Pandemic Fears and Contemporary Quarantine: Protecting Liberty through a Continuum of Due Process Rights

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[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.¹

INTRODUCTION

Isolation and quarantine are historically recognized public health tools used to contain the spread of infectious diseases. Both isolation and quarantine severely curtail the freedom of individuals to whom they are applied. Thus, they are often tools of last resort because they require the separation of infected and potentially infected persons from the public through confinement to treatment facilities, residences, and other locations.

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Contemporary concerns regarding an avian flu pandemic and threats of bioterrorism make it reasonable to anticipate the imposition of large numbers of quarantine orders should public health officials find themselves confronted with threats of uncertain origin, magnitude, and risk. Given the obvious liberty interests implicated when individuals are involuntarily confined, sufficient due process in quarantine regulations is imperative. This Comment addresses the ways in which traditional elements of procedural due process would come into play in a contemporary quarantine and how individuals affected by quarantine orders would exercise their due process rights. The implications of substantive due process concerns are considered to a lesser extent as well. Such an analysis is important because the United States has not implemented quarantine measures on a large scale since the Spanish flu pandemic in 1918–1919 well before the expansion of due process in the 1960s and 1970s.

2. It is feared that it is only a matter of time before the avian flu H5N1 virus mutates into a form that passes easily among people, triggering a pandemic. Predictions estimate that a modern pandemic could lead to the deaths of 200,000 to 2 million people in the United States alone. 1 HOMELAND SEC. COUNCIL, IMPLEMENTATION PLAN FOR THE NATIONAL STRATEGY FOR PANDEMIC INFLUENZA (May 2006), available at http://www.whitehouse.gov/homeland/pandemic-influenza-implementation.html [hereinafter IMPLEMENTATION PLAN]. On May 3, 2006, President George W. Bush released the Implementation Plan, a follow-up to his National Strategy for Pandemic Influenza issued on November 1, 2005. See id.; HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA (Nov. 2005), available at www.whitehouse.gov/homeland/nspi.pdf [hereinafter NATIONAL STRATEGY]. The Implementation Plan discusses the avian flu pandemic threat and translates the National Strategy for Pandemic Influenza into more than 300 actions for Federal departments and agencies and “sets clear expectations for State and local governments and other non-Federal entities.” U.S. DEP'T OF STATE, OFFICE OF THE PRESS SEC'Y, FACT SHEET: ADVANCING THE NATION'S PREPAREDNESS FOR PANDEMIC INFLUENZA (May 3, 2006), http://www.whitehouse.gov/news/releases/2006/05/20060503-5.html. According to the Implementation Plan, “[t]he response to an influenza pandemic could require, if necessary and appropriate, measures such as isolation or quarantine.” IMPLEMENTATION PLAN, supra, at 12. See also 2 DEP’T HEALTH & HUMAN SERVS., PANDEMIC PLANNING UPDATE II: A REPORT FROM SEC’Y MICHAEL O. LEAVITT (June 29, 2006) (“[W)e are in a race, a race against a fast-moving, highly pathogenic avian H5N1 flu virus; a race to prepare in every possible way against a potential human flu pandemic.”).

Part I of this Comment examines the history of quarantine abroad and in the United States, and reviews state and federal authority to impose quarantine requirements. Part II discusses the importance of legal limits on quarantine authority, such as substantive and procedural due process protections, the appropriate parameters of procedural due process, and the legal origins of applying procedural due process requirements to quarantine of communicable diseases. It also discusses why, in the event a large-scale quarantine is imposed in the United States, viewing procedural and substantive due process from a continuum framework will provide the necessary flexibility for public health officials and the court system to adapt to unexpected situations. The focus of Part III is on current quarantine procedural due process requirements at the state and federal level, including those incorporated into amendments of federal quarantine law proposed by the Centers for Disease Control in November of 2005. Part IV will conclude with specific ways due process guarantees can be protected in the event of a large-scale quarantine.

I. QUARANTINE FROM ANCIENT TIMES TO MODERN DAY

A. Historical Origins of Quarantine

For centuries, isolation and quarantine have proven effective in controlling the spread of infectious diseases by increasing social distance between healthy individuals and those who are infected or have been exposed. Although the term quarantine is commonly used to refer to both isolation and quarantine, the two strategies differ. Isolation is defined as "the separation of persons who have a specific infectious illness from those who are healthy and the restriction of their movement to stop the spread of that illness." Quarantine, on the other hand, is defined as "the separation and restriction of movement of persons who,


while not yet ill, have been exposed to an infectious agent and therefore may become infectious.\textsuperscript{6}

The concept of using isolation and quarantine for the purpose of controlling the spread of disease goes as far back as the Old Testament. The idea that unclean persons should be isolated from the rest of the community can be found in the Book of Leviticus.\textsuperscript{7} In the early Middle Ages, the Church drew upon such biblical references as the basis of their methods for combating leprosy.\textsuperscript{8} During the Council of Lyons held in 538 A.D., the Church issued a decree that restricted the free association of lepers with healthy persons.\textsuperscript{9} A leper was considered a public menace and was expelled from the community to protect its healthy members.\textsuperscript{10} Due process protections had yet to be articulated; thus, a person with leprosy was deprived of all civic rights and was considered socially dead, given the incurable nature of the disease.\textsuperscript{11}

This early form of preventive medicine was adopted and expanded upon in dealing with the bubonic plague during the Middle Ages. In the fourteenth century the bubonic plague, or "Black Death," spread rapidly throughout Europe.\textsuperscript{12} Communities took measures not only to control disease specifically within the community, but also to prevent its entry.\textsuperscript{13} All suspected individuals and objects were isolated and observed for a specified period under stringent conditions until it was determined that they were not bearers of the plague.\textsuperscript{14} The most significant early

\begin{itemize}
\item \textsuperscript{6} Id.
\item \textsuperscript{7} See Leviticus 13:46 (King James) ("All the days wherein the plague shall be in him he shall be defiled; he is unclean: he shall dwell alone; without the camp shall his habitation be."); George Rosen, A History of Public Health 64 (1958); Charles-Edward Amory Winslow, The Conquest of Epidemic Disease: A Chapter in the History of Ideas 78-80 (Hafner Publ'g Co. 1967) (1943) (explaining additional biblical examples of quarantine regulation).
\item \textsuperscript{8} See Rosen, supra note 7, at 64.
\item \textsuperscript{9} Id.
\item \textsuperscript{10} Id.
\item \textsuperscript{11} See id. at 64-65.
\item \textsuperscript{12} See id. at 66.
\item \textsuperscript{13} See id. at 67.
\item \textsuperscript{14} Id. at 67-68.
\end{itemize}
attempt to protect a population and its commercial enterprise against plague occurred in Venice, which by 1348 had systematic procedures to deal with infected ships, travelers, and merchandise. In 1377, the Republic of Regusa, on the eastern shore of the Adriatic, implemented regulations that had proven successful in Venice. A thirty-day period of isolation, termed the "trentina," for ships coming from plague-stricken areas was routinely ordered. This period was later extended to forty days, the "quarantina," which gave rise to the more modern term "quarantine."

Quarantine in American history dates back to the time of the American Colonies. Colonists brought with them from Europe their knowledge of and experience with isolation and quarantine, knowing them to be effective methods of preventing the spread of disease. Quarantine in the colonies was first directed toward disease which entered by sea; the concept of local isolation and quarantine developed later. The statutory authority for the imposition of quarantine originated during the colonial period at the local level.

The earliest formal quarantine restriction in America was a maritime quarantine enacted by the Massachusetts Bay Colony in 1647 against Barbados. By 1797, Massachusetts established quarantine powers in the first comprehensive state public health statute. At approximately the same time, in 1796, a yellow fever

15. See Ralph Chester Williams, The United States Public Health Service: 1798-1950, at 63 (1951); see Rosen, supra note 7, at 68; Wesley W. Spink, Infectious Diseases: Prevention and Treatment in the Nineteenth and Twentieth Centuries 7 (1978).

16. See Rosen, supra note 7, at 68-69; Williams, supra note 15, at 63.


18. Id. at 65.


23. Barbera et al., supra note 21, at 2712.
epidemic prompted Congress to pass the first federal quarantine statute authorizing the President to assist in state quarantines.\textsuperscript{24} As the federal government became more active in regulating the practice of quarantine, a nineteenth century conflict arose between federal and state quarantine powers.\textsuperscript{25} In the ensuing federalism debate, the states claimed authority pursuant to their police power; the federal government maintained it had preeminent authority deriving from its interstate commerce powers.\textsuperscript{26}

B. State Quarantine Authority

Currently, each state has the authority to compel isolation and quarantine within its borders pursuant to its inherent "police powers."\textsuperscript{27} The state police powers were first referred to in \textit{Gibbons v. Ogden}.\textsuperscript{28} In \textit{Gibbons}, the United States Supreme Court recognized the state's power to protect the health of its citizens, including the imposition of quarantine measures.\textsuperscript{29} Chief Justice John Marshall conceived of state police powers as:

\begin{quote}
[T]hat immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State . . . .\textsuperscript{30}
\end{quote}

In \textit{Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health}, the Supreme Court reiterated the state's authority to enact and enforce laws "for the purpose of preventing, eradicating, or controlling

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\item \textsuperscript{24} Act of May 27, 1796, ch. 31, 1 Stat. 474 (repealed 1799); see Williams, \textit{supra} note 15, at 68.
\item \textsuperscript{25} See Barbera et al., \textit{supra} note 21, at 2712.
\item \textsuperscript{26} See id.; Compagnie Francaise de Navigation a Vapeur v. Louisiana State Bd. of Health, 186 U.S. 380, 377-88 (1902); Gibbons v. Ogden, 22 U.S. 1, 205-06 (9 Wheat) (1824).
\item \textsuperscript{27} See generally Gibbons, 22 U.S. 1.
\item \textsuperscript{28} See id.
\item \textsuperscript{29} See id.
\item \textsuperscript{30} Id. at 203 (emphasis added).
\end{itemize}
the spread of contagious or infectious diseases." At issue in Compagnie was a resolution passed by the Louisiana Board of Health preventing anyone from entering a place in Louisiana where a quarantine had been declared. A French cargo ship, although free from any infectious or contagious disease, was not permitted to enter New Orleans. The Court upheld state authority to enact and enforce the quarantine, despite its impact on interstate commerce. "That from an early day the power of the states to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants has been recognized by Congress, is beyond question." The Court recognized an exception to state quarantine authority, however, where state law conflicts with federal law passed by Congress pursuant to the Commerce Clause.

Whenever Congress shall undertake to provide . . . a general system of quarantine, or shall confide the execution of the details of such a system to a national board of health, or to local boards, as may be found expedient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent. But, until this is done, the laws of the state on the subject are valid.

