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ARTICLE

In Defense of the “Old” Public Health

THE LEGAL FRAMEWORK FOR THE REGULATION OF PUBLIC HEALTH*

Richard A. Epstein[†]

ABSTRACT

The traditional forms of public health law were directed largely toward communicable diseases and other externalities, such as pollution, with negative health impacts. The more modern view treats any health issue as one of public health so long as it affects large numbers of individuals, and this definition includes such matters as obesity and diabetes. This paper examines the historical and constitutional evolution of the public health principle as it moved from the narrower to the broader conception. It then argues that the narrower principle better defines the appropriate scope of coercive government intervention than the broader definition, which could easily authorize intervention in economic affairs whose indirect effects are likely to reduce overall social wealth and freedom, and in turn, the overall health levels of the population.

* © 2004 Richard A. Epstein. All Rights Reserved. Portions of this article are taken with modification from an earlier piece that I have published on the same subject, *Let the Shoemaker Stick to His Last: A Defense of the “Old Public Health,”* 46 PERSP. BIO. MED. S176 (2003).

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I. INTRODUCTION: THE MYSTIQUE OF PUBLIC HEALTH

In April of 2003 I had the honor to deliver the keynote address at a conference on obesity sponsored by the American Enterprise Institute. The room was filled with people who specialized in this growing area and who had a deep professional commitment to eliminating a condition that has been rightly linked to discomfort, disability, and death. For reasons that often resonate in political and academic circles, especially in Washington, D.C., most of these people strongly supported various forms of government intervention to respond to the rising peril of obesity. They held deep convictions that the bad eating habits of Americans have grown worse and that profit-seeking corporations have manipulated the situation to serve their vested interest in peddling foods with instantaneous allure but long-term detrimental effects. The belief in consumer sovereignty and rationality was not strongly in evidence, and my own speech, which countered the prevailing wisdom, received a chilly reception in many quarters – hardly a first in my academic career. But the point that struck me most on that occasion had little to do with the content of the arguments pro and con for the use of regulation in this context. Rather, it was that all the members of the public health service who attended the event appeared *in uniform*. They looked and acted as though they were part of the military establishment, complete with medals, bars, and stripes.

This observation relates to more than esthetics, for it illuminates the popular attitude toward public health. Most people start with the naive assumption that when matters of public health are on the table, claims for individual liberty normally must give way. The usual thinking about this subject is that preserving the public health is an essential state function that cries out for the use of coercive powers. Deciding whether a given activity counts as a public health function therefore tells us about the legitimacy of government intervention.¹ Modern interventionists have seized on these associations to expand government power by defending a wide new account of public health.

¹ See Mark A. Hall, *The Scope and Limits of Public Health Law*, 46 PERSP. BIOLOGY MED. S199, at S202.

The traditional position by and large reserved the strong powers of the state to containing epidemics, contagion, and nuisances, which, for reasons that I shall presently discuss, do not lend themselves effectively to either market solutions or to private actions in tort. The newer definitions of public health offer, in contrast, a cornucopia of good practices that combine all the elements of the traditional system with new topics involving everything from improving patient care to redressing inequalities of wealth and fortune that might contribute to differential health outcomes. The set of interventions proposed in these cases therefore go far beyond inspection, quarantine, and vaccination to include such diverse matters as medical malpractice liability, access to health care, privacy, and the alleviation of poverty by redressing overall economic inequalities of wealth.² The language of this conception's defenders best states what it requires:

The broad pole of public health defines a very wide scope of organized activities, concerned not only with the provision of all types of health services, preventive and therapeutic, but also with the many other components relevant to the operation of a national health system. These involve questions of health behavior and the environment as well as the production of resources (personnel and facilities), the organization of programs, the development of economic support, and the many strategies required to ensure equity and quality in the distribution of health services.³

In his similar account of the scope of public health, Lawrence Gostin quite consciously entwines old functions (which are, rightly, never abandoned) with new ones:

The mission of public health is broad, encompassing systematic efforts to promote physical and mental health and to prevent disease, injury and disability. The core functions of public health agencies are to prevent epidemics, protect against environmental hazards, promote healthy behaviors, respond to disasters and assist communities in recovery, and assure the quality and accessibility of health care services.⁴

In essence, the new definition sees public health as including all measures to protect individual or collective health that are not involved with the treatment of given individuals

² See, e.g., Norman Daniels et al., *Why Justice is Good for Our Health: The Social Determinants of Health Inequalities*, DAEDALUS, Fall 1999, at 215 (1999).

³ THEODORE H. TULCHINSKY & ELENA A. VARAVIKOVA, *THE NEW PUBLIC HEALTH: AN INTRODUCTION FOR THE 21ST CENTURY* xix (2000).

⁴ LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 16-17 (2000).

within a medical setting. It includes dealing directly with risks of communicable disease, and of course pollution, but only to the extent that these are directly linked to particular pathogens or substances, as opposed to larger behavioral and ecological accounts of the determinants of health.⁵ It may well be that some overall improvement in the income or wealth of society will improve public health, but these general improvements, of which there have been many, correlate no more closely with public health issues than to a thousand other measures of individual happiness and satisfaction.

As Mark Hall has emphasized, these are worthy goals, but they are not public health goals as such.⁶ All arguments about the proper response to each of these questions are a fair subject of debate. One could argue that tort law should dominate contract in medical malpractice, or the reverse. One could argue that protecting medical privacy through regulation is central to health care, or the reverse. One could argue that income and wealth distribution are critical to the just society, or the reverse. My thesis here is not to quiet that debate; rather, my thesis is that we should discuss these issues for what they are and evaluate them as such – not as a branch of public health law where the case for government intervention (which I generally oppose in these areas) gets that extra boost of legitimacy. More concretely, I oppose these proposals not only because they have dubious ends, but more critically because their means, such as the pursuit of economic equality, will likely push strongly in the opposite direction when the full range of factors exerts its force.

In approaching this hot topic, I shall deal with the problem not only as one of contemporary choice but also as one with historical and constitutional dimensions. I shall trace the nineteenth century (or at least the late-nineteenth century) conception of public health and argue that it is in many ways superior to the rival versions that recently have gained ground. In making this argument, I do *not* defend each and every nineteenth century decision or policy, or worse, believe that the then-common forms of state regulation had no downside. Quite the opposite, I think that “the dark side” to nineteenth century

⁵ Lawrence O. Gostin, et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59 (1999), criticized in Hall, *supra* note 1, at S206.

⁶ Hall, *supra* note 1, at S206.

regulation, as William Novak has called it,⁷ clearly surfaces in the eagerness with which late-nineteenth and early-twentieth century judges sustained racial segregation in public and private life under the then-regnant account of the police power, which treated racial purity as a legitimate objective of government. Recall that in *Plessy v. Ferguson*,⁸ the Supreme Court scored a regrettable trifecta when in a single decision it sustained, over the lone dissent of Justice John Marshall Harlan, state antimiscegenation laws, segregation in railroad transportation, and segregated schools. This decision, most definitely, did not show any respect for the laissez-faire tradition of limited government that I staunchly defend. Instead, the Supreme Court let down its guard against the dangers of faction and abuse in political systems, a stance made intolerable by the systematic exclusion of blacks from the electorate. As such, its decision was antithetical to everything that laissez-faire stands for.

Let me stress therefore at the outset that my purpose here is not to defend any and all nineteenth century police power decisions, but only that strand of cases consistent with the vision of limited government that animated the old tradition of public health. I am therefore quite happy to admit – make that insist – that there are individual decisions, as Novak has argued, as illiberal and indefensible as one could imagine.⁹

My point here is narrow but important: the *limited set of ends* in the older tradition of public health is superior to the modern, more capacious view, which encompasses all areas that affect the health of ordinary individuals. I believe that today's broad (and meddlesome) definition of public health will compromise the health of the very individuals its proponents seek to protect. That definition extends regulation into areas where it ought not operate, sapping the material resources and political focus from responding to matters more appropriate for regulation, such as the spread of *communicable* diseases or public nuisances like widespread pollution. The correct theory of public health tracks the economic conception of public goods,

⁷ See William J. Novak, *Private Wealth and Public Health: A Critique of Richard Epstein's Defense of the Old Public Health*, 46 PERSP. BIO. & MED. S176, S190-91 (2003). Indeed, I thought that I had made the same point myself. See Richard A. Epstein, *Let the Shoemaker Stick to His Last: A Defense of the 'Old' Public Health*, 46 PERSP. BIO. & MED. S138, S147-48.

⁸ See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁹ Novak, *supra* note 7.

namely those nonexcludable goods that cannot be given to one unless they are also given to another.¹⁰ In contrast to public goods, public bads are inflicted upon others without their consent, as are communicable diseases and pollution, but not obesity or genetic diseases.

In dealing with the definition of public health, one must resist the temptation of insisting "better safe than sorry," or it is "best to err on the side of safety." That maxim works as a double-edged sword, for the risks of overregulation count not solely in dollars and cents but also in terms of negative safety effects. In risk regulation, the "perils of prudence" impel the overregulation of remote risks under worst-case hypotheses. As Albert Nichols and Richard Zeckhauser argued some time ago, overregulation could increase, not reduce, risk.¹¹ Their target was the regrettable tendency to use unreliable and alarmist estimates in areas concededly subject to government regulation, such as cancer control. But the basic point also can be analogized to unwise regulation passed in the name of health or safety, as with the broad definition of public health. That broader definition justifies interference with contractual arrangements (such as for providing vaccines) that could save lives, while undercutting the control of communicable diseases such as AIDS.

In order to develop these themes, Part II outlines in greater detail the difference between the old and new accounts of public health. Part III outlines the two rival accounts of public health as they apply to both questions of individual rights and matters of federal and state power, where they play an important if underappreciated role. Part IV examines the parallel treatment of the term "public" in the time-honored expression "affected with the public interest," which in the nineteenth century was a restricted condition in which the state, under the police power, could regulate the rates that private firms charged in the market place. The next two sections examine the parallel evolution of the term "public" in connection with public health. Part V traces the term's use in connection with quarantine, vaccination, and regulation under the police power in the period before 1937 when, roughly

¹⁰ For the classical account, see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971).

¹¹ Albert L. Nichols & Richard J. Zeckhauser, *The Perils of Prudence: How Conservative Risk Assessments Distort Risk Regulation*, *REGULATION*, Nov./Dec. 1986, at 13.

speaking, the use of government power conformed to a classical liberal model. Section VI then extends that analysis forward into the modern period, examining these same heads of liability. A short conclusion follows.

II. THE OLD PUBLIC HEALTH

Salus Populi Suprema Lex. "The well being of the public is the supreme law." That hoary legal maxim is not a ringing endorsement of the welfare state in an age of technological progress. Rather, that Latin maxim is as old as the law itself, with powerful roots even in the American political tradition.¹² Taken at face value, it embodies the basic proposition that individual liberty, especially on matters of public health, must bow to the common good. Thus, the state may justifiably use public force to achieve that end. In many nations, this maxim remains a matter of political prudence, guiding legislative and administrative decision making. In the United States, however, our constitutional structure surely raises the stakes, as it explicitly protects liberty and property against both state and federal regulation. The command that "no person shall be deprived of life, liberty or property without due process of law"¹³ contains both substantive and procedural dimensions.¹⁴

On its face, this categorical provision does not permit any regulation that trenches on liberty or property. Historically, however, the protection of liberty and property has never been read absolutely. Rather, in light of the long-standing maxim, the protection of liberty and property as a constitutional matter has always been subject to an *implied* exception under the so-called police power. The grand question, in which the disputes over public health form a part, is: How far does (or should) this elusive police power extend? On the modern view it reaches to any matter of general public interest or concern, including health in its broadest signification. The law makes little attempt to identify separate headings of the police power, such as public health, that operate as limited exceptions to the general presumption in favor of protecting liberty and property. It makes even less attempt to identify any

¹² WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA* 9 (1996).

¹³ U.S. CONST. amend. V (binding the federal government); *id.* amend. XIV (binding the states).

