LAW OF QUARANTINE OUTLINE

I. Distinction between "Law as I want it to be" and "Law as it is"

A. I have a particular ideology – It sets the framework for how I think.

1. "Pro-Capitalist"

> "Capitalism is a social system based on the recognition of individual rights, including property rights, in which all property is privately owned.
>
> The recognition of individual rights entails the banishment of physical force from human relationships: basically, rights can be violated only by means of force. In a capitalist society, no man or group may initiate the use of physical force against others. The only function of the government, in such a society, is the task of protecting man's rights, i.e., the task of protecting him from physical force; the government acts as the agent of man's right of self-defense, and may use force only in retaliation and only against those who initiate its use; thus the government is the means of placing the retaliatory use of force under objective control." http://aynrandlexicon.com/lexicon/capitalism.html

2. Capitalism Consistent with the needs of man's life, which means it comports with reality

> "My morality, the morality of reason, is contained in a single axiom: existence exists—and in a single choice: to live. The rest proceeds from these." http://aynrandlexicon.com/lexicon/virtue.html

B. However, my ideology does not always (often) comport with our present social/political/cultural order

C. I am talking here about "the law" as I think it currently stands ("law as it is"), not "law as I want it to be"

1. Sometimes the present law isn't fully coherent

> Since the present legal system, "law as it is", isn't fully in accordance with the fact that existence exists, and in the choice to live, it isn't always fully coherent.

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Some law is "non-objective", and therefore left up to the personal feelings or whims of bureaucrats, judges, legislators, and other government officials.

But, I will try to describe "law as it is", while implicitly recognizing that it may sometimes be incoherent.

II. At First Glance, What do I think is a "Quarantine"?

A. Individual Restrictions on Travel or Free Movement to Prevent Spread of Virus, Bacteria, and Fungi

B. Mass Restrictions on Travel or Free Movement to Prevent Spread of Virus, Bacteria, and Fungi

C. What about quarantine to stop something besides Virus, Bacteria, and Fungi?

1. Radiation?
2. Poison?
3. Locusts?

D. Is quarantine of animals, as opposed to humans, to be governed by different laws? - Is/should there be greater authority to quarantine animals/plants? Fifth Amendment Takings jurisprudence would come in for quarantine of animals, since they are property.

III. What is the current legal/medical definition of quarantine?

A. Code of Federal Regulations Definition

1. 42 CFR Sec. 70.1

"Quarantine means the separation of an individual or group reasonably believed to have been exposed to a quarantinable communicable disease, but who are not yet ill, from others who have not been so exposed, to prevent the possible spread of the quarantinable communicable disease." (42 CFR Sec. 70.1)

2. "Quarantine" versus "Isolation"

"Isolation means the separation of an individual or group reasonably believed to be infected with a quarantinable communicable disease from those who are healthy to prevent the spread of the quarantinable communicable disease." (42 CFR Sec. 70.1)

B. "Medical" Definition of "Quarantine" (i.e., what I found on the Internet at a random web page)

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"Quarantine: A period of isolation decreed to control the spread of infectious disease. Before the era of antibiotics and other medications, quarantine was one of the few available means for halting the spread of infectious diseases." https://www.medicinenet.com/script/main/art.asp?articlekey=5169

IV. Constitutional Authority For Federal Quarantine

A. What do I mean by "Federal Quarantine"

"Quarantine means the separation of an individual or group reasonably believed to have been exposed to a quarantinable communicable disease, but who are not yet ill, from others who have not been so exposed, to prevent the possible spread of the quarantinable communicable disease." (42 CFR Sec. 70.1)

B. Commerce Clause Is (Alleged) Basis of Federal Quarantine Power

1. Commerce Clause Power (Arguably)

"The Congress shall have power...To regulate commerce with foreign nations, and among the several states, and with the Indian tribes..." (US Constitution Article I, Section 8)

2. CDC states that Commerce Clause is Basis for Federal Authority

"The federal government derives its authority for isolation and quarantine from the Commerce Clause of the U.S. Constitution." https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html

V. Substantive Due Process as It Relates to Quarantine Law

A. Substantive Due Process Definition

"Under this theory, if a legislature passed any law which restricted vested rights or violated natural law, it exceeded all bounds of the social compact restricting the freedom of some individuals. Therefore, some authorities reasoned that the legislature had denied due process of law to those individuals whose rights or liberties were limited by such legislation because the legislature had denied those deprived persons the guarantees of the basic social compact." (Constitutional Law, Seventh Ed. John E. Nowak and Ronald D. Rotunda, Thomson West Hornbook Series, Chapter 11, Section 11.1, "Judicial Control of Legislation Prior to the Civil War, Substantive Due Process".)

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B. Constitutional Right to Travel

1. "Firmly Embedded in Our Jurisprudence"

a. "The word 'travel' is not found in the text of the Constitution. Yet the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence." (Saenz v. Roe, 526 U.S. 489, 498 (1999).)

b. "The 'right to travel' discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." (Saenz v. Roe, 526 U.S. 489, 500 (1999).)

c. "The right of 'free ingress and regress to and from' neighboring States, which was expressly mentioned in the text of the Articles of Confederation, may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'" (Saenz v. Roe, 526 U.S. 489, 501 (1999).)

2. Article IV, Section 2 – "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." (US Constitution, Article IV, Section 2)

"Thus, by virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the 'Privileges and Immunities of Citizens in the several States' that he visits. This provision removes 'from the citizens of each State the disabilities of alienage in the other States.'" (Saenz v. Roe, 526 U.S. 489, 501 (1999).)

3. Fourteenth Amendment Privileges or Immunities Clause

"The Framers of the Fourteenth Amendment modeled this Clause upon the 'Privileges and Immunities' Clause found in Article IV... Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the Slaughter-House Cases, 16 Wall. 36 (1873), it has

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always been common ground that this Clause protects the third component of the right to travel." (Saenz v. Roe, 526 U.S. 489, 503 (1999).)

C. Fourteenth Amendment

1. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States..."

a. This includes a "right to travel" component. (Saenz v. Roe, 526 U.S. 489 (1999).)

2. "...nor shall any state deprive any person of life, liberty, or property, without due process of law..."

"First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U. S. 601, 612-615 (1973). Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." (Chicago v. Morales, 527 U.S. 41, 52 (1999))

3. "...nor deny to any person within its jurisdiction the equal protection of the laws."

"It was the arbitrary classification by previous residency for tuition, by pregnancy for employment, or by income tax status for food stamps that was impermissible basis for these laws." (Constitutional Law, Seventh Ed. John E. Nowak and Ronald D. Rotunda, Thomson West Hornbook Series, Chapter 13, Section 13.6, "Irrebuttable Presumptions -The 'Non' Liberty or Property Due Process Requirement".)

