnote{For example, London experienced epidemics in 1667-69, 1669-72, 1673-75, 1675-80 and 1681.} However, unlike the plague described below, the wars did little to disrupt the course of economic and social life of society.\footnote{Supra 6, at 176.}

Locke himself was born Britain August 29, 1632, studied at Oxford and in 1666 became involved with Lord Anthony Ashley Cooper, 1st Earl of Shaftsbury. Shaftsbury opposed the king of the day, Charles II and his paternalistic, near absolute reign. Locke undertook medical studies under Thomas Sydenham.\footnote{“…Sydenham well deserving of his title of the English Hippocrates for his notable application of scientific principles in clinical medicine was by no means as good an epidemiologist as a clinician. He tended to ignore not merely the germ but the whole fact of contagion and led medicine back to an emphasis on mystical conceptions of unknowns and unknowable atmospheric influences which was far more extreme than that of Hippocrates himself” Supra 6, at VI. “He [Sydenham] was a friend of Locke and of Boyle but did not make a great impression upon his compatriots Supra 6, at 161.}

It is believed that around 1679 Locke composed the bulk of the “Two Treatises of Government”. The “Second Treatise on Civil Government,” Chapters IX-XII is part of this famous document. In the Second Treatise, Locke outlines his theory of civil society. Locke was opposed to absolute State power and promoted a theory of natural rights, social contract and consent to be governed.\footnote{“… Locke saw that the main problem of the State is the conquest of freedom and it was for its definition in terms of individual good that he above all strove.” Harold J. Laski, Political Thought in England, 1s Edition, United States of America, (Westport: Greenwood Press, 1920).}
But, let us go back to 1665 in order to examine how events – in addition to Shaftsbury and Sydenham – shaped Locke’s theories outlined in “Two Treatises of Government”.

**Great Plague**

In 1665, the Great Plague was a massive outbreak of disease in England. The Great Plague was believed to have arrived on Dutch trading ships carrying bales of cotton from Amsterdam. The plague germs were carried by fleas which lived as parasites on rats. Rats were everywhere in London. Areas of impoverished living conditions, wooden thatched roof housing and no sewage control facilitated the rat populations – and hence the diseased fleas that carried the plague. The ‘rich’ tended to live in better living conditions of stone build houses and were able to flee the city to country estates if the plague neared.

The plague killed 75,000 to 100,000 people, up to a fifth of London’s population. In September of 1665, it was estimated that 7,000 persons per week died in London of the plague. King Charles II of England, his family and his court left London for Oxford. Locke was out of Britain on “diplomatic” duty for the period of the Great Plague. The great medical clinician, Thomas Sydenham, is believed to also have left London.

“The nobility left the city for their estates in the country. They were followed by the merchants, and the lawyers. The Inns of Court were deserted. Most of the clergy suddenly decided they could best minister to their flocks from far, far away. The College of Surgeons fled to the country, which did not stop several of its members from writing learned papers about the disease they had been at such pains to avoid. …

By June the roads were clogged with people desperate to escape London. The Lord Mayor responded by closing the gates to anyone who did not have a certificate of health. These certificates became a currency more valuable than gold, and a thriving market in forged certificates grew up. … Anyone in constant contact with plague victims, such as doctors, nurses, inspectors, were compelled to carry colored staffs outdoors so that they could be easily seen and avoided.

those leaders betray the historic rights of Englishmen.”
11 In 1672, Locke became Secretary of Presentations and Secretary to the Council of Trade and Foreign Plantations in 1673. Historians state that Locke was involved in the trade of slaves. The hypocrisy of absolute power of one individual over another will not be discussed in this essay. However, it will be said that in the mid to late 1600s, slaves were the victims of disease epidemics such as Yellow Fever and harsh living conditions as were Londoners in the Great Plague of 1665.

13 Ibid 12.

14 After deserting London for more than a year, the King and his entourage to return to the city when all appeared safe in 1666.