¹⁴ *See, e.g., Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897).

category of regulation that lies outside the police power. In contrast, the earlier period of our constitutional history – roughly speaking, any time before 1937 – did recognize an ample police power, whose extent has been documented in William Novak's book "The People's Welfare."¹⁵

At this point, I do not wish to deal with doctrinal variations in the formative period of the Constitution. Novak is surely correct to note that most of the police power jurisprudence developed in the period after the Civil War when the nation faced the multiple challenges associated with the rapid industrialization of the economy.¹⁶ The birth and growth of what are now called network industries, such as railroads and telephones, gave rise to extensive legislation and litigation. The period also witnessed extensive regulation to preserve common pool assets, such as wildlife, threatened with mass extinction by over-hunting. But these new challenges should not be used to obscure the only point that I wish to make here. No one ever doubted, either before or after the Civil War, that controlling diseases and contagions, by quarantine if necessary, fell within the state's police power. Nor, on the other side, did the state ever invoke the police power to mandate unwilling hospitals to admit patients or prevent hospitals from discriminating on the ground of a prior medical condition. To the contrary, the state stoutly protected the autonomy of these institutions during that period.¹⁷ The police power was extensive and subject to variations. But no one could mistake the earlier conceptions for the latter ones simply by stressing the levels of evolution within the doctrine.

To some, the broad use of the police power during the nineteenth century decisively refutes the contention that the late nineteenth century was a halcyon period during which the American economy thrived unshackled by any and all forms of government regulation. In its place stood, as Novak has urged, the view that state limitations on private power did not assist economic development but rather in creating "a special sphere of social activity, distinctively cognizable as an object of governance."¹⁸ But no careful defender of laissez-faire has ever

¹⁵ See NOVAK, *supra* note 12.

¹⁶ Novak, *supra* note 7, at S186-88.

¹⁷ See, e.g., *McDonald v. Massachusetts*, 120 Mass. 432 (1876).

¹⁸ See NOVAK, *supra* note 12, at 86. In his jacket blurb, Robert Gordon writes: "[Novak] blasts to pieces the surprisingly hardy myth of laissez-faire, the libertarian fantasy that until the twentieth century the American state left private property owners and economic entrepreneurs alone."

confused property and liberty with anarchy; all have indeed recognized the case for some state regulation under the police power. Even though the classical writers on the subject, such as Ernst Freund,¹⁹ were reluctant to offer any precise or comprehensive definition of the term, the received wisdom *confined* its application to laws and regulations that advanced the *public* safety, health, and morals as well as the catchall general welfare category.²⁰ It is therefore critical to develop a test to determine whether the nineteenth-century cases conformed to or deviated from the laissez-faire vision of limited government, and if so, in what areas. Endlessly reciting instances of state nuisance regulation does not answer that question, for these regulations in principle comport with *both* the broader and narrower conceptions of the police power. The acid test lies elsewhere. Can one find the use of the police power to sustain any overtly anticompetitive or protectionist program, where the former evinces a preference for competition in domestic labor markets and the latter for open markets across state boundaries?²¹ For example, so-called labor statutes, which regulated the terms and conditions of employment contracts, would be permissible under the broader definition of a well-regulated society, but not under the traditional definition of the police power, which defined labor statutes in opposition to health and safety statutes. In more modern terms, labor statutes were those whose anticompetitive effects dominated, so that they fell outside the pre-1937 scope of the police power.²² The same was true for rate regulation in ordinary businesses not "affected by the public interest."²³

¹⁹ See, e.g., ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* (1904).

²⁰ See, e.g., NOVAK, *supra* note 12, at 13-17. "The police power is the inherent plenary power of a State . . . to prescribe regulations to preserve and promote the public safety, health, and morals, and to prohibit all things hurtful to the comfort and welfare of society." *Id.* at 13 (quoting Lewis Hockheimer, *Police Power*, 44 CENT. L.J. 158 (1897)).

²¹ In making this analysis, recall that the foreign commerce clause was drafted with explicit protectionist impulses to present a unified front in negotiation with European powers. See THE FEDERALIST NO. 11 (Alexander Hamilton). But Hamilton also envisioned "an unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets." *Id.*

²² See, e.g., *Adair v. United States*, 208 U.S. 161 (1908) (striking down a law that required mandatory collective bargaining on the railroads); *Coppage v. Kansas*, 236 U.S. 1 (1914) (striking down a state statute that required mandatory collective bargaining on the railroads).

²³ See *infra* Part III.

Novak's exhaustive compilation of the nineteenth century uses of the police power unduly stresses the admitted scope of the powers while ignoring the limitations on them.²⁴ At no point does he list even one regulation that cuts against ordinary competition or in favor of protectionism. His selective vision is as important with respect to public health as with everything else. No one questions that the police power has emphatically applied to matters of public health and safety, but only in a manner consistent with the then-prevailing constitutional agenda.

Extensive litigation has tested the exact limits of that power, but public health has always rested at its core. In upholding a compulsory vaccination law against smallpox, Justice Harlan put the matter this way in *Jacobson v. Massachusetts*²⁵ — a case to which we shall return at length:

Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and "health laws of every description;" indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations, established directly by legislative enactment as will protect the public health and the public safety. *Gibbons v. Ogden*, [22 U.S. 1 (1824)].²⁶

Harlan's formulation covers two distinct doctrinal elements that play essential roles in American constitutional history. One theme, of secondary importance in this context, articulates the division of authority between the state and national governments in public health regulation. Harlan's citation to *Gibbons v. Ogden* reinforces the point because it was at the time the leading decision on the scope of Congress's power under the Commerce Clause.²⁷ The second, which is our primary focus, addresses how far government at either level

²⁴ For a similar approach, see GOSTIN, *supra* note 4, at 47-51.

²⁵ 197 U.S. 11 (1905).

²⁶ *Id.* at 25. The references to jurisdiction may be of little concern to non-lawyers, but they are an essential part of the overall story of health care regulation in the United States. The case authority cited by Justice Harlan immediately after the quotation was *Gibbons v. Ogden*, 22 U.S. 1 (1824), which was concerned with the delineation of the power of Congress "to regulate commerce . . . among the several states. . . ." *Id.* at 77.

²⁷ U.S. CONST., art. I, § 8, cl. 3. For my detailed analysis of this provision, see, Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

may regulate on behalf of the public health.²⁸ The question was difficult because broad as the police power was, it was not (at least 100 years ago) an "open sesame" that legitimated any and all uses of government power invoking the mantra "public health or public safety."

On the jurisdictional question, the limitations on federal power alluded to in *Jacobson* have largely disintegrated.²⁹ An expansive interpretation of commerce has defeated the traditional effort to demarcate exclusive spheres of state and federal regulation. In the hands of Chief Justice Marshall, the term "commerce" received what he regarded as a broad and not technical definition. It covered transportation and trade that crossed state boundaries. It thus excluded all solely intrastate commerce and trade, and more importantly, all manufacture and agriculture, which were regarded as "local" concerns beyond the power of the federal government.³⁰

This distribution of powers left the national government without a general police power over these internal matters. Its power over public health therefore had to stem from other significant powers granted by the Constitution. The power to raise and maintain armed forces necessarily gave the national government influence over public health issues in military contexts.³¹ Its powers over immigration allowed it to set and implement policies that determined which individuals should and should not be admitted to the United States, a choice in which issues of public health played a great role. Finally, its power over transportation and navigation gave it some limited power over public health matters. But all things considered, under the basic constitutional design in place during the formative period of this country's public health regulation, the brunt of the work fell on the states. Chief Justice Marshall explicitly acknowledged that truth in *Gibbons* when he noted

²⁸ See *Gibbons*, 22 U.S. at 205-06 (noting that state quarantine laws were consistent with the commerce power). For a more emphatic statement of the same point, see *License Cases*, 46 U.S. 504, 580-81 (1847).

²⁹ I ignore for these purposes the recent decisions of the Supreme Court that have struck down some federal enactments as falling outside the scope of the commerce clause. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

³⁰ For just one indication that this was the clear understanding of commerce, see THE FEDERALIST NO. 17 (Alexander Hamilton).

³¹ See, e.g., An Act Relative to Quarantine, 1 Stat. 619 (1799); 1 Stat. 474 (1796) (seeking to coordinate the execution of the federal power with applicable state laws, acknowledged as proper under the police power). See NOVAK, *supra* note 12, at 210.

that quarantine and inspection laws – designed in part as health measures – fell exclusively within the power of the states at the beginning or conclusion of the journey.³²

The most contentious question in the earlier period, however, did not involve federalism but rather concerned the claims of individuals attempting to resist regulation by government at either level. At this point, the matter of public health gives rise to the well-known tension between individual liberty and the common good, which became more central in the post-Civil War period. Justice Harlan stated this point forcefully, as well:

But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis, organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual to use his own, whether in respect to his person or his property, regardless of the injury that may be done to others.³³

The central task, therefore, is to explicate the relationship between individual liberty (“real” or otherwise) and the common good in the context of public health, including the narrow question raised in *Jacobson*: When may the government impose a compulsory vaccination requirement? One cannot consider that question in isolation because the same tension between individual liberty and the common good arose in a wide range of settings during this period of constitutional history – roughly the years between the end of the Civil War and the constitutional crisis of 1937. In dealing with this issue, two questions must be addressed. The first of these concerns the correct account of public health or indeed any other form of public good, namely those concerns that trigger the police power. The second is the means-ends question of whether, with the legitimate end established – say the control of a contagion – the means in question properly achieves the purpose.

³² *Gibbons v. Ogden*, 22 U.S. 1, 203, 205-06 (1824).

³³ *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

On both these issues we can see a powerful transformation from a more to a less restrictive view. Regarding the question of public health or common good, the original definition – not perfectly, but by and large – embraced only those goods or bads that raised serious issues of market failure, such that competitive markets based on strong individual property rights could not reliably achieve anything close to the social optimum. The rival view, which gained momentum over this period, simply invokes the idea of the common good or the public interest to justify state regulation on any matter of business or social life that affects a substantial fraction of the community; the allocative outcomes of the competitive marketplace no longer supply a normative baseline against which to measure the efficacy and validity of state regulation. An enormous gulf separates these two conceptions both on matters of general regulation and public health. On the former, the broader view allows for extensive regulation of competitive markets that the narrower view limits. On the latter, public health ceases to regard only questions of sanitation and communicable diseases, and becomes a vast justification for any government effort to improve the health and overall quality of life of its citizens.³⁴

III. BUSINESSES "AFFECTED WITH THE PUBLIC INTEREST": 1865-1937

Justice Harlan's formulation of the police power in *Jacobson* did not speak of the ability of the state to regulate for matters of health generally, but confined its powers to the regulation of *public* health. Was the word "public" simply window-dressing, so that all matters of health (public or private, as it were) became proper objects for government regulation, or did that term identify a limited and proper sphere of government regulation? The choice between rival conceptions did not arise in a vacuum, but against an extensive legal tradition governing the relationship between private rights and the common good. In its earliest manifestation, the question was whether certain forms of property were to be regarded as private or common. As early as Justinian, "natural

³⁴ THEODORE H. TULCHINSKY & ELENA A. VARAVIKOVA, *THE NEW PUBLIC HEALTH: AN INTRODUCTION FOR THE 21ST CENTURY* (2000).

reason" demanded that certain forms of property be public.³⁵ These included, most prominently, the air and the water, with the beach as the marginal case. On the private side of the line lay most land, ordinary movables, and wild animals whether on land, sea, or air. All of these were unowned in the state of nature, but could become privately owned by occupation in the case of land, by taking in the case of chattels, and by capture in the case of wild animals.

The initial set of rules for common property was relatively simple because the sole function of the state was to prevent people from excluding others.³⁶ However, the situation became more complicated when widening a waterway or building a bridge required large-scale investment in infrastructure. No longer would rules of open access suffice. Someone had to provide the needed capital and management. At this point the state had only two options for financing this so-called public good – that is, a good which has to be supplied to all if it is supplied to even one. The state could tax and spend or it could grant an exclusive franchise to a private firm prepared to make the needed investment. An enormous historical debate quickly arose as how best to fund and construct these public goods.