D. Fifth Amendment

"No person shall... be deprived of life, liberty, or property, without due process of law..." (US Constitution, Amendment 5)

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E. Habeus Corpus Under US Constitution

"A petition for a writ of habeas corpus is filed by or on behalf of a person in "custody," a concept which has been expanded so much that it is no longer restricted to actual physical detention in jail or prison.294 The writ acts upon the custodian, not the prisoner, so the issue under the jurisdictional statute is whether the custodian is within the district court's jurisdiction..." https://www.law.cornell.edu/constitution-conan/article-3/section-1/habeas-corpus-the-process-of-the-writ

"The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." (US Constitution, Article I, Section 9)

F. Right to Freedom of Assembly

"Congress shall make no law ... abridging ... the right of the people peaceably to assemble..." (US Constitution, Amendment I)

G. Ninth Amendment

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." (US Constitution, Amendment IX)

"Although the Ninth Amendment has not been used as the basis for defining rights of individuals and invalidating either federal or state laws, it has been mentioned as a possible basis for justifying judicial protection of rights not explicitly listed in the Constitution or other Amendments. References to the Amendment in the Supreme Court appear to be only in dicta or in opinions of individual Justices. See e.g., Richmond Newspapers, Inc. v. Virginia, 448 US 555, 579-80 n. 15....justifying a judicial role in defining 'fundamental rights not expressly guaranteed'..." (Constitutional Law, Seventh Ed. John E. Nowak and Ronald D. Rotunda, Thomson West Hornbook Series, Chapter 11, Section 11.7, "Fundamental Rights", note 10.)

VI. Federal Statutory Authority for Federal Quarantine

A. Public Health Service Act

1. 42 USC Section 264

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a. Detention of persons entering from a foreign country. (42 USC Sec. 264(c))
b. Detention of persons moving from one state to another (42 USC Sec. 264(d)(1)(A))
c. Detention of persons who **might** infect **other** people who move from state to state. (42 USC Sec. 264(d)(1)(B))
d. <u>These are "enabling statutes"</u>

These are not statutory prohibitions, in and of themselves, prohibiting persons from moving from state to state or coming into the country from a foreign nation because they have a disease.

They give the power to the Surgeon General, with the approval of the Secretary of Heath and Human Services to "…make and enforce such regulations…" as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable disease from foreign countries int the States or possession or from one State or possession into any other State or possession. (42 USC Sec. 264(a))

They are "enabling statutes" https://legal-dictionary.thefreedictionary.com/Enabling+Statute

2. <u>42 USC Section 271</u>
    a. Provides penalties for those who violate Federal Quarantine law
    b. A fine of not more than $1,000 or imprisonment for up to one year.
    c. Forfeiture of a "vessel" (a boat), up to $5,000 lien.

3. <u>Need an executive order by the President – 42 USC Sec. 264(b)</u>
    a. Executive Order 13295 lists communicable diseases for which quarantine authority may be exercised.
    b. CDC has said: "The list of quarantinable communicable diseases for which federal public health orders are authorized is defined by Executive Order and includes "severe acute respiratory syndromes." COVID-19 meets the definition for "severe acute respiratory syndromes" as set forth in Executive Order 13295, as amended by Executive Order 13375 and 13674, and, therefore, is a federally quarantinable communicable disease." (https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html)
4. <u>Quarantine in Times of War</u>
    a. <u>Special Quarantine powers in times of war</u>

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b. 42 USC Sec. 266
Provides for enhanced detention power of Federal Government in times of war.

This provision gives the Surgeon General authority to provide for regulations for the "…apprehension and examination…of any individual…" to be a "…probable source of infection to members of the armed forces…or to individuals engaged in the production or transportation of arms…food, clothing, or other supplies for the armed forces…"

Persons found to be infected "…may be detained for such time and in such manner as may be reasonably necessary…"

c. Examining this statute is important because it provides context for 42 USC Section 264
   - Does it provide **more** authority due to the needs of fighting a war?

d. The biggest difference is that it appears to allow for detention of persons regardless of state to state transmission.

It allows for the detention of person who might infect a member of the military or someone engaged in the production of military supplies.

Such possible transmission could be entirely **intrastate**, and still fall under this statute.

B. Code of Federal Regulations Provisions
   1. 42 USC 264 is an enabling statute
   2. 42 CFR Sec. 70.6 is the regulation enacted pursuant to the enabling statute

"The Director", i.e., the head of the CDC or other relevant official, may authorize the apprehension, medical examination, quarantine, or isolation of any individual for the purpose of preventing "…introduction, transmission, and spread of a quarntinable communicable diseases, as specified by Executive Order, based upon a finding that:"

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The individual is reasonably believed to be infected with a quarantinable communicable disease in a qualifying state and is moving or about move from a State into another State or

The individual is reasonably believed to be infected with a quarantinable communicable disease in a qualifying stage and constitutes a probable source of infection to other individuals who may be moving from a State into another State.

3. Must provide basic necessities to person's quarantined under the Regulations

   An Individual must be provided with adequate food, water, appropriate accommodation, appropriate medical treatment, and means of communication. (42 CFR Sec. 70.6(b))

4. Individuals detained must have access to some sort of "adjudicative" review

   72 hours after service of the federal order of quarantine, the Director must reassess the need. (42 CFR Sec. 70.15(a))

   Director must consider less restrictive alternatives. (42 CFR Sec. 70.15(c))

   If the quarantine continues, the Director must make the individual aware of the process for requesting a medical review. (42 CFR Sec. 70.15(e))

5. There does seem to be textual authority for quarantining a group of individuals here.
   a. "The Director's written Federal order shall be promptly served on the individual, except that the Federal order may be served by publication or by posting in a conspicuous location **if the Federal order is applicable to a group of individuals** and individual service would be impracticable." (42 CFR Sec. 70.15(f), emphasis added.)

   b. This is ominous. It implies the authority to quarantine entire cities or states -which would likely violate procedural due process jurisprudence.

   c. But, even here, it would seem the Director would have to assess each person subject to the quarantine order on an individual basis: "The Director

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… shall reassess the need to continue the quarantine, isolation, or conditional release of **an individual** no later than 72 hours after the service of the Federal order." (42 CFR Sec. 70.15(a), emphasis added.) But, see 42 CFR Sec. 70.16(o).

d. Additionally, under 42 CFR Sec. 70.16, each individual subject to Federal quarantine seems to be entitled to medical review upon request within 72 hours. (42 CFR Sec. 70.16(a))
e. **Case law would seem to indicate that such "mass quarantine" would be illegal, although the US Supreme Court doesn't appear to have squarely addressed the issue. See, for instance, Hickox v. Christie, 205 F.Supp.3d 579 (2016)**: "*Courts have sometimes struck down quarantine orders, however, when they were found to be arbitrary and unreasonable in relation to their goal of protecting the public health. In Jew Ho v. Williamson, 103 F. 10 (C.C.D.Cal.1900), the court found that sealing off an entire section of San Francisco to prevent the spread of the bubonic plague was "unreasonable, unjust, and oppressive." .... Such an overbroad order, the court declared, was "not in harmony with the declared purpose" of preventing the spread of the disease*." (Hickox v. Christie, 205 F.Supp.3d 579, 592 (2016).)