15 cite
When one person in a house caught the plague the house was sealed until 40 days after the victim either recovered or died (usually the latter). Guards were posted at the door to see that no one got out. The guard had to be bribed to allow any food to passed to the inmates. It was not unknown for families to break through the walls of the house to escape, and in several cases they carefully lowered a noose over the guard's head from an attic window and hung him so they could get away.  

This above passage reflects severe, corrupt State actions which were unchecked and overrode individual rights.

**Effect of Plague**

The plague was not just a medical issue. The plague affected individual rights through discretionary State action. During the plague, the sick were isolated, the dead were buried, private property was burned to avoid contagion, streets and city exits were blocked, and anyone who did not co-operate with State actions could be arrested and tortured. While the plague itself knew no socio economic distinction, the measures to attempt to stem the plague did. Individual rights were different for the rich and the poor.

> "Cunning, privilege and private power stood above the laws, mocking the regulations that carried out extremely severe, even cruel punishments for people who were less powerful or less cunning."  

The plague also greatly affected the economics of Britain. Funds were required to set up and maintain segregated and isolation areas, to pay physicians and grave diggers, cleaners, guards and to reimburse – if reimbursed - those for burning infected property. The plague affected trade and commerce where the decrease and/or cessation of trade had a direct effect on the ability to earn income and create taxation revenues. The death or impoverishment of citizens also decreased tax revenue. The country’s noblemen paid little or no tax yet the nation’s strength depended on taxes. Epidemics had a way of decreasing the wealth generating capacity of the nation by decreasing the number of people available to tax. The “great die-offs” that accompanied the plague produced great social and economic change.  

The depopulation brought on by the plague brought a shortage of labour to till the land such that the price of labour rose and the price of farms fell. This labour-property ownership change spelt the end of feudalism as many serfs were able to buy their freedom and could potentially rent or own property. ‘Plague changes the whole status of England from a society based on personal service to a money

---

16 [http://www.britainexpress.com/History/plague.htm](http://www.britainexpress.com/History/plague.htm)


18 Ibid at 43.
Theoretical Perspectives on Public Law, Administration and Public Health

economy dictated by the State.” Thus, the Great Plague of 1665 had no only a great impact health but also on labour, taxation and the potential for land ownership.

The plague also decreased the power of the State – both that of the Church and the Monarch. The epidemic affected the power and status of the Church in terms of the clergy affected by the plague, their lack of positive assistance to those followers affected by the plague and their inability to verify their exalted status to communicate with God. For example, the plagues disproportionately stuck clerics who honored their calling to the sick.

“...and undermined Church authority. As each succeeding wave of the epidemic rolled over Europe, it became plain to the faithful that God had run amok and that His priestly servants couldn’t provide solace to a flea. In some parts of England, a fifth of the clergy simply fled the plague and abandoned their parishes in search of ale, mistresses or riches. … Many of the men who replaced dead or truant clerics were neither trustworthy nor holy. … The plague’s sheer killing efficiency clearly advanced the revolutionary notion that people were better off talking to God directly than going through a useless and impotent ecclesiastical bureaucracy.”

The status of the Monarch – that of Charles II who ruled during the 1665 Great Plague - may have also undergone a similar undermining of authority as seen in the Church. The Court was not present in London during the plague. It had retreated to Oxford. Yet this absence of the Monarch did not appear to be a loss for the people remaining in London.

“... and accepted the fact of their passing.”

The people appeared not to miss the absent Monarch but resented the State’s ability to interfere with their “ordinary affairs”. For example, the ordinary people bitterly resented the magisterial banning during the plague of funerals and funeral processions at which the living honored the dead and accepted the fact of their passing.

