9-1-2011

When Push Comes to Shove: Mandatory Immunization in Times of Pandemic-Type Emergencies

Philip P. Houle
Suzanne R. Houle

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/bpilj

Part of the Constitutional Law Commons, and the Health Law and Policy Commons

Recommended Citation
Available at: https://digitalcommons.law.buffalo.edu/bpilj/vol30/iss1/5

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Public Interest Law Journal by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
WHEN PUSH COMES TO SHOVE:
MANDATORY IMMUNIZATION IN TIMES OF
PANDEMIC-TYPE EMERGENCIES

PHILIP P. HOULE† & SUZANNE R. HOULE‡

Upon the principle of self-defense, or paramount necessity, a community has the right to protect itself against an epidemic or disease which threatens the safety of its members . . . .

If the mode adopted by . . . Massachusetts for the protection of its local communities against smallpox proved to be distressing, inconvenient, or objectionable to some . . . the answer is that it was the duty of the constituted authorities primarily to keep in view the welfare, comfort, and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few. There is, of course, a sphere within which the individual may assert the supremacy of his own will . . . . But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.†

This paper will explore when the government can mandate vaccination and other methods of treatment to control contagious disease and epidemics, and related legal and practical issues such as time and other limits on emergency powers, “drafting” physicians and health workers to assist, and the scope of judicial review and remedies.

† Philip Houle graduated from Marist College, holds law degrees from the University of Maine and University of Missouri-Kansas City, is a member of the Maine, Missouri, Tennessee, and Maryland Bars, and works in Washington, D.C. The views expressed herein are solely his own.
‡ Suzanne R. Houle graduated from the University of Maryland at College Park with honors in psychology and environmental science and from the University of North Carolina law school. She is a member of the Maryland bar.
† Jacobson v. Massachusetts, 197 U.S. 11, 27-29 (1905) (rejecting claim by persons with no signs of disease for exemption from mandatory vaccination on religious grounds).
The problem is not limited to natural causes. As then-Secretary of Defense William S. Cohen noted, we are in a “grave new world” in which a number of nations, including Iraq, Iran, China, Taiwan, North Korea, Syria, Egypt, Cuba, Israel, Russia, Japan, and the United States likely have biological weapons programs.\(^2\)

Dealing with pandemics is global in scope. “Anthrax doesn’t respect state borders . . . . Whatever public health emergency we experience in Washington is likely to be a problem in Oregon and Idaho and, for that matter, Canada as well.”\(^3\)

Health pandemics, natural or the product of humans, are often global in one aspect or another.\(^4\) What happens in, say, South America or Eastern Europe will probably impact the United States.\(^5\)

The current global recession almost certainly impacts public health. When times are tough, the two things that surface are crime and war, with health consequences in the mix.\(^6\)

---


Health care and disease-control in developing and Third World nations is precarious and likely to decline further, as government and international aid diminishes. Worldwide, the political and social impact of the financial crisis is being felt as unemployment rises and income deteriorates, to the point that public protests are occurring and extremism and terrorism are increasing. Life-expectancy in sub-Saharan Africa has dropped from 67 years to 47 years due to AIDS, with a rise in child mortality, including 70% due to AIDS in Zimbabwe.

Complicating the use of vaccination to combat infection is the fact that vaccine must be developed and administered significantly in advance of an outbreak actually striking to have a real effect. Thus, an executive’s declaration of an emergency mandating vaccination sufficiently before a scourge hits will almost of necessity involve “predictive judgment calls” and subjective evaluations.

I. WHAT IS A PANDEMIC AND WHEN DOES ONE START?

Many of the legal and practical issues on preparing for and declaring a public health emergency hinge on defining “pandemic” and determining when one starts.

Pandemics involve person-to-person non-sexual transmission capable of crossing international borders.

According to WHO, “[a] pandemic is not a single point in time, but a scenario that may occur in several waves over a period...”

---

7 Id.
8 Id.
of months” that are difficult or subjective for officials to identify. Pandemics can appear to halt or dissipate, then continue.\textsuperscript{12}

Health experts reportedly were “almost completely surprised” at how the swine flu unfolded in 2009, to the point that health experts are now rethinking how to define a pandemic and what pandemic preparedness might really mean. For now, health officials will likely be less inclined to move to “stage 6,” the top level of WHO’s international pandemic ladder, in which a pandemic is declared and nations move to control the situation.\textsuperscript{13}

Many nations do not have meaningful plans on dealing with a Phase 6 situation. Therefore, health officials may be forced to learn “on the run” and issue orders in a fluid, fast-changing situation. If so, that would have novel or unclear implications for both public-health and legal issues.\textsuperscript{14}

II. CHAMBER OF BIOLOGICAL HORRORS – “DESIGNER PLAGUES”

As former Secretary of Defense William Cohen noted, we are truly in a “grave new world” in which bio-terrorists and others can intentionally or otherwise wreak havoc on the world by creating “designer plagues” that end-run known medical defenses.\textsuperscript{15}

\textsuperscript{12} See When does a pandemic start? Industrial engineers take a closer look at planning stages as the WHO re-works alert scale, Emerging Health Threats Forum, http://anitamakri.com/wp-content/uploads/2010/01/EHTF09.05.28_anitamakri.com_.pdf
“[T]he potential use of biological agent to inflict disease is a pernicious consequence of advances in medical, laboratory, and engineering sciences. This threat cannot be dismissed, given the extensive biologic-weapons programs in Iraq and the former Soviet Union, and the terrorism targeted at Americans abroad, as well as acts of domestic terrorism perpetrated by Americans.”

The chamber of biological horrors—natural and otherwise—is seemingly increasing in size and ferocity.

Even without the “help” of state-sponsored or free-lance terrorists, the biotic world may be mutating in that direction on its own.

A list of potential bio-horrors could probably continue for pages. Many of the new risks, though, are likely unknown to the public and even health professionals, as terrorists and their allies develop designer plagues and as natural diseases develop along those lines circumventing our best defenses. The chamber of bio-horrors is both expanding and recycling.

---

III. HISTORY OF EMERGENCY POWERS – HOW HAVE THEY BEEN USED OR ABUSED?

A. Historical Overview

In the context of the war on terrorism, Professor David Cole of Georgetown University has written on the history of emergency powers in the United States and elsewhere, and has concluded that there is considerable reason to doubt that the laws on the books would not be abused. Professor Cole notes the tendency in times of emergency to give short-shrift to civil liberties that shield minorities and unpopular groups from heated and fearful over-reactions without proof of an individualized showing of risk.\(^2\)

For legislatures and executives, “[i]t is much easier to sell an initiative that denies only the rights of [unpopular minorities or persons] than one that requires everyone to sacrifice their rights.”\(^2\)\(^1\) Further, executives are quick to declare emergencies and are often very slow to declare the emergency over and give up those powers, sometimes keeping the emergency powers in place for many years or even decades after the true emergency had ended.\(^2\)\(^2\)

While more is said on judicial review later, recent history has shown the dangers resulting from lack of timely and meaningful action by the courts. Facing the often-stated argument that executives have greater access to intelligence and similar information and thus warrant special judicial deference, Professor Cole asks: if “the executive has much greater power to classified intelligence and foreign policy expertise in ordinary times as well

\(^{20}\) David Cole, No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Restraint, 75 U. CHI. L. REV. 1329, 1355 (Summer 2008). “In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign, as in a state of nature where the weaker individual is not secured against the violence of the stronger.” Federalist 51 (Madison in The Federalist 347, 352 (Wesleyan 1961)) (Jacob E. Cooke ed.).

\(^{21}\) Id. at 1350.

\(^{22}\) Id. at 1353-54.
[as emergencies], . . . why should their argument for [expansive] deference be limited to emergencies?"\(^{23}\)

And, of course, officials’ waiving the “emergency flag” before a court and the public can be viewed as a means of stampeding or short-circuiting the analytical process and public debate.\(^{24}\)

Yet the ongoing debate as to the outer limits of government power in major emergencies is still unresolved. But it does appear that if a truly major disaster were at hand (or even fairly clearly foreseeable), the government’s powers to act would be great.\(^{25}\)

Even if the dust had settled on an emergency, when faced with money damages claims for wrongful detention against depleted government treasuries, courts might be reluctant to find liability for fear of making the situation worse for government agencies forced to divert resources from other public needs. Such an outcome could result despite laws like N.C. Gen. Stat. §§ 148-82 to 148-84, which authorize payments from the government of $20,000 to 500,000 per year for wrongful detention or incarceration and possibly constructive wrongful detention.\(^{26}\)

The last major pandemic to strike America was the Spanish Influenza of 1918. While American concepts of due-process have

\(^{23}\) Id. at 1355.

\(^{24}\) CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 40 (2005) (“the word ‘terrorism’ evokes vivid images of disaster, thus crowding out probability judgments” by judges and others).

\(^{25}\) Bruce Ackerman, The Emergency Constitution, 113 YALE L. J. 1029 (March 2004) (“[t]errorist attacks will be [a permanent] part of our future” and diminish liberty); & Lawrence O. Gostin, When Terrorism Threatens Health: How Far Are Limitations on Personal and Economic Liberties Justified?, 55 FLA. L. REV. 1105, 1106 (2003).

\(^{26}\) See Ackerman, supra note 25, at 1063 n.82 (listing federal and State laws on compensation for wrongful detention). A civil suit by a private citizen against the government for an injunction or declaratory judgment that the act of the executive exceeded his or her authority under a statute or was unconstitutional could be converted into a monetary damages claim if a court ruled in a citizen’s favor and established grounds for damages, particularly if the government did not honor a court’s declaratory judgment; see SEC v. Commonwealth Chemical Secs., 574 F.2d 90, 96-97 (2d Cir. 1978) (collateral estoppel effect of SEC action in later suit against wrongdoer by private victim).
expanded since then, potential “Dark Winter”-like fears are a reminder that we likely have not yet heard the last word on this.\(^\text{27}\) Thus, it may be the case that we are in a new, undeclared era involving a perpetual state of emergency.