6. Right to medical review within 72 hours of being quarantined – due process rights
   a. 42 CFR Sec. 70.16
   b. Purpose of review- "…ascertaining whether the Director has a reasonable belief that the individual is infected with a quarantinable communicable disease in a qualifying stage." (42 CFR Sec. 70.16(c))
   c. Person quarantined entitled to notice in writing of the time and place of the medical review. (42 CFR Sec. 70.16(d))
   d. Medical reviewer is designated by the Director (42 CFR Sec. 70.16(e))
   e. The individual under Federal quarantine is authorized to an "advocate", such as an attorney, family member, or physician to submit medical or other evidence and to present medical experts. (42 CFR Sec. 70.16(f))
   f. Right to have a government-appointed advocate if the person under quarantine certifies under penalty of perjury that they are indigent. (42 CFR Sec. 70.16(f))
   g. Right of person under quarantine to examine the medical records to be used in the review, prior to the review. (42 CFR Sec. 70.16(g))
   h. Limitation of right of person under quarantine to speak to advocate, to limit the spread of disease. (42 CFR Sec. 70.16(h))

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[To me, this probably means the Director can prevent **face-to-face contact**, but would **have** to provide other means of communication such as a phone or computer access.]

i. Right of Director to order medical examination. (42 CFR Sec. 70.16(i))
j. The medical reviewer must consider and accept into the record evidence concerning whether less restrictive alternatives would adequately serve to protect public health. (42 CFR Sec. 70.16(j))
k. The medical review **shall** be conducted by means to allow the person under quarantine to participate, such as telephone, audio, or video conference. (42 CFR Sec. 70.16(k))
l. Right to have a written report issued by the medical reviewer, including whether other less restrictive alternatives would protect public health. (42 CFR Sec. 70.16(l))
m. Director must review the medical reviewer's written report, and any objections submitted by the quarantined individual, and the medical reviewer's recommendations. Then the Director shall promptly issue a written Federal order directing that quarantine be continued, modified, or rescinded, and serve it on the person quarantined. (42 CFR Sec. 70.16(l))
n. If the quarantine is to continue, the Director's written order shall include a statement that the individual may request that the Director rescind the quarantine based on a showing of significant, new or changed facts or medical evidence that raise a genuine issue as to whether the Federal quarantine should continue. (42 CFR Sec. 70.16(l))

7. **Right of Director to consolidate one or more medical reviews if the number of individuals or other factors makes the holding of individual medical reviews impracticable.** (42 CFR Sec. 70.16(o))

    a. **This is scary. It implies the authority to quarantine entire cities or states - which would likely violate procedural due process jurisprudence.**

    b. Will the Director order a mass-quarantine of a city or state, and then not hold a medical review hearing for each individual quarantined?

    c. The Director must still hold a hearing, but would it be a "mass review"?

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d. How would this work in light of the provisions allowing for individuals under Federal quarantine to authorize an advocate and to review their medical records under provisions like 42 CFR Sec. 70.16(f) and (g)?

e. The Federal government must provide adequate food, water, appropriate accommodation, appropriate medical treatment, and means of communication to persons under Federal quarantine. (42 CFR Sec. 70.6(b)) How can the Director guarantee this to the people of an entire city or state? If the hospitals of a city or state are overflowing due to a disease, such that not everyone can receive medical care, and the Federal government attempts to prohibit people from leaving, this would violate 42 CFR Sec. 70.6(b).

f. The Fifth Amendment prohibits deprivation of liberty without "due process of law", and this doesn't seem to comport with that.

C. Authorization of Director to take action to prevent spread of disease from one state to another if he determines the measures taken by local health authorities are inadequate to prevent the spread of the disease

1. 42 CFR Sec. 70.2

a. Text:

> "Whenever the Director of the Centers for Disease Control and Prevention determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection." (42 CFR Sec. 70.2)

b. List after "including" may not be exhaustive

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(Reading Law: Interpretation of Legal Texts, Antonin Scalia and Brian A. Gardner, Semantic Cannons, "15. Presumption of Nonexclusive 'Include'")

2. What is the Statutory Authorization for this Regulation?

a. It's not clear to me that 42 USC Sec. 264 authorizes this.

b. Wouldn't 42 USC Sec. 264(e), about preemption of state law prohibit this?

"Nothing in this section or section 266 of this title, or the regulations promulgated under such sections, may be construed as superseding any provision under State law (including regulations and including provisions established by political subdivisions of States), except to the extent that such a provision conflicts with an exercise of Federal authority under this section or section 266 of this title." (42 USC Sec. 264(e).)

VII. Procedural Due Process

A. Fifth Amendment of US Constitution guarantees no deprivation of life, liberty, or property by Federal Government without "due process of law" (14th Amendment Governs State Law)

B. Fifth Amendment has a "substantive" and also a "procedural" aspect.

1. "Substantive due process" is things like the right to freedom of speech or assembly, and usually comes up in the context of State deprivations of life or liberty in violation of the Fourteenth Amendment, which applies to states. (See, e.g., Lochner v. New York, 198 U.S. 45 (1905); Roe v. Wade, 410 U.S. 113 (1973).)

2. "Procedural due process" means that even when the government can rightly deprive someone of life, liberty or property, it can only do so if the person is afforded a certain "process".

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For instance, the government can prohibit certain conduct, like killing with malice aforethought (murder), and imprison those who commit murder, but it must provide a "process" for doing that, i.e., a trial.

"The due process clauses also have a procedural aspect in that they guarantee that each person shall be accorded certain 'process' if they are deprived of life, liberty, or property. When the power of the government is to be used against an individual, there is a right to a fair procedure to determine the basis for, and legality of, such action." (Constitutional Law, Seventh Ed. John E. Nowak and Ronald D. Rotunda, Thomson West Hornbook Series, Chapter 13, Section 13.1, "Introduction".)

C. What is a "deprivation of life, liberty, or property" such that some process is due?

1. "Life" – Usually comes up in Death Penalty, Abortion, and Assisted Suicide Cases.

2. "Property" – This usually comes up in cases relating to certain debt collection actions, such as garnishment of a debtor's bank account; entitlement to government welfare benefits; and government employment cases.

3. "Liberty" – This is the most likely way that the government could run afoul of procedural due process protection in the context of a Federal quarantine.

D. What is "Liberty" such that process is due?

1. How is someone deprived of "liberty"?

a. Physical restraint of an individual's action by government

"…the government might deprive the person of his freedom of action by physically restraining him." (Constitutional Law, Seventh Ed. John E. Nowak and Ronald D. Rotunda, Thomson West Hornbook Series, Chapter 13, Section 13.4(a), " Liberty - Generally, Introduction".)

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b. Governmental denial of the ability to exercise special constitutional rights.

> "Second, the government might limit someone's freedom of choice and action by making it impossible or illegal for that person to engage in certain types of activity….The government might deny a person the ability to exercise a right with special constitutional protection (such as the right to free speech…" (Constitutional Law, Seventh Ed. John E. Nowak and Ronald D. Rotunda, Thomson West Hornbook Series, Chapter 13, Section 13.4(a), " Liberty -Generally, Introduction".)

c. Governmental denial of "other rights or liberties"

> "While the Court has not defined the exact scope of these liberties which are protected by the due process clauses, it is clear that they go beyond mere physical restraint or fundamental constitutional rights. The clauses also guarantee that each individual will have some degree of freedom of choice and action in all important personal matters." (Constitutional Law, Seventh Ed. John E. Nowak and Ronald D. Rotunda, Thomson West Hornbook Series, Chapter 13, Section 13.4(d), " Liberty -Generally, Other Rights or Liberties".)
>
> Examples include governmental termination of professional licenses, such as: a medical license or license to practice law, (Board of Regents v. Roth, 408 US 564 (1972)); driver's licenses, (Bell v. Burson, 402 US 535 (1971)); or freedom of action within the community. (See Wisconsin v. Constantineau, 400 US 433 (1971), in which the government could not single someone out as a "drunkard" -which would foreclose a person's ability to buy alcoholic beverages without a hearing.)
>
> The government must also give a hearing to resident aliens who are to be deported. (Chew v. Colding, 344 US 590 (1953).)

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E. A Federal quarantine order would probably touch all three of the above-described liberty interests to which process is due.

1. Governmental Physical Restraint

Ordering someone, under threat of legal penalty, to stay in their home or in a special quarantine center or medical facility would be a physical restraint.

"Institutionalizing a person, buy definition, takes away that individual's liberty." (Constitutional Law, Principles and Policies, Erwin Chemerinsky, Aspen Law and Business, Chapter 7, Section 7.3.3, "Deprivations of 'liberty'", "Freedom from physical restraint".)