Three years after Compagnie, the Supreme Court ruled on the seminal case of Jacobson v. Massachusetts. In Jacobson, the Court upheld a state's authority to enact laws mandating compulsory vaccination. Although the case involved mandatory vaccination against smallpox, rather than a quarantine, it provides the leading authority for states to enact quarantine laws. Justice John Marshall Harlan, writing for the Court, remarked, "[u]pon the

31. Compagnie Francaise de Navigation a Vapeur, 186 U.S. at 387 (upholding the quarantine law at issue and its implementation as an appropriate exercise of state police power).

32. See id. at 381-82.

33. See id. at 381.

34. See id. at 397.

35. Id. at 387.

36. See id. at 388.

37. Id.


39. See id. at 37-38.
principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." For over 100 years, the Jacobson opinion has served as the constitutional foundation for state actions that constrain liberty in the name of public health.

C. Federal Quarantine Authority

Notwithstanding the status of quarantine as a public health measure generally within the states' purview, the federal government has the authority to enact quarantine measures to prevent the transmission of communicable diseases across state lines and to prevent the introduction of infectious diseases from foreign countries into the United States. Federal law provides two basic authorities for exercising quarantine power in the event of an outbreak of communicable disease: (1) general provisions of Title 42 of the United States Code; and (2) the Stafford Act.

1. Title 42 of the United States Code. Federal law authorizes the Secretary of Health and Human Services ("Secretary of HHS") peacetime and wartime authority to control the movement of individuals into and within the United States to prevent the spread of communicable disease. Under its delegated authority, the Centers for Disease Control and Prevention ("CDC"), through the Division of Global Migration and Quarantine, is empowered to detain, medically examine, or conditionally release individuals reasonably believed to be carrying a communicable disease.

40. Id. at 27.

41. See generally Wendy E. Parmet et al., Individual Rights versus the Public's Health — 100 Years after Jacobson v. Massachusetts, 352 NEW ENG. J. MED. 652 (2005).


45. See also 42 U.S.C. §§ 267-268, 270 (2000) (describing methods by which the movement of individuals may be controlled in order to prevent the spread of communicable disease).
The list of diseases for which quarantine is authorized is specified in an Executive Order by the President on the recommendation of the Secretary of HHS. Since 1983, the list has included cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, and viral hemorrhagic fevers; severe acute respiratory syndrome ("SARS") was added by Executive Order in April, 2003. President George W. Bush recognized the very real threat of an avian flu pandemic and signed an Executive Order on April 1, 2005 to amend the list by adding types of influenza that either cause or have the potential to cause a pandemic.

The exercise of federal authority to quarantine an exposed person was challenged in United States v. Shinnick. The U.S. Public Health Service had quarantined for fourteen days an airline passenger arriving from Stockholm, Sweden, which had been declared a smallpox infected area by the World Health Organization. On arrival, the passenger failed to present valid certification of smallpox vaccination. The district court upheld the detention, finding that the federal health authorities acted in good faith, given the opportunity for exposure while the passenger had been in Stockholm. Further, there was no way of determining whether she had been infected until the incubation period of fourteen days had expired; she also had a history of unsuccessful vaccinations.

49. Exec. Order No. 13,375, 3 C.F.R. 162 (2005) ("Influenza caused by novel or reemergent influenza viruses that are causing, or have the potential to cause, a pandemic.").
51. See id. at 790.
52. Id.
53. See id. at 791.
54. See id.
2. Stafford Act. The Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act") provides another avenue through which the federal government has authority to implement quarantine. It was enacted to provide support and assistance to state and local governments when disaster overwhelms them. The Stafford Act establishes a process for requesting and obtaining a Presidential disaster declaration by the governor of the affected state; defines the type and scope of assistance available from the federal government; and, puts forth the conditions for obtaining that assistance. In any major disaster, the president may implement health and safety measures, presumably including quarantine. The Federal Emergency Management Agency ("FEMA"), now part of the Emergency Preparedness and Response Directorate of the Department of Homeland Security, coordinates the response. Quarantine would then be implemented under the statutory standards in Title 42 of the United States Code.

D. Federal-State Cooperation

The government's slow response following Hurricane Katrina and the resulting devastation of the U.S. Gulf Coast highlights the importance of emergency


57. See 42 U.S.C. § 5170 ("All requests for a declaration by the President that a major disaster exists shall be made by the Governor of the affected State. Such a request shall be based on a finding that the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary.").

58. See 42 U.S.C. §§ 5121-5206; See also Federal Emergency Management Agency, supra note 56.

Moreover, this recent tragic event illustrates that an efficient interplay between federal and state laws is critical to an effective emergency response. In the event of an avian flu pandemic, or a similar public health emergency, both state and federal quarantine laws would likely be invoked to control the spread of the disease. To implement an effective quarantine that complies with constitutional requirements, quarantine laws and response efforts must be coordinated between all levels of government.

The federal government is authorized to accept assistance from state and local authorities in the enforcement of quarantine regulations. Similarly, the federal government may assist state and local governments in the prevention and suppression of communicable diseases and aid in the enforcement of their quarantine. Regulations promulgated under Title 42 U.S.C. § 264 permit the Director of the CDC to take reasonably necessary measures to prevent the spread of communicable diseases whenever state or local efforts are “insufficient.”

II. THE DEVELOPMENT OF QUARANTINE DUE PROCESS REQUIREMENTS

A. Substantive Due Process

The due process clauses of the Fifth and Fourteenth Amendments guarantee the fairness of laws by stipulating that the government shall not take a person's “life, liberty,
or property without due process of law." Courts not only review quarantine regulations to scrutinize the procedural protections provided, but also to determine whether the regulations achieve the objectives of the legislature through reasonable means. Substantive due process guarantees that laws will be reasonable and not arbitrary. Within the context of public health interventions, basic elements of substantive due process include: (1) a demonstrated public health necessity; (2) an effective intervention with a demonstrable means-end connection; (3) proportionality—the intervention is neither too narrowly or broadly tailored; and (4) it is the least restrictive in terms of infringing on individual rights while accomplishing its purpose, and does not inflict unnecessary harm.

Quarantine can be an effective public health tool; however, by its nature it is controversial in that it gives rise to tensions between individual rights and broader community interests. The history of quarantine in this country also reveals its use as an instrument of prejudice and subjugation. For example, during both World Wars, the United States military involuntarily quarantined thousands of prostitutes to prevent the spread of venereal disease among American troops. Thousands of women and girls suspected of engaging in promiscuous sexual activities with soldiers were committed to institutions; no similar efforts were made to quarantine men.

66. See Jackson v. Indiana, 406 U.S. 715, 738 (1972) ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.").

67. See Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (quoting NAACP v. Alabama, 377 U.S. 288, 307 (1964) ("This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."); Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) ("In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.").


69. See id. at 86, 89.
One of the most well known and controversial quarantine cases is that of Mary Mallon, coined "Typhoid Mary." Mallon, an Irish immigrant who worked as a cook in New York City around the turn of the twentieth century, was a healthy carrier of typhoid fever. She was twice isolated against her will for a total of twenty-six years without a trial, and without having violated any law. Prejudice against her as an Irish immigrant and a defiant woman of lower economic status is believed to have played a role in her extended isolation. These examples illustrate the importance of legal limits—including due process and equal protection—on quarantine measures.

Justice Harlan, in *Jacobson v. Massachusetts*, wrote: "Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others." While the individual's right to liberty cannot stand in the way of protecting the public's health, substantive due process prohibits state public health laws from being applied in an "arbitrary and oppressive" manner. Justice Harlan's acceptance of an exception to mandatory vaccination in *Jacobson*, where the state of a person's health made it "cruel and inhuman" to require vaccination, has been interpreted as establishing rational legal limits on state public health actions, such as quarantine.

In 1900, a California federal court addressed the discriminatory potential of quarantine in *Wong Wai v. Williamson*. The court struck down a quarantine resolution adopted by the San Francisco Board of Health which required only Chinese residents in an area of the city

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70. See generally Judith Walzer Leavitt, *Typhoid Mary: Captive to the Public's Health* (1996).
71. *Id.* at 14.
72. *See id.* at 2, 81-82.
73. *See generally id.* at 96-125.
76. *Id.*
77. *See Wong Wai v. Williamson*, 103 F. 1 (N.D. Cal. 1900).
known as the "Chinese Quarter" to be quarantined and inoculated for bubonic plague.\textsuperscript{78} The resolution deprived those individuals of personal liberty and their constitutionally protected right to travel in violation of equal protection and substantive due process.\textsuperscript{79} The court noted that laws or regulations necessary to protect the public health, which are appropriate measures intended to accomplish this end, are not subject to judicial review.\textsuperscript{80} However, such measures "must have some relation to the end in view, for, under the mere guise of the police power, personal rights . . . will not be permitted to be arbitrarily invaded" by the legislature.\textsuperscript{81}

The quarantine resolution in \textit{Wong Wai} violated the four basic elements of substantive due process.\textsuperscript{82} First, there was not a demonstrated public health necessity because there was no fact established by the defendants that the disease was definitively bubonic plague.\textsuperscript{83} Second, the resolution mandated an ineffective intervention that did not have a demonstrable means-end connection. Despite the fact that the vaccine was designed to be administered only to prevent contagion from exposure and not as a treatment after a person had been exposed to the disease, the resolution mandated the administration of the vaccine when individuals had potentially or definitely been exposed.\textsuperscript{84} The resolution, therefore, did not meet the requisite means-end effectiveness test because it had no relation to the public health of the city inhabitants.\textsuperscript{85} Third, the resolution lacked proportionality because although there were almost 350,000 residents in the city, the mandated quarantine did not apply to any residents other

\begin{footnotes}
78. \textit{See id.}
79. \textit{See id.} at 5.
80. \textit{Id.} at 7.
81. \textit{Id.}
82. \textit{See supra} text accompanying note 67.
83. \textit{See id.} at 6 ("There is . . . no fact established by the board of supervisors or by the board of health from which an inference might be drawn that any particular class of persons, or persons occupying a particular district, were liable to develop, or in danger of developing, the plague.").
84. \textit{See id.} at 7-8.
85. \textit{See id.} at 8-10.
\end{footnotes}
than Chinese or Asians. The resolution further violated this element because it inflicted unnecessary harm. The resolution mandated the vaccine at inappropriate times, which had life threatening effects.

In *Jew Ho v. Williamson*, San Francisco health officials diagnosed nine fatal cases of what was alleged to be bubonic plague in that same Chinese neighborhood discussed in *Wong Wai*. Consequently, the San Francisco Board of Health adopted a second resolution authorizing the Board to quarantine twelve city blocks in which some ten thousand Chinese residents lived. The issue was whether or not the quarantine was reasonable and necessary. The Ninth Circuit held that the quarantine violated substantive due process because it was not a reasonable regulation to accomplish the purpose sought—to prevent the spread of the bubonic plague. Expert testimony disputed the existence of the plague and suggested that it could have been a number of other diseases. Further, if the disease was the bubonic plague, the quarantine resolution did not attempt to confine the individuals to their homes to stop the spread of infection, but rather allowed intercommunication within the quarantined district, increasing the likelihood the disease would spread. While facially neutral, the quarantine had been implemented in such a way that it discriminated against only the Chinese population and therefore violated equal protection as well.