But others say that any supposed “new era” of civil rights has long been part of our American constitutional method of dealing with wars and major emergencies, for better or worse.\(^\text{28}\)

Despite the ruling by the U.S. Supreme Court in *Jacobson v. Massachusetts*,\(^\text{29}\) modern medical and isolation methods and protections would likely be asserted as grounds for not mandating vaccination of those who oppose it on moral, religious, or philosophical grounds.\(^\text{30}\)

In sum, the history of emergencies seems to be one of the lack of adequate preparation and being forced (hopefully) to learn on the run.\(^\text{31}\) Another theme is that “[t]he history of public health is littered with illustrations of trade-offs between public health and civil liberties.”\(^\text{32}\)


B. Justice Holmes on Emergency Law

Justice Holmes is perhaps regarded as the father of modern law on emergencies, which forms the backdrop of mandatory public health measures in times of emergency. Justice Holmes took the position that:

1. The existence and duration of an emergency are questions of fact.
2. During emergencies, courts should not practice “judicial minimalism” but should reach out promptly to declare the existence of an emergency, limits on governmental power, and the end of an emergency.
3. During emergencies, there are no non-derogable rights, since government can do virtually anything if circumstances warrant, including the taking of human life.
4. The main checks on government action during emergencies are
   a. Legislative limitations on executive powers.
   b. Ex post sunsetting once an emergency has actually ended by rescinding government’s emergency powers.
5. In the eyes of the law, there is no distinction between different types of emergencies.\(^{33}\)

Ambiguity in laws or court rulings can create aggressiveness in officials, who may well respond by moving to “seize disputed legal territory” and thereby diminish the prospects for meaningful full future judicial review and subject citizens to unlawful action in the meantime.\(^{34}\)


\(^{34}\) Vermeule, *supra*, note 33, at 180.
Justice Holmes’ view of emergencies as “fact” greatly affects the availability and the scope of judicial review. Legislatures are typically the best or most competent agency on facts, and courts on the law. Holmes would defer to the legislature and executive that an emergency exists, but not as to obvious mistakes or clear errors as to either the facts or the law.

In contrast to the “perpetual state of emergency” we are said to be in today, Holmes assumed that emergencies were only temporary and that it was wrong to assume that an emergency would continue forever.

As to the imminence of harm needed to constitute an emergency, Holmes believed that harm must be immediate or that an immediate intent to bring it about existed. Imminence was a question of proximity and degree. Presumably Justice Holmes would modify that position to account for developments in technology and the need for fairly lengthy periods of “lead time” to plan and act, although case law seems not to have fully addressed that.

The Supreme Court’s statements on how emergencies impact the law are arguably unclear or conflicting. In upholding a law establishing an 8-hour work-day for railroad workers to avoid labor unrest as America entered World War I, the Court stated that “although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.”

However, reliance on government’s potent “inherent powers,” would seem in theory to avoid claims that it had created

35 Id. at 168-71.
36 Id. at 173 (citing Richard A. Posner, Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11 at 187-89 (2005)).
37 Id. at 174.
38 Id. at 174-75.
new powers from whole cloth powers that did not previously exist.\textsuperscript{40}

"[T]he President has implied constitutional power under Article II of the Constitution to suspend entry of certain groups of aliens . . . . Even if there is no express statute for the President to execute, he may act to protect threatened American citizens or property.\textsuperscript{41} Thus the President clearly has inherent authority to act to protect the United States . . . .\textsuperscript{42}

The fact that the government’s or executive’s inherent or express authority has not been exercised in the past or has long been dormant has been held not to invalidate that authority.\textsuperscript{43}

Individuals who assert “surprise” or a lack of fundamental unfairness that a court’s announcing or recognizing for the first time (or for the first time in many years) a specific inherent power of government would likely have to overcome case-law giving the executive exceptionally broad powers in times of emergency and otherwise refusing to apply \textit{laches} to government. When it comes to inherent power, a court could reason that the inherent power claimed by the executive is sufficiently central to the carrying out of executive powers as to be readily implied and understood as a

\textsuperscript{40} See \textit{In re Sealed Case}, 310 F.3d 717, 742 (FISA Ct. Rev. 2002) (recognizing “that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information”); Petition of Florida State Bar Ass’n, 40 So.2d 902, 905 (Fla. 1949) (“Inherent power . . . [u]nder our form of government [is] the right that each department of government has to execute the powers falling naturally within its orbit[,]”).

\textsuperscript{41} Haitian Refugee Ctr., Inc. v. Gracey, 600 F. Supp. 1396, 1400 (D.D.C. 1985) (citation omitted).


\textsuperscript{43} United States v. Lane-Labs USA, Inc., 427 F.3d 219, 226 (3d Cir. 2005) (“[a]uthority granted by Congress . . . cannot evaporate through lack of administrative exercise””) (citing Bankamerica Corp. v. United States, 462 U.S. 122, 131 (1983)). See also Luoyang Bearing Factory v. United States, 240 F. Supp. 2d 1268, 1283 (Ct. Int’l Trade 2002) (noting that “an agency must be allowed to reassess the wisdom of its policy on an ongoing basis . . . [A]gency discretion to reconsider policies is inalienable”).
matter of basic fairness, as discussed in the above cases and in the following section on probable cause.

C. A Recent Analysis of American Emergency Law

An interesting and realistic view of the American law of emergencies was recently presented in Comment, Small Emergencies:

America has not in general had a toggle-switch approach to crises, where normal constitutionalism continues until a switch is flipped to stop it, and then the emergency continues until the switch is flipped back . . . [Thus] [t]he more realistic view is that emergencies are endemic to the American constitutional order, which has absorbed and rationalized them within the system of public law rather than holding them outside normal governance. In many ways, this is consistent with . . . [the] argument, which warns darkly of the “permanent emergency.” The ‘great presidents,’ Lincoln and Roosevelt, played fast and loose with constitutional rules in the name of civil war and economic emergency. Beyond these extreme cases, emergency exceptionalism . . . has always had its defenders. Venerable (and some unlikely) figures like George Mason, James Madison, Charles Evans Hughes, and Oliver Wendell Holmes, have been caught saying kind things about exceptional governance in Levinson's account. To his impressive list, we add Thomas Jefferson, who wrote: There are extreme cases where the laws become inadequate even to their own preservation, and where the universal recourse is a dictator, or martial law . . . . On great occasions every good officer must be ready to risk himself in going beyond the strict lines of law, where the public preservation requires it . . . . [But] in America and virtually every other stable democratic constitutional state, the government retreats from the extremes when the declared
crisis ends. That is what it means to have an ongoing constitutional order . . . .

But what might come of America’s traditional “retreat from the extremes” of the law when we live in an apparent age of “permanent emergency,” due to international dangers and terrorism? That question is still unanswered. But as a friend said: “One mushroom cloud over Denver, and the Bill of Rights will be ‘suspended’ indefinitely until further notice, on the demand of the people.”

Under the Disaster Relief and Emergency Assistance Act of 1974 (Stafford Act), the President may determine the existence of an emergency, defined as: any occasion or instance for which federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and the public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States. That grant of power apparently is absolute. There are no additional guidelines in the Stafford Act as what constitutes an emergency.

Further, procedural rules established by other statutes for administering federal funds may be overridden in a presidentially-declared emergency. The Stafford Act also authorizes the President to suspend or override laws in dealing with a crisis.

While Michael Greenberger’s scenario discussed in the following section envisions action by local and State officials, the “emergency exception” to the Posse Comitatus Act allows the President to use federal troops for local law-enforcement during national emergencies.

Additional authorities that allow the

---

44 Id. at 843 (emphasis added.) For the proposition that America has generally not had a toggle-switch approach to crises, see Kim Lane Schepple, Comment, Small Emergencies, 40 GA. L. REV. 835, 843 (2005-2006)
45 Id. at 842.
46 Id. at 843.
47 Id.
48 Id.
49 Id.
50 JENNIFER K. ELSEA & R. CHUCK MASON, CONG. RESEARCH SERV., RS22266, THE USE OF FEDERAL TROOPS FOR DISASTER ASSISTANCE: LEGAL ISSUES
military to perform local law-enforcement include the Insurrection Act, 10 U.S.C. §§ 371-378, 18 U.S.C. § 831 (nuclear and radiological risks), the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C., Ch. 68, and executive non-statutory “inherent emergency power.”

IV. SCENARIO OF CONCERN TO THE LEGAL COMMUNITY

A scenario of concern for the legal community in connection with massive health emergencies would involve mandatory vaccinations, physical exams, and quarantines due to public health threats. Some view emergency power as eroding civil liberties, with the ongoing “war on terrorism” only heightening that concern.\footnote{Jules Lobel, \textit{Emergency Power and the Decline of Liberalism}, 98 \textit{Yale L. J.} 1385, 1412-21 (1989) (federal laws that limited the President’s power during emergencies had little impact in real life).}

Michael Greenberger, Director of the University of Maryland’s Center for Health and Homeland Security, projects a likely scenario that we would face if and when a bio-terrorist strike occurred.\footnote{Michael Greenberger, \textit{America at War – The Legal Issues: The Law of Counterterrorism Wants You!}, 35 MD. B. J. 10, 15 at n. a1 (Nov./Dec. 2002).}

Private citizens would be stopped by police, following the governor’s declaration of catastrophic health emergency in the hypothetical wake of a crop-duster spreading a smallpox pathogen over large parts of a city. The smallpox would be highly contagious with a 30 percent mortality rate. The governor would have authorized authorities to compel persons in affected areas to

be immediately examined for signs of contamination and vaccinated against smallpox as a precaution, pursuant to the State’s catastrophic health emergencies law that purport to justify the actions taken by the State.\textsuperscript{54}

Police would then direct citizens to nearby tents to disrobe before a police officer and medical person for an examination and vaccinations. Citizens would then be warned that about one out of 1 million persons vaccinated die and that many more suffer non-lethal, but severe, reaction. Those citizens who inquire as to the consequences of not submitting to the process would be informed that they will be taken to a holding facility with others who refuse, and will likely be charged with a criminal misdemeanor.\textsuperscript{55}

Citizens are also told that following the examination and vaccination, they will be quarantined in a nearby school building for as long as it would take to determine that they pose no substantial risk of transmitting smallpox, a process that could take up to thirty days—and that every effort will be made by public officials to bring adequate food and supplies to quarantine centers.\textsuperscript{56} Family members of detainees will be subject to the same procedures and restrictions and maintained in quarantine centers near the location where they were confronted by police, often considerable distances and incommunicado.\textsuperscript{57}

Judicial review, while available, might very well be delayed considerably, due to the nature of the emergency and the sheer volume of hearings. Lawyers and judges themselves would also be subject to the same vaccination and quarantine rules and a shortage of available lawyers and judges could arise.\textsuperscript{58}

\textsuperscript{54} Id. at 12-13.
\textsuperscript{55} Id. at 12.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
V. PROBABLE CAUSE AND REASONABLE SUSPICION IN TIMES OF EMERGENCIES

On the heels of legal concerns over massive police-sweeps of citizens for mandatory vaccination and possible quarantining, come issues of probable cause, search-and-seizure and the authority of government to take action against individuals when there is no proof that they were infected or dangerous.

A. Balancing Test

The Supreme Court has stated that “determination of the standard of reasonableness applicable to a particular class of searches requires ‘balanc[ing] the nature and quality of the intrusion . . . against the importance of the governmental interests alleged to justify the intrusion.’”