The history of lighthouses neatly illustrates the matter. Although often described as a pure public good because their beacons benefit all users,³⁷ lighthouses were privately owned and operated before the 1830s. The owner-operators collected their fees from landed vessels by relying on the British customs office with its coercive power over ships. Yet that semi-private system did not last, replaced instead by one that financed lighthouses out of public resources. Why the shift? In part the answer depends on which deviation from pure market institutions creates fewer distortions. The private lighthouses probably were able to extract a monopoly rent for their services, which reduced the level of trade. The taxation could contain that risk so long as the political process limited the amount of tax collected to the cost of the service provided. But public administration can easily introduce administrative

³⁵ See, e.g., J. INST. 2.1.pr, available at <http://www.fordham.edu/halsall/basis/535institutes.html> (last visited June 16, 2004).

³⁶ RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD 254-56 (1998).

³⁷ See Ronald Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357 (1974). Coase stressed the ability of private markets to fund public goods, but downplayed the use of public power to collect the needed revenues.

inefficiencies of its own. Whether the newer system outperformed the older one is an empirical question.

This same painful choice between monopoly power and taxation arose with other forms of improvements. Consider the example of widening the channel on a single river or building a single bridge. Once the state chose not to construct the improvement itself, it allowed the franchisee to charge, quite literally, what the traffic would bear, which opened the public to the risk of monopoly exploitation.³⁸ The task was then to limit the return without confiscating the initial investment. Here is not the place to discuss the full range of techniques used to approach this goal.³⁹ But it is critical to note that first the English and then the American law spoke of these monopolies as businesses "affected with the public interest." Sir Matthew Hale⁴⁰ used this phrase in the seventeenth century to explain why individuals who operated a public wharf – that is one to which all *must* come to load and unload – could not charge whatever rates they chose but had to charge rates that were only "reasonable and moderate." Hale supplied the decisive argument in *Allnutt v. Inglis*,⁴¹ a challenge to a state monopoly in the form of a licensed customs house for goods bound for export free of local custom duties. Lord Ellenborough held that the licensee's monopoly power justified limitations on rates.

There is no doubt that the general principle is favored in both law and justice, that every man may fix what price he pleases upon his own property or the use of it; but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of the monopoly, he must as an equivalent perform the duty attached to it on reasonable terms.⁴²

The United States Supreme Court adopted this principle in *Munn v. Illinois*,⁴³ when it rejected a constitutional challenge to the maximum rates that Illinois set for grain

³⁸ For a more detailed discussion, see EPSTEIN, *supra* note 36, at 278-318.

³⁹ See HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 (1991). For a judicial assessment of rate-making, see *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

⁴⁰ Matthew Hale, *De Portibus Maris* (Concerning the Gates to the Sea), in FRANCIS HARGRAVE, A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND FROM MANUSCRIPTS (1787).

⁴¹ 104 Eng. Rep. 206 (K.B. 1810).

⁴² 104 Eng. Rep. at 210-11.

⁴³ 94 U.S. 113 (1876).

elevators operating along-side the railroad tracks, holding that they were "affected with the public interest." Justice Waite quoted extensively from both Hale and *Allnutt*,⁴⁴ including Hale's reference to legal monopoly. Waite alluded to some agreement among the grain operators, but stopped short of calling this "virtual" monopoly a cartel, concluding that any remedy for the operators lay at the polls and not with the Court.⁴⁵ Justice Field, a consistent libertarian, issued a stinging dissent to the effect that if grain elevators were affected with the public interest, then so was every other business.⁴⁶ But all the while he remained eerily quiet on the issue of monopoly lurking in the background.

The following fifty years produced a confused array of decisions establishing when states could regulate prices or rates for firms affected with the public interest, subject to a constraint against confiscation. Public utilities were always in the mix because of their monopoly power.⁴⁷ Eventually the entire edifice crumbled, as the Supreme Court slowly separated the test of "affected with the public interest" from the existence of legal or natural monopolies.⁴⁸ Here it is useful to mention two landmarks along the way. First, *German Alliance Insurance Co. v. Kansas*⁴⁹ sustained rate regulation in the competitive fire insurance industry, without so much of a hint of industry-wide collusion. A generation later, *Nebbia v. New York*⁵⁰ rejected the tests altogether by upholding New York's *minimum* prices for milk on the ground that the dairy industry, like every major

⁴⁴ *Id.* at 125-28.

⁴⁵ *Id.* at 131, 134.

⁴⁶ 94 U.S. at 141 ("There is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community, in which the public has not an interest in the sense in which that term is used by the court in its opinion . . .").

⁴⁷ See Walton H. Hamilton, *Affection with the Public Interest*, 39 YALE L.J. 1089 (1930).

⁴⁸ A legal monopoly is created as a matter of law, sometimes for good reason. In *Allnut*, the state monopoly was created to allow the state to monitor goods meant for the export market. To mix them with local goods would in effect encourage widespread evasion or defeat the tax entirely. This legal monopoly is not subject to erosion by technical innovation. In contrast a natural monopoly arises when, for example, only a single harbor can service ships in the export trade. That monopoly is subject to erosion if newer hulls are able to enter shallower water, for example. *Allnut* covered the natural and legal monopolies alike, notwithstanding the differences between them. 104 Eng. Rep. 206 (K.B. 1810).

⁴⁹ 233 U.S. 389 (1914). "Indeed, it may be enough to say, without stating other effects of insurance, that a large part of the country's wealth, subject to uncertainty of loss through fire, is protected by insurance. This demonstrates the interest of the public in it . . ." *Id.* at 413.

⁵⁰ 291 U.S. 502 (1934).

business, was affected with the public interest.⁵¹ *Nebbia* transformed a concept initially designed to limit monopoly power into one that propped up state-sponsored cartels, in part on the dubious public health ground that higher costs offered protection against contamination and spoilage.⁵² *Nebbia* led to an increase in price and a reduction in the supply of milk, with serious negative health consequences even though one of New York's stated purposes for the passage of the minimum price statute was the advancement of the health of its citizens.⁵³ Yet the differences in the two accounts are manifest. The older account used price controls to limit the effects of monopoly. The newer account used price controls to convert a competitive industry into a monopoly industry. Such was the bow that the new definition of public health makes toward the old.

The problem here was not the conceptual inability of the Supreme Court to differentiate between competition and monopoly. One year after *Nebbia* sustained New York's price-fixing scheme for New York farmers, *Baldwin v. G.A.F. Seelig, Inc.*⁵⁴ used federalism principles to strike down New York's

⁵¹ *Id.* at 531-32.

We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle.

Id.

⁵² *See id.* at 516-19.

⁵³ For evidence of the impact of price controls, see Dale Heien & Cathy Roheim Wessells, *The Nutritional Impact of the Dairy Price Support Program*, 22 J. CONSUMER AFF. 201 (1988) (noting that the greatest impact of price supports were on welfare families whose consumption of calcium under regulation fell below recommended daily amounts, but which rose above those levels with deregulation). For some of the evidence on the adverse impact, see, for example, Kuo S. Huang, *Effects of Food Prices and Consumer Income on Nutrient Availability*, 31 APPLIED ECON. 367 (1999): "According to the estimates, the [1 percent] change in income would increase energy by 0.26%, protein by 0.267%, saturated fats by 0.385%, cholesterol by 0.314%, calcium by 0.316%, iron by 0.212%, vitamin A by 0.354%, and vitamin C by 0.351%." *Id.* at 372. *See also* John Adrian & Raymond Daniel, *Impact of Socioeconomic Factors on Consumption of Selected Food Nutrients in the United States*, AM. J. AGRIC. ECON., Feb. 1976, at 31. For a description of the programs, see Kevin McNew, *Milking the Sacred Cow: A Case for Eliminating the Federal Dairy Program*, POLICY ANALYSIS (Cato Institute), Dec. 1, 1999, at 1.

⁵⁴ 294 U.S. 511 (1935). For a modern variation, see *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), where the Supreme Court invalidated a uniform Massachusetts tax on all milk sold within the state regardless of whether it was

differential tax on out-of-state milk, which was intended to eliminate the entire price advantage enjoyed by out-of-state suppliers. Congress may with impunity impose or authorize nationwide cartels, however misguided, because such an imposition or authorization represents national, not parochial state interests.⁵⁵ But when Congress is silent, free trade is the norm. Under this new logic, antitrust laws vigorously punish private cartels, but leave untouched state-sponsored cartels⁵⁶ even though their greater durability makes them more dangerous to the public at large. The point here is that we can stick to the original view of *Alnutt* that rate regulation is the quid pro quo for monopoly power. We do far worse in rate regulation with the broad conception of the public interest than we do with the narrower one. The narrow definition curbs the misallocations from monopoly. The broad definition creates misallocations by stifling competition in order to create cartels. The cardinal sin of the antitrust laws thus becomes high government policy.

My argument thus far is to show that the term "public" effectively limits the scope of government power. It is no coincidence therefore that those who are skeptical of the effort to constrain the idea of public health look askance on any defense of this narrow definition. Stated otherwise, the attack on public health closely tracks to the progressive movement of the early twentieth century, which exerted so much influence on so many fronts. Novak in particular draws that explicit connection when he criticizes my earlier defense of the old public health on the ground that it embodies "an overriding economic reductionism that views police power jurisprudence through the lens of a simple calculus of economic interests, costs and benefit."⁵⁷ That statement is meant to say in part that I have overlooked and neglected the full range of "demographic, psychological, social, cultural, technological, biological, intellectual, diplomatic, legal and political" factors that make history the complex and interactive subject that it surely is.⁵⁸ I have no doubt that it is easy to find all sorts of issues on which these esoteric points really do matter, but the question of how

produced locally or out of state, because tax rebates were only available to Massachusetts dairy farmers.

⁵⁵ See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942).

⁵⁶ *Parker v. Brown*, 317 U.S. 341 (1943) (decided the same term as *Wickard*).

⁵⁷ Novak, *supra* note 7, at S178.

⁵⁸ *Id.* at S192.

to understand the phrase "affected with the public interest" is surely not one of them. In the present context, genuflecting to history's bounty is a form of academic foreplay to the central question: Whether these manifold sources of inspiration can sufficiently attack the principle of freedom of contract, even after it is adjusted to allow restrictions on contracts that prejudice the public health or create economic monopoly.⁵⁹

In order to support his wide-ranging critique on the Chicago School with its "relentless critique of regulation and redistribution,"⁶⁰ Novak invokes that most overrated public philosopher of the twentieth century – a man with impeccable Chicago credentials – John Dewey. At the most general level, Dewey's progressive criticism attacked all the central pillars of the classical liberal state, with its insistence that strong and permanent principles guide matters of political organization, and that these principles are best understood as a combination of the right mix of private and public property, freedom of contract and limited government.⁶¹ In its place, Dewey asserted a conception of liberty that took into account changes in socioeconomic status, downplayed formal conceptions of negative liberty, reduced the emphasis on money relative to nonfinancial goods, and deemphasized the obsession with excessive individualism.⁶² Ultimately, his program defended the progressive forms of social legislation that marked the first third of the twentieth century. Dewey wrote: "[T]he doctrine of 'natural rights,' superior to legislative action, has been given a definitely economic meaning by the courts, and used by judges to destroy social legislation passed in the interest of a real, instead of purely formal, freedom of contract."⁶³

I think that Dewey is wrong on all his basic points, but will pause here only to say that the principle of voluntarism contains no nefarious subtext, but rather brings people

⁵⁹ The latter was also well understood. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir 1898), *aff'd*, 175 U.S. 211 (1899).

⁶⁰ Novak, *supra* note 7, at S193.

⁶¹ For my defense of this conception, see EPSTEIN, *supra* note 36. For a progressive critique see Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923), which was a critique of THOMAS NIXON CARVER, *PRINCIPLES OF NATIONAL ECONOMY* (1921). Hale was defended in BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 338 (1998). For my critique of Fried, see Richard A. Epstein, *The Assault that Failed: The Progressive Critique of Laissez Faire*, 97 MICH. L. REV. 1697 (1999).

