Protecting Civil Liberties During Quarantine and Isolation in Public Health Emergencies
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If you were diagnosed with a communicable disease tomorrow, would you know your rights in regard to government-forced quarantine and isolation? There is a delicate balance between public health and our individual rights.

I. Introduction
In July, 2006, doctors in Phoenix, Arizona diagnosed Robert Daniels with extreme multi-drug-resistant tuberculosis (XDR-TB). After visiting a local convenience store without a mask, public health officials obtained a court order to involuntarily commit Daniels to a Maricopa County Medical Center lockdown ward for treatment and to prevent him from transmitting his illness to others. Hermetically isolated, he was strip-searched and prohibited from venturing outside, exercising, and receiving visits from family. On May 31, 2007, the American Civil Liberties Union (ACLU) filed a lawsuit against Maricopa County, Arizona, on behalf of Daniels for the deplorable way he was treated – “[I]ke jailed inmates accused of crimes.” While states have the authority to quarantine and isolate individuals with dangerous and communicable diseases in order to protect the public’s health, they also have a duty to respect individual civil liberties. This article discusses states’ roles in protecting individuals’ civil liberties while simultaneously effectuating quarantine and isolation orders to protect the public’s health.

II. State Authority to Quarantine or Isolate
In certain public health emergency situations, states have the authority to quarantine and isolate individuals in order to prevent the transmission of communicable and dangerous diseases and infections. The Public Health Service (PHS) Act, limited by Executive Order 13,295, authorizes the Secretary of the Department of Health and Human Services (HHS) to declare a public health emergency and take appropriate responsive action to “prevent the introduction, transmission, or spread of communicable diseases.” In practice, however, states and local jurisdictions assume primary responsibility for instituting public health protective measures under their Tenth Amendment “police power.” This authority has been reaffirmed by the Supreme Court of the United States and further bolstered by the doctrine of parens patriae and state constitutions. The authority, however, is not limitless; it is tempered by individual rights and civil liberties, guaranteed by the Due Process Clause of the Constitution.

III. The Balance: Public Health and Safety vs. Individual Rights and Civil Liberties
The Daniels case illustrates some of the potential dangers to individual freedoms a public health emergency might pose. Recognizing these dangers, shortly after September 11, 2001, a group of scholars drafted the Model State Emergency Health Powers Act (MSEHPA). MSEHPA is aimed at assisting states with drafting legislation to promote effective public health response plans that ensure adequate responses to the threats posed by modern disease and bioterrorism, while maintaining respect for individual rights. Although the question of whether this goal was achieved is debatable, and it may be considered by some to be overly
paternalistic, as many as thirty-nine states have passed bills with similar provisions to those in the MSEHPA.\textsuperscript{xv}

Regardless of whether a state adopts legislation similar to the MSEHPA, states are required to protect civil liberties during public health emergencies.\textsuperscript{xvi} Quarantine and isolation orders must be conducted in accordance with substantive and procedural due process, and any restrictions of civil liberties should be legal and as minimally restrictive as reasonably possible.\textsuperscript{xxvii} To this end, states should ensure that the following five threshold requirements are met: 1. the individual must pose an actual threat to the public; 2. the intervention must be reasonable and effective; 3. it must be conducted in a manner that comports with equal protection and due process; 4. individuals must be provided with safe and comfortable conditions; and 5. reasonable compensation for loss of income must be ensured.\textsuperscript{xviii}

First, the individual must have actually been exposed to an infectious agent (for quarantine) or infected with the agent (for isolation)\textsuperscript{xx} and be in the period of communicability. There is no compelling state interest in quarantining or isolating an individual that does not actually pose a public health risk.\textsuperscript{xxi} In a situation where the individual does not pose a public health risk, the individual may use the writ of habeas corpus to challenge the legality of her or his detention, but the writ will not be available if a showing of legal cause for the detention can be made.\textsuperscript{xxi}