Some courts have held that quarantining and isolation require something beyond mere suspicion to believe that a person has a contagious disease.

B. Exemptions to Fourth Amendment – Emergency Authorities

The “emergency authorities,” “community caretaking” and “special needs” exceptions to the Fourth Amendment have been


60 See Love v. Superior Court, 226 Cal.App.3d 736, 740 (1990); see also Barmore v. Robertson, 302 Ill. 422, 432, (1922) (“A person cannot be quarantined upon mere suspicion that he may have a contagious and infectious disease”). See also Love at 742 (1990) (upholding mandatory immunization for prostitution-related AIDS, California noted that government action which might otherwise be unconstitutional is often valid under “the ‘special needs’ doctrine.”); Hill v. Commonwealth, 47 Va. App. 442, 455-57, (finding that “inspections . . . without a warrant” are “traditionally upheld in emergenc[ies]”) (citing U.S. Supreme Court).
Mandatory Immunization

held to allow government action to proceed without a warrant or probable cause when exigent circumstances exist.\textsuperscript{61}

The “emergency authorities” exception allows for infringement on the privacy rights of persons who may be innocent but are swept up in a police net during an emergency. In these situations, law enforcement officials may take intrusive measures against a much broader number of persons, such as when the police have a partial description of a suspected terrorist and stop everyone who matches that partial description.\textsuperscript{62}

This can, of course, lead to racial or ethnic profiling and underscores an as-yet unresolved tension between the requirement of individualized suspicion on an anti-discriminatory basis versus the government’s practical inability to effectively address a significant threat otherwise.\textsuperscript{63}

C. Special Needs

Government action that would otherwise be unconstitutional is often upheld under “the ‘special needs’ doctrine.”\textsuperscript{64}

The “special needs” exception will also justify a search without probable cause or a warrant.\textsuperscript{65} In Vernonia, the Court added that: “[a] search unsupported by probable cause can be constitutional ... ‘when special needs ... make ... probable-cause requirements impracticable.’”\textsuperscript{66}


\textsuperscript{64} Love at 742, (discussing mandatory vaccination for prostitution-related AIDS) (citing U.S. Supreme Court). See also Hill at 455-57 (concerning warrantless inspections in emergencies) (citing U.S. Supreme Court).


\textsuperscript{66} Id. at 653.
Special needs considers: (1) “the nature of privacy” violated, (2) “the character of the intrusion,” and (3) “the nature and immediacy of the government’s concern . . . and the efficacy of [the search] for meeting it.”

Courts often use the special-needs exception when the government acts in civil or regulatory matters. But agencies are not prohibited from turning over evidence to criminal prosecutors, when an initial government inquiry was civil in nature.

D. Community Caretaking

The “community caretaking” exception to the Fourth Amendment is based on the concept that the police strive to ensure the safety and welfare of the community at large and that some emergencies require immediate action. When no seizure of a person is involved, an officer is not required to have particularized objective justification.

These types of civil/administrative or non-criminal police-citizen encounters are not judged by the normal Fourth Amendment standards since they are not deemed to be searches and seizures.

---

67 Id. at 654, 658 & 660 (finding that student-athlete drug tests results used only for sports eligibility). See also Von Raab at 663 (no criminal prosecution); Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 621 (1989) (safety drug-tests not sought for criminal prosecution).
68 See Vernonia at 653-54. Some commentators claim that the special-needs exception could swallow whole the Fourth Amendment. See generally Jennifer Y. Buffaloe, Note, “Special Needs” and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule, 32 Harv. C.R.-C.L. L. Rev. 529 (1997); Michael Polloway, Comment, Does the Fourth Amendment Prohibit Suspicioneless Searches—or Do Individual Rights Succumb to the Government’s “So-Called” Special Needs?, 10 Seton Hall Const. L.J. 143 (1999).
69 See United States v. Fort, 248 F.3d 475, 478-80 (5th Cir. 2001) (upholding the denial of a motion to suppress 561 pounds of marijuana discovered as the result of a routine commercial inspection.)
71 See Cady, 413 U.S. at 442-43; Naumann, supra note 71.
Courts use a three-part test to evaluate community-caretaking: (1) “there must exist an objectively reasonable basis for a belief in an immediate need for police assistance for the protection of life or substantial property interests,” (2) the police action “must be motivated by an intent to aid” rather than solve a crime, and (3) the police action “must fall within the scope of the emergency.”

Bioterrorism, for example, presents a unique challenge under the Fourth Amendment, one that the courts have not resolved, in that it presents a low-probability but high-magnitude risk.

E. Administrative and Regulatory Inspections

Even in non-emergency, garden-variety civil administrative inspections like those by regulatory and health agencies, courts have recognized that agency officials may investigate “merely on suspicion” or just because they “[want] assurance” that a situation does not warrant further action.

As the courts address the above Fourth Amendment exceptions in terrorism cases, answers should emerge as to: (1) the scope of discretion that police have as the magnitude and proximity of risks vary, (2) the rules of engagement that govern and distinguish valid security concerns from pretexts for arbitrary police action, (3) when, if ever, targets may validly become the focus of police attention on the basis of their race or ethnicity, (4) when probable cause or reasonable suspicion are needed, and (5) the extent of police intrusions into private homes and businesses without probable cause.

---

72 Decker, supra note 60, at 457, 510, 517.
73 United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950); McVane v. FDIC, 44 F.3d 1127, 1134-35 (2d Cir. 1995) (distinguishing agency subpoenas from criminal warrants); United States v. Aukai, 497 F.3d 955, 959 (9th Cir. 2007) (en banc) (noting that a private business subject to agency regulation has little-to-no expectation of privacy).
VI. POST 9-11 ACTION AND THE MODEL STATE HEALTH EMERGENCY POWERS ACT

A. Background

Following the 9/11 terrorist attacks, the Centers for Disease Control and Prevention commissioned Johns Hopkins University to convene experts and draft a Model State Health Emergency Powers Act. Over 44 States (including North Carolina) have adopted some or all of the Model Act. The legislation and executive orders issued in the aftermath of 9-11 underscored the legal and medical need for the Model Act.

The Model Act gives governors broad powers to declare emergencies, including mandatory quarantines and vaccinations of large segments of the population. The first draft was viewed as an unjustified departure from traditional patients’ rights. In December 2001, the CDC issued a revised draft that tried to address those concerns. Maryland, has reportedly improved on the Model Act.

In addition, Congress’ enactment of the far-reaching Public Health Security and Bioterrorism Response Act of 2002, 42 U.S.C. § 247d-7b, went nearly unnoticed. That law covers environmental, food and drug, agricultural, and intellectual property law, and allows the President to suspend other laws.

74 N.C. GEN. STAT. ANN. §§ 120-71 et seq. See also N.C. DEP’T OF CRIME CONTROL & PUBLIC SAFETY, STATE OF NORTH CAROLINA EMERGENCY OPERATIONS PLAN (2009).

75 Some physicians have expressed concern about the model act and have urged improving public health laws. See Robert M. Pestronk et al., Improving Laws and Legal Authorities for Public Health Emergency Legal Preparedness, 36 J. LAW MED. ETHICS 47, 48 (Spring 2008).


77 Franklin H. Alden, Jr., Liberty or Death: Maryland Improves Upon the Model State Emergency Health Powers Act, 8 J. HEALTH CARE LAW & POLICY 185 (2005).

78 Greenberger, supra note 54, at 12. See also Zucht v. King, 260 U.S. 174, 176 (1922) (upholding law vesting “broad discretion” in health officials to apply and enforce law).
The Model Act has its defenders. According to Professor Gostin, the Model Act: (A) allows a governor to declare an emergency only under strict standards and after careful consultation with public health experts, (B) empowers the legislature to overrule a governor’s emergency declaration at any time and (C) authorizes the courts to terminate the governor’s declaration if the governor violates the law or acts unconstitutionally.

Others argue that the Model Act’s treatment of civil rights is still inadequate. The Model Act, though, may be the best currently available piece of legislation on the books.

B. Overview of Model Act

The Model Act is structured to reflect 5 basic public health functions to be facilitated by law:

(1) **preparedness**, including comprehensive planning for a public health emergency;
(2) **surveillance**, including measures to detect and track public health emergencies;
(3) **management of property**, ensuring adequate availability of vaccines, pharmaceuticals, and hospitals, as well as providing power to abate hazards to the public's health;

---


(4) protection of persons, powers to compel vaccination, testing, treatment, isolation, and quarantine when clearly necessary; and
(5) communication, providing clear and authoritative information to the public.

C. The More Controversial Provisions of the Model Act

The more controversial provisions of the Model Act are in Articles II, V, VI and VIII which address Public Health Authorities/Powers (investigations and compulsory medical treatment), Public Health Emergencies (use of private property and liability), and criminal and civil enforcement and immunities.\(^8\)

The Model Act at § 1-102 also contains definitions of 67 terms.

Under 2-104 of the Model Act, public health authorities may “provide or implement essential public health services and functions, including services or functions” on a long list of open-ended activities. That “including” phrase arguably indicates that the government has broad authority beyond the literal language of the statute.\(^8\)

Section 5-101(b)(4) provides that:

[a] state or local public health agency shall employ the least restrictive alternative in the exercise of its authorities or powers, especially compulsory powers . . . . Employing the least restrictive alternative does not require the agency to adopt policies or programs that are less effective in protecting the public’s health or safety.

Section 5-101(c)(1) requires health officials, when possible, to request individuals to voluntarily participate in the program when mandatory or compulsory powers are involved. The only

---

\(^8\) THE MODEL STATE EMERGENCY HEALTH POWERS ACT (Discussion Draft 2001), available at www.publichealthlaw.net/ModelLaws/MSEHPA.php.

\(^8\) See Turtle Island Restoration Network v. Nat’l Marine Fish Serv., 340 F.3d 969, 975 (9th Cir. 2003); World Wide Const. Services, Inc. v. Chapman, 683 P.2d 1198, 1201 (Colo. 1984) (Quinn, J., dissenting).
case found that defined “least restrictive alternative” in a health-care statute, held that when an individual is a danger to him/herself or others, involuntary institutionalization was justified.\footnote{In re Wilson, 431 So. 2d 552, 554 (Ala. Civ. App. 1983). See also In re Doe, 102 Hawaii 528, 548-49, (Haw. Ct. App. 2003) (holding that there must be clear and convincing evidence of danger to civilly commit an individual.)}

Section 5-104 of the Model Act, health authorities may investigate not only emergency situations, but non-emergency situations too, with an eye to preventing them from developing into emergencies.