*Wong Wai* and *Jew Ho* are early examples of substantive due process challenges to isolation and quarantine orders, despite the broad police powers recognized by courts at that time. It was not until the mid-1960s and 1970s, after the majority of quarantine cases

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86. See id. at 6.
87. See id. at 7-8.
88. *Jew Ho v. Williamson*, 103 F. 10, 11 (N.D. Cal. 1900); see also *Wong Wai v. Williamson*, 103 F. 1, 6 (N.D. Cal. 1900).
89. See id. at 11-13.
90. Id. at 20-21.
91. See id. at 21-24.
92. See id. at 21, 24.
93. Id. at 22-23.
94. See id. at 26.
were decided, that the due process clauses were interpreted by courts as placing substantive limits on laws and regulations that deprive individuals of fundamental rights.\textsuperscript{95} Prior to that time, courts often deferred to state statutes that fell within the police power to protect public health.\textsuperscript{96}

The revival of substantive due process has since meant that laws involving fundamental liberty rights are now subject to constitutional scrutiny.\textsuperscript{97} Where a law or government action limits a fundamental right, or implicates a suspect class, strict scrutiny will be applied. The law will be upheld only if it is necessary to promote a compelling or overriding governmental interest. The fundamental rights recognized by the Supreme Court fall into four categories:\textsuperscript{98} freedom of association and other First Amendment rights;\textsuperscript{99} the right to vote;\textsuperscript{100} the right to travel;\textsuperscript{101} and the right to privacy, which includes freedom of choice in marriage,\textsuperscript{102} child bearing,\textsuperscript{103} and child rearing.\textsuperscript{104} In all other cases, the

\textsuperscript{95} See Laurence H. Tribe, American Constitutional Law 1306-09 (2d ed. 1988).

\textsuperscript{96} But see Jew Ho, 103 F. 10; Wong Wai v. Williamson, 103 F. 1 (N.D. Cal. 1900) (illustrating successful substantive due process challenges to isolation and quarantine orders).

\textsuperscript{97} See Wendy E. Parmet, AIDS and Quarantine: The Revival of an Archaic Doctrine, 14 Hofstra L. Rev. 53, 77 (1985).


\textsuperscript{104} See Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (private education); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). But see Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (affirming the state's authority to restrict parental authority). Today, these particular decisions might be viewed as relating to certain First Amendment rights, but the Supreme Court
rationality standard is applied. In the context of a community emergency and the threat of an infectious disease, courts would likely defer to the judgment of a legislative body, invoking rational review, and would require the government to show a legitimate state interest and that the law is rationally related to that interest. However, in the presence of an equal protection issue involving a suspect classification or an overburdening of a fundamental right, courts may apply strict scrutiny.

O'Connor v. Donaldson, a case involving the involuntary commitment of a mentally ill individual, illustrates a substantive due process challenge to a public health intervention. In O'Connor, the Supreme Court addressed Donaldson's right to liberty because he had been kept in a mental hospital against his will for fifteen years. Donaldson challenged the fifteen years of confinement he was forced to endure despite his repeated requests for release. The jury found that "[he] was neither dangerous to himself nor to others, and also found that, if mentally ill, [he] had not received treatment." Absent public safety concerns or the need for mental health treatment, the jury found no grounds for Donaldson's continued confinement. The Court found that a finding of mental illness alone could not justify a state involuntarily confining a person indefinitely against his will. Therefore, the mental hospital's superintendent, as an


107. Id. at 564.
108. Id. at 564-65.
109. Id. at 573.
110. Id. at 573-74.
111. Id. at 575.
agent of the state, violated Donaldson's substantive due process right to liberty.\footnote{112}

Should an avian flu pandemic or bioterrorism event strike, government actions and orders to isolate or quarantine individuals infected or believed to be infected with a communicable disease must comply with this overall substantive due process analysis. A public health intervention in search of a rationale or justification is a substantive due process problem. The governmental purpose of controlling and preventing the spread of infectious disease may not be "achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."\footnote{113} This effectively requires that any government action or order be proportional to the public health threat. The proper balance between protecting the public health and the individual's liberty interest must be fact specific. The more sweeping the proposed isolation or quarantine in terms of number and geographic scope, the more factual support, such as clinical evidence or expert testimony, will be required to illustrate the necessity and warrant the liberty intrusion.

B. Procedural Due Process

Fairness in process and procedure lies at the core of due process concerns and must be incorporated into isolation and quarantine laws. The basic elements of procedural due process include: (1) reasonable and adequate notice directed to the affected individual of the action that the government is purporting to take, typically through a written order; (2) an opportunity for a hearing at a reasonable time and manner to contest the government's action, typically through the right to present evidence and witnesses and to contest the government's evidence and witnesses; (3) access to legal counsel; and (4) a final administrative decision that is subject to review in a court of law by an impartial

\footnote{112}{Id. at 575-76.}
For public health purposes, such as quarantine, due process does not always require a judicial hearing or a proceeding akin to a criminal trial. Because quarantine implicates an individual's liberty interest to remain free from physical restraint, all levels of government—federal, state, and local—must act in a manner consistent with the basic elements of procedural due process when carrying out quarantine actions.

Quarantine, the physical separation of one or more exposed or potentially exposed individuals (from healthy individuals), imposes restrictions on freedom of movement, constituting "bodily restraint." Freedom from bodily restraint constitutes the core of the liberty interest protected by the due process clause of the Fourteenth Amendment. The Supreme Court has stated, "[i]t is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." However, as compulsory isolation and quarantine illustrate, the liberty interest to be free from physical restraint is not absolute, even in the civil context.

Procedural due process expectations are best viewed as a continuum. A continuum framework works well because the nature of what "process" is "due" is not the same in


115. See Parham v. J.R., 442 U.S. 584, 609 (1979) ("Although we acknowledge the fallibility of medical and psychiatric diagnosis, we do not accept the notion that the shortcomings of specialists can always be avoided by shifting the decision from a trained specialist using the traditional tools of medical science to an untrained judge or administrative hearing officer after a judicial-type hearing." (citation omitted)); Addington v. Texas, 441 U.S. 418, 431 (1979) (holding that states need not apply the strict criminal standard of proof beyond a reasonable doubt before committing the mentally ill); Morales v. Turman, 562 F.2d 993, 998 (5th Cir. 1977) (noting in dicta that "[a] state should not be required to provide the procedural safeguards of a criminal trial when imposing a quarantine to protect the public against a highly communicable disease.").


117. Foucha, 504 U.S. at 80 (citing Jones v. United States, 463 U.S. 354, 361 (1983) (internal quotation marks omitted)).

every circumstance. "[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . [It] is compounded of history, reason, the past course of decisions . . . ."\footnote{119} Thus, "due process is flexible and calls for such procedural protections as the particular situation demands."\footnote{120} The level of process granted is required to be commensurate with the degree of deprivation and the circumstances of the event.\footnote{121}

In the event a large-scale quarantine is imposed in the United States, viewing the fact-specific concept of procedural due process from a continuum framework will provide the necessary flexibility for public health officials and the court system to adapt to unexpected and individualized situations. On the far left of the continuum are identified individuals who have a definitive diagnosis for a communicable disease and for whom isolation is the appropriate public health tool. Moving right on the continuum are individuals who exhibit symptoms, but the diagnosis has not yet been confirmed. On the far right, quarantine becomes the appropriate public health tool and legal, scientific, political, and social issues become more complicated. Procedural due process safeguards should increase, from left to right, along this continuum because the level of restraint on liberty increases.

Courts make a determination as to what procedures are necessary by applying the test articulated by the Supreme Court in \textit{Mathews v. Eldridge}.\footnote{122} In determining the constitutional adequacy of protective procedures provided in any given law, an analysis of governmental and private

\begin{footnotesize}
\begin{enumerate}
  \item Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J. concurring).
  \item Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
  \item See Parham v. J.R., 442 U.S. 584, 608 (1979) ("What process is constitutionally due cannot be divorced from the nature of the ultimate decision that is being made.").
\end{enumerate}
\end{footnotesize}
interests is required.\textsuperscript{123} Mathews dictates that the process due in any given instance is determined by weighing three factors: (1) the importance of the individual interest that will be affected by the official action; (2) the value of specific procedural safeguards to that specific individual's interest; and (3) the governmental interest, including the fiscal and administrative burdens that additional procedural safeguards would entail.\textsuperscript{124}

Hamdi v. Rumsfeld illustrates how the Mathews test is applied.\textsuperscript{125} Although Hamdi does not involve quarantine law, it is a recent example of how the Supreme Court applies the balancing test when an individual's liberty is at stake. It is also a noteworthy example of the conflicts of interest at the due process balancing point.\textsuperscript{126} The petitioners, a citizen-detainee and his father, petitioned for a writ of habeas corpus under 28 U.S.C. § 2241.\textsuperscript{127} The Fourth Circuit ordered the petition dismissed, finding that the citizen-detainee's detention was legally authorized and that he was entitled to no further opportunity to challenge his enemy-combatant label.\textsuperscript{128} On appeal, the United States Supreme Court addressed the issue of what process is constitutionally due to a citizen who disputes his enemy-combatant status.\textsuperscript{129}

Hamdi's private interest was the "most elemental of liberty interests—the interest in being free from physical detention by one's own government."\textsuperscript{130} The weight on this side of the Mathews scale was not offset by the circumstances of war or the accusation of treasonous behavior, for "[i]t is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires

\begin{itemize}
  \item \textsuperscript{123} See Mathews v. Eldridge, 424 U.S. at 334.
  \item \textsuperscript{124} See id. at 334-35.
  \item \textsuperscript{125} See Hamdi v. Rumsfeld, 542 U.S. 507, 528-35 (2004).
  \item \textsuperscript{126} For a similar comparison regarding constitutional conflicting interests of providing for the common defense and due process, see Franklin H. Alden, Jr., Comment, Liberty or Death: Maryland Improves Upon the Model State Emergency Health Powers Act, 8 J. HEALTH CARE L. & POL'Y 185, 195-96 (2005).
  \item \textsuperscript{127} Hamdi, 542 U.S. at 511.
  \item \textsuperscript{128} Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir.) (2003).
  \item \textsuperscript{129} See Hamdi, 542 U.S. 507.
  \item \textsuperscript{130} Id. at 529.
\end{itemize}
due process protection." The Court noted that as critical as the government's interest may be in detaining those who pose an immediate threat to national security, history and common sense dictate that an unchecked system of detention carries the potential for abuse of others who do not present such a threat. Therefore, the starting point for the Mathews analysis was unaltered by the allegations surrounding Hamdi or the organizations with which he was alleged to have associated.

The Court considered that on the other side of the scale were weighty and sensitive governmental interests in ensuring that Hamdi did not return to fight with the enemy against the United States. The government argued that heightened trial-like process would unnecessarily and dangerously distract military officers, result in a futile search for evidence buried under the rubble of war, and discovery into military operations would intrude on sensitive secrets of national defense. The Court indicated that to the extent those burdens were triggered by heightened procedures, they were taken into account in the due process analysis.