This has come up in the context of civil commitment of mentally ill persons. (Addington v. Texas, 441 US 418 (1979).)

Perhaps the government could make a distinction between commitment to an institution like a hospital versus forcing someone to stay at home or within a particular city or state?

I would like to see a case involving house arrest and see what the courts said out procedural due process specifically in that context.

2. Governmental denial of the ability to exercise special constitutional rights

What Special Governmental rights could be infringed with a Federal quarantine?

"The most significant implied 'fundamental' rights are the right to freedom of association, the right to interstate travel; the right to privacy…and the right to vote." (Constitutional Law, Seventh Ed. John E. Nowak and Ronald D. Rotunda, Thomson West Hornbook Series, Chapter 13, Section 13.4(c), "Liberty -Generally, Fundamental Constitutional Rights".)

Shapiro v. Thompson, 394 US 618 (1969)

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The State of Connecticut imposed a "waiting period" on receipt of welfare benefits to persons who had recently arrived in the state over those who had lived there longer.

"This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." (Shapiro v. Thompson, 394 US 618, 629 (1969))

3. Governmental denial of "other rights or liberties"

a. Right not to be declared a "drunkard" such that you cannot buy alcohol, without due process

Wisconsin v. Constanteineau, 400 US 433 (1971)

The police chief of Hartford, Wisconsin, pursuant to a state statute, posted a notice in all liquor stores in Hartford that sales or gifts of liquor to a particular resident of the city were forbidden for one year.

The statute was based on the reasoning that people who drink to excess are dangerous to the community.

The court said: "The only issue present here is whether the label or characterization given a person by 'posting,' though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the District Court that the private interest is such that those requirements of procedural due process must be met." (Wisconsin v. Constanteineau, 400 US 433, 436 (1971))

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F. What "process is due" if a governmental action deprives someone of life, liberty, or property?

1. The Question

Assuming the governmental action is a deprivation of life, liberty, or property, as those terms are defined by the courts, what sort of "process" does the government have to provide before the deprivation can occur?

2. Almost always required: Notice, meaningful hearing, impartial decisionmaker

a. Notice of the charges or issue

"Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." (Mullhane v. Central Hanover Bank & Trust Co., 339 US 306 (1950))

Mulhane involved whether notice by publication was sufficient in certain circumstances related to a complicated issue of trust law and service of notice on out-of-state beneficiaries.

Generally, notice by personal service is preferred, although there are times when notice by publication ("constructive notice") can be sufficient:

"Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding." (Mullhane v. Central Hanover Bank & Trust Co., 339 US 306 (1950))

"The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet.

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> Personal service has not in all circumstances been regarded as indispensable to the process due to residents…" (Mullhane v. Central Hanover Bank & Trust Co., 339 US 306 (1950))

What sort of notice is sufficient will turn on a "reasonableness test":

> "The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected,…or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." (Mullhane v. Central Hanover Bank & Trust Co., 339 US 306 (1950))

b. An Impartial Decisionmaker

An example of a decisionmaker that would not be considered "impartial" is when the decisionmaker has a pecuniary interest in the outcome. For instance, in Gibson v. Berryhill, 411 US 564 (1973), optometrists who worked for a specific corporation were going to have their professional licenses revoked by a board made up exclusively of optometrists who did not work for any corporation. The court said the board was therefore to biased against the defendant optometrists.

"…there must be some type of neutral and detached decision-maker, be it a judge, hearing officer, or agency." (Constitutional Law, Seventh Ed. John E. Nowak and Ronald D. Rotunda, Thomson West Hornbook Series, Chapter 13, Section 13.8, "General Principles, Right to a Fair Decisional Process and an Impartial Decisionmaker ".)

c. Opportunity for Meaningful hearing

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> "Where practicable, due process generally requires notice and a hearing in advance of a deprivation of liberty. Zinermon v. Burch, 494 U.S. 113, 127, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). In an emergency situation, however, a post-deprivation hearing is acceptable." (Hickox v. Christie, 205 F.Supp.3d 579, 601 (2016))

3. **How** to determine the "quality" of notice, **what** type of hearing is "meaningful", and **how** "impartial" of a decision maker is needed?

a. **The Question**: For instance, is a mere publication in a newspaper sufficient notice of hearing, or is personal service required? Do you need to be provided with things like the ability to present witnesses in the hearing? Do you need a hearing before or after detention has occurred?

b. **Balancing Test Approach Taken:**

"A court considers three factors in assessing procedural due process: "(1) the private interest affected by the official action; (2) the risk that the plaintiff will suffer an erroneous deprivation through the procedure used and the probable value if any of additional procedural safeguards; and (3) the government's interest." Mathews v. Eldridge, 424 U.S. 319, 334–35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)." (Hickox v. Christie, 205 F.Supp.3d 579, 601 (2016).)

"The court uses a balancing test to determine which procedures will be required. In Mathews v. Eldridge the Court stated that it will consider three factors in making this determination…"(Constitutional Law, Seventh Ed. John E. Nowak and Ronald D. Rotunda, Thomson West Hornbook Series, Chapter 13, Section 13.8, "General Principles, Form of the Hearing or Process: The Balancing Test ".)

"…first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and

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administrative burdens that the additional or substitute procedural requirement would entail." (Mathews v. Eldridge, 424 U.S. 319 (1976).)

"The first factor is the importance of the interest to the individual. The more important the interest, the more in the way of procedural safeguards the Court will require. The second consideration is the ability of additional procedures to increase the accuracy of the fact-finding. The more the Court believes that the additional procedures will lead to better, more accurate, less erroneous decisions, the more likely it is that the Court will require them. Finally, the Court looks at the burden imposed on the government by requiring the procedures. The more expensive the procedures will be, the less likely it is that the Court will require them." (Constitutional Law, Principles and Policies, Erwin Chemerinsky, Aspen Law and Business, Chapter 7, Section 7.4.2, "What is the test for determining what process is due?".)

G. "Mass deprivations" of liberty, property or life

1. Statutes of general applicability implicate more limited procedural due process

"Yet, not every deprivation of life, liberty, or property presents a procedural due process question. For example, if the government adopts a law prohibiting abortion, it is unquestionably a deprivation of liberty under current law and yet there would not be a procedural due process issue. The plaintiffs challenging the anti-abortion law would not be objecting to the procedures followed by the government, but rather would be challenging the substantive constitutionality of the law." (Constitutional Law, Principles and Policies, Erwin Chemerinsky, Aspen Law and Business, Chapter 7, Section 7.4.1, "When is procedural due process required?".)

2. What is the distinction?

"…procedural due process issues arise when an individual or group is claiming a right to a fair process in connection with their suffering a deprivation of life, liberty, or property." (Constitutional Law, Principles

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and Policies, Erwin Chemerinsky, Aspen Law and Business, Chapter 7, Section 7.4.1, "When is procedural due process required?".)

3. Even here, "due process" is required, but that process due is the legislative process

"It is most common for the government to affect the life, liberty, or property interest of a great number of people through its legislative functions. When the legislature passes a law which affects a general class of persons, those persons have all received procedural due process -the legislative process. The challenges to such laws must be based on their substantive compatibility with constitutional guarantees." (Constitutional Law, Seventh Ed. John E. Nowak and Ronald D. Rotunda, Thomson West Hornbook Series, Chapter 13, Section 13.8, "General Principles, Rulemaking-Legislative Process".)