Section 5-106 authorizes both consensual and mandatory testing and examination. Mandatory testing and examination is authorized when a person has or may have been “exposed to a contagious disease that poses a significant risk or danger to the public’s health.” Under that section, compulsory screening is authorized “for conditions of public health importance that pose a significant risk or seriously threaten the public’s health.”

“Mandatory treatment” under § 5-107 is required as to any person who has been or may have been exposed to a contagious disease that poses a significant risk do danger to others or the public’s health . . . .” Under § 5-107(b), mandatory treatment includes completion of a “prescribed course of medication . . . and . . . infection control . . . .” As noted later, “treatment” has been held to include vaccination.

Section 5-108 addresses quarantine and isolation pursuant to rules or regulations promulgated by the State public health agency. It also lists the condition and principles governing isolations and quarantines, including use of the “least restrictive means necessary to prevent the spread of a contagious or possibly contagious disease” and separation of isolated individuals from those who are under quarantine.

Section 5-108 also states that: “[t]o the extent possible, cultural and religious beliefs shall be respected in addressing the needs of individuals, and establishing and maintaining isolation and quarantine premises.” Case law indicates that “to the extent
possible requires nothing more than creation of a sufficient record to show that the agency did not act unreasonably.  

Section 5-108 further provides for temporary isolation and quarantine without notice to the person placed in isolation or quarantine, when “delay . . . would significantly jeopardize the agency’s ability to prevent the transmission of contagious or potentially contagious disease to others.” Within 10-days of directing a temporary isolation of quarantine, the state agency shall petition a court to authorized continued temporary isolation or quarantine.

Section 5-108 also authorizes isolation or quarantine with prior notice, so long as there is a prompt court hearing on any petition within 48-hours or as otherwise provided by a particular State’s version of the Model Act. The Model Act directs courts to appoint counsel for individuals affected, with appointments lasting for the duration of the isolation or quarantine of the person or persons affected. The state agency is then required to provide “adequate means of communication” between those persons and their counsel.

Section 5-109 addresses vaccinations and does not expressly authorize involuntary vaccination, except for attendance at public schools and children’s day-care. Under § 5-109(h)(4), “[n]o individual shall be required to be vaccinated pursuant to this Section when . . . [t]he individual objects in a written, signed affidavit issued pursuant to court order on the basis that the vaccination interferes with the free exercise of the individual’s sincere religious beliefs.” Since courts have extended the First Amendment to similar non-religious-based core beliefs, it seems likely that a court would extend or apply § 5-109(h)(4) to those other types of beliefs.

Despite the lack of express authority in § 5-109 to mandate vaccinations, the compulsory screening, medical treatment (including an “appropriately prescribed course of medication”), and quarantine and isolations addressed in §§ 5-106 through 5-108

---

85 See City of Rochester v. U.S. Postal Service, 541 F.2d 967, 976 (2nd Cir. 1976).
seem to capture and express that authority as part of broader mandatory treatment powers. As will be seen, § 6-104 also authorizes state health agencies to “use every available means to prevent the transmission of infectious disease . . . and apply proper control and treatment in all cases of infectious disease . . . .” That includes the power under § 6-104 to “perform or administer tests, examinations, screenings, treatment, isolation, quarantine, decontamination, or vaccination consistent with § 5-106, § 5-107, § 5-108, and § 5-109.” As noted below, “treatment” has been held to include vaccination.

While § 5-107 the Model Act expressly provides for mandatory or compulsory medical “treatment” (apparently including vaccination), traditional rules of statutory interpretation would seem to give priority to § 5-109 as the law that specifically addresses compulsory vaccination. But a court might well come to a different conclusion by first reading §§ 5-107, 5-109 and other parts of the Model Act together as part of a single statute and thus “incorporating” the mandatory powers of § 5-107 into § 5-109, standing alone or pursuant to the “every available means” and “may administer . . . vaccination” language of § 6-104(a) and (b) and/or interpreting “pursuant to a court order” in § 5-109(h)(4) as recognizing inherent judicial power and discretion to inquiring into the merits of claims of religious-based exemptions coming before the court.

Those issues are unresolved as to the Model Act, but would likely be answered in the government’s favor under traditional rules of statutory interpretations.86

Creating an additional hurdle for persons asserting a religious exemption to mandatory vaccination, many States require

86 See Caselnova v. N. Y. State Dep’t of Health, 91 N.Y.2d 441, 444-45 (1998) (reading different health laws together); Miller v. Ala.State Bar, 711 S.2d 917, 923 (Ala. 1997) (stating that the court has “inherent power to inquire into the merits . . . and to take any action it sees fit”) (citing Simpson v. Ala. State Bar, 294 Ala. 52 (1975)).
those claiming religious exemptions to also assert that their religious beliefs preclude them from any and all vaccines.\(^{87}\)

Persons administering or authorizing vaccinations are immune from civil and criminal liability for: (A) simple negligence or (B) for failure to vaccinate due to a person’s or his/her representative’s refusal or failure to consent.\(^{88}\)

Section 5-111 empowers government to abate public health nuisances, including taking “immediate action” when warranted, with the State allowed to pay the costs of abatement or seek reimbursement from “responsible persons.”

Section 5-112 addresses administrative searches and inspections, with or without the consent of an owner. “[A]dministrative search warrants” are authorized, indicating that the heads of State agencies have authority to issue such warrants. In cases where “a nuisance is known . . . to exist . . . and the nuisance poses an immediate threat,” health official may enter property without an owner’s consent and without administrative search warrant to evaluate the situation. Officials may enter any “public place,” apparently without consent of an owner and without an administrative search warrant.

Section 6-101(b)(4) requires public health emergency plans to address the “continued, effective operation of the judicial system including the potential identification and training of personnel to serve as emergency judges for matters of isolation and quarantine.” Sections 6-101(b)(7) and (9) address “treatment, decontamination, or vaccination of individuals” and the “safe and effective” protection of individuals isolated, quarantined, vaccinated, tested, treated, or decontaminated” during a public health emergency.

\(^{87}\) Margaret J. Kochuba, Comment, Public Health vs. Patient Rights: Reconciling Informed Consent with HPV Vaccination, 58 EMORY L. J. 761, 783 n. 162 (2009) (noting that Georgia, Maryland, North Carolina, South Carolina, and Virginia, among other states, have “strict policies against partial exemption.”)

\(^{88}\) See ANGIE A. WELBORN, CONG. RESEARCH SERV., RS21414, MANDATORY VACCINATIONS: PRECEDENT AND CURRENT LAWS(2005) (noting that West Virginia is the only State that does not exempt mandatory vaccination on the basis of religious belief), www.fas.org/sgp/crs/RS21414.pdf.
Section 6-101(b)(11) requires emergency plans to address “relevant cultural norms, values, religious principles, and traditions,” while § 6-101(b)(12) authorizes plans to include unspecified “other measures necessary to carry out the purposes of this Article.”

Section 6-102 states when and how a governor may declare a public health emergency and lists the contents of declarations of public health emergencies and the effect of a declaration. Section 6-102(d) lists the emergency powers that governors have, including suspending the operations of certain state laws and regulations. Section 6-102(d) does not expressly limit emergency powers to those listed therein, nor does it address methods of statutory interpretation that courts should use in construing § 6-102. Under § 6-102(d), State health authorities are vested with power to enforce orders issued pursuant to the Model Act, including seeking the help of the “organized militia.”

Section 6-102 also addresses termination of declarations of emergency by: (A) executive order, (B) automatic termination 30-days after declaration unless extended for an additional 30-day period(s) by the governor under the same standards governing an initial declaration of emergency, or (C) declaration by a majority of both chambers of a state legislature. Section 6-102 does not address possible action by a court to terminate a declaration of emergency.

Section 6-103 deals with management of property during public health emergencies, including closing and decontamination of property, acquiring or condemning property, using and managing health care facilities, and destroying and controlling materials. Section 6-103 also deals with control of medical materials, roads and public areas, and the disposal of human remains without expressly providing how or if religious and similar beliefs may affect the disposal of human remains. When

---

89 See Turtle Island Restoration Network v. Nat’l Marine Fish Ser., supra note 84, 340 F.3d at 969, 975 (9th Cir. 2003); Chapman, 683 P.2d at 1201 (Colo. 1984) (noting the open-ended language indicates broad authority beyond literal language of the statute).
the State contemplates the destruction of property, the state public health agency shall initiate a civil action seeking court orders to proceed (pursuant to normal rules of procedure or other special emergency rules created by courts).

Section 6-104 authorizes state health agencies to “use every available means to prevent the transmission of infectious disease . . . and apply proper control and treatment in all cases of infectious disease. . . .” That includes the power to “perform or administer tests, examinations, screenings, treatment, isolation, quarantine, decontamination, or vaccination consistent with § 5-106, § 5-107, § 5-108, and § 5-109.”

Section 6-105 grants civil immunity to private parties who consent without compensation to the State’s use of their property. Civil immunity also extends to non-governmental persons and their employees who perform contracts with the State under the State’s direction, if the death, injury or damage was not due to their gross negligence or willful misconduct—and provided that the acts or omissions of non-governmental person or employees or agents did not cause the emergency in whole or in part.

Section 6-106 directs the State to pay just compensation to owners of facilities lawfully used or appropriated by a state or local health agency for temporary or permanent use during an emergency. Section 6-103 prohibits compensation paid to owners of property that is closed, evacuated, decontaminated, or destroyed when there is reason to believe that their continued use would endanger the public health. Private parties may sue the State for

---

90 See e.g. People v. Steinberg, 190 Misc. 413, 414-15 (1947) (noting that “[i]t is argued that the vaccination was not a diagnosis, an operation, a treatment nor a prescription and further that all of the aforesaid terms presuppose the existence of human disease or disorder. Treatment is a very general term. Vaccination is a treatment given to a human being, even though no disease is present, to prevent disease . . . particularly of the contagious kind such as smallpox. It is treatment as well as preventive medicine. In our modern age, the great progress of science is evidenced among other things by preventive medicine which is adopted even before disease makes its appearance and precisely to bar it from the human organism (emphasis added)).
just compensation in amounts calculated in the same manner as in non-emergency eminent domain cases.

Section 8-101 authorizes state and local public health agencies to issue rules and regulations to implement the Model Act.

Section 8-103 provides the procedural due process that is to be granted to all persons after reasonable notice, unless otherwise provided elsewhere in the Model Act, including a list of individual rights, subpoenas and witnesses, a record of the proceedings, and appeals to courts.

Section 8-104 lists criminal penalties for willfully violating any provision, regulation or order under the Model Act. Violations are punishable as misdemeanors, with enhanced penalties for subsequent convictions.

Section 8-105 outlines civil remedies that aggrieved persons may seek in court, including actual and punitive damages and attorney fees. Responsible parties are jointly and severally liable. The Model Act does not limit or expand the rights of aggrieved persons to recover damages under other applicable law.