The Court recognized the competing concerns and struck a balance, holding that Hamdi was entitled to notice of the factual basis for his classification and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker. The Hamdi case illustrates that the Mathews test does not necessarily have neat or distinguishable steps, but is a well thought out balance and consideration of the three factors.

131. Id. at 530 (quoting Jones v. United States, 463 U.S. 354, 361 (1983)).
132. Id. at 530.
133. See id. at 531.
134. Id.
135. Id. at 531-32.
136. Id. at 532.
137. See id. at 533.
As discussed in Part I, long-standing precedent has given Congress and the states broad power to enact quarantine and other public health laws, and to have them executed by public health officials. In the nineteenth and early twentieth centuries, quarantine was used against acute, short-lived communicable diseases. To be effective in controlling the spread of such diseases, quarantine had to be implemented immediately. During this period, broad authority was given to state health officials under state quarantine statutes, and courts frequently upheld the validity of quarantine pursuant to such statutes without considering substantive due process. Furthermore, state statutes, at that time, generally did not require that quarantine be accompanied by a judicial order, notice, or a hearing. The broad authority of health officials and the absence of legal safeguards is illustrated in the 1876 case of Haverty v. Bass.

In Haverty, the Supreme Judicial Court of Maine upheld a statute permitting municipal officers to remove a person infected with "a disease dangerous to the public health" to a separate house without first obtaining a warrant. The court stated:

We do not perceive how it could be of importance to the sick man, whether a warrant was obtained or not. It would be the merest form in the world, as far as he is concerned. There is no provision...
for any examination by the justices, nor for notice to any parties to be heard, nor could any appeal be had.144

The absence of procedural protections, such as mechanisms by which the individual could appeal, was not viewed as a constitutional defect by the court. Substantive due process, therefore, was not a consideration. Rather, the court's view in the circumstances, was merely that "[t]he individual right sinks in the necessity to provide for the public good."145 The court noted, however, that habeas corpus was always an option.146

In a 1917 case, Crayton v. Larabee, the New York State Court of Appeals upheld the quarantine of a woman who was not sick, but lived next door to someone infected with smallpox.147 The plaintiff alleged that she had been wrongfully detained because she was not "infected with or exposed to" the disease as required under the relevant state law.148 However, the court ruled that the statute was a valid health regulation under the police power of the state and the statute had a broader meaning than the plaintiff's interpretation.149 "Among all the objects to be secured by governmental laws none is more important than the preservation of the public health. . . . [P]owers conferred for so greatly needed and most useful purposes should receive a liberal construction for the advancement of the ends for which they were bestowed."150 The state regulation vested in the health officer a discretionary power to quarantine "as he deems necessary" to protect the public's health.151

To illustrate how the framework of due process as a continuum may be applied, the isolated individual in Haverty would fall on the left of the continuum because he was clearly ill with an identified infectious disease. In comparison, the individual subjected to quarantine in

144. Id. at 73.
145. Id. at 74.
146. Id.
148. See id. at 357.
149. See id. at 358-59.
150. See id. at 358 (citation omitted).
151. See id. at 358.
Crayton would fall on the right of the continuum and, hence, was owed greater due process protections because her contact with an infected neighbor was only suspected. Nonetheless, by contemporary standards, neither received sufficient due process and the power of public health officials in both cases was determinative.

Some courts during this early period, however, did set limits on the discretion of public health officials to enact quarantine measures. In Kirk v. Wyman, the local board of health issued an order that a former missionary afflicted with leprosy was to leave the city or be isolated in a pesthouse, which had previously been used for individuals afflicted with smallpox. The Supreme Court of South Carolina stated that it was obvious the board of health was within its duty in requiring the patient to be isolated, but the case turned on whether the isolation was "so clearly beyond what was necessary to the public protection that the court ought to enjoin it as arbitrary." The Kirk court found that although regulations requiring isolation of infected persons for the protection of public health are constitutional, boards of health are not entitled to arbitrary power over such persons, and may not deprive any person of property or liberty, unless the deprivation by due inquiry is "reasonably necessary to the public health." Significantly, the court engaged in a substantive due process review, requiring officials to adopt a less restrictive alternative in enforcing isolation measures, thereby limiting the discretion of health authorities.

Later isolation and quarantine cases markedly reflect advancements in epidemiology. Following World War I, venereal diseases and tuberculosis were most often the subject of litigated quarantine orders. With both diseases, individuals could be quarantined for long periods

154. Id. at 390.
155. Id. at 389-90.
156. It was decided that Miss Kirk would be isolated in a cottage to be built for her outside the city and she was not forced to be isolated in the pesthouse. Id. at 391.
157. Parmet, supra note 97, at 69.
of time because the incubation period and treatment were lengthy, and neither disease resulted in death quickly.\textsuperscript{158} By the middle of the twentieth century, venereal disease and tuberculosis were treatable, and presented less of a threat to the community than the plague or smallpox had in an earlier age.\textsuperscript{159} Therefore, courts and health officials could afford the time and had the evidentiary basis to be concerned with matters of proof and legal procedure.\textsuperscript{160} Wendy Parmet, of Northeastern University School of Law, summed the phenomenon up well: "As science provided more methods of fighting disease, and more ways to understand it, courts could begin to question the methods proposed by experts for controlling disease."\textsuperscript{161}

Nonetheless, some courts were still hostile to due process challenges to quarantine orders. In the case of \textit{Ex Parte Caselli}, the petitioner was quarantined after a diagnosis of gonorrhea.\textsuperscript{162} The petitioner applied for a writ of habeas corpus to obtain her release on the ground, inter alia, that she was not granted a judicial hearing prior to her detainment.\textsuperscript{163} The Supreme Court of Montana acknowledged the petitioner's right to habeas corpus, but clearly rejected the notion that individuals quarantined to stop the spread of contagious disease are entitled to a hearing in the first instance because it would render the quarantine inoperative.\textsuperscript{164} The court went even further, stating that the Fourteenth Amendment had no application to quarantine cases since it would render the state powerless to act against contagious disease.\textsuperscript{165} Unlike the court in this case, modern courts must apply the Fourteenth Amendment to cases of state-imposed quarantine. However, case law in addition to \textit{Ex Parte Caselli} suggests that a hearing may be held after the start of detainment in an

\begin{itemize}
\item \textsuperscript{158} Id.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} Id.
\item \textsuperscript{162} \textit{Ex parte Caselli}, 204 P. 364 (Mont. 1922).
\item \textsuperscript{163} Id. at 364.
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Id. at 364-65.
\end{itemize}
emergency, presumably where the incubation period is of an unknown length, to protect the public's health.\footnote{See Parmet, supra note 97, at 80; see, e.g., Camara v. Municipal Court of San Francisco, 387 U.S. 523, 539 (1967) (noting that the law has traditionally upheld prompt inspections without a warrant in emergencies); N. Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306, 315 (1908) (explaining that the state has the right to seize and destroy spoiled and unwholesome food even though no notice and opportunity to be heard are given).} \footnote{Ex parte Company, 139 N.E. 204 (Ohio 1922).} \footnote{Id. at 205.}

Hostility to due process challenges continued in the early 20th century. In \textit{Ex parte Company}, the Ohio Supreme Court did little to hide its frustration with challenges to quarantine regulation for venereal disease.\footnote{Id. at 205.} The court declared: "There is perhaps no provision of the federal Constitution that is more overworked than the Fourteenth Amendment. Counsel generally are apparently unanimous in thinking that any judgment or finding as against the client denies such client the equal protection of the laws, or is without due process of law."\footnote{Id. at 205.}

The broad authority granted to health officials was still apparent in the 1952 decision of \textit{Moore v. Draper}.\footnote{Moore v. Draper, 57 So. 2d 648 (Fla. 1952).} In \textit{Moore}, the Supreme Court of Florida denied the petitioner's writ of habeas corpus, by which he sought release from isolation for tuberculosis, arguing that the state statute, inter alia, violated the due process clause of the Fourteenth Amendment.\footnote{Id. at 649 (citations omitted).} The court upheld the quarantine statute, reasoning that necessary laws or regulations regarding public health is a legislative question, and "appropriate measures intended and calculated to accomplish these ends are not subject to judicial review."\footnote{Id. at 649 (citations omitted).} Further, it declared that the courts will not interfere with the exercise of the state police power except where the quarantine regulations are "arbitrary, oppressive and unreasonable."\footnote{Id. (citations omitted).}

Some courts at that time, however, did demand greater due process protections. In \textit{State v. Snow}, the Supreme Court of Arkansas refused to order the respondent,
suspected of having communicable tuberculosis, into isolation until sufficient findings of active tuberculosis were presented.\textsuperscript{173} The significance of \textit{Snow} is that while the court recognized the importance of proceedings by the State for the commitment of tubercular persons to protect the public's health, it also recognized the need for quarantine statutes “to be strictly construed to protect the rights of the citizen.”\textsuperscript{174} This stands in contrast to the earlier \textit{Crayton} decision, which gave a “liberal construction” of power to public health officials to carry out quarantine statutes.\textsuperscript{175} A partial explanation is that during the forty-two years separating the \textit{Crayton} and \textit{Snow} decisions, medical research as well as the law, with respect to recognition of individual rights, had evolved considerably.

It is noteworthy that the \textit{Snow} court made an analogy between involuntary confinement for communicable diseases and involuntary confinement for mental illness. Justice McFaddin wrote, “Like an insanity proceeding, this is neither a civil nor a criminal proceeding, but rather it is a special proceeding by the State in its character of \textit{parens patriae}, based on the theory that the public has an interest to be protected.”\textsuperscript{176}

Seven years after \textit{Snow}, the California Court of Appeals decided \textit{In re Halko}.\textsuperscript{177} The petitioner, who was diagnosed with active tuberculosis, was ordered into isolation in the security side of a hospital pursuant to provisions of the California Health and Safety Code.\textsuperscript{178} Thereafter, a county public health officer served him with four successive orders of isolation each for a period of six months.\textsuperscript{179} After almost two years in isolation, the petitioner sought a writ of habeas corpus contending that the state statute deprived him of his liberty without due process of law. Provisions of the relevant law allowed the health officer to issue consecutive certifications of isolation, “without means of questioning

\textsuperscript{173} State v. Snow, 324 S.W.2d 532, 534 (Ark. 1959).
\textsuperscript{174} See \textit{id}.
\textsuperscript{176} \textit{Snow}, 324 S.W.2d at 534.
\textsuperscript{177} \textit{In re Halko}, 246 Cal. Rptr. 661 (Ct. App. 1966).
\textsuperscript{178} \textit{id}. at 662.
\textsuperscript{179} \textit{id}.
and judicially determining” the conclusion of the health officer.\textsuperscript{180}