19 W. Hobson, World Health and History, (Bristol: John Wright and Sons Ltd., 1963) at 18.
20 Supra 17.
21 Doctors also lost credibility during the plague. It is said that the only prescription doctors gave for the plague is: fugo cito, vade longo, rede tarde (flee quickly, go far, come back slowly) Supra 17 at 56.
22 Supra 17 at 55.
24 Ibid.
25 It is interesting to note that not all historians saw the plague as decreasing State status. For example, “... new policies severely strained traditional ideals about the roles appropriate to rulers and those who were ruled, ... within Europe the creation of plague controls greatly strengthened both the image and reality of elite authority.” Supra 23 at 4.
Reflections
Without the State operating in London, Londoners went about their daily lives. Individuals did not need the State for their daily lives. State actions against individuals in an effort to stamp out the plague were met with resentment and resistance. State actions which could be circumvented by privilege and power. Absolute control by the State – be it the Monarch, the Church or both - was not helping but rather disadvantaging individuals. The plague planted seeds of doubt about Church rhetoric of God’s punishment for sins and about those who were traditionally privileged to speak with God – the Church and the Monarch. Coupled with the shortage of labour and increased wages and land ownership, Britain was ready to question the ideas of paternalistic State oversight. The Great Plague transformed not only human health but human thought – thoughts about State and individual rights. This Great Plague context made it viable for Locke’s theoretical perspectives on natural rights and consent to gain attention and be seen as an alternative to near absolute State power.

John Stuart Mill (1806-1873)
The theoretical perspectives outlined by Mill in his work “On Liberty” discussed the freedom of the individual versus the role of the State to impose unlimited control on the individual or groups of individuals. On Liberty was first published in 1859. However, according to Mill's autobiography, On Liberty was first conceived as a short essay in 1854. This date of 1854 is important because of a critical public health event and actions which took place in London at the same time. The event was the cholera outbreak of 1854 – which will be discussed below.

According to Mill, in order for society to have liberty and the positive utilitarian consequences for society, there must be freedom of speech, freedom of assembly and freedom to pursue tastes and pursuits. In the struggle between authority and liberty, Mills outlines how the tyranny of government must be held in check via the rights of citizens and the constitutional checks of consenting citizens. Mill warns not only of the tyranny of government but also the tyranny of the majority as threats to liberty. At the base of

While this may have been the immediate case, this author argues that reflection of the State’s role in everyday life versus the raw power of the State in extreme cases of public health safety – such as large epidemics – provided the practical context to delineate State rights and individual rights.

26 Supra 6 at117.


28 The author hypothesizes that the cholera outbreak of 1854 influenced the On Liberty short essay of 1854 by Mill.
Theoretical Perspectives on Public Law, Administration and Public Health

liberty, according to Mill, is individual sovereignty such that "[o]ver himself, over his own body and mind, the individual is sovereign".

According to Mill in his On Liberty, there is only one legitimate reason for the exercise of state power over individuals:

"That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[29]

This concept – individual rights prevail except where the State may legitimately impose on individual rights in order to prevent harm to others – is known as the ‘harm principle’.

Mill’s harm principle was simultaneously being explored in the public health context during the 1854 cholera outbreak in London. In 1854, London had approximately

“… two and a half million people crammed inside a thirty mile circumference. But most of the techniques for managing that kind of population density that we now take for granted – recycling centers, public-health departments, safe sewage removal – hadn’t been invented yet.”[30]

Two and a half million people created a lot of human excrement and corpses. There were no sewage treatment plants and the waterclosets (toilets) of the rich tended to flush the contents into existing cesspools in the basement of homes - which often overflowed. Corpses were buried with little thought to ground water sources. It is now believed that human excrement and corpses were contaminating drinking water.