⁶² See Novak, *supra* note 7, at S180 (outlining the views of John Dewey in his 1935 book *Liberalism and Social Action*).

⁶³ JOHN DEWEY, *LIBERALISM AND SOCIAL ACTION* 26 (1935).

together by allowing them to engage in high levels of personal association. It is also a system that allows them to decide whether they come together for profit, prayer, reflection, or amusement. Nothing requires that the logic of mutual gains be cashed out in dollars in order to be sensible, for nothing is more common than for people (including academic lawyers) to steeply sacrifice wages to do work that they love. What's more, these people do it in ways that defenders of the older order would praise, not condemn.

But my concern here is not with the caricature of classical liberalism that pervades Dewey's thought. Rather, I am troubled with how his focus on lofty motivations and cultural values blinds him to the struggle taking place on the ground right under his nose. None of the highfalutin' factors that Dewey (and Novak) think relevant to understanding historical progression and social legislation had anything to do with the legal battles of this period. The battle of progressive legislation swirled over the tense choice between competition and monopoly as means for supplying goods and services within labor and product markets. Recall that *Nebbia* sustained minimum rates for milk as part of the statutory system to cartelize the dairy industry. It was a state-sponsored cartel, pure and simple. Nor was it an isolated example. The "retrograde" judges who favored the "formal" conception of freedom of contract took the view that competition could outperform monopoly in the provision of services. They did so largely – and rightly – on the traditional neoclassical ground that monopoly reduced output and increased, as the case may be, wages or prices, blocking many of the gains that competition could achieve. They did not, of course, oppose innovation and imagination, but thought that it came from private initiative and not central planning. Dewey was not alone in denouncing freedom of contract, which reflected the attitude contained in much of the legislation of his day. Section 6 of the Clayton Act, for example, mirrored his attitude:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be

illegal combinations or conspiracies in restraint of trade, under the antitrust laws.⁶⁴

I quote this passage in full because it indicates the clever way in which appeals to some richer and deeper social position prop up good, old-fashioned labor monopolies. The first sentence illustrates the modern preoccupation with the ancient recognition that certain items, such as gravesites, were *res extra commercium*. The modern variation on that theme attacks the "commodification" of labor that takes place through voluntary exchange. But if that were the concern, then the solution would be that no person should be allowed to sell his labor in the marketplace, a position so contorted and counterproductive that no progressive could support it. But what rises in its stead? An exemption from the antitrust laws, which means in effect that no combination of workers, no matter what its economic power, can be held to act in restraint of trade, just as the payoff portions of the statute said. It is hard to resist the conclusion that the statute resolved the old conflict between competition and monopoly in the wrong way, under the bare fig leaf that this antitrust exemption served some nobler human end.

The same holds for Dewey's lofty preference for "real" as opposed to "formal" freedom of contract. On this point one should examine the findings and policies in the National Labor Relations Act of 1935, the original Wagner Act, before the Taft-Hartley Amendments of 1947 altered it. There, one key finding is:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership, substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.⁶⁵

Note the statutory crutch: The showy terms "full" and "actual" are used not to justify maintaining a competitive structure but rather to justify institutionalizing a collective bargaining system in which firms have a duty to bargain with a

⁶⁴ Clayton Act, Pub. L. No. 63-212, § 6, 38 Stat. 730 (1914) (codified at 15 U.S.C. § 17 (2000)).

⁶⁵ National Labor Relations Act of 1935, Pub. L. No. 74-198, § 1, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 159(a) (2000)).

labor union once it is elected or designated as the exclusive bargaining agent of all the workers in that unit, including that minority of workers who do not wish representation.⁶⁶ All the grand talk about higher goals has little to do with the object and effect of this statute. The Clayton Act allowed unions to organize but did not protect them against competition and new entry by non-unionized workers. The Wagner Act neutralized the threat of entry. In the history of ideas, nothing is more dangerous than judging the effects of statutes and regulations by the idle speculation of the philosophers who support them. The blunt truth is that John Dewey did not know the first thing about labor (or indeed, any) economics. Only the uninformed could write as he did: "In general, labor legislation is justified against the charge that it violates liberty of contract on the ground that the economic resources of the parties to the arrangement are so disparate that the conditions of genuine contract are absent; action by the state is introduced to form a level of which bargaining takes place."⁶⁷

Note once again the verbal crutch by inserting "genuine" before "contract." Yet the maneuver cannot conceal the economic errors that infect Dewey's work. The difference in size between firms and workers is not the key determinant of wages. What matters is productivity on the one hand and market structure on the other. Multiple large firms in competition with each other will avoid any ostensible "disparity" of which Dewey speaks. There is of course the possibility of collusion in mass production industry, but in that unlikely event the cure lies in the standard enforcement of the antitrust law. It is surely not to create monopolies on both sides of the market, when that result only compounds the social losses from (an occasional) monopoly with the risks of bargaining breakdown. As matters now stand, heavy union structure reduces the mobility of labor and creates the risk of brinkmanship resulting in strikes and other external dislocations. Why Novak, or anyone else, should take Dewey's intellectual pabulum as a call to arms is beyond my comprehension. The older definition of "affected with the public interest," which stressed questions of monopoly, had the evident virtue of identifying the central element in that debate.

⁶⁶ *Id.*

⁶⁷ JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 62 (1927).

IV. PUBLIC HEALTH REGULATION: 1865-1937 – WHY REGULATE HERE?

The battles and misunderstandings over regulation in the name of the public interest carry over to questions of public health. Within the classical tradition, the key danger that triggers regulation is communicable disease, not monopoly. The progressive assault on the earlier conception attempts to broaden the grounds for public health intervention, paralleling the destruction of the once honorable conception of "affected with the public interest." The early public health initiatives focused on controlling communicable diseases, namely epidemics and pollution. A key question is why should there be regulation of communicable diseases and not of the "epidemics" of the new public health law, such as obesity and diabetes?

The simplest way to approach this question is to ask whether a system of private rights under a laissez-faire theory could deal with the contagion issue.⁶⁸ The key building blocks of that system are the exclusive entitlement that all persons have in their own body and property; the dominance of voluntary contract as the means to alter those initial entitlements; and the use of tort remedies to protect against harms that one person inflicts against another. How might such a system treat the risk of communicable diseases? The only weapons in its arsenal are to either allow one person to sue a second for damages for harms that have occurred, or to seek injunctive relief against threatened harms. Both these private remedies are, to put it mildly, inadequate to meet the challenge at hand.

Start with the question of whether one person could sue another for death or injury due to communicable disease. These illnesses stand in stark contrast to the ordinary traumatic or sudden injury that typically has one easily identifiable cause. It is even debatable whether communicable diseases stem from the actions of any individual, as opposed to natural forces of undetermined origin. Quite often, disease quickly spreads from one person to the next without any human action (save sneezes) at all. Once disease spreads, it becomes quite impossible to determine which person or persons were responsible for each case of disease. This is true even today

⁶⁸ For the more general statement of my views, see Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* chs. 8, 9 (1985) (analysis of the police power).

although we possess a solid knowledge of the mechanism of disease transmission. Can any person who caught influenza say from whom? These fact questions were quite beyond the power of any legal system to resolve by piecemeal litigation 300 or even 100 years ago. In truth they are beyond the power of our legal system today. Even if by some miracle one could finger the wrongdoer, what is to be done if he has perished from the plague? No one, for example, has thought that private law suits were an appropriate response to the recent SARS epidemic, which was successfully contained by more traditional public health means.

Injunctions are every bit as bizarre. No longer does one landowner seek to enjoin a flow of stench from a neighbor's well. Here, quite literally, tens of thousands of people are both potential plaintiffs and defendants – just who should sue whom, and for what? Either way, then, public intervention makes sense. If the plague is an act of God, then no one is liable. If attributable to one person, no one could track him down to hold him liable. In both cases some (but not all) forms of direct regulation hold out the possibility of increasing security for all at the expense of liberty. So long as each regards himself as the gainer from this massive social exchange, who should protest against it in the abstract? The protestors regard liberty as the sole good, so much so that they believe people have the right to perish from cholera. Many philosophers gravitate toward that position, but only because they do not have the power of choice or control. The power of the state to act in response to these public necessities is well established. The only real question is how that awesome and dangerous power should be exercised.

The upshot is simple: The massive breakdown in both the theory and practice of private rights makes public remedies instantly attractive even to people who have not gone through any formal drill. In the easiest cases, moreover, these public health remedies will not conflict with any conception of individual rights. Thus it is hard to conjure up any civil liberties objections to one of the great public health triumphs of the nineteenth century, when John Snow discovered that the source of cholera lay in the contaminated waters pumped from the Thames below London's Broad Street station. Moving the water pipes upriver to combat the pollution is the kind of

sensible self-help measure that only a madman would protest.⁶⁹ The near ninety percent reduction in deaths (from 317 per 10,000 homes to 37 per 10,000 homes) supplies the controlling cost/benefit analysis. Likewise, only a knave would protest in principle the use of public funds, raised by taxes, to support a system of public drainage and sewers, including the London rivers and the waterworks involved in Snow's cholera case. The conflict between public health and individual liberty lies elsewhere, most notably with quarantine and related sanctions, such as the destruction of infected animals and goods, and with vaccination statutes. The following subsections examine each in turn.

A. *Quarantines and Related Sanctions*

Quarantine was a standard health protection measure in the nineteenth century and before. Quarantine measures were common in the American colonies before independence.⁷⁰ The practice of quarantine is, in a sense, almost as old as disease itself. As early as 1710, the English adopted a generalized quarantine statute in response to the entrance into England of diseased individuals from the Baltic.⁷¹ The ship was a discrete unit that could be kept from port until it was determined administratively that all the individuals on it were free from disease. The statute's coercive aspect lay in its warning that persons who boarded that ship "may be compelled and in the case of Resistance may by Force and Violence, be compelled" to return and remain on the vessel until the risk had passed, at the expense of the ship owner, not the Crown.⁷² The subtle message to the owner was: Either you scrutinize your passenger list or you can be forced to pay the costs of mistakes.

The narrow focus on quarantine helped design the highly sophisticated public health systems used during the massive immigration to the United States and Canada during the late-nineteenth and early-twentieth century. The policy of the time, as opposed to now, was to allow unrestricted

⁶⁹ See Tulchinsky & Varavikova, *supra* note 34, at 25-27, for a brief account of the episode.

⁷⁰ See, e.g., Elizabeth C. Tandy, *Local Quarantine and Inoculation for Smallpox in the American Colonies, 1620-1775*, 13 AM. J. PUB. HEALTH 203 (1923).

⁷¹ Act to Oblige Ships Coming from Places Infected More Effectually to Perform Their Quarantine, 1710, 9 Ann., c. 2 (Eng.).

⁷² *Id.* § IV.

immigration even though the new supply of cheap labor put immigrants in competition with domestic workers. Open immigration policies fueled the massive movement across the seas before the First World War. But at this point the clear issue of the police power arises. In the case of goods, the greatest devotion to free trade will not allow people to bring in pests and poisons that could do real damage to people or places in the United States. The same is true of people. Accordingly, the key test operated to exclude people who suffered from some contagious disease without excluding everyone else. The system therefore required medical inspections at the docks. Infected people were not sent home straight-away but were sent to Ellis Island, where they were given a chance to recuperate. If sent home, it was, as in the English case, at the expense of the carrier, which then had an incentive to only board individuals free of infection at the other end. Pier 21 in Halifax, Canada operated on a similar system. That system did a fine job of reconciling individual liberty with public health, and showed none of the intolerance or abuse that arose in enforcing some morals legislation. It was the lifeline for millions, including my grandparents.

Quarantine is especially important when the fact of infection and contagion is known but little can be done to fight it piecemeal. Thus, as a thought experiment, no one would (or should) favor quarantine with respect to a communicable disease for which all individuals had perfect self-help remedies against the threat. Indeed, in these cases the disease would be eradicated, or at least contained, in a short time. But recall that only in the second half of the nineteenth-century were bacteria understood to be a causal agent for the spread of disease. In that uncertain environment, an overbroad remedial scheme has great advantages over an underinclusive one, which could cause entire communities to perish, along with their individual liberties.