The In re Halko court disagreed with the petitioner, finding that any person who was confined pursuant to a quarantine order issued by a health officer under the California Health and Safety Code was not entitled to relief on habeas corpus where the evidence showed reasonable cause to believe that person is infected.\textsuperscript{181} However, individuals quarantined without reasonable grounds are entitled to relief by habeas corpus.\textsuperscript{182} Since the petitioner had not disputed the finding that he was afflicted with tuberculosis, the court held that there had been no deprivation of due process rights.\textsuperscript{183} Further, the court found that the law permits consecutive orders for quarantine as long as the individual continues to be infected with tuberculosis and is reasonably believed by the health officer to be dangerous to the public health.\textsuperscript{184}

In Halko and Snow, although factually similar in that both dealt with individuals infected or potentially infected with contagious tuberculosis, the courts arrived at different conclusions as to whether isolation was to be ordered. Halko is illustrative of previous cases which gave health authorities broad discretion to isolate individuals who threatened the public’s health, provided their acts were not arbitrary and were based on a reasonable belief that the individual was infected.\textsuperscript{185} Additionally, the tuberculosis in Halko was confirmed to be active. Whereas, Snow is illustrative of limits on such discretion and favors greater protection of individual due process rights. Even though it was reasonable that the tuberculosis was in an infectious stage at the time in question, the Snow court did not order

\textsuperscript{180} Id.
\textsuperscript{181} See id. at 662-63.
\textsuperscript{182} Id. at 664.
\textsuperscript{183} See id.
\textsuperscript{184} Id.
isolation because the findings did not meet a preponderance of evidence.\textsuperscript{186}

D. Development of Procedural Due Process Requirements for Involuntary Detention

Few courts have considered the procedural due process requirements of quarantined individuals; however, many have considered procedural protections in the context of involuntary commitment for mental illness. "The state has a legitimate interest under its \textit{parens patriae} powers in providing care to its citizens who are unable" to care for themselves due to mental or physical illness.\textsuperscript{187} The power of the state as \textit{parens patriae} is not unlimited—it is not an "invitation to procedural arbitrariness."\textsuperscript{188} The state, under the authority of its police power, also has an interest in protecting the community from threats, such as "the dangerous tendencies of some who are mentally ill."\textsuperscript{189}

States rely on civil commitment procedures to accommodate these interests. A civil commitment carries with it a loss of liberty for treatment, not punitive, purposes. However, there is no state interest in confining individuals involuntarily if they are not mentally ill and can safely live in freedom because they are not dangerous to themselves or others.\textsuperscript{190} Additionally, if an individual is involuntarily confined, the confinement must cease when the reasons for commitment disappear.\textsuperscript{191}

Procedural due process applies to restraints on physical liberty in both criminal and non-criminal settings. Involuntary detention where no crime has been committed

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\textsuperscript{186} See State v. Snow, 324 S.W.2d 532, 534 (Ark. 1959).

\textsuperscript{187} Addington v. Texas, 441 U.S. 418, 426 (1979) (referring to those who cannot take care of themselves because of emotional disorders); see also Snow, 324 S.W.2d at 534 (referring to those who cannot take care of themselves because of physical illness).

\textsuperscript{188} In \textit{re} Gault, 387 U.S. 1 (1967) (quoting Kent v. United States, 383 U.S. 541, 555 (1966)).

\textsuperscript{189} Addington, 441 U.S. at 426.

\textsuperscript{190} Id.; see O'Connor v. Donaldson, 422 U.S. 563, 575-76 (1975).

\textsuperscript{191} See Jackson v. Indiana, 406 U.S. 715, 738 (1972) ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.").
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involves a balancing of the state's duty to protect the public's health and safety with the liberty interests and due process rights of the individual to be detained. In the late 1960s and throughout the 1970s, procedural due process protections for individuals involuntarily detained expanded, particularly in the area of civil commitment of the mentally ill.\textsuperscript{192} The Supreme Court has repeatedly recognized that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."\textsuperscript{193} Although the parameters of the process required may differ depending on the type of action,\textsuperscript{194} due process protections are guaranteed in civil commitments of juvenile delinquents,\textsuperscript{195} mandating sex offenders to various treatment programs,\textsuperscript{196} and commitment of the mentally ill.\textsuperscript{197}

A 1967 Supreme Court decision, \textit{Specht v. Patterson},\textsuperscript{198} involved a petitioner who was convicted in state court for indecent liberties under a Colorado statute that carried a maximum sentence of ten years. However, he was not sentenced under that statute, but rather under the confusing Colorado Sex Offenders Act.\textsuperscript{199} This act did not make the commission of a specified crime the basis for sentencing; rather, Colorado criminal procedure made the conviction for specified sex offenses, such as the one the petitioner committed, as the basis for commencing another proceeding under the Colorado Sex Offenders Act.\textsuperscript{200} Therefore, the petitioner was sentenced under a new and

\textsuperscript{192} See infra text accompanying notes 196-211.
\textsuperscript{193} Addington v. Texas, 441 U.S. at 425; see, e.g., Jackson v. Indiana, 406 U.S. 715; Humphrey v. Cady, 405 U.S. 504 (1972); In re Gault, 387 U.S. 1; Specht v. Patterson, 386 U.S. 605 (1967).
\textsuperscript{195} See, e.g., In re Gault, 387 U.S. 1.
\textsuperscript{196} See, e.g., Kansas v. Hendricks, 521 U.S. 346 (1997); Humphrey, 405 U.S. 504.
\textsuperscript{198} Specht, 386 U.S. 605.
\textsuperscript{199} Id. at 607.
\textsuperscript{200} Id. at 608. The Colorado Sex Offenders Act came into play where the district court was of the opinion that any person convicted of specified sex offenses constituted a threat of bodily harm to the public, or was a habitual offender and mentally ill. Id. at 607.
greater charge without notice and a full hearing.\textsuperscript{201} The Supreme Court held that the petitioner was entitled to a full judicial hearing before the more severe sentence was imposed because the state could not involuntary confine the petitioner without due process measures required under the Fourteenth Amendment.\textsuperscript{202} Procedural due process, in this instance, entitled the detainee to have the right at the hearing to "be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own."\textsuperscript{203}

In that same year, the Supreme Court held in \textit{In re Gault} that juvenile delinquency proceedings which may lead to commitment in a state institution "must measure up to the essentials of due process and fair treatment."\textsuperscript{204} Specifically, the child and his parents were entitled to: (1) a hearing; (2) notice of the specific charge or factual allegations, given sufficiently in advance of the hearing to permit preparation; (3) notification of the child's right to be represented by counsel, and if they are unable to afford counsel, that counsel would be appointed to represent the child; (4) application of the constitutional privilege against self-incrimination; and (5) an order of commitment based on sworn testimony subjected to the opportunity for cross-examination.\textsuperscript{205}

The following year, the Supreme Court in \textit{Addington v. Texas} addressed the standard of proof to be applied in a civil commitment proceeding.\textsuperscript{206} The Court found civil commitment to be a significant deprivation of liberty requiring the state to justify confinement by proof greater than a mere preponderance of the evidence.\textsuperscript{207} The reasonable doubt standard used in criminal prosecutions was rejected because of the unlikelihood that the state

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\textsuperscript{201} \textit{Id.} at 607.
\textsuperscript{202} \textit{Id.} at 608.
\textsuperscript{203} \textit{Id.} at 610.
\textsuperscript{204} \textit{In re Gault}, 387 U.S. 1, 30 (1967) (quoting \textit{Kent v. United States}, 383 U.S. 541, 562 (1966)).
\textsuperscript{205} See \textit{id.} at 33-57.
\textsuperscript{206} \textit{Addington v. Texas}, 441 U.S. 418 (1979).
\textsuperscript{207} \textit{Id.} at 427.
\end{flushright}
could ever meet such a burden in a civil commitment proceeding given the fallibility and lack of certainty of psychiatric diagnosis.\textsuperscript{208} The \textit{Addington} Court held that a mid-level burden of proof "strikes a fair balance between the rights of the individual and the legitimate concerns of the state."\textsuperscript{209} Therefore, the required standard to apply to civil commitments to meet due process guarantees is "equal to or greater than the 'clear and convincing' standard," the precise determination of which is a matter of state law.\textsuperscript{210}

One year later, the Supreme Court held in \textit{Vitek v. Jones} that even a convicted felon was entitled to the benefit of procedural protections in a commitment hearing before he was declared to have a mental illness and transferred to a mental hospital.\textsuperscript{211} Of particular relevance to quarantine for communicable disease, the Court determined that even though the determination of whether the individual is mentally ill is essentially medical, the "medical nature of the inquiry . . . does not justify dispensing with due process requirements."\textsuperscript{212} Such a deprivation of liberty required the following due process protections: written notice of the transfer; an adversary hearing before an independent decisionmaker; right to present evidence and cross-examine witnesses against him; right to counsel; written findings, and; effective and timely notice of such rights.\textsuperscript{213}

E. Application of Procedural Due Process Requirements to Quarantine of Communicable Diseases

Involuntary detention for mental illness has been analogized to involuntary detention for communicable disease, thus giving rise to similar procedural due process requirements. In the 1980 decision, \textit{Greene v. Edwards}, the West Virginia Supreme Court of Appeals held that the same procedural protections afforded to those involuntarily

\begin{itemize}
\item \textsuperscript{208} See id. at 428-31.
\item \textsuperscript{209} Id. at 431.
\item \textsuperscript{210} Id. at 433. For example, in New York State the government must sustain its petition calling for involuntary detention of a person by clear and convincing evidence. Bradley v. Crowell, 694 N.Y.S.2d 617 (Sup. Ct. 1999).
\item \textsuperscript{211} Vitek v. Jones, 445 U.S. 480 (1980).
\item \textsuperscript{212} Id. at 495.
\item \textsuperscript{213} Id. at 494-95.
\end{itemize}
committed for mental illness should be applied to quarantined individuals with communicable diseases.\textsuperscript{214} Greene was involuntarily confined under an order of the county court pursuant to the West Virginia Tuberculosis Control Act (the "Act").\textsuperscript{215} The West Virginia Department of Health had filed a petition alleging that Greene was suffering from active tuberculosis, was a danger to the health of others, and needed to be committed.\textsuperscript{216} Although notice of the hearing was given to Greene, he was not notified of his right to be represented by counsel. Only after the hearing had begun was counsel appointed, and no recess was taken to allow him the opportunity to consult his attorney.\textsuperscript{217}

Greene filed a writ of habeas corpus, arguing an absence of adequate due process.\textsuperscript{218} The court reasoned that the purpose of the Act, to prevent a person suffering from contagious tuberculosis from becoming a danger to others, was analogous to the rationale underlying the state statute governing involuntary confinement of a mentally ill person.\textsuperscript{219} Consequently, the court found that the due process requirements afforded to mentally ill persons under the state statute governing involuntary hospitalization must also be afforded to isolated persons charged under the Act.\textsuperscript{220} The court reasoned that involuntary commitment for communicable tuberculosis and mental illness implicated liberty interests to a similar extent, therefore, persons charged under the Act must be afforded:

(1) an adequate written notice detailing the grounds and underlying facts on which commitment is sought; (2) the right to counsel and, if indigent, the right to appointed counsel; (3) the right to be present, to cross-examine, to confront and to present witnesses; (4) the standard of proof to be by clear, cogent and