Second, the intervention must be “reasonable and effective.”\textsuperscript{xxi} Public health officials must consider the gravity of the public health risk, the mode of transmission, the potential outcomes of possible containment methods, and the least restrictive means of containment. For example, a public health intervention that involves quarantining a large number of individuals suspected of being infected with influenza together could be considered overly intrusive and potentially hazardous. A mass quarantine ignores the less restrictive option of requesting that citizens voluntarily isolate themselves in their own homes, and infringes upon their autonomy and liberty interests. Additionally, quarantining individuals together may increase the virulence of a disease because of the potential for and ease of influenza transmission via aerosol droplets spread during conversations, coughing, or sneezing.\textsuperscript{xxi} Therefore, mass quarantining for influenza might be less effective than other containment measures and could potentially increase harm. When either mass quarantine or less restrictive means, such as requiring individuals to isolate themselves at home, are utilized, the state’s implementation must not be arbitrary or capricious in order to be considered reasonable.\textsuperscript{xxiv}

Third, the quarantine or isolation should be imposed in a manner that preserves the individuals’ Constitutional rights to equal protection and due process.\textsuperscript{xxv} To comply with equal protection, the intervention must be non-discriminatory.\textsuperscript{xxiv} For example, confining only Russian immigrants during a tuberculosis epidemic would be considered arbitrary because, on its face, it has little applicability to transmission avenues, and discriminatory due to the focus on nationality or alien status.\textsuperscript{xxvii}

For the state to comply with due process, quarantined or isolated individuals should be provided with adequate notice, the right to counsel, a hearing, and an appeal.\textsuperscript{xxviii} Additionally, the invasive nature of isolation or quarantine, and the potentially stigmatizing consequences, require heightened procedural protections. To this end, individuals should be provided with a full written explanation of why and how
they are being subject to isolation or quarantine, including duration, location, and method they may employ in contesting the order.\textsuperscript{xxx} In addition to a written directive, the individual should be allowed to speak with a health official, either in person or by phone, to receive an explanation of the procedures and how said procedures are the “least restrictive means,” given the prognosis of the suspected disease. Not only is such notice congruent with due process, but this form of transparency increases the government’s accountability and respect for the autonomy and liberty interests of the citizens the state is obligated to protect, thus enhancing public trust.\textsuperscript{xxx}

Fourth, individuals subject to quarantine or isolation should be provided safe and comfortable conditions, including adequate food, shelter, clothing, and medical care.\textsuperscript{xxi} When possible, the individual should be provided with the choice to isolate or quarantine him or herself within the comfort of his or her own home. When this is impractical, as it may be when the individual needs to receive medical treatment, the facility where the individual must stay should be made as comfortable and un-intrusive as possible.

Finally, an individual subject to quarantine or isolation should be provided reasonable compensation for loss of income due to her or his inability to go to work. Quarantine and isolation orders often require individuals to stay away from work to avoid infecting others. This can be problematic, especially when the individual’s occupation does not allow them to work from home, or their employer does not provide paid sick leave. Thus, employee concern regarding potential job loss or reduction in pay may result in public resistance to quarantine or isolation orders.\textsuperscript{xxxii} In addition to lost wages, a stigma may attach to individuals who are quarantined or isolated if their employer or colleagues become aware of the reason for their absence from work. In some circumstances, though unlikely to succeed,\textsuperscript{xxxiii} the state’s restriction on an employee’s ability to work may provide legal cause for damages due to interference with the employee’s freedom to contract.\textsuperscript{xxxiv}

Quarantine and isolation orders severely restrict an individual’s liberty and should only be utilized when absolutely necessary to prevent a substantial public health threat. These five threshold requirements will help to ensure that the states respect their citizens’ individual rights when upholding their duty to protect the public’s health.

**IV. Conclusion**

In summary, states are responsible for protecting their citizens. Although quarantine and isolation orders are designed to protect the public’s health, it is critical that states not unnecessarily sacrifice the civil rights of individuals in the process of responding to public health emergencies. If states utilize the recommendations discussed herein, and account for the due process rights of individuals, then situations like that experienced by Robert Daniels may be avoided in the future.