"Similarly, an administrative agency may make decisions that are of a legislative or general rulemaking character. When an agency promulgates generalized rules there is no constitutional right to a hearing for a specific individual." (Constitutional Law, Seventh Ed. John E. Nowak and Ronald D. Rotunda, Thomson West Hornbook Series, Chapter 13, Section 13.8, "General Principles, Rulemaking-Legislative Process".)

4. If an administrative agency is engaged in an "adjudicative" deprivation of life, liberty, or property, then it must provide more procedural due process than just the legislative process

"However when the agency makes rules that might be termed adjudicative in that they affect a very defined group of interests, then persons representing those interests should be granted some fair procedure to safeguard their life, liberty, or property." (Constitutional Law, Seventh Ed. John E. Nowak and Ronald D. Rotunda, Thomson West Hornbook Series, Chapter 13, Section 13.8, "General Principles, Rulemaking-Legislative Process".)

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H. Right to pre- or post- deprivations of liberty and property?

1. The question is this: Must the government provide an individual with his hearing or other process **before** the deprivation of liberty (or property) occurs?

2. Balancing Test

> "A court may need to employ the Mathews v. Eldridge balancing test in three areas of procedural due process rulings. First, a court should use the test to determine if an individual is entitled to a hearing prior to (rather than after) a governmental action which would deprive him of a liberty or property interest." (Constitutional Law, Seventh Ed. John E. Nowak and Ronald D. Rotunda, Thomson West Hornbook Series, Chapter 13, Section 13.8, "Form of the Hearing or Process: The Balancing Test".)

3. So, the court must look at:

> a. the private interest that will be affected by the official action;
>
> b. the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;
>
> c. the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (Mathews v. Eldridge, 424 U.S. 319 (1976).)

4. In an emergency, post-deprivation hearing can be acceptable, but must be held as soon as practicable

> "In an emergency situation, however, a post-deprivation hearing is acceptable. See, e.g., Goss v. Lopez, 419 U.S. 565, 582–83, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)...In such a case, the hearing should take place "as soon as practicable." Goss, 419 U.S. at 582–83, 95 S.Ct. 729; see also In re Barnard, 455 F.2d 1370, 1374 (D.C.Cir.1971)..." (Hickox v. Christie, 205 F.Supp.3d 579, 601 (2016).)

I. What is the standard to satisfy the burden of proof in such cases?

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1. Probably "clear and convincing evidence" because that it is the standard in civil commitment cases, where the state must show someone is a danger to themselves and others prior to being forced into a mental institution.

2. Addington v. Texas, 441 U.S. 418, 425 (1979)

3. "Clear and convincing" is a standard that is higher than "preponderance of the evidence", which is the level of proof required in an ordinary lawsuit, but it less than the level of proof required in a criminal case. ("Beyond a reasonable doubt") https://www.law.cornell.edu/wex/clear_and_convincing_evidence

VIII. State Authority to Quarantine under US Constitutional Law

A. What Is a State's "Police Power"?

"The authority of the State to enact this statute is to be referred to what is commonly called the police power -- a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet **it has distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description**;' indeed, all laws that relate to matters completely within its territory and which do not, by their necessary operation, affect the people of other States." (Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905), emphasis added.)

B. State Police Power- Limits

1. Limited by 14th Amendment

"We say necessities of the case because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all, might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons." (Jacobson v. Massachusetts, 197 U.S. 11, 28 (1905))

2. Limited by a State's Constitution

3. Limited by Commerce Clause or Federal Preemption

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a. Article VI of the US Constitution

> "...the supremacy clause which provides that the Constitution, and laws and treaties made pursuant to it, are the supreme law of the land. If there is a conflict between federal and state law, the federal law controls and the state law is invalidated because federal law is supreme." (Constitutional Law, Principles and Policies, Erwin Chemerinsky, Aspen Law and Business, Chapter 5, Section 5.2.1, "Introduction".)

b. Dormant Commerce Clause (Discussed more later)

C. State right through Federal Law to Create a Permitting System for out-of-state travelers

1. 42 C.F.R. § 70.3

a. Text

> "A person who has a communicable disease in the communicable period shall not travel from one State or possession to another without a permit from the health officer of the State, possession, or locality of destination, if such permit is required under the law applicable to the place of destination. Stop-overs other than those necessary for transportation connections shall be considered as places of destination." (42 C.F.R. § 70.3)

b. Implicitly delegates power to state officials from Federal Government

> Since individual states can decide whether to or not to require a permit, it implicitly creates the right of a state to enforce a federal provision through its laws.

IX. Restriction of Right to Travel Due to Disease Fear, But Not Necessarily "Quarantine"

A. Federal Do Not Board List

1. CDC Web Site Regarding Do Not Board List

> "In June 2007, federal agencies developed a public health Do Not Board (DNB) list, enabling domestic and international public health officials to request that persons with communicable diseases who meet specific criteria and pose a serious threat to the public be restricted from boarding commercial aircraft

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departing from or arriving in the United States."
https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5737a1.htm

2. Criteria for Being Put on the List

"To include someone on the list, CDC must determine that the person 1) likely is contagious with a communicable disease that would constitute a serious public health threat should the person be permitted to board a flight; 2) is unaware of or likely to be nonadherent with public health recommendations, including treatment; and 3) likely will attempt to board a commercial aircraft."
https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5737a1.htm

3. Statutory Authorization for creating and enforcing the List (49 USC § 114 (f) and (h))

"The list is authorized under the Aviation and Transportation Security Act of 2001* and is managed jointly by DHS and CDC..."
https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5737a1.htm

X. Dormant Commerce Clause

A. Definition

"When the Supreme Court examines the compatibility of a state or local law with the commerce clause (on a subject regarding with Congress has not spoken) the Court may refer to its action as involving either 'dormant commerce clause' principles or 'negative commerce clause' principles....Both phrases embody the concept that the mere grant of a commerce power to Congress in Article I, Sec. 8, by implication, places limits upon state or local laws regulating commerce. When a state law regulates a commercial activity on which Congress has not spoken, the state is regulating an activity regarding which the commerce clause is dormant (in the sense that Congress has not brought to life its Article I, Sec. 8 commerce power regarding the specific subject matter)....The negative aspect of the commerce clause is the principle, established by the Supreme Court, that the Article I grant of power to Congress, by implication, placed a limitation on state or local laws related to interstate commerce." (Constitutional Law, Seventh Ed. John E. Nowak and Ronald D. Rotunda, Thomson West Hornbook Series, Chapter 8, Section 8.1, "State Regulation Affecting Interstate Commerce-Introduction".)

B. Functional Effect of Dormant Commerce Clause Jurisprudence

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The court could have interpreted the commerce clause as meaning Congress had exclusive power to enact legislation that affected interstate commerce.

Or, the court could have interpreted the commerce clause as placing no limitations on state or local laws.

"...the Supreme Court took a middle course, between these two extremes. The Court decided that the judiciary was authorized to interpret the dormant commerce clause to invalidate certain types of state or local legislation, and that Congress had the power to approve state laws that otherwise would violate dormant commerce clause principles." (Constitutional Law, Seventh Ed. John E. Nowak and Ronald D. Rotunda, Thomson West Hornbook Series, Chapter 8, Section 8.1, "State Regulation Affecting Interstate Commerce-Introduction".)

C. Purpose of the Dormant Commerce Clause

"The Court has long recognized that the purpose of the commerce clause was to eradicate interstate trade barriers, and to prohibit Balkanization of the Union in economic matters." (Constitutional Law, Seventh Ed. John E. Nowak and Ronald D. Rotunda, Thomson West Hornbook Series, Chapter 8, Section 8.1, "State Regulation Affecting Interstate Commerce-Introduction".)