\textsuperscript{215} Id. at 661-62.
\textsuperscript{216} Id. at 662.
\textsuperscript{217} Id.
\textsuperscript{218} See id. at 661-62.
\textsuperscript{219} Id. at 662.
\textsuperscript{220} Id. at 663.
convincing evidence; and (5) the right to a verbatim transcript of the proceedings for purposes of appeal. 221

Given that counsel was not appointed for Greene until after the commitment hearing had begun, the court found that his counsel could not have been prepared to defend him, thus Greene's writ of habeas corpus was granted, and he was given a new hearing. 222

Similar to the reasoning in Greene, the New York Supreme Court of Suffolk County in Bradley v. Crowell determined the burden of proof to be applied in a petition hearing seeking involuntary detention of an individual with communicable tuberculosis. 223 In an issue of first impression, the court stated: "[T]his situation is analogous to situations where, because of mental infirmity, a person is sought to be detained in a mental facility against his will . . ." 224 Therefore, Addington v. Texas was controlling and the court held that a petition requesting involuntary detention of someone with communicable disease must be proven by "clear and convincing evidence." 225

The United States Supreme Court has never ruled on what specific due process procedures are owed to quarantined individuals. Nevertheless, the Court has maintained that involuntary confinement for any purpose constitutes a significant deprivation of liberty requiring due process protection. 226 The Greene and Bradley courts and various authors have maintained that courts should uphold the same due process requirements for quarantines as are demanded for civil commitments. 227 These due process protections are instructive in the context of quarantine,

221. Id. at 663.
222. Id. at 663.
224. Id. at 618.
225. See id.
however, a continuum of procedural due process may work best for individualized quarantine circumstances.

F. Continuum Legal Framework

The analogy to civil commitments is imperfect in the context of quarantine. The legal framework of a continuum may more appropriately suggest the apt level of procedural safeguards, allowing the nuances of both isolation and quarantine to be considered. Such an analogy is warranted where on the far left of the continuum individuals are justifiably isolated because there is a definitive diagnosis of an infectious disease for identified individuals. In those instances, the detention is relatively straightforward legally, scientifically, politically, and socially. An analogy to civil commitments of the mentally ill, who have not committed any crime but are either dangerous to themselves or others, is appropriate because those ill with infectious diseases are dangerous to others as well. Protecting the community’s health outweighs the individual’s right to liberty, especially where it is simple to determine who should be isolated, where to do so, and for how long. However, an analogy to civil commitments is not necessarily appropriate for quarantined individuals, who may or may not be ill with an infectious disease, because they may not be dangerous to others. Quarantine is further along on the continuum and requires greater procedural due process protections.
Isolation and quarantine pose contemporary concerns in addition to due process. This includes having a safe and habitable environment during the isolation or quarantine and being treated fairly. Isolation and quarantine are designed to promote the public’s health, not to punish the individual, therefore, public health authorities have the obligation to provide decent quarters. There is no doubt that this would be extremely challenging in the event of a pandemic, but degrading settings such as jails or prisons are inappropriate. Modern public health practice favors “sheltering in place,” preferably in a person’s home. Home quarantines assume voluntary compliance, however, an assumption of compliance could be problematic in a modern day quarantine in the United States.

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228. See Lawrence O. Gostin et al., Ethical and Legal Challenges Posed by Severe Acute Respiratory Syndrome: Implications for the Control of Severe Infectious Disease Threats, 290 JAMA 3229, 3234 (2003).

229. See id.

230. See Gostin et al., supra note 228, at 3234.

231. See generally Robert J. Blendon et al., Attitudes Toward the Use of Quarantine in a Public Health Emergency in Four Countries, 25 HEALTH AFF. W15 (2006), http://content.healthaffairs.org/cgi/content/abstract/25/2/w15. Civilian noncompliance with quarantine orders could compromise public health efforts and even become violent. Barbera et al., supra note 21, at 2715. Quarantine incidents in the past have generated organized civil disobedience and disregard for authority. Id. That is why voluntary quarantine would be
Additionally, issues such as job security and loss of income of individuals subject to isolation or quarantine are a matter of concern.\textsuperscript{232}

\section*{III. CURRENT QUARANTINE PROCEDURAL DUE PROCESS REQUIREMENTS}

\subsection*{A. State Procedural Due Process Requirements:}

\begin{enumerate}
\item \textit{The Model State Emergency Health Act and The Turning Point Model State Public Health Act.} The National Association of Attorneys General issued a resolution in December of 2003 urging states to review their public health laws.\textsuperscript{233} The majority of state statutes were passed several decades ago and have not been amended since to account for changes in medical and public health circumstances.\textsuperscript{234} Although each state has its own laws addressing isolation and quarantine, two important model acts have been promulgated to guide states in the updating process. It was not intended that all states enact the same statutes since “[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold.”\textsuperscript{235} Two model acts, the Model State Emergency Health Powers Act (“MSEHPA”)\textsuperscript{236} and the Turning Point Model State Public Health Act, are considerably more effective than a court-ordered quarantine as a public health response to a pandemic. See Mark A. Rothstein, \textit{Are Traditional Public Health Strategies Consistent with Contemporary American Values?}, 77 TEMP. L. REV. 175, 191-92 (2004). Voluntary quarantine is dependant on “a shared sense of community and public perceptions of the necessity and effectiveness of quarantine.” \textit{Id.} at 192.

\textsuperscript{232} See Gostin et al., \textit{supra} note 228, at 3234.


\textsuperscript{234} \textit{Id.}

\textsuperscript{235} Addington v. Texas, 441 U.S. at 431.

Health Act ("Turning Point Act"),\(^\text{237}\) include provisions that States may adopt, either in whole or in part, to protect due process rights in isolation and quarantine situations.

The MSEHPA was released on December 21, 2001, following the tragic events of September 11, 2001, as a cooperative effort between the Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities and the CDC. It was premised on the finding that existing state laws were inadequate to confront emergency health threats caused by bioterrorism and epidemics; therefore, "development of a comprehensive plan to provide a coordinated, appropriate response in the event of a public health emergency" was needed.\(^\text{238}\) The MSEHPA grants specific emergency powers to state governors and public health authorities, while at the same time protecting the civil rights, liberties, and needs of infected or exposed persons. As of July 15, 2006, thirty-eight states and the District of Columbia have passed bills that include provisions from or closely related to the MSEHPA.\(^\text{239}\)

The Turning Point Act, a product of the Public Health Statute Modernization Collaborative that is comprised of representatives from five states and nine national organizations and government agencies, was published on September 16, 2003. It is even more comprehensive in scope

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\(^{238}\) MSEHPA pmbl. at 6.

\(^{239}\) Ctr. for Law & the Pub.'s Health at Georgetown & Johns Hopkins Univs., The Model State Emergency Health Powers Act Legislative Surveillance Table (July 15, 2006), available at http://www.publichealthlaw.net/MSEHPA/MSEHPA%20Surveillance.pdf. The extent to which the MSEHPA's provisions were incorporated into each state's laws varies. However, the Model State Emergency Health Powers Act Legislative Surveillance Table provides insight into the ways state legislatures have used the MSEHPA provisions. Id.
than the MSEHPA in its attempt to address public health law reform. It is intended to serve as a template and checklist of issues that states and their agencies can use to assess their preparedness.\textsuperscript{240} The MSEHPA has been folded into the "public health emergencies" section of the Turning Point Act. As of October 24, 2006, thirty-three states have introduced a total of one-hundred and ten legislative bills or resolutions that are based upon or feature provisions related to the Turning Point Act.\textsuperscript{241} Of these bills, forty-four have passed.\textsuperscript{242}

The MSEHPA explicitly acknowledges that "the rights of people to liberty . . . must be respected to the fullest extent possible consistent with maintaining and preserving the public's health and security."\textsuperscript{243} Sections 604 and 605 of the MSEHPA provide for the implementation of quarantine and isolation in the event of a public health emergency. These provisions include most, if not all, the due process requirements afforded to the mentally ill in civil commitment proceedings. The procedures set forth in Section 605 are divided into two categories depending upon whether there is or is not adequate time for notice of isolation and quarantine. Timing and providing procedural due process rights such as notice, however, will be very difficult where a contagious disease is at issue. The MSEHPA stipulates that the public health authority may temporarily isolate or quarantine individuals through a written directive, but without notice by a court, if the delay to provide notice would "significantly jeopardize" the public health authority's ability to prevent the transmission of contagious diseases.\textsuperscript{244} It is difficult to imagine a scenario

\begin{thebibliography}{99}
\bibitem{240} \textit{TURNING POINT ACT}, prefatory notes, at 3; \textit{See generally} M. Jane Brady et al., \textit{How States Are Using the Turning Point Model State Health Act}, 32 J.L. MED. & ETHICS 97 (2004).
\bibitem{241} Ctr. for Law & the Pub.'s Health at Georgetown & Johns Hopkins Univs., \textit{The Turning Point Model State Public Health Act State Legislative Table} (Oct. 24, 2006), available at http://www.publichealthlaw.net/Resources/ResourcesPDFs/MSPHA%20LegisTrack.pdf. This State Legislative Table does not include legislative bills closely resembling the MSEHPA, although some of the MSEHPA's provisions are included in the \textit{TURNING POINT ACT}. \textit{Id.}
\bibitem{242} \textit{Id.}
\bibitem{243} MSEHPA § 102.
\bibitem{244} \textit{Id.} § 605(a)(1).
\end{thebibliography}
involving a contagious disease where there would be time to adequately provide notice. Given that the text calls for a threat that would "significantly" jeopardize the public health, public health authorities may more readily exercise their discretion in the direction of not complying with the due process requisite of notice.

The written directive for quarantine without notice must specify the identity of the quarantined individual(s); the premises subject to the isolation or quarantine; the date it will begin; and the suspected contagious disease, if known. The public health authority is required to file a petition for a court order authorizing the continued isolation or quarantine within ten days after issuing the written directive.