Quarantine and isolation are two methods for containing the transmission of communicable diseases that deal with different types of exposed individuals: exposed, but non-ill people, and ill, infected people, respectively. See U.S. Department of Health and Human Services (HHS), HHS Pandemic Influenza Plan, S8-14 (Nov. 2005), available at http://www.hhs.gov/pandemicflu/plan/pdf/HHSPandemicInfluenzaPlan.pdf (last visited Mar. 6, 2011); See also Kathleen S. Swendiman & Nancy Lee Jones, Congressional Research Service (CRS), The 2009 Influenza Pandemic: Selected Legal Issues, 10 (Oct. 29, 2009).

See U.S. CONST. amend. X, See also Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) ("According to settled principles...the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.").

See 42 U.S.C.A. § 247d (West 2011) (also known as the Public Health Service (PHS) Act); See also Pub. L. No. 107-188, 116 Stat. (2002) (Section 319(a) involves the PHS Act); See also Gostin, Public Health Law, at 205-06 (citing Act of May 27, 1796, ch.31, I Stat. 474 (repealed 1799)) (Gostin discusses the history of federal quarantine regulation); See also Edwin Maxey, Federal Quarantine Law, 43 Am. L. Rev. 382, 383 (1909).

Executive Order 13,295 limits the diseases for which individuals may be quarantined to only those diseases included on its list. See Exec. Order No. 13,295, 68 Fed. Reg. 17,255 (Apr. 4, 2003); See also Exec. Order No. 13,375, 70 Fed. Reg. 17,299 (Apr. 1, 2005) (amended Exec. Order No. 13,295 by adding "influenza caused by novel or reemergent influenza viruses that are causing, or have the potential to cause, a pandemic.").

See 42 U.S.C.A. § 264(a) (West 2011) (note that the Surgeon General, with the HHS Secretary’s approval, is authorized to “make and enforce...regulations,” including quarantine measures).

See U.S. CONST. amend. X. Additionally, other organizations, including the Centers for Disease Control and Prevention (CDC), Department of Homeland Security (DHS), and others, have the ability to assist with the enforcement of quarantines intrastate and interstate, as well as at ports of entry to the United States. See Memorandum for the President, Office of the Attorney General, Summary of Legal Authorities for Use in Response to an Outbreak of Pandemic Influenza (Apr. 25, 2009), available at www.ncsl.org/Portals/1/Documents/health/attorneygeneral_flu.pdf (last visited Mar. 13, 2011); See also Swendiman, supra note 5, at 11.

See Jacobson, 197 U.S. at 25 (1905) (Constitutionally granted state police power have been used to protect the public’s health since the 19th century in Jacobson v. Massachusetts, where the Supreme Court upheld the authority of states to pass compulsory vaccination laws.).

The doctrine of parens patriae regards the state as sovereign (“[T]he state in its capacity as provider of protection to those unable to care for themselves.”). See BLACK’S LAW DICTIONARY (9th ed. 2009); See Heller v. Doe, 509 U.S. 312, 332 (1993) (“[T]he state has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable ... to care for themselves,’ as well as ‘authority under its police power to protect the community’....”).

See, e.g., W. VA. CODE ANN. § 16-3-1 (West 2011); OKLA. STAT. ANN. tit. 63, § 1-502(a) (West 2010).

xiv See Margaret M. Corley, Disease or Deprivation: The State’s Authority to Quarantine, Depriving the Individual of His Constitutional Liberty, in the Shadow of H1N1, 22 Health Lawyer 21, 25 (2010).

xv MSEHPA, supra note 14. The MSEHPA also grants broad police powers to public health officials to quarantine and isolate certain individuals who either refuse vaccination or become infected. Bills modeled after the MSEHPA have been proposed in a number of state legislatures, and adopted in 39 states (although there is a debate concerning how many states have actually adopted parts of the model legislation). See also Centers for Disease Control and Prevention (CDC), Quarantine and Isolation, available at http://www.cdc.gov/quarantine/index.html (last visited Mar. 9, 2011) (includes specific state statutes on quarantine and isolation).

xvi See U.S. Const. amend. X.

xvii See Jacobson, 197 U.S. 11 (The Supreme Court held that the state act instituting mandatory smallpox vaccination, while constitutional, must be reasonable and not arbitrary or capricious).