Section 8-106 authorizes State Attorney General to sue civilly to enforce compliance with the Model Act, with relief issued under §§ 8-104 and 8-105.

Section 8-107 grants immunity to the State, state agencies, the governor, state and local health agencies, and other state and local officials and agencies for the death of or injury to individuals and for damage to property in attempting to comply with the Model Act, unless the tort was grossly negligent or willful. The immunity extends coverage to state and local health agencies for acts or omissions of “private sector partners” working with state or local health officials.
VII. LIBERAL READING OF DISASTER/EMERGENCY-RELATED LEGISLATION

As noted, public health laws are remedial and liberally interpreted.\footnote{See Ruffing ex rel. Calton v. Union Carbide Corp., 193 Misc.2d 350, 374, 746 N.Y.S.2d 798, 817 (N.Y. Sup. Ct. 2002) (noting that “CERCLA is . . . a remedial statute . . . to protect and preserve public health and the environment” which courts “are therefore obligated to construe . . . liberally”) (quoting Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986)).}

Laws authorizing public agencies to act in furtherance of the public good are also broadly construed.\footnote{Barnhart v. Peabody Coal Co., 537 U.S. 149, 160 (2003) (Thomas, J., dissenting) (“Congress was presumably aware that we do not readily infer congressional intent to limit an agency’s power . . .”). See also Crusco v. Oakland Care Center, Inc., 305 N.J. Super. 605, 610-11, 702 A.2d 1363, 1366 (App. Div. 1997) (“Classically, remedial legislation . . . is to be accorded liberal construction. Logically, therefore, any stated limitation on its sweep or applicability must be strictly construed”); Norman J. Singer & J.D. Shambie Singer, Sutherland on Statutory Construction, § 65; 3 nn.1, 6-7 & 18 (7th ed. 2011).}

Because a remedial law is to be broadly read, limitations on the operation of a remedial law are to be strictly construed.\footnote{Crusco, A.2d at 1365.}

If need be, courts will read clarifying language into a law to avoid an unjust result.\footnote{N. J. Coal. Of Rooming and Boarding House Owners v. Mayor and Council, 152 F.3d 217, 227 n.8 (3rd Cir. 1998) (“[A] court ‘may engage in judicial surgery to . . . engraft [in] a needed meaning’”) (citation omitted); Catholic Cnty. Serv. v. City of Newark, 21 N.J. Tax 633, 637-38 (2004) (“[a] court is not precluded from interpreting a remedial statute to apply in circumstances not specifically considered by its drafters” and using “judicial surgery” if necessary).}

Courts have thus liberally interpreted public health laws, even if they were enforceable by criminal penalties like those in the Model Act.\footnote{NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 73:2 n.7 (7th ed. 2011) (“[c]ourts are [still] inclined to give health statutes a liberal interpretation despite the fact that such

VIII. PUBLIC HEALTH EMERGENCY  
MANDATORY VACCINATION PROGRAMS

A. *Jacobson is Still “The Law” – Arguments and Counter-Arguments*

*Jacobson v. Massachusetts* is still “the law” on this point.  

In addition to the language in the opening quote of this paper, the *Jacobson* Court added that:

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 of his person or property, regardless of the injury that may be done to others . . . .

Upon the principle of self-defense, or paramount necessity, a community has the right to protect itself against an epidemic of disease . . .

This principle is part of the common law. Arizona, Maryland, Nevada, and other states have upheld mandatory vaccination programs even if no epidemic actually existed.

---


97 *Jacobson*, 197 U.S. at 26-27.


Thus, persons objecting to mandatory vaccination have traditionally had limited rights. The Supreme Court cited *Jacobson* in support of forced “mass vaccinations and . . . quarantines of Americans even if they show no signs of illness.”

One appeals court has held that a compelling government interest exists to mandate involuntary immunization to prevent or curb the spread of infectious disease.

As one commentator concluded: “Without question, the use of compulsory vaccination in the proper situation would . . . weather any later legal challenge.”

“There can be little doubt that, even if there were not an explicit rule providing for suspensions where students posed risks to others on account of medical conditions, the school had implied authority to exercise the police power for that purpose.”

---


101 See McCormick v. Stalder, 105 F.3d 1059, 1061 (5th Cir. 1997).


B. Major Themes in American Justice: Individual vs. Community Interests

Mandatory vaccination or treatment raises hot-button issues that touch on perhaps the two strongest and not yet fully resolved currents of American justice: Community and Liberty.\textsuperscript{104}

The tension between individual autonomy and community interests surfaced in a revealing manner in a case challenging a law mandating the wearing of helmets by motorcyclists. The court noted that: “We do not understand a state of mind that permits plaintiff [motorcyclist] to think that only he himself is concerned” as to the consequences of potential massive brain injuries resulting from motorbike accidents, also noting Kentucky and New York cases recognizing “the state’s generalized assertion of an interest in the continued productivity of its citizenry.”\textsuperscript{105}

The “social cost” that often results from the exercise of individual rights has been with us for some time and can be expected to play a large, if silent, role in litigation during times of economic distress, as now, to the likely disadvantage of persons objecting to mandatory treatment during public health emergencies.\textsuperscript{106}

C. Section 5-108 of the Model Act and Religious/Philosophical Exemptions

Of course, § 5-108 of the Model Act does provide for religious and philosophical exemptions from mandatory vaccination “to the extent possible.” But what the “extent possible” might be


could very well vary widely under the circumstances (such as limited, nonexistent, or arguably ineffective quarantine and isolation resources) to the point that no religious or philosophical exemptions were allowed in cases of serious danger when individuals felt that “the most” was at stake for them and their genuinely-held beliefs.

Further, a federally-declared emergency would likely preempt any rights arising under state law that were deemed to interfere with federal emergency operations. The additional discussion in the section on the Model Act indicates that the prognosis for a religious-based claim of exemption under the Model Act would not likely succeed.

Thus, those who oppose mandatory vaccination or other treatment on First Amendment grounds would likely still have to overcome *Jacobson vs. Massachusetts* and its progeny in truly serious public health emergencies. The civil rights aspects of mandatory immunization are omnipresent and almost certainly to be asserted if and when a government program is proposed or initiated. Opponents of mandatory vaccination note that rights are not really rights, if they may be trumped by the government.107

**D. Arguments Pro and Con**

Some in the legal profession thus surmise that we are now in a new, undeclared era of constitutional law involving preparing for and dealing with emergencies in pandemic situations. But that seems to be a slippery slope that can cut either or both ways—with some arguing that a “new era” should allow courts to fully reexamine the legal and medical underpinnings of *Jacobson*, while others would urge that the “new era” of a “permanent state of emergency” should have just the opposite result with individuals having to yield to the omnipresent greater-good.

Arguments favoring an exemption from mandatory vaccination in public health emergencies are outlined above.108

---

Those arguments by opponents of mandatory vaccination are not insubstantial. Mandatory treatment arguably encourages some individuals to hide or conceal their condition for a range of reasons (including employment-related ones), thus increasing the spread of disease.\footnote{Wendy E. Parmet, Dangerous Perspectives: The Perils of Individualizing Public Health Problems, 30 J. LEGAL MED. 83 (2009).}

Opponents also claim that our current approach "stigmatizes" the sick and subjects them to harsh penalties that have are really quasi-criminal in nature.\footnote{Id. at 106 n.147 (citing Susan Klein, Redrawing the Criminal-Civil Boundary, 2 BUFF. CRIM. L. REV. 679 (1999)).} Further, health officials’ coercive authority is seen as central rather than peripheral, resulting in action that departs from “public health law’s democratic moorings”—an approach that ignores respect for individual dignity and rights, while instead focusing health officials on the powers that they can wield.\footnote{Id. at 105-06. Experts agree that the “benefits of preemptive, voluntary vaccination are great . . . . Vaccination before exposure dramatically reduces the value of smallpox as a [biologic terrorist] weapon.” William J. Bicknell, The Case for Voluntary Smallpox Vaccination, 346 NEW ENG. J. MED. 1323 (2002). As noted above, when health officials conclude in good faith that vaccination before an epidemic arrives is warranted, the life-preserving effect of vaccinating people before exposure should “dramatically reduce” the value of any bio-terror plagues. “The court has given state and federal legislatures wide discretion to pass legislation [and delegate authority to agencies] in areas where there is medical and scientific uncertainty . . . . ‘When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad’.” Gonzales v. Carhart, 550 U.S. 124, 163 (2007) (citing Supreme Court decisions). See also Kansas v. Hendricks, 521 U.S. 346, 360 n.3 (1997) (“it is precisely where such disagreement exists that legislatures have been afforded the widest latitude”). Health/safety regulation is thus an area where courts have accorded agencies “the greatest leeway” in turning back claims for damages or eminent domain “takings” resulting from garden-variety regulatory action in emergencies or exigent circumstances. Rose Acre Farms, 559 F.3d at 1281, infra note 168. Similarly, even loss of human life due to the government’s initiatives taken during emergencies might not be compensable, depending on circumstances, absent a statutory mandate to the contrary. Infra note 174.}

\footnote{Id. at 106 n.147 (citing Susan Klein, Redrawing the Criminal-Civil Boundary, 2 BUFF. CRIM. L. REV. 679 (1999)).}
This leads, according to opponents of forced vaccination, to an overuse of those coercive powers and to deferential courts that then legitimize the diminution of individual rights. Perhaps worse, there is a lengthy history of health officials using emergency powers to discriminate against minorities under the guise of “public health.”

For the time being, though, Jacobson is still the law, supplemented as to state-declared emergencies by the Model Act.

E. Providing Exemptions from Vaccination on Basis of Religion/Philosophy

A 1990 Supreme Court decision casts doubt on the validity and public-policy of exempting persons from mandatory vaccination and other treatment in times of \textit{bona fide} public health emergencies, on the basis of even genuinely-held religious, moral, or philosophical beliefs.