The provisions set forth in the MSEHPA for isolation or quarantine with notice provide that, where possible, the public health authority may make a written petition to the trial court for an order authorizing isolation or quarantine. This petition must specify all the requirements listed above where there is no notice, but must also include a statement of compliance with the conditions and a statement of the basis upon which the isolation and quarantine is justified. Notice must be given to the individuals who will be subject to the quarantine or isolation within twenty-four hours. A hearing must be held on any petitions filed within five days of filing, and only in extraordinary circumstances can this be extended for up to ten days at the discretion of the court. The individual may or may not be quarantined at this point. The date and time when the isolation and quarantine commences is based on the individual circumstances as set forth in the petition. A court will grant the petition and issue an order if it is shown, by a preponderance of the evidence, that isolation or quarantine

245. Id. § 605(a)(2).
246. Id. § 605(a)(4).
247. Id. § 605(b)(1).
248. Id. § 605(b)(2).
249. Id. § 605(b)(3).
250. Id. § 605(b)(4).
251. See id. § 605(b)(2).
is reasonably necessary to prevent or limit the spread of the contagious disease.\textsuperscript{252} The order may authorize the quarantine or isolation for no more than thirty days;\textsuperscript{253} however, the public health authority may seek a continuance.\textsuperscript{254} These extended procedural and substantive due process safeguards are to be applauded; however, because the procedural protections in quarantine hearings ought to be greater than those in civil commitment hearings,\textsuperscript{255} the burden of proof to meet due process demands for quarantine ought to undoubtedly be \textit{greater} than a preponderance of evidence, the lowest evidentiary standard that applies to civil commitments.\textsuperscript{256}

The MSEHPA additionally provides that individuals subject to quarantine or isolation may apply to the trial court for release, somewhat akin to a writ of habeas corpus,\textsuperscript{257} seeking an order to show cause why the individuals should not be released.\textsuperscript{258} The court must rule on the application within forty-eight hours. If granted, a hearing must then be scheduled within twenty-four hours.\textsuperscript{259} Further, hearings may be requested where the isolation and quarantine orders are breached.\textsuperscript{260} A record of the proceedings must be kept, and counsel is appointed at state expense for those who are not otherwise represented by counsel.\textsuperscript{261} These provisions include all the due process protections that were required by the Greene court.\textsuperscript{262} Nineteen states and the District of Columbia have passed bills that include these procedural due process provisions.\textsuperscript{263}

\begin{enumerate}
\item \textit{Id.} § 605(b)(5).
\item \textit{Id.} § 605(b)(5)(i).
\item \textit{Id.} § 605(b)(6).
\item \textit{See supra} Part II.E.
\item \textit{See} Reich, \textit{supra} note 236, at 412.
\item MSEHPA § 605(c)(1).
\item \textit{Id.}
\item \textit{Id.} § 605(c)(2).
\item \textit{Id.} §§ 605(d); 605(e)(1).
\item \textit{See} Greene v. Edwards, 263 S.E.2d 661, 663 (W. Va. 1980).
\item MSEHPA Legislative Surveillance Table, \textit{supra} note 239 (AK, AZ, CT, DE, DC, GA, HI, ID, ME, MD, MN, NV, NH, NM, NC, PA, RI, SC, WY). Note
\end{enumerate}
The Turning Point Act similarly formulates separate procedures for temporary isolation and quarantine without notice and isolation or quarantine with notice. With slight changes of wording and some differences in ordering, Section 5-108[d]-[f] of the Turning Point Act adopts Section 605 of the MSEHPA outlined above, with two notable exceptions.

The first difference relates to the timeframe for hearings and depends on when the state files a petition seeking a confinement order. In regard to isolation or quarantine with notice, the MSEHPA requires that a hearing be held within five days of filing a petition, and within a maximum of ten days in extraordinary circumstances and for good cause at the discretion of the court. However, the Turning Point Act requires that such hearings be held within forty-eight hours of the filing of the petition and up to five days in extraordinary circumstances and for good cause at the discretion of the court.

The second difference between the two model acts relates to the evidentiary burden in such proceedings. The MSEHPA stipulates that “[t]he court shall grant the petition if, by a preponderance of the evidence, isolation or quarantine is shown to be reasonably necessary to prevent or limit the transmission of a contagious or possibly contagious disease to others.” Whereas, the Turning Point Act stipulates that “[t]he court shall grant the petition . . . by clear and convincing evidence.” Because the Supreme Court decided in Texas v. Addington that the clear and convincing evidence standard was appropriate for civil commitment, states should consider adopting that standard for quarantine and not the more lenient preponderance of the evidence standard since quarantine impinges upon the right to liberty more than involuntary commitment for being mentally ill.

that “this table only tracks the subject matter of recently passed legislative bills, not existing legislative provisions.” Id.

264. MSEHPA § 605(b)(4).
265. TURNING POINT ACT § 5-108[e](3).
266. MSEHPA § 605(b)(5) (emphasis added).
267. TURNING POINT ACT § 5-108[e](4) (emphasis added).
268. See supra Part II.E.
The Turning Point Act calls for stricter procedural due process requirements and hence offers greater protection of individual rights. These added protections will do little to impinge upon the authority of public health officials to effectively enforce isolation and quarantine in the event of an epidemic or a bioterrorism event; however, they do much to safeguard the liberty interests of affected individuals. Because of these differences, states would be wise to adopt the provisions in the Turning Point Act over those in the MSEHPA. The Turning Point Act is also superior with respect to protecting individual liberty since it includes a procedural due process "catchall" provision. Nonetheless, for those states that have not updated their isolation and quarantine statutes, either model act would be a significant step toward protecting Fourteenth Amendment liberty interests.

2. New York City Health Code Revisions. In light of September 11, 2001, the New York City Department of Health and Mental Hygiene ("Department") revised the city health code to improve its ability to effectively control and contain not only known diseases, but also novel infectious agents. New York City's amendments come close to anticipating a procedural due process continuum because of the added flexibility in enforcing quarantine and the corresponding flexibility in protecting due process rights.

Just two days before the world became aware of SARS, the amendments were approved by the New York City Board of Health and were implemented against SARS. These amendments, which became effective July 19, 2003, specifically attempt to ensure that health authorities can legally quarantine individuals for previously unknown diseases, as might be the case with bioengineered diseases or newly emerging diseases. Because there may be no effective treatment or preventive measures, New York City has recognized that isolation and quarantine of cases and

269. See Turning Point Act § 8-103.
contacts may be the only effective public health measures to control the outbreak.\footnote{272}{N.Y. City Dep't of Health & Mental Hygiene, N.Y. City Bd. of Health, Notice of Adoption of Amendments to Sections 11.01 and 11.55 of the New York City Health Code 2 (2003), available at http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption.pdf.}

In New York City, guidelines are in place in all acute care facilities to address the evaluation of patients with suspected smallpox infection.\footnote{273}{Id. at 3.} A diagnostic algorithm developed by the CDC is one tool stipulated in the guidelines.\footnote{274}{Id.} Depending upon a distinct set of clinical criteria, patients would be classified as low, moderate, or high risk.\footnote{275}{Id.} "All moderate and high risk patients would be medically tested and evaluated immediately . . . ."\footnote{276}{Id.} Similar guidelines could be used to evaluate patients with other suspected infectious diseases if sufficient clinical criteria are known. This approach is clearly less applicable to novel and newly emerging diseases. In those instances, it would be impossible to say that a particular individual "is" a present danger until the medical situation was better determined. The Department anticipated this issue and amended the New York City Health Code to clarify that individuals who "may be" a danger can be detained.\footnote{277}{Id. at 3.}

The City Health Commissioner may order the detention of a "case, contact or carrier," or "suspected case, contact, or carrier" of a communicable disease by clear and convincing evidence.\footnote{278}{Id.} In light of \textit{Addington v. Texas}, clear and convincing appears to be the proper burden of proof for quarantine when an individual's liberty is at stake.\footnote{279}{See Addington v. Texas, 441 U.S. 418, 432-33 (1979).} Obviously, a suspected case, contact, or carrier should be afforded greater procedural protection than a diagnosed case, contact or carrier.
Individuals who are detained for less than three business days will be afforded an opportunity to be heard upon request and their individual circumstances would be assessed to determine whether detention should be continued. The Commissioner's order must advise the detained individual that he or she has the right to request release and must include instructions on how such a request is made. If the detainment extends beyond three days and the individual requests release, the Commissioner must obtain a court order within three business days. No individual is to be detained for more than sixty days without a court order, even if no request for release is made. Additionally, any person who is subject to detention has the right to be represented by counsel and upon request, counsel is provided. These amendments represent a marked achievement toward applying quarantine with sufficient due process in a flexible and adaptable manner. However, detention for up to sixty days without a court order seems to be an excessive period of time.

In the wake of SARS, a new subdivision was added to the New York City Health Code providing that when an individual is ordered to remain at home or at a premise of the individual's choice acceptable to the Department, and the order is not being physically enforced, the individual must be afforded an opportunity to be heard. However, the due process protections for custodial detention orders described above are not applicable in these non-custodial orders. The preference is for people to stay at home and self quarantine, but states and localities must have alternatives that anticipate non-compliant individuals.

The procedural safeguards contained in the revisions described above are similar to those found in section 11.47 of the New York City Health Code, which is applicable to

280. 24 R.C.N.Y. HEALTH CODE REG. § 11.55(e).
281. Id.
282. Id. § 11.55(f).
283. Id.
284. Id.
the compulsory detention of tuberculosis patients who do not complete treatment. Amendments to the provisions dealing with tuberculosis, and the relevant procedural protections, were enacted in 1993 and have since been upheld by the courts.

B. Federal Procedural Due Process Requirements: HHS Pandemic Influenza Plan & Changes in Federal Quarantine Regulations

On November 1, 2005, President George W. Bush issued his National Strategy for Pandemic Influenza to address the nation's preparedness and response to an influenza pandemic. It reflects the federal government's approach to a pandemic threat and is based on three pillars: (1) preparedness and communication; (2) surveillance and detection; and (3) response and containment. Quarantine authority is acknowledged as an appropriate public health intervention as part of the response and containment pillar. The following day, the U.S. Department of Health and Human Services ("HHS") Secretary Michael Leavitt released the HHS Pandemic Influenza Plan ("HHS Plan"), the medical and public health component of the National Strategy for Pandemic Influenza.

The HHS Plan is a detailed guide on how the health care system in the United States can prepare and respond to an influenza pandemic. In particular, it provides guidance to national, state, and local policy makers and health departments with the goal of achieving a state of readiness and quick response. The HHS Plan includes a


288. NATIONAL STRATEGY, supra note 2.

289. Id. at 3-9.

290. Id. at 8.

checklist of legal considerations for pandemic influenza. Notably, there is a specific section devoted to due process considerations in the context of quarantine and isolation. Among these considerations are the following:

- that legal counsel has reviewed all draft isolation/quarantine orders and forms, as well as applicable administrative hearing procedures, to ensure concurrence with basic elements of due process (e.g., adequate notice, opportunity to contest, administrative determination).
- that procedures or protocols exist to ensure that persons subject to an isolation/quarantine order have access to legal counsel, if desired.
- that legal counsel has analyzed procedures needed to satisfy due process in different isolation/quarantine scenarios.292

On May 3, 2006, President Bush released the Implementation Plan for the National Strategy to translate the previous National Strategy into specific actions and responsibilities for Federal departments and agencies.293 It includes measures of progress and timelines for implementation. Further, it sets expectations and provides initial guidance for state and local governments and private entities on the development of their institutional plans for pandemic preparation, including the implementation of isolation and quarantine. Due process concerns are not addressed; rather, the intent of this implementation plan is to provide a common frame of reference for understanding the pandemic threat and to coordinate planning considerations.