Back in 1854, the cholera outbreak was described by Dr. John Snow as “the most terrible outbreak of cholera which ever occurred in this kingdom.”[31] Within a radius of 250 yards, over 500 cases of cholera occurred within a period of ten days.[32] It was John Snow who originally established a causal link between cholera transmission and exposure to contaminated water. Snow is considered to be one of the fathers of epidemiology because of his work in tracing the source of the 1854 cholera. Snow found that the local water pump was dispensing cholera infected drinking water. This was the first time the spread of a water-borne disease had been shown to be due to specific contamination of water-supply by an agent present in the excreta of people suffering from the disease.[33]

Snow convinced the local council to disable the well pump by removing its handle thus stopping the epidemic. The harm principle of contaminating public drinking water with

---

[31] Supra 6 at 273.
[32] Ibid at 274.
[33] Supra 19, at 92.
an individual’s excrement or burial forced the State to investigate and act. It was discovered that the public well had been dug only three feet from an old cesspit that had begun to leak fecal bacteria. A baby who had contracted cholera from another source had its diapers washed into this cesspit, the opening of which was under a nearby house.³⁴

Thus, during the ‘Great Sanitary Awakening’ of the 1800s, burying the dead outside the city, removing ‘night soil’ and walling in sewers to prevent contamination of the water supply helped to protect the majority from harm. An individual was not at liberty to place a dead body or excrement in or near a drinking well as that action would bring harm to others. In this respect, according to the theoretical perspective of Mill, this would be a legitimate reason for state power over the individual.

“During the mid-nineteenth century, burgeoning democratic movements in Europe rallied to the idea that health and liberty were mutually dependent. … all saw democracy and public health as connected and believed that, until life was improved for the poor, disease could not be prevented. Such hopes of improving the urban environment were given practical expression especially in Britain during the mid-1800s, the heroic age of sanitary engineering “Think of what our nation stands for”, John Benthman, the poet laureate, exhorted in verse, “Democracy and proper drains.”³⁵

However, the right of the State to take action to decrease harm to its citizens but which tread on individual rights was not met with gratitude.

“… The Times, commented on a debate in the House of Commons, 31 July, 1854, which said that ‘the English people would prefer to take the chance of cholera and the rest rather than be bullied into health’.³⁶

Modern Times
Fast forward to our present time – a time were most public health disease are controlled by modern medicine, public government and public infrastructure – through vaccinations, chlorinated water, sewage systems, land use and pollution controls – to name a few. We have evolved so the public health State power is inconspicuous.

Today, the 1982 Canadian Charter of Rights and Freedoms establishes power limitation to curtail the rights of the State - the federal and provincial governments.³⁷ Individual

---

³⁴ It was common at the time to have a cesspit under most homes. Most families tried to have their raw sewage collected and dumped in the Thames to prevent their cesspit from filling faster than the sewage could decompose into the soil. [http://en.wikipedia.org/wiki/John_Snow_(physician)]


³⁶ Supra 19 at 92.
rights are protected from State interference. These individual rights include freedom of religion, expression, assembly, association, voting, mobility, various procedural rights as well as equal protection under the law.

However, State intervention from the federal or provincial government on individual rights can be justified if State action passes the section 1/Oakes Test. However, this test requires the State action to pressing and substantial and reasonable and demonstrably justified – achieve the objective, not arbitrary or unfair but rationally connected to the objective. The State action must impairing individual rights as little as possible and proportional in terms of limiting the right and achieving a sufficiently important objective.

Via section 33 of the Charter, the State can also infringe on individual rights if the empowering statute declares that the statute overrides the Charter’s protected rights.38

In the even of threats to the public’s health, the State may override individual rights – not because it is unaware of the impact or unequal equality as may have been the case with Locke and Mill – but as a last resort rather than a first or only resort in Locke’s and Mill’s time. We are, in practice, operationalizing Locke and Mill.

Judicial discretion, rather than democratically elected representatives, often becomes the deciding body regarding the rights of the State to infringe on individual rights.39 It could be argued that the Courts act as a ‘constitutional check’ on State power as Mill described in On Liberty. On the other hand, it can be argued that the Courts are the embodiment of the new absolute power over the State and individuals. How the judicial discretion is exercised40 depends on whether it is seen as a constitutional check or an absolute power.