There, the Supreme Court stated:

\textit{The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, ‘cannot depend on}

\begin{flushleft}
\begin{itemize}
\item \textsuperscript{112} Parmet, supra, note 110, at 107-08.
\item \textsuperscript{113} Id. at 104 n.137 (discussing discrimination against Chinese-Americans and Middle Eastern and Jewish persons).
\item \textsuperscript{114} North Carolina follows Jacobson. See In re Moore’s Sterilization, 289 N.C. 95, 103-04, 221 S.E.2d 307, 312-13 (1976) (upholding government-mandated sterilization of mentally retarded); In re Williams, 269 N.C. 68, 79, 152 S.E.2d 317, 326 (1967) (upholding contempt citation against minister objecting to testifying in criminal trial on religious grounds). \textit{See also} Hamdi v. Rumsfeld, 542 U.S. 507, 592 (2004) (citing Jacobson as “upholding legislated mass vaccination and approving of forced quarantines of Americans even if they show no signs of illness”) & Love v. Superior Court, 226 Cal.App.3d 736, 741-42, 276 Cal. Rptr. 660, 662-63 (1990) (requiring mandatory AIDS vaccination of prostitutes, noting that public health emergency action that might otherwise be unconstitutional is often upheld under “the ‘special needs’ doctrine”).
\item \textsuperscript{115} Employment Div. v. Smith, 494 U.S. 872 (1990) (upholding denial of unemployment benefits due to job-dismissal for religious-based peyote use).
\end{itemize}
\end{flushleft}
measuring the effects of a governmental action on a religious objector's spiritual development.' To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, "to become a law unto himself,"—contradicts both constitutional tradition and common sense . . . . The 'compelling government interest' requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, or before the government may regulate the content of speech, is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly.116

In a footnote, the Court said:

[W]e have held that generally applicable laws unconcerned with regulating speech that have the effect of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment . . . . Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.117

The Court pursued that discussion as to why proof of a "compelling government interest" was not required in cases like a denial of unemployment benefits or perhaps denial of an

116 Id. at 885-86 (emphasis added) (internal citations omitted).
117 Id. at 886 n. 3 (emphasis added).
exemption from mandatory treatment during public health emergencies, in terms that seems to clearly reject any claim to a constitutional right (as opposed to statutory claims under the Model Act) as to a religious-based exemption to mandatory vaccination and treatment during times of public health emergencies:

Nor is it possible to limit the impact of respondents’ proposal by requiring a ‘compelling state interest’ only when the conduct prohibited is ‘central’ to the individual’s religion. It is no more appropriate for judges to determine the ‘centrality’ of religious beliefs before applying a ‘compelling interest’ test in the free exercise field, than it would be for them to determine the ‘importance’ of ideas before applying the ‘compelling interest’ test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer’s assertion that a particular act is ‘central’ to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable ‘business of evaluating the relative merits of differing religious claims.’ As we reaffirmed only last Term, ‘[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.’ Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim . . . . If the ‘compelling interest’ test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded . . . . Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them . . . . [so that] as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order [would fail]. The rule respondents favor would open the prospect
of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment's protection of religious liberty does not require this.\textsuperscript{118}

The Court concluded by noting that the above constitutional scheme was not only valid but was “prefer[able] to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs,” even if “leaving accommodation to the political process will place at a relative disadvantage those whose religious practices . . . are not widely engaged in . . . .”\textsuperscript{119} North Carolina earlier adopted that reasoning in upholding a contempt ruling against a minister who objected on religious grounds to testifying in a criminal trial.\textsuperscript{120}

\textbf{F. Requirements for a Sound Mandatory Vaccination Program}

There are, of course, many medical and administrative steps that must be taken if a sound mandatory vaccination program is to be instituted and implemented.\textsuperscript{121}

\begin{footnotes}
\item [118] Id. at 886-89 (emphasis added in part Court’s and in part added)(internal citations omitted).
\item [119] Id. at 890 (noting that “a number of States have made an exception to their drug laws for sacramental peyote use.”).
\item [120] In re Williams, 269 N.C. 68, 79, 152 S.E.2d 317, 326 (1967).
\item [121] Those steps are outlined in U.S. Centers for Disease Control and Prevention, Public Health Emergency Response Guide for State, Local and Tribal Public Health Directors (2006).
\end{footnotes}
The failure to take those steps (including developing and testing a vaccine before being used) in a clearly reasonable manner would seem to provide *an additional basis for objecting to mandatory vaccination orders*. Objections might be based on statutory or regulatory grounds, such as the government’s failure to comply with medical and related standards—and that the government’s demanding individuals to undergo mandatory vaccinations violated due process when either the proper medical procedures and safeguards were not followed or the vaccine itself was of questionable quality or effectiveness.

The outline of a potential substantive due process challenge when the government failed to comply with medical standards in establishing and implementing a mandatory vaccination program or when the vaccine itself was suspect were discussed in a 1991 Connecticut case. In vacating as premature an injunction against enforcement of a state law imposing a criminal penalty for refusing to assist a police officer or firefighter when commanded, the Connecticut Supreme Court noted that:

While minor intrusions on the personal security of an individual have been permitted to accommodate some public necessity, the Supreme Court has often observed that *certain intrusions might be forbidden entirely*. When, for instance, the court upheld against a due process challenge to a Massachusetts statute compelling individuals to submit to vaccinations for smallpox, it nevertheless noted that *the judiciary could and should intervene to prohibit a vaccination if an individual established, to a ‘reasonable certainty’ that such vaccination ‘would seriously impair his health or probably cause his death.’* One commentator has noted that most courts would be *‘properly reluctant’* to validate on due process grounds *any intrusion risking ‘irreversible injury to health, and the danger to life itself.’* . . . The government is not, to be sure, wholly without the power to compel ordinary individuals to risk their lives [in defense of the nation] . . . . Yet, as the court below correctly concluded, the federal power to conscript individuals
Mandatory Immunization

differs significantly from the power granted to police officers by the statute at issue here. The federal power arises from an express constitutional grant, while the police officer’s power does not; and the federal power has been exercised through a highly regulated procedure that carefully defines eligibility for service, manner of selection, and available deferments and exemptions, and provides for review of individual decisions, while the peace officer's authority is, in the words of the trial court, inevitably “summary, ad hoc, and unreviewable” at the time when obedience is compelled . . . . Although the government can, in certain circumstances, compel individuals to risk their physical safety, it cannot compel such a risk arbitrarily.

The touchstone of due process is protection of the individual against arbitrary action of government. The great purpose of the [due process] requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen.122

Most individuals would lack access to the factual history as to the government’s improper implementation of a mandatory vaccination program or facts indicating that a vaccine’s safety was questionable—and would not be in the best position to prove or establish the facts. Thus, a court should be willing to reduce the

degree and extent of a person’s burden of proof in that regard to something far less than proving a case to a “reasonable certainty.”

If courts still insisted that a person must at least approach a “reasonably certainty” degree of proof, courts should be willing to grant a person wide leeway in conducting pretrial discovery or an investigation (with subpoenas) before even seeking judicial review.\footnote{In re Tyndall, 360 B.R. 68, 73 (Bkrtcy. D. Del. 2007) (citing Lindahl v. Office of Pers. Mgmt., 776 F.2d 276, 280 (Fed. Cir. 1985) (finding “the party with the best knowledge normally has the burden of proof”) & Merriam v. Venida Blouse Corp., 23 F. Supp. 659, 661 (D.N.Y. 1938) (holding “the party who is in the best position to know the facts bears the burden of explanation”) (internal citations omitted)). See also Koelfgen v. Jackson, 355 F.Supp. 243, 250-51 (D. Minn. 1972) (stating “when a statutory classification . . . affects a ‘fundamental right,’ the burden of proof shifts and such a classification will be held to deny equal protection unless it can be justified by a ‘compelling governmental interest’”) (quoting Shapiro v. Thompson, 394 U.S. 618, 627 (1969)); East Hartford Ed. Ass’n v. Board of Ed., 562 F.2d 838, 852 n.11 (2d Cir. 1977) (finding the “state must carry the burden of proof when it . . . burdens the exercise of a ‘fundamental’ right”) (citing United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); Shapiro v. Thompson, 394 U.S. 618, 634 (1969)); See also Fisher, supra, note 30; and Segev, supra, note 30, at 629.\footnote{See Mark A. Rothstein, Are Traditional Public Health Strategies Consistent with Contemporary American Values?, 77 TEMP. L. REV. 175 (2004); Mark R. Vol. XXX

It is true that “modern medical protections” might have appeal if it were documented. But if America ever again faced anything like the Spanish Influenza of 1918 or a “Dark Winter”-like pandemic, an exemption claim based on “modern medical protections” might not succeed if isolation or quarantine resources in place were not adequate or questionable.

IX. QUARANTINES AND ISOLATION

Alternatives to mandatory vaccination include quarantine and isolation, which are mentioned in the Model Act. Arguments have been made regarding whether or not quarantine for a considerable time is a greater or lesser encroachment on individuals than mandatory vaccination.\footnote{See Mark A. Rothstein, Are Traditional Public Health Strategies Consistent with Contemporary American Values?, 77 TEMP. L. REV. 175 (2004); Mark R.}
Although momentary, vaccination might cause permanent illness and other problems many days, weeks or even months in the future. The government’s choice between mandatory vaccination and quarantining is apparently one that courts will not question, absent a clear violation of constitutional rights.\textsuperscript{125}

Large-scale isolation may not adequately protect, especially on short notice, due to inadequate housing, storage, health personnel, security, and other factors.\textsuperscript{126}

Compounding the problem with quarantining is the possibility that stockpiles of protective equipment for health-care workers may not be adequate.\textsuperscript{127}

Many States have inadequate resources to implement effective quarantines.\textsuperscript{128} Prior to the Model Act, State quarantine laws were an “overall antiquity” with many being over 140-years old and focus on particular diseases.\textsuperscript{129} Those who are not actually sick but are carriers can be quarantined.\textsuperscript{130}

---


\textsuperscript{125} See Jew Ho v. Williamson, 103 F. 10, 13-14, 21, 26 (C.C.N.D. Cal. 1900) (invalidating quarantine law directed only to persons of Chinese ancestry). As noted, “[t]raditionally, the States have been allowed broad discretion in the formulation of measures designed to protect and promote public health.” People v. Adams, 597 N.E.2d 574, 605 (Ill. 1992).

\textsuperscript{126} See Joseph Barbera et al., Large-Scale Quarantine Following Biological Terrorism in the United States, 286 JAMA 2711, 2713-15 (2001); see also Daniel Markovits, Quarantines and Distributive Justice, 33 J. L.MED. & ETHICS 323 (2005) (comparing legal and practical aspects of quarantine and vaccination).


\textsuperscript{128} ANGIE A. WELBORN, CONG. RESEARCH SERV., RL 31333, FEDERAL AND STATE ISOLATION AND QUARANTINE AUTHORITY (2005).

\textsuperscript{129} Id. at 4 & nn.24- 26.

\textsuperscript{130} Id. at 7-8 & nn.53-58 (citing People ex rel. Barmore v. Robertson, 134 N.E. 815 (Ill. 1922)).
Under the Public Health Service Act, the Secretary of HHS may issue regulations to prevent the introduction, transmission or spread of communicable diseases into the States or from one State to another. Federal quarantine law preempts State law to the extent of any conflict. The apprehension and detention of persons to prevent the spreading of communicable diseases is left to the President. Quarantines have been upheld in the face of right-to-travel claims.