Within the framework of American constitutionalism, quarantine necessarily interfered with the ordinary liberty to associate and to travel, but the gains to public health so outweighed the losses that it was impossible to mount a principled categorical opposition to this form of regulation. Behind a veil of ignorance, everyone would opt for quarantine when no lesser remedy could do the job. The basic *laissez-faire* account of the police power holds: From behind the veil of ignorance, everyone gains from the uniform application of quarantine rules. So understood, this view of the police power

was seamlessly incorporated, as Novak has noted, into the American law.⁷³ The Supreme Court wrote in *Railroad Co. v. Husen*,⁷⁴ that "we unhesitatingly admit" that the power covers the prohibition against entrance of people, animals, and goods that carried with them the danger of transmitting any contagious or infectious disease.⁷⁵ That power to exclude carried with it the power to admit subject to regulations and conditions, such as the use of reasonable inspection laws.

This same attitude helps one understand one of the most important cases of the reconstruction era, the *Slaughterhouse Cases*,⁷⁶ which showed the tension between economic liberties and public health. The relevant statute required all the slaughtering of animals in the New Orleans area to be performed in a single district, which the Crescent City Livestock Landing and Slaughterhouse Company set aside for that purpose. The challengers to that district claimed that the state-created monopoly interfered with the ordinary occupations of life. In their view, the state monopoly offended the Privileges or Immunities Clause of the Fourteenth Amendment that reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."⁷⁷ The opposing view maintained that the regulation was an appropriate public health measure because it effectively curbed waste runoff into the Mississippi River.

As a matter of constitutional law, the case rested on the dubious ground that the privileges or immunities of United States citizens did not include the privileges and immunities set out in the earlier case of *Corfield v. Coryell*,⁷⁸ including the right to enter a trade. Rather, they included only those rights that individuals had as citizens of the United States, such as the ability to go to Washington to petition for redress of grievances. In large measure, *Allgeyer v. Louisiana*⁷⁹ negated that portion of the opinion by treating the broad definition of privileges and immunities for *citizens* as part of the liberty for all *persons* protected under the Due Process Clause of the Constitution, again subject to the police power limitations at play in *The Slaughterhouse Cases*.

⁷³ See, e.g., NOVAK, *supra* note 12, at 210-11.

⁷⁴ 95 U.S. 465 (1877).

⁷⁵ *Id.* at 472.

⁷⁶ 83 U.S. 36 (1872).

⁷⁷ U.S. CONST. amend. XIV, § 1.

⁷⁸ 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

⁷⁹ 165 U.S. 578 (1897).

In dealing with *Slaughterhouse*, Novak stresses the importance of the police power to a well-regulated society in order to make light of "Stephen Field's dissenting paean to an 'inalienable right' to 'the pursuit of the ordinary avocations of life.'"⁸⁰ But one need not knock Field's basic concern in order to defend the legislation in Louisiana if the legislation minimized a public nuisance, which was always a proper subject of state regulation. Rather, the proper approach asks whether it is possible to serve the public health objectives without infringing on ordinary occupational liberties. On that score Novak properly noted that Herbert Hovenkamp has made a strong case that the Louisiana statute *did* work in an appropriate fashion by allowing all butchers to ply their own trade within the designated district or to outsource that work at legislatively determined rates.⁸¹ This open access undercut the charge that the district was intended to foster monopoly power. At this point one need not claim that the police power in the post-Civil War era received an ominously narrower interpretation than what went before. Instead, it is accurate to say that occupational freedom does not include the right to create a public nuisance.

As should be apparent, a sound understanding of the scope of the police power lies in the details of its application. The key part of the overall story that Novak did *not* develop (in part because it became explicit only after the period – up to 1877 – on which he wrote) is those cases where purported police power laws fell before constitutional provisions concerning jurisdictional and individual rights. Once again the narrow focus on public health sharply delineates the issues. In *Husen*, an 1872 Missouri law prohibited driving or conveying Texas, Mexican, or Indian cattle within the state between March 1 and November 1 of any year. The law also required that if owners transported and unloaded cattle by railroad or steamboat, the owners thereof stood liable for any disease that the cattle might cause. It also set up the presumption that cattle infection along the route was the cause of that disease. Notwithstanding the general recognition that the state police power embraced quarantines, the Court struck down this particular regulation as invading Congress's exclusive right to

⁸⁰ NOVAK, *supra* note 12, at 231 (quoting *Slaughter-House Cases*, 83 U.S. 36, 106.

⁸¹ See HOVENKAMP, *supra* note 39, at 116-24, *noted in* NOVAK, *supra* note 12, at 342 n.175.

regulate commerce among the several states because the state measure went "beyond what was absolutely necessary for its self-protection."⁸² Notably, this evaluation of the limits of the police power showed little sign of any broad communitarian sentiment. Favoring trade over quarantine, the Court held that the statute disrupted the national market by blocking transportation across state lines.

Husen set an uneasy balance; recall the arguments on the other side. A statute directed toward trade restriction would not have targeted only areas in which cattle suffered from Spanish or Texas fever. The real question therefore is whether some lesser means could have detected the disease. Here the statute exempted cattle that had wintered within the state, presumably because they had time to show signs of disease. The big hole in the record was whether any border inspection could have detected infected cattle at reasonable cost, and, if so, with what reliability. Perhaps a fuller record could have explained why the eight-month ban was necessary, but for these purposes, the merits of the decision are less important than the frame of mind it evinced. Although the police power was broad, it was by no means unlimited. Quite the opposite, rival considerations cabined its use, especially the maintenance of an open and competitive market.

That same narrow focus on structure of the law justified striking down quarantine laws that subjected discrete minorities to state-sponsored discrimination. In *Jew Ho v. Williamson*,⁸³ the purported quarantine applied only to the Chinese quarter of San Francisco. Unlike the strictures in the 1710 Quarentine Act, the ordinance in *Jew Ho* permitted Anglos to go in and out of the quarantined district at will, while the local Chinese, who had borne the brunt of many a discriminatory law,⁸⁴ were required to stay put. The older cases always asked whether the means chosen fit the narrow constitutional end, which here they manifestly did not. The Court thus struck down this quarantine as a sham outside the scope of the police power.⁸⁵

⁸² R.R. Co. v. *Husen*, 95 U.S. 465, 472 (1877).

⁸³ 103 F. 10 (C.C.N.D. Cal. 1900) (No. 12, 940).

⁸⁴ See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (discriminatory rules for laundry permits).

⁸⁵ See *Jew Ho v. Williamson*, 103 F. 10, 26 (1900). Note that Novak mentions the Chinatown quarantine but does not discuss *Jew Ho's* invalidation of it. See NOVAK, *supra* note 12, at 215, 336 n.102. Gostin approves of the outcome. See GOSTIN, *supra* note 4, at 213.

The point can be generalized. So long as one holds dear the ideals of liberty and competition, then the hard question under the police power is how one deals with cases of mixed motives. On these cases, I am not aware of any evidence that the Supreme Court was so distasteful of legislative interference that it foolishly or willfully classified health legislation as labor legislation in order to vindicate a hidden anti-statist agenda. In arguably the most famous case of the 1865-1937 period, *Lochner v. New York*,⁸⁶ which ranked high in the Progressive hit-list, the Supreme Court by a bare five-to-four majority struck down a statute that limited the maximum work hours for employees (but not owners) in some but not all types of bakeries. It treated the statute as an illicit labor law, not a public health measure, even though a few years before the Supreme Court upheld a maximum hours statute for coal miners.⁸⁷ *Lochner* included two notable dissents with very different implications. Justice Harlan's ponderous opinion argued that New York's health justifications were bona fide. Justice Holmes' classic, pithy, and wrongheaded dissent attacked the idea of liberty of contract itself as the revival of Mr. Herbert Spencer's Social Statistics. The difference is palpable. Once the issue was a straight labor regulation, namely whether employers could be forced to bargain with employee unions, Harlan switched sides and struck down a mandatory collective bargaining statute as a labor statute.⁸⁸ Meanwhile, Holmes dissented on the ground that the conception of liberty of contract did not prevent the state from equalizing bargaining power between the parties.⁸⁹ It is the exact same debate, almost to the word, that Dewey had with the classical liberals. Today's embrace of the broader government role rejects the view that liberty of contract protects individual choice in competitive labor markets, so the *Lochner* jurisprudence quickly collapsed.⁹⁰ The historical opposition between public health and labor statutes was no more.

At the same time, however, the appeal of competitive federalism in the absence of congressional command has kept

⁸⁶ 198 U.S. 45 (1905).

⁸⁷ See *Holden v. Hardy*, 169 U.S. 366 (1898).

⁸⁸ See *Adair v. United States*, 208 U.S. 161, 180 (1908).

⁸⁹ *Id.* at 190-92 (Holmes, J., dissenting).

⁹⁰ See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a state minimum wage requirement for women).

the distinction between protectionist legislation and health laws robust and well in interstate matters. Thus, on public health grounds Maine could exclude out-of-state baitfish from Maine waters only because of the genuine uncertainty whether these fish carried parasites that might prove harmful to native species.⁹¹ In contrast, simply invoking the language of quarantine did not suffice to allow one state to keep waste from another state out of its jurisdiction.⁹² Note too that the protectionist peril makes it imperative to keep this inquiry alive, which is why the standard free trade agreements under the WTO limit the scope of the health exemption to the free trade rule.⁹³

As with the regrettable validation of minimum price levels for dairy products, all these cases have public health interests on both sides of the line. A strong protectionist, regulatory system of dairy products would increase the costs of these goods and thus would hurt the health of the citizens who cannot afford to purchase enough dairy. The appeal to public health cannot trigger concern about only one type of error (letting in harmful goods) while ignoring the second (keeping out healthful goods). Fortunately, the Supreme Court has reacted with appropriate skepticism at local efforts to keep out milk, for example, that has not been pasteurized in local facilities, so long as it has been appropriately treated at its point of origin.⁹⁴ It is highly unlikely that the state of Illinois would set low standards of safety for milk that is sold within its state to allow a few dairy farmers the option of selling spoiled milk in Wisconsin, where of course they could be fined and sued for the mischief that they caused. In this case, at least, the nondiscrimination rule was a powerful check against health risks, which meant that Wisconsin had to make some very specific showing of the shortfall in the out-of-state processing for this restriction to constitutionally apply. Once again the federalism rules observe the line between protectionist and legitimate health legislation that could serve as the model for dealing with regulations that apply to individuals within a single state. The firm that sells milk in

⁹¹ See *Maine v. Taylor*, 477 U.S. 131 (1986).

⁹² See *Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978) (relying explicitly on the pro-competitive language found in *Baldwin v. Seelig*, 294 U.S. 511, 527 (1935)).

⁹³ See Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A [hereinafter WTO Agreement].

⁹⁴ See *Dean Milk v. City of Madison*, 340 U.S. 349 (1950).

Chicago should not be kept from selling that same milk in Peoria.

B. *Vaccination*

Quarantine is only one public health measure. Vaccination is second, and one that requires somewhat greater medical sophistication. Here the practice began with Edward Jenner's discovery in 1796 that exposure to the mild cow pox rendered people immune to smallpox.⁹⁵ For most people at the time, the only real question was how to access a vaccine that provided strong protection against a deadly killer; the issue of compulsion lay far in the background. Anyone who doubts this need only look at the pictures of anxious individuals lined up in order to receive smallpox vaccination in the scare of 1946.

But these calculations are not that clear in all cases. Recall that the extensive discussion of the police power 100 years later in *Jacobson* arose because at least one individual challenged the power of the state to vaccinate him against smallpox. Jacobson's challenge, moreover, was not fanciful: He claimed that in light of his family history and his severe reaction to a prior vaccination, a second treatment would endanger him.⁹⁶ His lawyer also introduced statistical evidence indicating that the incidence of smallpox was no higher in those states without compulsory vaccination than in those with it – doubtless, I suspect, because of a high level of voluntary compliance. He thus objected to a categorical order of the Cambridge Board of Health ordering vaccination or revaccination (for those who had not been vaccinated after March 1, 1897) of all adults living in the town. The penalty for noncompliance was, note carefully, five dollars.