xviii See Lawrence O. Gostin & Benjamin E. Berkman, Pandemic Influenza, Ethics, Law, and the Public’s Health, 59 Admin L. Rev. 121, 147 (2007)[hereinafter Gostin, Pandemic Influenza][Discusses the values of public health ethics based, in part, on the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Many of the requirements herein have been adapted from these values of public health and some suggestions by Gostin and Berkman).

xix See Gostin, Public Health Law, at 209-210 (Discusses the difference between quarantine and isolation).

xx See Id. at 216 (citing Smith v. Emery, 42 N.Y. Supp. 258, 260 (1896) ("The mere possibility that persons may have been exposed to disease is not sufficient....They must have been exposed to it, and the conditions actually exist for a communication of the contagion."); See also Arkansas v. Snow, 324 S.W.2d 532 (Ark. 1959) (holding that commitment for TB treatment requires a finding that the patient is a danger to the public health); See also State v. Superior Court for King County, 174 P. 973, 976 (Aug. 27, 1918) ("A writ of habeas corpus is a writ of right and is never to be denied in any case where the liberty of the subject is made the subject of inquiry. But it has always been held that a return showing a legal cause for the detention of a petitioner is enough to suspend the operation of the writ.").

xxi See Ex parte Hardcastle, 208 S.W. 531, 531 (Jan. 22, 1919) ("The Legislature, under the police power, has authority to authorize the establishment of quarantine regulations for the protection of the public against contagion from those persons whose condition is such as to spread disease, and, incident thereto, to authorize the arrest and detention of such persons...but if, after arrest, such person challenges the right of the authorities to continue the detention, the fundamental law accords him the right to have the legality of his detention inquired into by a proper court in a habeas corpus proceeding. The law denies to no one restrained of his liberty without a hearing the right to prove in some tribunal that the facts justifying his restraint do not exist.").

xii See Gostin, Pandemic Influenza, at 147-48.


See U.S. CONST. amend. XIV. (“nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”)

See Corley, supra note 15 at 23 (discussing Wong Wai v. Williams, 103 F.1 (N.D. Cal. 1900) where the court overturned a discriminatory quarantine of Chinese residents in the “Chinese Quarter” of San Francisco during a bubonic plague event.); See also Gostin, Public Health Law, at 214 (providing an example of a “prejudicial” quarantine where gay men with HIV might be targeted for confinement rather than all “others who engage in unsafe sex”).

Id.


This is the notice requirement of procedural due process. For example, in Maryland, after the Governor has declared a public health emergency, and prior to ordering anyone into isolation or quarantine, the Secretary must issue a written directive to the individual or group affected, which directly: (1) Identifies the individual or group, and (2) specifies the (a) premises subject to isolation of quarantine, (b) the date and time isolation or quarantine is supposed to start, (c) the suspected deadly agent, (d) basis upon which isolation or quarantine is justified, and (e) the availability of a hearing to contest the directive. Md CODE ANN., HEALTH-GEN, §18-906(a)(1) and (2) (2011).

See Gostin, Pandemic Influenza, at 149.

See Gostin, Public Health Law, at 212 (citing Kirk v. Wyman, 65 S.E. 387, 391 (S.C. 1909) ("even temporary isolation in [a pesthouse] would be a serious affliction"); See also Souvannarath v. Hadden, 116 Cal. Rptr. 2d 7 (Cal. Ct. App. 2002) (upholding state law forbidding detainment of noncompliant MDR-TB patient in a jail); See also Benton v. Reid, 231 F.2d 780 (D.C. Cir. 1956) (persons with infectious disease are not criminals and should not be detained in jails); See also Ex parte Martin, 188 P.2d 287 (Cal. 1948) (upholding quarantine in county jail despite the fact that it was overcrowded and had been condemned).

See U.S.C.A. CONST. amend. 14; See also West Coast Hotel Co. v. Parrish, 300 U.S. 379, 581-582 (1937) (According to Chief Justice Hughes, the "Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty...[ it is] subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.").

See West Coast Hotel Co. v. Parrish, 300 U.S. 379, 581-582 (1937).

The right of freedom to contract, articulated in Article 1, Section 10 of the Constitution, is also protected through the due process clause of the 14th Amendment. See U.S.C.A. Const. amend. 14.