X. JUDICIAL REVIEW OF EXECUTIVE EMERGENCY ACTION

A. The Model Act

The Model Act does expressly provide for timely judicial review. In practice, though, and despite Justice Holmes’ hope that courts would provide prompt and meaningful review even when emergencies were ongoing, it remains to be seen as to what courts are actually willing to address in the midst of a public health emergency.

B. Court’s Traditional Scope of Judicial Review During Emergencies

Courts have rarely, if ever, summoned much “political courage” in the face of action by Congress and the President during emergencies.

133 See Zemel v. Rusk, 381 U.S. 1, 15 (1965) (“The right to travel... does not mean that areas ravaged by flood, fire, or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the Nation as a whole.”). See also Miller v. Campbell Cnty., 945 F.2d 348 (10th Cir. 1991) (rejecting Takings Clause and Due Process claims when village was declared uninhabitable and homeowners were ordered to evacuate).
134 David Cole, Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis, 101 MICH. L. REV. 2565 (2003); Mark Tushnet, Controlling Executive Power in the War on Terrorism, 118 HARV. L. REV. 2673,
Elsewhere, and citing *Jacobson v. Massachusetts* approvingly, the Supreme Court in *Gonzales v. Carhart*, an abortion case, stated: “The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.”\(^1\) As a general matter, differences among the medical community on the effectiveness of a particular vaccine, for example, would probably not be enough to invalidate a legislative or executive directive mandating vaccination. As the *Jacobson* Court stated:

The fact that the belief is not universal [in the medical community] is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to common belief of the people, are adapted to [address medical emergencies]. In a free country, where government is by the people, through their chosen representatives, practical legislation admits of no other standard of action.\(^2\)

---

\(^1\) *Gonzales*, 550 U.S. at 163 (citing Kansas v. Hendricks, 521 U.S. 346, 360 n.3 (1977); Jones v. United States, 463 U.S. 354, 364-5 n.13 (1983); Lambert v. Yellowley, 272 U.S. 581, 597 (1926); Collin v. Texas, 223 U.S. 288, 297-98 (1912); *Jacobson*, 197 U.S. at 30-31 (1905)); *see also* Marshall v. United States, 414 U.S. 417, 427 (1974) (“When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad.”). *See also* Hamdi v. Rumsfeld, 542 U.S. 507, 592 (2004) (same effect and citing *Jacobson* as “upholding legislated mass vaccinations and approving of forced quarantines of Americans even if they show no signs of illness”) & Kansas v. Hendricks, 521 U.S. 346, 360 n.3 (1997) (“These disagreements, however, do not tie the State’s hands in setting the bounds of its civil commitment laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes.”)

\(^2\) *Jacobson*, 197 U.S. at 35. *Jacobson* also upheld “legislation imposing punishment on persons refusing to be vaccinated. *See also* Washington v.
It should be noted that when dealing with public health emergencies, reality is often stranger and less predictable than fiction, something that might well discourage courts from departing from traditional judicial approaches, at least during emergencies.\textsuperscript{137}

**C. Justiciability & Standing**

The President’s declaring a state of emergency is apparently nonjusticiable.\textsuperscript{138}

According to California, a declaration of emergency by authorized officials “for the protection or preservation of health is conclusive on the courts except only to the limitation that it must be a reasonable determination, not an abuse of discretion, and must not infringe rights secured by the Constitution.”\textsuperscript{139} Even then, “the injury must be ‘certainly impending’” to warrant federal intervention.\textsuperscript{140}

Even if constitutional rights were involved, federal courts have ruled that “standing will not lie if ‘adjudication . . . rests upon


\textsuperscript{138} Chang v. United States, 859 F.2d 893, 895 n.3 (Fed. Cir. 1988) (finding inquiry that would require a court “to examine the President’s motives and justifications for declaring a national emergency . . . would likely present a nonjusticiable political question”) (citing Baker v. Carr, 369 U.S. 186, 217 (1962); Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948); Belk v. United States, 858 F.2d 706, 709-10 (Fed. Cir. 1988); Florsheim Shoe Co., Div. of Interco, Inc. v. United States, 744 F.2d 787, 795-96 (Fed. Cir. 1984)).

\textsuperscript{139} Love, 226 Cal.App.3d at 741 (internal citations omitted).

contingent future events that may not occur as anticipated or indeed may not occur at all.\textsuperscript{141}

But the government’s admission that it was “ready to resume” the challenged activity kept a civil rights claim alive in \textit{Golden State Transit Corp. v. City of Los Angeles},\textsuperscript{142} presumably by adding “concreteness” of the claim and immediacy of harm to the case.

Of course, traditional equity rules require that an individual seeking an injunction against mandatory vaccination at least as to him or herself, must show that issuance of an injunction would be in the public interest.\textsuperscript{143} The pro-vaccination arguments and case-law cited above would seem to present a nearly insurmountable “public interest” hurdle in that regard.

\textbf{D. Pre-Emergency Preparation of the Judiciary}

Just to get to the point where meaningful judicial review during an emergency could be had, the legal preparation that should be taken in anticipation of a future emergency is extensive.\textsuperscript{144}

\textsuperscript{141} Pryor v. NCAA, 288 F.3d 548, 561 (3rd Cir. 2002) (internal citations omitted); see also Texas v. United States, 523 U.S. 296, 307 (1998); State Bd. of Chiropractic Exam’rs v. Stjernholm, 935 P.2d 959, 969 (Colo. 1997) (stating “In ‘rare circumstances,’ a person may seek injunctive relief against continuing or future government misconduct which” violates constitutional rights) (citing Lemmons v. Law Firm of Morris & Morris, 39 F.3d 264, 267 (1994)). But if an emergency were declared by \textit{federal} authorities under federal law, \textit{Porter v. Black}, 175 P.2d 807 (1946) indicates that state courts would not act.

\textsuperscript{142} \textit{Golden State Transit Corp. v. City of Los Angeles}, 475 U.S. 608, 613 n.3 (1986).

\textsuperscript{143} Langlois v. Board of County Com’rs, 78 P.3d 1154, 1158 (Colo. App. 2004) (holding that a plaintiff must show, among other factors, that the “threatened injury outweighs the harm that the injunction may cause to the opposing party [or the public] and [that] . . . the injunction, if issued, will not adversely affect the public interest”) (citing Fisher v. Okla. Health Care Auth., 335 F.3d 1175 (10th Cir. 2003) (citing Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n.12 (1987))).

\textsuperscript{144} See N. Pieter M. O’Leary, \textit{Cock-a-Doodle-Doo: Pandemic Avian Influenza and the Legal Preparation and Consequences of an H5N1 Influenza Outbreak},
Legal triage and thinking through the range of legal issues that might arise during an emergency is vital.¹⁴⁵

Dealing with an influx of displaced and volunteer out-of-state attorneys and other licensed professionals (including physicians and judges) should also be addressed at the planning stage.¹⁴⁶ Of course, ample supplies of vaccine and other health goods are a *sine qua non*.¹⁴⁷ But planning in advance and preservation of liberties likely go hand-in-hand, so that we can avoid or minimize those trade-offs.¹⁴⁸

E. Speedy Trial Claims

Courts should also take into consideration the effect of ongoing emergency conditions on criminal defendants’ demands for a speedy trial, whether or not enabling legislation expressly addressed the situation.¹⁴⁹ Courts, though, should not become too

¹⁴⁸ See Bruce Ackerman, Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism (2006).
comfortable with scripted plans for use in public health emergencies, since reality is often stranger and less predictable than fiction or simulated scenarios.\footnote{150}

**F. Professor Bruce Ackerman’s Recommendation**

Yale law Professor Bruce Ackerman has suggested a number of steps that Congress and legislatures should take to honor civil liberties and assure meaningful judicial review during or after emergencies.\footnote{151} Those steps include:

- A greatly expanded executive authority.
- Internment during emergencies, without judicial review or a hearing.
- Release of detainees after 45-days if the government does not connect them with the emergency.\footnote{152}


\footnote{151} Ackerman, *supra*, note 156, at 4-5, 19-22, 26, 39-57, 41-44, 80, 83-87, 90-96 (2006) (noting that if a major terrorist strike or two hit American soil, *Korematsu*, which is “bad law, very bad law, very, very bad law,” could quite possibly be extended to internment of Middle Eastern and Islamic Americans. “The war with Japan came to an end, but the war against terror will not.”). See also Ackerman, *The Emergency Constitution*, *supra* note 25, at 1043.

\footnote{152} Without a hearing and confrontation, the door is open for self-serving “accusations” by others who may also be interned or held on other charges, to “finger” innocent persons. Confrontation is part of due-process in civil or agency actions when the government denies or revokes a major benefit or entitlement. Addington v. Texas, 441 U.S. 418, 425 (1978) (discussing proof standards needed for “civil commitment for any purpose”); *but see* Morales v. Turman, 562 F.2d 993, 998 (5th Cir. 1977) (finding that the government is “not...required to provide the procedural safeguards of a criminal trial when imposing a quarantine...against a highly communicable disease”). But due process is still a “procedural floor below which even informal proceedings cannot go” such as “opportunity to confront and cross-examine . . . when credibility” and “factual determinations are made.” Cooper v. Salazar, 196 F.3d
A grant of emergency powers to the President would continue only if Congress consented.

The President would have the power for a very short time or perhaps one or two weeks, to act unilaterally.

At the end of the short period, the state of emergency would expire unless a majority of Congress voted to sustain it.

After another 2-to-3 months passed, the state of emergency would expire unless 60 percent of Congress voted to sustain it.\(^{153}\)

Increasingly higher super-majorities in Congress until sustaining a state of emergency would require 80% approval.

Eventual power-sharing and information-sharing with the President by select designees of Congress.\(^{154}\)

XI. OTHER ISSUES

A. “Drafting”/Mandating Health Providers to Serve

Directing or ordering health care providers to serve and assist in public health emergencies is perhaps one of the lurking “latent” issues. The literature on the subject is not unanimous, with some agreeing that there is a legal or ethical duty to serve and others disagreeing. The Model Act does not address the issue meaningfully.\(^{155}\)

---

809, 814-15 (7th Cir. 1999); see also American-Arab Anti-Discrim. Comm. v. Reno, 70 F.3d 1045, 1069 (9th Cir. 1995); ATL, Inc. v. United States, 4 Cl. Ct. 374, 386 (1984) (same effect).


\(^{154}\) Professor Ackerman’s thesis has been criticized by Harvard law professor Adrian Vermeule in A New Constitutional Order? The Emergency Constitution in the Post-September 11 World Order, 75 FORDHAM L. REV. 631 (2006).