In response, Justice Harlan did not defend the efficacy of compulsory vaccination laws as such, but in effect followed the lead of one of the briefs in deferring to the legislature, which "is the only body which has the power to determine whether the anti-vaccinationists or the majority of the medical profession are in the right."⁹⁷ And it was on just this ground – that courts cannot consider individuated evidence – that the Court sustained the program. "Upon the principle of self-

⁹⁵ See Tulchinsky & Varavikova, *supra* note 33, at 19-20.

⁹⁶ See *Jacobson v. Massachusetts*, 197 U.S. 11, 36 (1905).

⁹⁷ *Id.* at 19. Deference is the issue under modern administrative law today. See *Chevron U.S.A. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."⁹⁸ Harlan then duly noted that the state could quarantine entrants into the United States who might ultimately prove disease-free.⁹⁹

However, the analogy is flawed. Quarantine involves the *ex ante* uncertainty of whether a person has a contagious disease. To make it explicit, assume that the condition is one against which other individuals have no known means of self-defense. At this point, the correct judgment in the face of uncertainty is to force all individuals to suffer the lesser peril of quarantine so as to spare others the probability of death.

In contrast, vaccination required neither detention nor isolation. Assume for the moment that Jacobson could have demonstrated that he, alone of all residents, was likely to die from the vaccine, but that the local authorities simply refused to introduce any exception into the program. Is that sacrifice still required? Suppose further that all other individuals could obtain *absolute* immunity from smallpox by taking the vaccine themselves. At this point, the scales seem to tip strongly against the requirement, for the availability of individual self-help measures undercuts the need to use compulsory vaccination for either self-defense or public necessity. Indeed, quarantine would achieve the same result. Far from controlling the contagion, compulsory vaccination now smacks of unwise paternalism that ignores all the private information that Jacobson, quite sensibly, regarded as relevant to his choice. On this model, the statute does not substitute a measure of security more valuable than the liberty surrendered. The traditional police power logic falters when effective self-help removes the *public* (i.e., communicable) risk from the equation.

But what if the smallpox vaccine has partial but not total effectiveness? Now the calculations shift back because self-help measures cannot cut the risk of infection to zero. Just think of a simple model in which vaccination reduces the risk for all normal individuals by fifty percent without any ill side effects. If the likelihood of getting the disease depends on the number of other exposed individuals elsewhere in the community, then compulsory vaccination is a justifiable counter to the classical prisoner's dilemma game where each

⁹⁸ *Jacobson*, 197 U.S. at 27.

⁹⁹ *Id.* at 29.

person stands aloof counting on others to take the vaccine. That coercion could be more critical when vaccination carries with it some small risk, say one percent, of harmful consequences. In this case, the uniform rule might well make all individuals better off with universal coverage than they would be with no coverage at all. Yet even here the calculations must be more nuanced. If one could say with certainty that the disease could not spread even if five percent of the population were not vaccinated, should a lottery system be used to exempt some? Should those of special risks be given preferred exemptions? Should people be allowed to bid for exemptions?

The early cases do not deal with any of these complications, but for smallpox it appears as though the vaccine was less than perfect. Justice Harlan quotes statistics from the 1870-1871 epidemic in Chemitz where the incidence of smallpox was far lower among the vaccinated population than it was among the non-vaccinated population.¹⁰⁰ Yet these numbers could be questioned: For example, some vaccinated people could have been previously exposed to the disease. But even so, the interdependent fortunes of those who were vaccinated and those who were not is clear enough. If more unvaccinated individuals had received the vaccine, the mortality rate in the vaccinated population would have declined. Yet even this proposition does not justify compulsory vaccination until it is known *why* the substantial minority of the population was left unvaccinated. One possibility is ignorance, with the fatal consequence that it carried. But yet another is that there were insufficient supplies of the vaccine to go around. If so, then perhaps state compulsion should be redirected to taxpayers who should be required to fund the vaccination of the poorest segments of the population, both for their protection and its own. If, it turns out, people have in ignorance refused life-saving injections, then it is tempting to endorse a dollop of paternalism, for individuals killed by

¹⁰⁰ *Id.* at 32 n.1.

At this time in the town there were 64,255 inhabitants, of whom 53,891 or 83.87 per cent, were vaccinated, 5,712, or 8.89 per cent, were unvaccinated, and 4,652, or 7.24 per cent, had had the small pox before. Of those vaccinated, 953, or 1.77 per cent, became affected with smallpox, and of the uninoculated, 2,643, or 46.3 per cent, had the disease. In the vaccinated, the mortality from the disease was 0.73 per cent, and in the unprotected it was 9.16 per cent.

Id.

infection cannot learn from their mistakes, even if others might.

Nor do these larger statistics necessarily deal with Jacobson's case, for his claim was that he was better off without the vaccine than he was with it, for in the latter case he was certain to be subject to serious disabilities, which in the former case were only possible. But note the final twist: He escaped his unwanted fate by paying a five dollar fine, which places the term "compulsory" in deserved quotation marks. It is not as though Jacobson had been vaccinated against his will.

So just how strong is the case for compulsory vaccination? Most obviously, sham vaccination programs, like sham quarantines, did not come within the police power. In the companion case to *Jew Ho, Wong Wai v. Williamson*,¹⁰¹ the applicable public health ordinance required vaccination of Chinese against the bubonic plague before leaving the city. Once again the Court struck the ordinance down because it did not apply to the entire population. Other situations were of course more complex. In *Zucht v. King*,¹⁰² the Supreme Court unanimously rejected a constitutional challenge to a statute requiring that all children be vaccinated before attending either public or private school – which is a lot steeper than a five dollar fine. For procedural reasons, Justice Brandeis's decision only addressed the facial validity of the statute. It did not consider any challenges based on its invidious administration. It just treated *Jacobson* as dispositive, notwithstanding the raised stakes. But should the state be able to require vaccination in the absence of any particular threat of a given disease? What kinds of individuating conditions could defeat the application of the statute? Why should the state have the power to ban children from attending private schools, capable of setting their own admissions rules, when the risk of infection or contagion is at least as great at beaches, movie theaters, and shopping malls? We should be more uneasy about the use of these programs than perhaps we were when *Zucht* itself was decided.

C. *Morals*

In order to complete the picture of the pre-1937 law on public health, it is necessary to address briefly the "morals"

¹⁰¹ 103 F. 1 (C.C.N.D. Cal. 1900) (No. 12,937).

¹⁰² 260 U.S. 174 (1922).

rationale for using the police power,¹⁰³ which covers areas that count, broadly speaking, as "sinful."¹⁰⁴ Thus the standard protection given to freedom of action and voluntary exchange did not carry over to such activities as gambling, idleness, and animal abuse. Nor did those standards protect much sexual conduct outside of marriage, including prostitution, fornication, adultery, homosexuality, sodomy, bestiality, bigamy, polygamy, and incest.¹⁰⁵ The laws in question not only targeted individual practices, but also shut down as public nuisances the saloons and bawdy houses used to organize these activities, thereby decreasing their frequency.¹⁰⁶

As applied to sexual conduct outside of marriage, these rules were motivated in part by concerns with health and safety, but also in equal, if not greater measure, by religious denunciations of these practices, independent of their public health consequences. So understood, much morals regulation seems almost bizarre today: Idleness was a form of immorality that justified shutting down a bowling alley.¹⁰⁷ Lotteries were (and are) terrible, unless operated by the state.¹⁰⁸ But whatever the odd motivation, egregious overbreadth, and unruly composition of morals cases, one side consequence of enforcing them was reducing sexually transmitted disease even in the absence of specific knowledge of the mechanism of its transmission. The morals head of the police power thus served as a somewhat useful backstop to health and safety in the response to communicable diseases.

By now the bottom line should be clear: The legal system had ample means to protect public health from communicable diseases and sanitation hazards. Yet at the same time it took steps to ensure that public health regulation did not introduce economic protectionism or regulate labor markets – the two central foci of the pre-1937 protections of liberty and property. On balance, with quibbles here and there, I think that this old balance on public health was the correct one even if one does not presume, as does Novak, the special

¹⁰³ For its inclusion, see Lewis Hockheimer, *Police Power*, 44 CENT. L.J. 158 (1897).

¹⁰⁴ For an extensive discussion, see NOVAK, *supra* note 12, at 149-89.

¹⁰⁵ *Id.* at 156 (citing *State v. Haines*, 30 Me. 65 (1849)).

¹⁰⁶ *Id.*

¹⁰⁷ See *State v. Haines*, 30 Me. 65 (1849).

¹⁰⁸ See *Stone v. Mississippi*, 101 U.S. 814 (1880) (finding that the inalienable nature of the state police power allows it to terminate private lotteries granted state charters).

relationship between the governed and the governor. The key point here is that the rules that limited state regulation were as important for advancing public health as those that authorized state regulation. I leave it for others to decide whether this "old" system of public health was or was not *laissez-faire*. The more important point is that both sets of choices made good social sense.

V. THE MODERN PERIOD

How does the modern alternative to the "old" system of public health measure up? The parallels to the evolution of "businesses affected with the public interest," are quite close, for in both areas the idea of public is unmoored from the economic conception of a (nonexcludable) public good so as to embrace any topic of widespread public importance. That broader definition in turn opens the field to increased regulation, such as mandated minimum prices in the dairy industry, that leads to a *reduction* in public health by raising the price of needed dairy products. Paradoxically, while economic regulation over wages and prices has *expanded* post-1937, the police power over health and morals has *contracted* in the face of renewed claims of privacy, religion, and intimate sexual conduct. To see how this pattern develops, it is useful to go over the three areas discussed in the last section, quarantine and related sanctions, vaccinations, and public morals.

A. *Quarantine and Similar Sanctions*

Quarantines proper have not been used in recent years because of our general success in controlling contagious (e.g., airborne) diseases. The great scourge of the late twentieth century in the United States and elsewhere has of course been AIDS, for which quarantine is overkill, since the disease is infectious but not contagious.¹⁰⁹ In addition, once the existence

¹⁰⁹ Quarantines are still used today in various settings. See, e.g., Melanie L. McCall, Comment, *AIDS Quarantine Law in the International Community: Health and Safety Measures or Human Rights Violations?*, 15 LOY. L.A. INT'L. & COMP. L.J. 1001 (1993). Note that McCall refers to AIDS as a contagious disease, which implies that it is airborne. In fact it is only an infectious disease, which can only spread through intimate contact. That difference makes all the difference, for if AIDS were the former, then the disease would have killed millions and the most severe restrictions against it would have instantly been put in place. More than a word is at stake. For tuberculosis,

of the disease is established, we can expect some natural private responses to slow its spread: Individuals will become more selective in their choice of sexual partners, for example, and be more willing to take vaccines (if such are available) when the perceived risks are high.¹¹⁰ It hardly follows, however, that all coercive public health measures are inappropriate because some private responses are available. The sexual transmission of AIDS depends, intravenous drugs to one side, largely on the frequency of sexual contacts with multiple partners. Transmitting the disease is more likely in its latent stage, before either the carrier or his sexual partner knows of the condition. In these circumstances, potential victims cannot take defensive measures, while infected persons could take extensive measures to disguise their condition. In this environment, which accurately describes the world of the early 1980s,¹¹¹ any systemic program that might have slowed down that rate of sexual contact would have slowed down the spread of the disease, especially in the early years when the potency of the virus was not tempered by effective treatments.