D. Dormant Commerce Clause Prohibits Discrimination Between Out-of-State People and In-State People

1. "...laws that do not discriminate are generally upheld and will be struck down only if found to place a burden on interstate commerce that outweighs the benefits from the law." (Constitutional Law, Principles and Policies, Erwin Chemerinsky, Aspen Law and Business, Chapter 5, Section 5.3.3.2, "Summary of Current Approach".)

2. "If the state or local law affects interstate commerce, then the dormant commerce clause may be applied." (Constitutional Law, Principles and Policies, Erwin Chemerinsky, Aspen Law and Business, Chapter 5, Section 5.3.4, "The central question: Is the state discriminating against out-of-staters? Importance of determining whether a law is discriminatory".)

XI. Particular Quarantine/Public Health Cases of Note

A. Jew Ho v. Williamson, 103 F. 10 (1900) (North District of California)

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Facts: San Francisco Board of Supervisors, by ordinance, authorized Board of Health to quarantine both persons, houses, places, and districts within the city and county "...when in its judgment it is deemed necessary to prevent the spreading of contagious or infectious diseases.." (Jew Ho v. Williamson, 103 F. 10 (1900))

The Board of Health then passed a resolution quarantining a portion of the city that roughly corresponded with the area's "Chinatown" to avoid the spread of bubonic plague.

Plaintiff had a residence combined with a grocery store within the established quarantine district. In his complaint, the Plaintiff said many of his customers were outside the quarantine district, and were prevented from patronizing his store, and that he had been prevented from doing business with these people.

Plaintiff also alleged that although the ordinance was "facially" race-neutral, "...said resolution is enforced against persons of the Chinese race and nationality only, and not against persons of other races." (Jew Ho v. Williamson, 103 F. 10 (1900))

Plaintiff also said that doctors were prevented from visiting Chinese patients within the quarantine zone, but white patient's doctors could still visit them.

Plaintiff also said in his complaint that the inclusion of large numbers of uninfected people within the quarantine zone thereby increased the risk for infection for those who remained uninfected, "... thereby increasing rather than diminishing the danger of contagion and epidemic..." (Jew Ho v. Williamson, 103 F. 10 (1900))

"The equities of the bill are that the complainant is being unlawfully restrained of his liberty, and illegally deprived of the use of his property." (Jew Ho v. Williamson, 103 F. 10 (1900))

Held: Plaintiff's petition for injunction was granted.

Reasoning:

(1) The court said the ordinance discriminated against Chinese persons in violation of the 14th Amendment to the Constitution.

(2) The court also said that the quarantine of a large portion of the city, which included large numbers of uninfected people was not consistent with the "police power": "*The purpose of quarantine and health laws and regulations with respect to contagious and infectious diseases is directed primarily to preventing the spread of such diseases among the inhabitants of localities.... To accomplish this purpose, persons afflicted with such*

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diseases are confined to their own domiciles until they have so far recovered as not to be liable to communicate the disease to others. The same restriction is imposed upon victims of such diseases found traveling. ***The object of all such rules and regulations is to confine the disease to the smallest possible number of people***... **the court must hold that this quarantine is not a reasonable regulation to accomplish the purposes sought**." (Jew Ho v. Williamson, 103 F. 10 (1900), emphasis added.)

B. Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905)

Facts: A local ordinance requiring vaccination of all adults over 21 for smallpox was challenged, in part, under the 14th Amendment to the US Constitution. The state claimed its power to enact the vaccination statute under its "police power".

Held: The ordinance held constitutional.

"The authority of the State to enact this statute is to be referred to what is commonly called the police power -- a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and "health laws of every description;" indeed, all laws that relate to matters completely within its territory and which do not, by their necessary operation, affect the people of other States. According to settled principles, the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." (Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905))

"'...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. It is then liberty regulated by law.'" (Jacobson v. Massachusetts, 197 U.S. 11, 26-27 (1905))

"Upon the 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. It is to be observed that, when the regulation in question was adopted, smallpox, according to the recitals in the regulation adopted by the Board of Health, was prevalent to some extent in the city of Cambridge, and the disease was increasing." (Jacobson v. Massachusetts, 197 U.S. 11, 27 (1905))

"We say necessities of the case because it might be that an acknowledged **power of a local community to protect itself against an epidemic threatening the safety of all,**

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might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons." (Jacobson v. Massachusetts, 197 U.S. 11, 28 (1905), emphasis added.)

"We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the State. If such be the privilege of a minority, then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population. We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and **enjoying the benefits of its local government**, should have the power thus to dominate the majority when supported in their action by the authority of the State. While this court should guard with firmness every right appertaining to life, liberty or property as secured to the individual by the Supreme Law of the Land, it is of the last importance that **it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law**. The safety and the health of the people of Massachusetts are, in the first instance, for that Commonwealth to guard and protect. **They are matters that do not ordinarily concern the National Government**. **So far as they can be reached by any government, they depend, primarily, upon such action as the State in its wisdom may take**, and we do not perceive that this legislation has invaded any right secured by the Federal Constitution." (Jacobson v. Massachusetts, 197 U.S. 11, 37-38 (1905), emphasis added. **This could be interpreted as:** The US Supreme Court will defer to a city or county taking steps to protect public health in ways it would not allow the Federal government, or a state, to take.)

C. Vitek v. Jones, 445 U.S. 480, 494–95 (1980)

Fact: Convicted felon transferred from prison to mental hospital. Procedural due process challenge. Prisoner said he needed notice and an adversary hearing before an independence decision maker, written statement by the fact finder, and appointed counsel.

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Held: Prisoner's procedural due process rights under the 14th Amendment were violated. He had procedural due process rights regarding involuntary commitment despite the fact that he was currently a convicted felon in prison.

"The medical nature of the inquiry, however, does not justify dispensing with due process requirements. It is precisely '[t]he subtleties and nuances of psychiatric diagnoses' that justify the requirement of adversary hearings."(Vitek v. Jones, 445 U.S. 480, 495 (1980))

D. Jihad v. Wright, 929 F. Supp. 325 (N.D. Ind. 1996)

Facts: Plaintiff inmate brought 42 USC Sec. 1983 action against superintendent of maximum control complex after inmate was placed on restrictive medical separation status for refusal to take tuberculosis screening test by injection. Inmate claimed the injection violated his religious beliefs and offered to take a chest X-ray.

The Plaintiff was placed in a medical quarantine area of the prison for people who had TB.

In his lawsuit, Plaintiff said he was protected by the Religious Freedom Restoration Act, that his Eighth Amendment rights against cruel and unusual punishment had been violated, and that his Fourteenth Amendment rights had been violated because he had been forced to live in restricted conditions worse than those in disciplinary lockup without due process. (For a period of almost six months, he was not allowed either inside or outside recreation, could not visit the institutional law library, could not have telephone calls or visits, could not have daily showers, could not receive a hot food tray, and had to wear a blue surgical mask.)

The court found that only persons with "active TB" were contagious. Many people with TB are asymptomatic, and therefore not contagious.

Defendant Prison Warden filed a motion for summary judgment.

Held: Deny Defendant's motion for summary judgment

RFRA Cause of Action: Less restrictive means could have been employed, such as requiring frequent chest X-rays or spatum samples to determine Plaintiff had active TB.

Eighth Amendment Cause of Action: Without a showing that the Plaintiff had actual TB, the amount of time he was allowed out of isolation to exercise was insufficient.