\(^{155}\) Recent articles on the topic include: Carl H. Coleman, Beyond the Call of Duty: Compelling Health Care Professionals to Work During an Influenza
But two cases arguably support the position that the government could order healthcare workers to pitch-in and help. One such case, In Re World Trade Center Disaster Site Litig.,\(^{156}\) noted that the government is required to act, *enlisting persons*, firms and corporations *in the private sector* to eliminate the threat to society.\(^{157}\)

The second case vacated as premature an injunction against enforcement of a state law that imposed a criminal penalty for refusing to assist a police officer or firefighter when commanded.\(^{158}\) There, the Connecticut Supreme Court noted that “the government can, in certain circumstances, compel individuals to risk their physical safety” by complying with police/fire-assistance laws, citing a number of instances where such laws have been upheld, apparently even though private citizens received no compensation.\(^{159}\)

Presumably an executive order or agency regulation directing physicians and other health workers to serve would have

\(^{156}\) *In Re World Trade Center Disaster Site Litig.*, 456 F.Supp.2d 520, 550 (S.D.N.Y. 2006).

\(^{157}\) *Id.* at 550 (stating that “pursuant to the common law . . . when an emergent disaster threatens society as a whole, the doctrine of *salus populi supreme lex* (the welfare of the people is the highest law) requires the government to act, enlisting persons, firms and corporations in the private sector to eliminate the threat to society and restore society's ability to function.”)


\(^{159}\) *Id.* at 1164.
the force of law justifying that action and could create “new law” or “new duties” that go beyond the letter of an enabling law.\textsuperscript{160}

**B. Sharing of Medical Information Among Government Authorities**

The Health Insurance Portability and Accountability Act ("HIPPA") contains exceptions allowing for data-sharing, including public health and terrorism emergencies. The Model State Emergency Health Powers Act provides similar power to States.\textsuperscript{161}

**C. Liability of Vaccine Manufacturers**

The Public Readiness and Emergency Preparedness Act (PREPA), enacted in 2005, provides immunity from liability to manufacturers, distributors, and other parties whose products are used to counter a pandemic or epidemic, once the Secretary of HHS declares an emergency.\textsuperscript{162}

PREPA also creates an exclusive compensation program for vaccine victims. Some have questioned the adequacy of Congress’ level of funding of the PREPA compensation program,

\textsuperscript{160} See Chrysler Corp. v. Brown, 441 U.S. 281, 301-02 (1979); Sorenson Communications, Inc. v. FCC, 567 F.3d 1215, 1222 (10th Cir. 2009) (stating that agency regulation “has the force of law, and creates new law or imposes new rights or duties”); Delgadillo v. Astrue, 601 F.Supp.2d 1241, 1248 (D. Colo. 2007) (asserting that “executive orders bind the agencies” and “have the force of law in the same way as legislative rules”) (quoting 32 Wright & Koch, § 8277). Administrative guidance or advisories do not have the force of law but can be used in enforcement actions and private suits for failure to adhere to medical or industry standards, when licensed or regulated entities ignore them. First Nat’l Bank of LaMarque v. Smith, 610 F.2d 1258, 1263-65 (5th Cir. 1980) (discussing regulatory advisory letter to national banks).


\textsuperscript{162} 42 U.S.C. §§ 247d-6d & 247d-6e; see also Federal Immunity Enacted for Manufacturers of Avian Flu Vaccine and Other Biodefense Products, 203 PRODUCTS LIAB. ADVISORY 5 (2006).
arguing that once the government provides exclusive remedies, it has a duty to provide adequate relief.\(^{163}\)

Determining which virus strains should be included in a vaccine is said to be an “educated guess.”\(^{164}\) U.S. and European officials reportedly might approve vaccines on a “fast track” basis before clinical trials are completed, and future immunization programs could be set-back for decades if a vaccine were found to be harmful. Opinions are divided over fast-track vaccine plans, and several experts say that if things go wrong, there could be lasting implications for public health.\(^{165}\)

**D. Effect of Government Directives on Civil Liability Among Private Parties**

An emergency and the preparation leading up to it can involve the government directing private firms to produce or deliver needed items and services, which can result in a firm’s breaching its pre-existing contracts with other private parties. In

---


general, government directives immunize private firms from liability.\textsuperscript{166}

These principles should cover any intervening government directive issued to vaccine manufacturers. Meanwhile, vaccine manufacturers would likely continue to process “regular” annual flu vaccines despite any developing pandemic.\textsuperscript{167}

E. “Takings,” Just Compensation & Price-Controls

The destruction or taking of private property and imposing price-controls during emergencies involves government’s police power and do not subject it to liability.\textsuperscript{168}


\textsuperscript{167} See N Henrich & B Holmes, supra, note 166.

\textsuperscript{168} United States v. Caltex, Inc., 344 U.S. 149, 154 (1952) (discussing the principle in both war-time and peace-time contexts); Miller v. Schone, 276 U.S. 272, 278-80 (1928) (allowing for the destruction of red cedar trees on private property in order to halt the spread of tree disease). See also Rose Acre Farms, Inc. v. United States, 559 F.3d 1260, 1281 (Fed. Cir. 2009) (“[Health and safety regulations are] the type of regulation[s] in which the private interest has traditionally been most confined and governments are given the greatest leeway to act without the need to compensate . . . .” (holding that, while the regulation did not necessarily preclude a taking, there was no taking here, where the government caused the loss of egg-laying hens due to testing positive for salmonella); Hansen v. United States, 65 Fed. Cl. 76 (2005) (discussing a range of eminent domain issues at length). See generally D. Benjamin Barros, The Police Power and the Takings Clause, 58 U. MIAMI L. REV. 471 (2004);
According to one group of commentators: “What are the regulatory repercussions of a government action to address an emergency public health threat? In particular, when, if ever, might such an action be held to constitute a ‘taking’ of property . . . and therefore require compensation? The answer is seldom, but the law if far from clear.”

Clear or not, traditional eminent domain case law has held that owners whose property has been destroyed pursuant to the government’s emergency police power are not entitled to compensation. The classic case involved the City of Boston’s destruction of entire homes in the path of a fast-moving fire, to contain a conflagration. The proposition was summed up in *AmeriSource Corporation v. United States*: “[P]roperty taken not to secure a public benefit but rather to prevent public harm is not compensable under the Fifth Amendment.”

*Bowditch* also noted British and American case law that stated emergencies could justifiably permit the “destruction of life itself” in extreme cases, and that “[t]he rights of necessity are a part of the law . . . [because] the common law adopts the principle of the natural law, and finds the right and justification in the same imperative necessity.”

---


*Bowditch v. City of Boston*, 101 U.S. 16, 16 (1879).


*Id.* at 747 (citing *Seay v. United States*, 61. Fed. Cl. 32, 35 (2004)).

101 U.S. at 18-19 (quoting *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 362 (1788)) (emphasis added) (citations omitted). References to the “destruction of life” pursuant to government exercise of its police-power in emergencies (perhaps when vaccine causes death) may be found in *Caltex (Philippines), Inc. v. United States*, 100 F.Supp. 970, 978 (Cl.Cl. 1951) (citing older Supreme Court case that in turn cites additional cases) and *Louisa County v. Yancey’s Trustees*, 63 S.E. 452, 455 (1909) (citing Iowa and Georgia cases). “There is an implied assent on the part of every member of society that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his
XII. CONCLUSION

The law of emergencies, especially public health emergencies, is a difficult area of the law, one that intersects with a number of areas of the law and that is fraught with hardship and much emotion.

The current “law of emergencies” can probably be summed up as follows:

[Pre-disaster] [s]tatutory and regulatory reform on their own do not ensure a functioning, sound legal environment during emergencies. This is due, in part, to a fundamental premise underlying most emergency laws: during declared emergencies, the legal landscape [often] changes instantly and drastically. With this changing landscape comes significant, though temporary, legal challenges that require affirmative [ongoing] responses [and adjustments] to effectuate public health efforts. . . . These and other efforts are not limited to single point in time. Rather, they must be accomplished throughout the duration of a public health emergency . . . . There is a consistent need to balance individual and communal needs and make trade-offs that are legally and ethically reasonable. Amidst chaos, constitutional norms may be stretched to facilitate emergency responses . . . . In reality, there is no pre-existing legal script for how to address these and other public health challenges and emergencies principally because the emergency itself defies systematic resolution of legal issues.174

property, liberty, and life shall under certain circumstances, be placed in jeopardy or even sacrificed for the public good.” State v. Hay, 35 S.E. 459, 460-61 (1900) (quoting HERBERT BROOM, A SELECTION OF LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED 4 (4th Ed. 1854)) (emphasis added). See also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (“As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.”).

174 Hodge, supra note 145, at 629-32 (emphasis added).
As the court stated in *In Re World Trade Center Disaster Site Litig.*:175

The City and State agencies acted also pursuant to the common law, *for when an emergent disaster threatens society as a whole, the doctrine of salus populi supreme lex (the welfare of the people is the highest law) requires the government to act, enlisting persons, firms and corporations in the private sector to eliminate the threat to society and restore society's ability to function. Salus populi means ‘that society has a right that corresponds to the right of self-preservation in the individual, and it rests upon necessity because there can be no effective government without it.’ Salus Populi and [State law] coincide, for both encourage immediate action to preserve society.*176

---


176 “Immediate state action” does not mean that the danger must be imminent. As government officials scan the globe and “see it coming,” they should be able to move forward with a program that might not culminate for weeks, months, or even longer—including “early” vaccinations that can require time to provide immunization. Given the nature of modern-era natural and “designer” catastrophes, lead-time and processing is essential, presenting a classic case of adapting traditional legal principles to the needs of today’s society and world. *In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, 379 F.Supp.2d 348, 439 (S.D.N.Y. 2005) ([Courts] expand the common law to accommodate the changing needs of society.”); Caesars Riverboat Casino, L.L.C. v. Kephart, 903 N.E.2d 117, 130-31 (Ind. App. 2009) (“[T]he strengths and genius of the common law lies in its ability to adapt to the changing needs of the society it governs.”) (quoting Brooks v. Robinson, 284 N.E.2d 794, 797 (Ind. 1972)). Langle v. Kurkul, 510 A.2d 1301, 1313 (Vt. 1986) (Gibson, J., dissenting) (“The judiciary must take cognizance of the vitality of the common law; as the needs of a society evolve, we are obligated ‘to face a difficult legal question and accept judicial responsibility for a needed change in the common law’”) (quoting Hay v. Med. Ctr. Hosp., 492 A.2d 939, 945 (Vt. 1985)).
Boiled down even further, the modern “law of emergencies” seems to be encapsulated by the point made by Chief Justice Rehnquist: When major emergencies strike, the “law of necessity” is the one rule that trumps all the others.177

---