Yet against this backdrop we see a continued effort to discount the compulsory use of police power regulation to deal with the AIDS menace by invoking the threat to associational freedom. I can recall attending more than one workshop where the dominant theme was that AIDS was a medical and not a social problem, as if the disease could have ever gained a toehold if everyone were perfectly monogamous. The hard question is what forms of public intervention make sense when liberty interests are so clearly implicated. Here the proper approach recognizes that there are always two kinds of error: the danger of stopping activities that turn out to be harmless, or allowing activities to go forward that turn out to be deadly. In making the trade-off between these two sorts of errors, it is a mistake to rely on any version of a precautionary principle that attaches enormous weight to errors that allow dangerous activities to go forward while slighting the losses associated with the beneficial activities that turn out to be thwarted. Those useful activities could well result in reducing accidents

see Rosemary G. Reilly, *Combating the Tuberculosis Epidemic: The Legality of Coercive Treatment Measures*, 27 COLUM. J.L. & SOC. PROBS. 101 (1993).

¹¹⁰ For discussion of these measures, see Tomas Philipson, *Economic Epidemiology and Infectious Diseases*, in 1 HANDBOOK OF HEALTH ECONOMICS 1761 (Anthony J. Culyer & Joseph P. Newhouse, eds., 2000).

¹¹¹ For the career of the notorious Gaetan Dugas, see RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE AND THE AIDS EPIDEMIC* (1987).

or disease from some other sources, which is most evident in the case of valuable new drugs that could always be kept off the market because they hold out some small risk of harm. Getting the right balance is one of the hardest tasks one must undertake. But so long as there is any uncertainty as to what the future holds, the problem is itself inescapable no matter what our basic political orientation. Even if we avoid the excessive moralism of the nineteenth century, we still have to make the same kind of hard choices. How should this be done?

Start with the bathhouses, where so much of AIDS spread in the initial stages.¹¹² The traditional police power trinity of safety, health, and morals could easily justify shutting down these operations even without specific proof that they facilitate the transmission of a particular disease. With hindsight we know that the spread was in fact both rapid and deadly. But we do not have to wait until after the fact to understand that risk. The introduction of any new pathogen will meet with little resistance in its early stages. The more rapid the transmission among individuals, the more likely it is that virulent strains will dominate over more benign ones, and rapid transmission is what we should expect before the nature of the disease is well known. Only when diseases (syphilis, and now perhaps AIDS) are known sources of danger will infected persons be more likely to die before they can spread the disease. At that stage the slower acting and less harmful variations will take hold, leading to an uneasy accommodation between bacteria or virus and its human host.

This standard cycle points out that the risks of communicable disease are greatest when the threat is unknown, which in turn requires great diligence in dealing with this subject. But the modern view on this subject so magnifies the constitutional rights of intimate association¹¹³ that the public health measures can only be justified by clear showing of disease transmission – by which time it may well be too late.¹¹⁴ The better approach, it appears, is to recognize that

¹¹² See *id.*

¹¹³ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (concerning privacy in marriage); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (concerning privacy in intimate relationships).

¹¹⁴ *Bowers v. Hardwick*, 478 U.S. 186 (1986), deserves brief comment. By a five-to-four majority, it rejected the view that the right of privacy contains a right of intimate association that insulates all actions of sodomy from criminal charges. The decision came over the passionate dissent of four justices, who lined up squarely behind that claim. See, e.g., Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J.

the frequent sexual contacts with multiple partners are always risky, no matter what the state of medical technology and disease awareness. Thus, with AIDS it bears noting that one critical boost for this viral epidemic was the effective control via antibiotics of the various bacterial infections, such as syphilis, that might otherwise kill their hosts before the viral infections had a chance to spread more widely. It is well known that the use of antibiotics always has the unfortunate collateral consequence of hastening the mutation of a pathogen into more resistant forms. But it is equally true that the effective containment of one type of (bacterial) pathogen opens the door for a second type of (viral) pathogen that is wholly impervious to the full range of current medical treatments. It is harsh, counterproductive, and unwise to go after individual sexual practices, but the nineteenth century practice of targeting institutions that facilitate harmful interactions with adverse third-party health effects does mark out a sensible compromise between our concern with individual liberties and the control of infectious diseases.

A second feature of the new response to AIDS also bears note: invoking powerful antidiscrimination norms in employment, health insurance and the like for the benefit of individuals infected with AIDS. These laws do not have any obvious efficiency justification. If it were cheaper for the employer to bear the loss or to provide insurance, then that result could be achieved by a voluntary market. But that solution is not at work here because of the intense desire to force the employer to bear these losses without disclosure, when they are passed on in part to other healthy employees. I know of no important nineteenth century regulation that ever imposed a duty to transact with others outside the common carrier settings, where the duty to deal was set up to counter the monopoly power of the common carrier. Even in that context, however, the carrier was allowed as of right to exclude high-risk (e.g., unruly) customers who cost more to service than the norm. The system of rate regulation was designed to curb monopoly profits; it was not designed to introduce economic cross-subsidies between different classes of users. The modern use of the antidiscrimination principle has the commendable effect of offering assistance to people down on their luck. But, if

624 (1980). The dissenters have won the war since 1986. Prosecutions for sodomy will not take place no matter what the constitution requires. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers*).

the standard literature on moral hazard is correct, as I think it is, then it also has the regrettable dynamic effect of increasing the likelihood (by lowering the cost) that individuals will engage in these risky forms of conduct in the first place. In this regard, the inability of private individuals and firms *not* to deal with persons carrying disease compromises the long-term health of everyone else, both by increasing the expected prevalence of the disease and reducing their resources to counter it. When we put together the two sides of the equation, we see that direct regulation of health risks has been weakened, while the increased regulation of market transactions has been strengthened. Both of these tendencies undermine public health in the broader sense of that term, even if improvements in science and technology in part mask these shortcomings in institutional design.

Finally, it is worth mentioning, if only briefly, that the new set of safety and health issues often relate to exposures to adverse conditions inside the firm, which are now regulated under OSHA, the Occupational Safety and Health Act. In my view, the first response should be that contract also governs these risks and thus they do not require government intervention. Historically, that position was *not* adopted in the nineteenth century, which routinely sustained legislation that overrode contracts on safety or health grounds.¹¹⁵ So much was the undisputed premise of *Lochner* itself, which did not challenge the requirement that all quarters prepared for employees sleeping on the job be outfitted with adequate ventilation, even though that rule could easily be used to raise rivals' costs (that is, the cost of bakers whose workers slept on the job relative to those who did not). But OSHA carries safety and health regulation within the firm to a degree unheard of in an earlier time, owing to the increased power of surveillance that marks the modern age. But here again there is no free lunch. Constant regulation, often on a "worst case" basis, frequently does little to protect against the accidents and diseases that do matter, but much to divert resources that could be better spent elsewhere.¹¹⁶ Just as with dairy products, ill-advised extensions of regulatory power concern more than finance. They also have a powerful, if negative, effect on health and safety by diverting resources for safety measures that do

¹¹⁵ See, e.g., *New York Cent. R.R. v. White*, 243 U.S. 188 (1916).

¹¹⁶ For an early account of the dangers of regulation under the worst case principle, see Nichols & Zeckhauser, *supra* note 11.

work into government projects that do not work, or do not work as well.

The broad view of public health has therefore weakened current responses to the traditional health perils. At the same time, it seems to this outsider as though the entire public health establishment agrees with the proposition that massive public action should be taken to deal with the new “epidemics,” such as obesity and diabetes.¹¹⁷ Defenders of the new public health, such as Lawrence Gostin and Gregg Bloche,¹¹⁸ claim that any near-exclusive fixation on communicable diseases reflects a moral bias against certain forms of conduct and thus ignores the harm that these practices cause. More specifically, in writing on this subject they accuse me of laboring under a certain form of moral blindness by stressing the harms that arise from sexual activities while ignoring the equal or greater dangers. “By insulating uninhibited coupling, but not eating, from ascription of personal responsibility, Epstein takes aim at the infamous bathhouses while putting sellers of high-risk food beyond the law’s reach.”¹¹⁹

Here the indisputable evidence shows that more people, both adult and infants, are overweight than before and that changes in diet and increases in exercise could go a long way to prevent obesity from undermining a solely individual problem. But the use of the term “epidemic” is just the *wrong* way to think about this issue. There are no non-communicable epidemics. I am not at greater risk for obesity because an increasing fraction of my neighbors are obese. To the contrary, an awareness of their perilous situation may spur me onto greater care in the conduct of my own life. The alarms over obesity make good sense if the message is that individuals have to worry about their personal health before they get sick, and should not think that medical care is a panacea that will rescue them no matter how they conduct their personal lives.

Yet designating obesity as a public health epidemic is designed to signal that state coercion is appropriate when it is not. Education and persuasion, yes; but private institutions and foundation can supply these things without government

¹¹⁷ See, e.g., Thomas A. Wadden, et al., *Obesity: Responding to the Global Epidemic*, 70 J. CONSULTING CLINICAL PSYCHOL. 510 (2002) (noting the positive association between obesity and diabetes).

¹¹⁸ Lawrence O. Gostin & M. Gregg Bloche, *The Politics of Public Health: A Response to Epstein*, 46 PERSP. BIOLOGY MED. S160, S165 (2003).

¹¹⁹ *Id.* at S168.

coercion and even without government guidance and warnings over what personal health targets should be and how they are best achieved. We need not face the specter that official tables of ideal weights ignore obvious differences in body type, age, and particular medical conditions. Indeed, here as elsewhere, there is good reason to fear that the increased levels of guaranteed health care works to undermine overall health levels. As with AIDS, the knowledge that one is protected against the adverse consequences of his own decisions by unwaivable insurance will increase to some uncertain extent the risks that individuals are prepared to tolerate. It is just a garden variety moral hazard problem, one which does not arise with all diseases of old age for which it is possible to obtain insurance. There are of course many mixed cases of diseases that respond in part to natural circumstances and in part to poor conduct. The question of whether these are insurable is hard to resolve in the abstract, for the proper response in some cases is higher premiums and limited coverage. But no matter how difficult these insurance questions, it is hard to see the reason for any market failure so long as the insurance company is entitled to full disclosure about the magnitude and severity of the risk.

Indeed today the major argument for extensive regulation of individual health practices comes from the government's role as the insurer of (first and) last resort, not from the fear of communicable diseases. Private insurers of course impose such conditions and can, ideally at least, back their preferences by canceling the coverage already provided. Yet the government here has made the coverage irrevocable, but has no willingness to impose explicit conditions that exclude people for dangerous habits (e.g., skydiving) or charge them differential rates for smoking or obesity. The language of epidemic suggests the need for a vigorous response akin to that of quarantine. Yet the best course would be to weaken the public safety net that induces harmful individual behaviors in the first event, and to replace it with a system of tailored disincentives that do not encroach on individual liberty.

In principle, this attention to personal health prior to medical treatment, which is the hallmark of the new public health, does not provide a case for government intervention, but only for personal diligence on these matters. The issue only becomes one of public concern, paradoxically, once the decision is made to supply publicly-funded health care to treat the conditions in question. The most dominant characteristic of

major public health initiatives, such as Medicare and Medicaid, is that they make no effort to tailor premiums to perceived risks: Smokers under Medicare do not have to pay a stated premium, as private insurers that retain the power to exclude individuals from coverage often require.

The upshot of all this is that the risk of cross-subsidy introduced by the flat premium structure does supply the state with some financial justification to limit personal choices. Yet the daunting administrative task of deciding what restrictions to impose and how to enforce them has left all such efforts stillborn. The current system is one of unconditional government cross-subsidy. The safety net granted *ex post* looks only at one side of the problem: the response to illness once it occurs. But it ignores the second side of the problem: the increased frequency of adverse conditions. It is worth noting that life expectancy increased more rapidly in the first half of the past century than the second. It is quite likely that these increases resulted from some combination of public health measures and improved medical treatment. But better roads and cars, safer workplaces, and better and cheaper food also count in the overall figures. When all these are taken into account, my own deep suspicion is that the program championed by new public health is likely to reduce overall life expectancy.