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14th Amendment Due Process Deprivation Cause of Action: Deny Defendant MSJ.

Reasoning (Due Process Violation): "The questions before the court are whether the due process clause creates a liberty interest in an inmate not being placed in long term medical isolation unless he actually has a communicable disease; if not, whether this could present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest; and if so, whether Indiana has created such a liberty interest." (Jihad v. Wright, 929 F. Supp. 325, 332 (N.D. Ind. 1996))

"Had Jihad been placed in medical isolation, even with extremely restrictive conditions, for the length of time it took to determine if he had a communicable disease, this court would have no problem holding that his due process rights had not been violated. This action is complicated by the fact that Jihad was kept in medical isolation for almost six months, in more restrictive conditions than other forms of segregation at MCC, without a determination that he had an infectious communicable disease..." (Jihad v. Wright, 929 F. Supp. 325, 333 (N.D. Ind. 1996))

"If avoidance of long term medical isolation in extremely restricted conditions is a dramatic departure from an inmate's sentence in which a state might conceivably create a liberty interest, the court would need to evaluate Indiana law to determine whether Indiana may have created a liberty interest." (Jihad v. Wright, 929 F. Supp. 325, 333 (N.D. Ind. 1996))

"In Sandin v. Conner, the Supreme Court determined that discipline by prison officials in response to a wide range of misconduct falls within expected parameters of a sentence imposed by a court of law, and that placement in disciplinary isolation where it did not exceed similarly but totally discretionary confinement in either duration or degree of restriction did not implicate due process." (Jihad v. Wright, 929 F. Supp. 325, 333-334 (N.D. Ind. 1996))

"The materials before the court discuss Sandin in very general terms, but do not address the questions of whether the due process clause creates a liberty interest in an inmate not being placed in long term medical isolation in conditions worse than other forms of segregation at the institution unless he actually has a communicable disease; whether this would present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest; and whether Indiana has created such a liberty interest." (Jihad v. Wright, 929 F. Supp. 325, 333-334 (N.D. Ind. 1996))

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E. City of New York v. Antoinette R., 630 N.Y.S.2d 1008 (N.Y. Sup. Ct. 1995)

Facts: (New York State Court Case) Due to a resurgence of tuberculosis, New York City revised the Health Code to permit the detention of individuals infected with TB who have demonstrated an inability to voluntarily comply with appropriate medical treatment. Effective April 29, 1993, New York City Health Code § 11.47 was amended to give the Commissioner of Health the authority to issue an order for the removal or detention in a hospital or other treatment facility of a person who has active tuberculosis

The prerequisite for an order is that there is a substantial likelihood, based on the person's past or present behavior, that the individual cannot be relied upon to participate in or complete an appropriate prescribed course of medication or, if necessary, follow required contagion precautions for tuberculosis. Such behavior may include the refusal or failure to take medication or to complete treatment for tuberculosis, to keep appointments for the treatment of tuberculosis, or a disregard for contagion precautions.

The statute provides certain due process safeguards when detention is ordered. For example, there are requirements for an appraisal of the risk posed to others and a review of less restrictive alternatives which were attempted or considered. Furthermore, there must be a court review within five days at the patient's request, and court review within sixty days and at ninety-day intervals thereafter. The detainee also has the right to counsel, to have counsel provided, and to have friends or relatives notified.

On March 9, 1995, the Commissioner issued an order of detention for the respondent. At the proceeding held before me for the purpose of enforcing the order, the petitioner relied upon the testimony of Doctor Gabriel Feldman, and numerous hospital records regarding the respondent. The respondent, Ms. R., represented by counsel, testified on her own behalf and called three witnesses in support of her request to be released from detention.

Respondent refused to undergo the necessary treatment for TB. Eventually an order was issued by the Commissioner of Health requiring her detention and treatment. She still refused to take the treatment.

At time of trial, the respondent was diagnosed as having active tuberculosis which has been rendered non-infectious, and was not the drug-resistant type.

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Rather than being detained, Respondent wanted to be placed on "Directly Observed Therapy", which would be at her home instead of in a hospital.

Held: The court agreed that the Respondent could continue to be held in a hospital for treatment because of her past non-compliance with less restrictive means of treatment. The court decided to review her case in ninety days to decide if she could be treated in a less restrictive setting.

F. Liberian Community Association of Connecticut v. Malloy, 2017 WL 4897048 (District of Conn. 2017), Currently on Appeal to the Second Circuit (Case No 17-1558).)

Facts: Individuals were quarantined by the state of Connecticut after returning from Ebola-affected countries in West Africa. Brought under various causes of action, including: Title II of the Americans with Disabilities Act, Rehabilitation Act of 1973, and 42 USC Section 1983.

The CDC screened persons entering the country from West Africa for Ebola. If they showed no symptoms, fever, or a history of exposure, then they were allowed to enter the US without being held in quarantine.

On October 7, 2014, the co-defendant, Governor Dannel Malloy, issued an order declaring a public health emergency for the State of Connecticut. This declaration authorized the co-defendant, Dr. Jewel Mullen, the Connecticut Commissioner of Public Health, to direct the isolation7 or quarantine8of individuals whom she "reasonably believe[d] to have been exposed to, infected with, or otherwise at risk of passing the Ebola virus."

The State order was stricter than the CDC guidelines because all asymptomatic individuals who had traveled to affected areas or been in contact with an infected individual were to be quarantined at home for twenty-one days. This was later changed to "mandatory active monitoring" for asymptomatic travelers arriving in Connecticut from Guinea, Liberia, and Sierra Leone, and still contemplated "quarantine for individuals based on risk factors."

Later, on April 1, 2016, Dr. Malloy terminated the "state of emergency in Connecticut", meaning no one entering the State from West Africa would be subject to any screening by the State.

At the time of the filing of the lawsuit, none of the Plaintiffs were subject to quarantine order by the State of Connecticut. (Although some had been in the past.)

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In addition to injunctive relief, the Plaintiffs' complaint sought damages from Dr. Mullen, in her individual capacity, for allegedly violating the plaintiffs' substantive due process rights, procedural due process rights, and Fourth Amendment rights.

Defendants filed a 12(b)(6) motion to dismiss on the grounds that Plaintiffs lacked standing to seek prospective injunctive relief, and because Dr. Mullen was entitled to "qualified immunity" regarding damages.

Held: The District Court Granted the motion to dismiss.

Reasoning: To establish Article III standing, a plaintiff must show (1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Put simply, at the time of the filing of the complaint, there was not a "real and immediate" threat of injury to the plaintiffs.

Accordingly, the plaintiffs' lacked standing to assert causes of action seeking prospective relief.

The doctrine of qualified immunity protects government officials from suits seeking to impose personal liability for money damages based on unsettled rights or on conduct that was not objectively reasonable.

The court concluded that Dr. Mullen is entitled to qualified immunity because she did not violate clearly established law. Alternatively, even if Dr. Mullen's actions violated clearly established law, her actions were objectively reasonable.

Note: This case does not deal with the substantive issue of whether the State's Quarantine Law was constitutional. It simply said that that Plaintiffs lacked standing to sue because they were no longer subject to quarantine. It also said that under principles of "qualified immunity", the state official involved could not be held personally liable for damages because the issue of the scope and nature of Constitutional rights in quarantine law is not sufficiently well established that the State official could have known whether her actions violated clearly established Constitutional law. The case is currently on appeal to the Second Circuit, so maybe this will change.