Of great significance, the CDC and HHS released on November 22, 2005 a proposed rule addressing control of communicable diseases and amending federal regulations governing quarantine ("Proposed Rule").294 These are the first significant changes to federal quarantine regulations

292. HHS PLAN § I-14.
293. IMPLEMENTATION PLAN, supra note 2.
in at least twenty-five years. The Proposed Rule sets out key legal rights, including appeals processes, in extraordinary detail for those affected by isolation and quarantine. The public comment period of sixty days expired on January 30, 2006. The CDC will issue a final regulation at a future date.

As a matter of routine, quarantine officers assess the presence of disease by conducting short term examinations of ill passengers at airports and other ports of entry. Where persons are suspected of having quarantinable diseases, the Director of the CDC has historically recommended medical isolation and/or home quarantine. Such examinations and isolation and quarantine have generally occurred on a voluntary basis with the individual’s consent. However, the sections of the Proposed Rule discussed below address those situations where passengers or travelers refuse to comply on a voluntary basis.

For those individuals believed to be in the qualifying stage of a quarantinable disease and who are moving or about to move from state to state, provisional quarantine is permitted for up to three business days without an administrative hearing, but with a provisional quarantine order. If further quarantine or isolation is necessary, the Director of the CDC must issue a written quarantine order including: the identity of the individuals to be quarantined; the quarantine location; the date and time when the quarantine will begin and end; a statement setting out scientific principles and evidence of exposure or infection that form the basis of the belief that the individual is in a qualifying stage of a quarantinable disease; and a


297. Those specified in an Executive Order by the President. See supra notes 47-49.


299. Control of Communicable Diseases, 70 Fed. Reg. at 71,932-33 (to be codified at 42 C.F.R. § 70.14(a)-(c)).
statement that while the quarantine order is in effect, the individual may request a hearing to review the quarantine order.\textsuperscript{300} The person may also seek judicial review of the quarantine order through a habeas corpus petition pursuant to 28 U.S.C. 2241.\textsuperscript{301} The length of quarantine or isolation must not exceed the period of incubation and communicability for the communicable disease as determined by the Director of the CDC.\textsuperscript{302} This would obviously be difficult for new diseases or new strains of diseases where such information is not known.

If an individual subject to quarantine requests a hearing, it must be held within one business day of the request.\textsuperscript{303} The Director of the CDC will designate a hearing officer to review the factual and scientific evidence and to make a recommendation as to whether the quarantine should be continued or terminated.\textsuperscript{304} The purpose of the hearing is not to review any legal or constitutional issues; rather, it is to determine if the individual is in the stage of the disease where quarantine is necessary.

Further provisions have been included in the Proposed Rule to ensure adherence to the basic elements of due process. For example, the quarantined individual may submit evidence through a representative, and measures are to be taken that are "reasonably necessary" to allow individuals to communicate with their representative (e.g., by video-conferencing, e-mail, or telephone).\textsuperscript{305} Within one business day of the hearing's conclusion, the Director of the CDC will order either the release or the continued quarantine of the individual on the basis of the hearing officer's findings and written recommendation, and the

\textsuperscript{300} Control of Communicable Diseases, 70 Fed. Reg. at 71,933 (to be codified at 42 C.F.R. §§ 70.14(d), 70.17).
\textsuperscript{302} Control of Communicable Diseases, 70 Fed. Reg. at 71,933 (to be codified at 42 C.F.R. § 70.16(e)).
\textsuperscript{303} Control of Communicable Diseases, 70 Fed. Reg. at 71,934 (to be codified at 42 C.F.R. § 70.20(a)).
\textsuperscript{304} Control of Communicable Diseases, 70 Fed. Reg. at 71,934 (to be codified at 42 C.F.R. § 70.20(d)).
\textsuperscript{305} Control of Communicable Diseases, 70 Fed. Reg. at 71,934 (to be codified at 42 C.F.R. § 70.20 (e)-(f)).
There is no provision for appeal of the hearing.

IV. PROCEDURAL DUE PROCESS AND LARGE-SCALE QUARANTINE

What will happen if an avian flu pandemic or a bioterrorism event occurs in the United States and a large number of individuals become ill? What if vaccines and treatment prove ineffective or there is an inadequate supply, thereby making quarantine on a large scale necessary? Such measures were necessary to a certain extent in Canada, China, Hong Kong, Singapore, Taiwan, and Vietnam, the countries with the greatest number of SARS cases during the 2003 global outbreak. The United States was largely spared and neither individual nor population-based quarantine of contacts was recommended.

In the event of a large-scale quarantine in the United States, the due process protections outlined above will almost undoubtedly survive, but realistically may not be possible in all instances. The first step in protecting due process rights, as previously discussed, is having statutes and regulations, both on the federal and state level, mandating legal safeguards. The next step is having plans to ensure they are carried out.

One essential element of enforcement is to anticipate how the court system will accommodate broad public health threats. This includes considerations for extended hours for judges or hearing officers to review isolation and quarantine requests and orders, plans for hearing cases or appeals for isolated or quarantined individuals where personal appearance may be a threat to public health, and plans for proceedings involving numerous people.

306. Control of Communicable Diseases, 70 Fed. Reg. at 71,934 (to be codified at 42 C.F.R. § 70.20(i)).


308. See Ctrs. for Disease Control and Prevention, supra note 5.
A recommendation within the HHS Plan is directly on point, providing that "[w]here applicable, ensure that public health officials have worked with the local court system to develop a 24 hours a day, 7 days a week 'on call' list of judges or hearing officers to review emergency requests for isolation/quarantine."309 All localities would be wise to put together a list of federal and state judges or hearing officers for the purpose of quarantine emergency requests and emergency appeals.

With the threat of an avian flu pandemic looming, procedures to allow individuals subject to isolation and quarantine to have meaningful participation in their hearings or appeal without a personal appearance are essential to protect due process and to protect court personnel and counsel from infectious disease. The HHS Plan includes a due process recommendation to "[e]nsure that public health officials have worked with the local court system to develop a plan for hearing cases and/or appeals for persons subject to isolation/quarantine orders (e.g., participation via telephone, video conference)."310 Relevant sections of the MSEHPA311 and the Turning Point Act312 provide that in the event parties cannot personally appear before the court, proceedings may be conducted by their legal or authorized representative and be held in any location or via any means that allows all parties to fully participate.

Courts in the past have permitted representatives to appear in lieu of sick individuals at hearings. As far back as 1909, in Kirk v. Wyman, the sick individual’s physician, rather than the patient herself, presented the patient’s view to the board of health so the contagion would not spread.313 If an authorized representative, preferably legal counsel, is the only alternative then it should be permitted. However, localities are encouraged to explore other options where the sick could individually participate in hearings or appeals by webcasting, telephone, or video telecommunication.

309. HHS Plan § I-14.
310. Id.
311. See MSEHPA § 605(d).
312. See Turning Point Act § 5-108[f][3].
Such concerns and solutions are discussed in detail in the Public Health Law Bench Book for Indiana Courts ("Bench Book"). The Bench Book was created as a significant part of the current public health emergency legal preparedness initiative underway at the Public Health Law Program of the CDC. More states should give thoughtful consideration to emulating this Bench Book and a few states already have. A bench book for Kentucky will be published soon, and a similar effort is underway in Arizona. The bench books are a reference manual for judges to guide them through a range of public health issues, such as quarantine and isolation. They can be used to quickly check the requirements of relevant statutes, cases, and procedures during emergencies when there is insufficient time for extensive legal research. The judicial bench books are ideal for judges who may be untrained in public health and perhaps have never issued a quarantine order, but suddenly find themselves responsible for deciding numerous quarantine cases.

Lastly, all jurisdictions should seriously consider having plans in place for protecting due process rights when the proceedings involve numerous persons, as they would in the event of a large-scale quarantine. Where there are insufficient numbers of judges or hearing officers to hear quarantine related hearings or appeals, numbers may be augmented through the use of higher court judges, the appointment of senior judges, and the appointment of temporary judges who are attorneys residing in that district.


315. CDC, Judicial Officials Meet to Discuss Public Health Law Bench Books, CDC PUB. HEALTH L. NEWS (Public Health Law Program, Atlanta, G.A.), Mar. 8, 2006. CDC officials met the beginning of March 2006 in Atlanta with state judges, court administrators, and judiciary executives from the U.S. Department of Justice and ten states to discuss progress on a series of bench books. Id. Participants at the meeting discussed methods for starting state bench book projects, including obtaining funding, forming advisory committees, consulting with experts, and other key actions. Id.

316. See id.

317. SCHOFIELD ET AL., supra note 314, § 5.31(A).
Where a local board of health or health officer finds it essential to bring a judicial action to enforce isolation or quarantine orders against numerous individuals, it may be necessary to consolidate cases as a class action. In such instances, class certification may be appropriate, depending on state procedural law, since questions of law, fact, and objections would be similar in most of the consolidated cases. Class certification is best as a measure of last resort, when no other procedure is feasible for efficiently adjudicating all matters pending before the court. The MSEHPA and the Turning Point Act recommend consolidation of individual claims where:

(i) the number of individuals affected is so large as to render individual participation impractical; (ii) there are questions of law or fact common to the individual claims or rights to be determined; (iii) the group claims or rights are typical of the affected individuals’ claims or rights; and (iv) the entire group can be adequately represented.

In the event the court agrees to class certification, the following ought to be required: (1) the best notice possible is provided to all the class members, including individual notice when reasonable; (2) each member of the class is to be advised, through the notice, that he or she may request to opt out of the class; and (3) the class is fully described when the orders are issued.

It will take additional planning to adequately prepare for large-scale quarantine. Nonetheless, taking into account such considerations would be a significant step toward protecting the procedural due process rights that are owed to individuals in a contemporary quarantine.

CONCLUSION

It has been almost eight decades since the United States has been faced with quarantine on a large scale, and much in the law and science has changed. The recent

318. Id. § 5.32(A).
319. Id. § 5.32(note).
320. TURNING POINT ACT § 5-108[f](3); MSEHPA § 605(e)(2).
321. SCOFIELD ET AL., supra note 314, § 5.32(A).
proposed changes in federal quarantine law, which include updated procedural safeguards, are the first in over two decades. Additionally, numerous states have updated their quarantine laws by adding due process provisions.

To best protect the individual’s right to liberty, isolation and quarantine regulations should be as narrowly tailored as possible to adequately address a valid public health necessity. Public health officials and courts should seriously consider applying due process from a continuum framework: the greater the restraint and less definite the diagnosis, the greater the due process protections. This continuum notion is consistent with both substantive and procedural due process requirements. Such a framework will provide flexibility to public health officials and courts while at the same time offering the greatest amount of safeguards possible to protect the valued individual right to liberty. Moreover, the continuum framework recognizes the differences in due process requirements between quarantine and isolation, which is ignored by merely applying to both the same due process requirements for civil commitments. The updated New York City Health Code is exemplary in that it embraces the continuum notion.

Due process holds an important place in the legal history of the United States. To guarantee the right to liberty in a contemporary quarantine, it will be crucial that procedural safeguards are enforced and that quarantine regulations comply with substantive due process. Those tasks will be challenging should quarantine be on a large scale, but adequate preparation and knowledge of due process protections will be key.