B. Vaccination

The full range of issues surrounding vaccination programs also reveal the changes of the modern approach. The major controversy over vaccinations in the pre-1937 period concerned their compulsory application. Typically, however, the simple fact that most people clamored for vaccines to spare themselves from horrible illnesses or death overshadowed the theoretical issue. The twentieth century saw smallpox eradicated and the full range of once-fearsome communicable diseases – such as diphtheria, typhoid, yellow fever, and malaria – effectively contained, at least in developed nations. The decline of bacterial infections has ironically led to the rise of viral infections, of which AIDS is, of course, the most notable. Although smallpox is the notable exception, the ability of any vaccination program to eradicate communicable diseases is remote: The lower the perceived prevalence of the disease, the more likely it is that people will avoid the vaccine, which then gives the disease the opening to surge through the

population, at which point vaccination rates increase until the cycle repeats itself.¹²⁰

In some cases the problem is still greater because of the genuine difficulty in figuring out when an epidemic might well occur. The Swine Flu fiasco of the mid-1970s illustrates this difficulty.¹²¹ Haunted by the specter of the 1918 pandemic that killed over twenty million people, public health officials used spotty evidence to rush into an ill-conceived mass vaccination program for a swine flu outbreak that never occurred. The program was not compulsory, but then-President Ford did what he could to promote the vaccine use, including being vaccinated with his family on national television. Vaccines, alas, are not foolproof. The swine flu vaccine led to a short-term increase in deaths followed by the widespread occurrence of the Guillian-Barré Syndrome, whose progressive paralysis results in death in five percent of the cases.

During the nineteenth century, no crash program of this magnitude could have been mounted at all. The legacy of the twentieth century's improved infrastructure was a mass of liability suits based on the inadequate warnings supplied by the government as part of its program.¹²² The drug companies were well aware of the risk of these suits and they agreed to manufacture the vaccine on a crash basis only after the government took for itself all the risks associated with inadequate warnings.¹²³ It is difficult to craft a set of warnings that meet the strict standards of modern products liability law when the warnings must hold for a large population that contains pregnant women, diabetics, heart disease patients, senior citizens, and so on. Those used were so woeful that in litigation the United States never defended their adequacy but only resisted liability on such issues as causation and damages.¹²⁴ In public health, the perils of moving too rapidly are

¹²⁰ For a more detailed account, see Philipson, *supra* note 110, at 1768-73.

¹²¹ For a detailed narrative, see GINA KOLATA, *FLU: THE STORY OF THE GREAT INFLUENCE PANDEMIC OF 1918 AND THE SEARCH FOR THE VIRUS THAT CAUSED IT* 121-85 (1999).

¹²² See, e.g., *Davis v. Wyeth Labs., Inc.*, 399 F.2d 121 (9th Cir. 1968) (liability for Sabin vaccine); *Reyes v. Wyeth Labs., Inc.* 498 F.2d 1264 (5th Cir. 1974) (same).

¹²³ See National Swine Flu Immunization Program of 1976, Pub. L. No. 94-380, 90 Stat. 1113 (codified at § 42 U.S.C. 247b (2000)). The statute made the government the sole defendant in any direct product liability action, with remedies against the drug suppliers only for breach of contract. *Id.*

¹²⁴ See, e.g., *Overton v. United States*, 619 F.2d 1299 (8th Cir. 1980); *Unthank v. United States*, 732 F.2d 1517 (10th Cir. 1984).

often as great as those of moving too slowly. There is no refuge, either way, from the risks of uncertainty.

Vaccines, of course, are not only used to respond to uncertain crises. Many vaccines, such as polio vaccines or DPT, should be used in many circumstances. In these cases, the expansion of tort liability post-1968 has had negative public health implications. Before 1937, it was true that many vaccinations caused adverse side-effects, but I am aware of no case that sought recovery for the adverse consequences either from the physician or other party who administered the vaccine or from the firm that manufactured it. Two explanations account for the result. First, paradoxically, it is difficult to persuade any jury that human error is responsible for adverse consequences so long as technology is primitive. In order to hold some person or entity responsible for misconduct, a jury must believe that it knows what proper conduct is and how it would have made a difference if employed in the case at hand. As Mark Grady has argued, only when death in surgery or from vaccines ceases to be commonplace does liability increase.¹²⁵ In addition, when laissez-faire principles exerted some influence on judicial behavior, a judge could easily conclude that any vaccinated person had assumed the risk of vaccine-related injury.

Vaccination risks are, of course, not assumed willy-nilly by rational agents. But in many settings the overarching deal made perfectly good sense. If there was a one-in-ten chance of perishing from the disease, and a one-in-one thousand chance of suffering illness or even death from the vaccine itself, then by all means you should trade the larger risk for the smaller one, even if you do not receive a dime for any harms that occur.

Before the modern period, that sentiment helped shape substantive law. Regarding physicians, the usual rule of liability required proof of negligence (which in the nineteenth century was closer to gross negligence). In an age in which protocols for the safe delivery of vaccines were hard to establish, plaintiffs simply could not make this case out. In somewhat similar fashion, the doctrine of privity halted suits against manufacturers. Under the privity doctrine, parties injured by a good could not sue the "remote" supplier of the good unless the supplier had known of the imminent danger of

¹²⁵ Mark F. Grady, *Why are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 NW. U. L. REV. 293 (1988).

their product.¹²⁶ A mix of market forces and government regulation dealt with the issue of vaccine safety.

The legal situation had changed dramatically by the time the swine flu vaccine was prepared.¹²⁷ Matters of causation were, in principle, at least better understood. Additionally, the rise of the modern social welfare state had undermined the intellectual and emotional appeal of assumption of risk, both in popular thought and legal doctrine. In the previous several years, the courts had extended modern product liability theories to allow injured persons to bring suits directly against the vaccine manufacturer for its failure to warn of the dangerous side effects of the drug. The most obvious objection to many of these cases was that the vaccine did not cause the adverse reaction at all. In all likelihood, the injured person had contracted the disease from nature before the vaccine had been administered. No matter. It was all a jury question, which presented a Catch-22 scenario. The jury had to decide both the warning and the causation issues. If the vaccine did not cause the injury, then a manufacturer would have no duty to warn against side effects that did not ensue. But once a jury was allowed, against the odds, to conclude that the vaccine did cause the injury, then by all means the manufacturer had a duty to warn of these side effects. The false perception of the underlying medical situation reshaped the associated legal duties.

The result of misattributing harm has led to sharp increases in the price of vaccines and a concomitant reduction in their availability.¹²⁸ Let a vaccine reduce the incidence of death from one thousand to fifty cases, and the manufacturer does not get credit for the 950 lives saved, but is charged a hefty sum for the fifty deaths that ensued. Building the cost of insurance for those losses back into the cost of the vaccine results in higher prices and shortages, as the legal system reacts as though the vaccine supplied had caused fifty deaths

¹²⁶ For the classical exposition, see *Huset v. J.I. Case Threshing Mach. Co.*, 120 F. 865 (8th Cir. 1903).

¹²⁷ For a discussion of the evolution, see RICHARD A. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* (1980).

¹²⁸ See Richard Manning, *Changing Rules in Tort Law and the Market for Childhood Vaccines*, 37 J.L. & ECON. 247, 248 (1994) (stating that the price of DPT vaccine increased by over 6,000 percent from 1970 to 1987, a large percentage of which goes to litigation costs).

and saved no lives.¹²⁹ The only sensible way to respond to these risks is to provide the manufacturer with some protection against open-ended tort liability.¹³⁰ That could be done in two ways.

First, legislatures could grant the manufacturers statutory protection against law suits, which on public health grounds trump any common law cause of action. In exchange for that protection, the legislature could establish a compensation fund to pay a limited sum of money to those individuals injured by the vaccine (assuming again that the causation issues can be resolved). But that outcome has never quite been reached. The closest response was the National Childhood Vaccine Injury Act of 1986,¹³¹ which developed a complex no-fault system of compensation, capped at \$250,000, for persons injured through vaccines; individuals with certain specific symptoms occurring within stated time limits were entitled to sue. But recovery under the Act is only elective, such that anyone who chooses to spurn recovery can sue for ordinary tort damages. On balance the number of cases that will be resolved under the program probably has reduced the overall level of exposure. But the dangers still remain: Plaintiffs with weak liability cases will use the no-fault system, while those with the stronger cases under tort law will eschew the no-fault system. The response is halting and incomplete, at best.

Second, in the absence of statute, the vaccine recipients could be asked to waive their right of actions in order to receive the vaccine. That contractual waiver could be total, or again, could accompany some limited compensation for vaccine-induced harms. But the categorical rejection of both assumption of risk and freedom of contract has become an unchallenged article of faith in modern product liability litigation.¹³² The now-canonical view reads as follows: "Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or

¹²⁹ For some of the calculations of net benefit, see Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 280-83 (1985).

¹³⁰ See, e.g., PAUL RUBIN, TORT REFORM BY CONTRACT 62-63 (2d ed. 1993).

¹³¹ Pub. L. No. 99-660, 100 Stat. 3758 (codified at 42 U.S.C. § 300aa-10 to 300aa-34 (2000)).

¹³² See *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 96-97 (N.J. 1960) (rejecting standard product warranties).

reduce otherwise valid product liability claims against sellers or other distributors of new products for harm to persons."¹³³ Why? "It is presumed that the ordinary product user or consumer lacks sufficient information and bargaining power to execute a fair contractual limitation of rights to recover."¹³⁴ Put simply, markets never work because they always fail.

At this point we have come full circle. In my view, restricting nineteenth century principles of freedom of contract has had strong adverse effects on overall health by reducing the development and supply of needed vaccines and other pharmaceuticals that would have been brought to market. Yet the standard public health treatises that expound the new public health undertake no discussion of the implicit trade-offs raised by this problem. Professor Gostin cursorily summarizes the evolution of strict liability in tort in product liability cases, but does not examine the specific liability issues that have arisen with respect to vaccines. The New Public Health treatise of Tulchinsky and Varavikova does not broach the question of tort liability and its relationship to freedom of contract at all.¹³⁵ But the lesson still remains. The economic principles of scarcity have as their legal offshoot the principle of correlative rights and duties. No new rights can be created unless new duties are imposed. The issue is whether the imposition of tort liability and the corresponding contraction of freedom of contract make sense in light of the dominant tendencies that they produce. Measured in lives saved, they do not.

C. *Public Morals*

The discussion of the modern view of public morals is implicit in what has already been said. Modern discourse has effectively silenced the older view that unregulated sexual conduct was a public health risk that justified public coercion. Today's prevailing view heavily emphasizes voluntary compliance with various norms in the effort to reduce the spread of disease, such that various institutional responses to communicable diseases have been weakened when they are most needed: before the identification of the threat makes private responses sensible. The trade-offs here are no different from those associated with the modern concerns on the trade-

¹³³ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 18 (1998).

¹³⁴ *Id.* cmt. a.

¹³⁵ See TULCHINSKY & VARAVIKOVA, *supra* note 34.

off between liberty and security in a potential age of (bio)terrorism. Both liberty and regulation should be understood as principles designed to achieve overall human satisfaction. The glorification of liberty, even for a libertarian, is risky business when the specter of infectious diseases looms so large on the horizons. We should not forget the concerns of the old public health in the headlong rush to embrace the new.

VI. CONCLUSION

In one sense the debate over the proper collective response to public health offers but one arena in which to test the relative power of the classical liberal as opposed to the modern social welfare model of the state. Here too I think that the classical model outperforms its rivals. By stressing the importance of private wealth creation through private property and voluntary exchange, it gives individuals the resources that allow them to take effective individual measures to insure and promote their own health. By offering focused intervention on matters of communicable disease, it seeks to control externalities that private forces cannot resist. The two efforts are not unrelated. The increase in private wealth will result in a higher level of taxation to create the social infrastructure and environmental control systems needed to contain these public health risks in the first place.¹³⁶ Stated otherwise, one must examine these issues from a comprehensive perspective that understands the profound interactions between public health and private wealth creation. The old public health, by choosing more focused targets for government intervention, showed a greater appreciation for these complex systematic effects.

¹³⁶ "Once per capita incomes get to about \$8,000 per year, nations start aggressively improving their environments." James K. Glassman, *A Bright Idea on Development*, WALL ST. J., Sept. 7, 2002, at A12.