G. Hickox v. Christie, 205 F.Supp.3d 579 (2016)

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Facts: Nurse brought civil rights action under 42 USC Sec. 1983 against governor and state public health officials, alleging that her eighty hour quarantine upon returning to the United States after caring for Ebola patients in Africa violated her rights under the Fourth and Fourteenth Amendments, and state-law causes of action. Defendant asserted immunity and filed a 12(b)(6) motion to dismiss.

Symptoms of Ebola commonly appear within 8 to 10 days of exposure, although it can take up to 21 days.

Just as Hickox was leaving Sierra Leone, Governor Christie announced that he had signed Executive Order 164, which created a statewide Ebola Preparedness Plan. The EPP provided that as of October 16, 2014, active screening had been implemented for passengers arriving from West African countries.

The screening for such passengers was to include temperature checks, visual inspection for symptoms, and an assessment of their history of risk exposure. The EPP stated that if CDC advises DOH of a traveler who is asymptomatic but has some high risk of exposure, DOH will determine whether that traveler will be subject to State quarantine.

If an asymptomatic individual to be quarantined lives within 100 miles of Newark Airport, he or she will be taken home. An individual who lives outside that radius will be placed in a temporary housing arrangement. Symptomatic travelers are to be immediately transferred to a designated hospital.

On landing at Newark airport, Plaintiff was taking to a quarantine station where her temperature was taken, and found to be normal. She was eventually told she was to be quarantined. She later developed a fever, which she disputed, and was sent to the hospital, and placed in an isolation tent outside the hospital. When her temperature was taken, mixed results were given on whether she had a fever. The same day, an order of quarantine was issued against her.

The order said that Plaintiff had had contact with infected individuals as recently as October 20, 2014, and was at high risk of exposure; that at the airport she experienced the onset of a fever; that she was currently in isolation at University Hospital for care and monitoring; that her medical status was uncertain; and that therefore the DOH could not rule out that she was infected and posed a danger to public health.

The order of quarantine was indefinite in length, and said she could seek relief by emailing or writing to the Office of Legal and Regulatory Compliance of Department of Health.

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The next day, the Plaintiff's blood test results were negative for Ebola. A DOH epidemiologist nevertheless recommended keeping Hickox in isolation for 72 hours to permit observation.

Two days after her arrival at the airport, Plaintiff asked to speak to her lawyer, which she was allowed to do through a window.

Three days after her arrival, Plaintiff was released from the hospital and she went home to the State of Maine.

Held: State's motion to dismiss granted regarding Fourth Amendment and Fourteenth Amendment causes of action for damages due to qualified immunity.

Reasoning: "Bad science and irrational fear often amplify the public's reaction to reports of infectious disease. Ebola, although it has inspired great fear, is a virus, not a malevolent magic spell. The State is entitled to some latitude, however, in its prophylactic efforts to contain what is, at present, an incurable and often fatal disease.." (Hickox v. Christie, 205 F.Supp.3d 579 (2016).)

"...grant the motion to dismiss the federal claims **on grounds of qualified immunity**. Public health officials responsible for containing the spread of contagious disease must be free to make judgments, even to some degree mistaken ones, **without exposing themselves to judgments for money damages**." (Hickox v. Christie, 205 F.Supp.3d 579, 585 (2016), emphasis added.)

""[Q]ualified immunity shields government officials from civil liability as long 'as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' "" (Hickox v. Christie, 205 F.Supp.3d 579, 589 (2016).)

""When properly applied, [qualified immunity] protects all but the plainly incompetent or those who knowingly violate the law."" (Id.)

"To assess whether defendants' actions violated clearly established law, I look first to existing precedent involving quarantine and related public health measures. I find that this case law would not have placed the defendant officials on notice of a clear violation of Hickox's constitutional rights. It authorizes preventive detention of a person exposed to others who suffer from a contagious, dangerous disease. Within broad boundaries, the length of such detention is a judgment call, calling for the application of expertise; there is no bright-line statutory or constitutional rule. (I consider an independent Fourth

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Amendment analysis in the following section.)" (Hickox v. Christie, 205 F.Supp.3d 579, 590 (2016).)

"The federal government possesses the power to declare and enforce a quarantine. That power, based on the commerce clause, would appear to be at its zenith with respect to preventive measures at the border." (Hickox v. Christie, 205 F.Supp.3d 579, 590 (2016).)

"In the modern era, the CDC has most commonly played a supportive role, with the States taking the lead in quarantine matters." (Hickox v. Christie, 205 F.Supp.3d 579, 591 (2016).)

"More than a century ago, the United States Supreme Court upheld such exercises of the states' general police powers to protect public health through quarantines and other measures. See Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25, 25 S.Ct. 358, 49 L.Ed. 643 (1905) (recognizing the "authority of a state to enact quarantine laws and health laws of every description") (internal quotations and citations omitted); see also Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health, 186 U.S. 380, 387, 22 S.Ct. 811, 46 L.Ed. 1209 (1902)("[T]he power of States to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants ... is beyond question."); Ogden v. Gibbons, 22 U.S. (9 Wheat.) 1, 203, 6 L.Ed. 23 (1824) (dicta that a state has the power "to provide for the health of its citizens" by quarantine laws)." (Hickox v. Christie, 205 F.Supp.3d 579, 591 (2016).)

"Courts have sometimes struck down quarantine orders, however, when they were found to be arbitrary and unreasonable in relation to their goal of protecting the public health. In Jew Ho v. Williamson, 103 F. 10 (C.C.D.Cal.1900), the court found that sealing off an entire section of San Francisco to prevent the spread of the bubonic plague was "unreasonable, unjust, and oppressive." Id. at 26. Such an overbroad order, the court declared, was "not in harmony with the declared purpose" of preventing the spread of the disease. Id. at 23.4" (Hickox v. Christie, 205 F.Supp.3d 579, 592 (2016).)

"Overbreadth was of similar concern in In re Smith, 101 Sickels 68, 76, 146 N.Y. 68, 40 N.E. 497 (1895). There, the New York Court of Appeals rejected the blanket quarantine of individuals who refused vaccination, when there was no reason to believe they had been infected or even exposed to that disease." (Hickox v. Christie, 205 F.Supp.3d 579, 592 (2016).)

"On such facts, I cannot find that the decision to quarantine Hickox for a limited additional period of observation violated clearly established law of which a reasonable

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officer would have been aware. **The facts do not suggest arbitrariness or unreasonableness as recognized in the prior cases—i.e., application of the quarantine laws to a person (or, more commonly, vast numbers of persons) who had no exposure to the disease at all.**" (Hickox v. Christie, 205 F.Supp.3d 579, 592 (2016), emphasis added.)

Court said it didn't see a sufficient lack of probable cause for Fourth Amendment purposes, under analogous civil commitment laws, so as to strip state officials of qualified immunity for the Plaintiffs brief detention such that they would be subjected to damages in civil suit.

Court also said it didn't think the actions of state officials were so egregious, so outrageous, that it could fairly be said to shock the contemporary conscience such that the state officials would be stripped of immunity and subjected to a suit for damages.

"**For purposes of qualified immunity**, I cannot find that any reasonable officer would have known that the quarantine order violated Ms. Hickox's right to procedural due process." (Hickox v. Christie, 205 F.Supp.3d 579, 603 (2016), emphasis added.)

Note: This case doesn't say anything about whether state officials could be enjoined from imposing a **present** quarantine or detention of someone for violating their Constitutional rights. It only deals with the issue of "qualified immunity" and whether it should be overcome, such that the officials can be subjected to a lawsuit for **money damages**.

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