Conclusion
The theoretical perspectives of John Locke and J.S. Mill regarding State and individual rights were intricately linked to the context of their day. Their context involved plaque and cholera outbreaks. It is with astonishment that the major public health disease outbreaks were hardly - if ever - mentioned in theoretical descriptions or biographies of these two men. While detailed description of political theory and political events are made available to any reader, there is a questionable lack of reference to plaques and disease, their economic impact and their impact on State and individual rights. The lack of discussion about theoretical perspective of State and individual rights in the context of major public health disease outbreaks involving State and individual rights may be three fold: First, Locke and Mill may not have been aware of the impact of public health State power had on individual rights. The men may have traveled in social-

---

37 Peter Hogg, Constitutional Law of Canada, (2004), excerpts from Ch. 12 “Parliamentary Sovereignty” at 12.2(b).
38 Ibid
40 Ibid at 21.
political circles that exempted them from the details of the application and impact of State power. Second, Locke and Mill may also have condoned State power over individual rights given the fear of disease contagion and the infancy of medicine. State power over individual rights may have been a form of their own self-preservation. Third, Locke and Mill may have condoned State power over individual rights when the particular individuals were not seen as having the same full individual rights – that being the poor and slaves.

There also appears to be an evolution in the theoretical perspective on the rights of the State and the rights of the individual. In John Locke’s day, the State appears to have had absolute right over the individual – an issue Locke hesitantly discussed given the autonomy of this writings and the lack of the right to freedom of speech in his day. The State’s power over the individual was openly questioned in Mill’s day. In modern times – that is post Charter, individuals have moved beyond questioning to actual litigation against the State if individual rights are perceived to be infringed upon by State action. In each time period, there appears to be an increasing role for individual rights and a decreasing role for the State – informally in Locke’s day where the State imposed sever often corrupt sanctions on the people. More formally in Mill’s day as seen when Snow went to local council to evoke State rights. The Charter, a written document with substantial judicial interpretation outlined in the caselaw, is the most formal description of State and individual rights. However, in all timeframes, where there have been major threats to public health, the absolute right of the State to impose on individual rights is sanctioned - by divine doctrine in Locke’s day, by the harm principle in Mill’s day and by the Charter’s section 1/Oakes Test for individual rights infringement. The challenge in our ever populating world is to distinguish between individual rights that cause harm to others and those that do not. The challenge is also to distinguish the roles and responsibilities among various State actors acting on behalf of the State. In both cases, historical public health disease outbreaks have shaped the theoretical perspectives Locke and Mill – London’s Great Plague of 1665 and the cholera epidemic of 1854 respectively. Public health – and the balancing of rights in the context of epidemics – will continue to shape theoretical perspectives for years to come.

41 Linden states there is a need not only for role and responsibility clarification but also transparent and accountable ministerial directives and rules and processes to exchange information between State actors. Hon. Sidney B. Linden, Vol. 4, Report of the Ipperwash Inquiry, Executive Summary, 91-93 (Queens Printer for Ontario, Ministry of the Attorney General, 2007).
APPENDIX A
Mill – *On Liberty*

“The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used is physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.”

42 Supra 29, at13.
BIBLIOGRAPHY


David K. Patterson, Pandemic Influenza, 1700-1900, (New Jersey: Rowman and Littlefield, 1986).


John Locke, The Second Treatise on Civil Government [1690], Chapters IX-XII and paragraphs 95 and 222.


Peter Hogg, Constitutional Law of Canada, (2004), excerpts from Ch. 9 “Responsible Government” and Ch. 12 “Parliamentary Sovereignty”.

GS/Law 6761.03 Fall 2007
Some Theoretical Perspectives on Public Law and Administration
Final Paper - Nov 30, 2007


W. Hobson, *World Health and History*, (Bristol: John Wright and Sons Ltd., 1963).