QUARANTINING THE LAW OF QUARANTINE: WHY QUARANTINE LAW DOES NOT REFLECT CONTEMPORARY CONSTITUTIONAL LAW

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In the summer of 2014, as the worst Ebola outbreak in history ravaged West Africa, two American healthcare workers who had contracted Ebola were flown back to the United States for treatment.1 Suddenly, the epidemic that had been largely ignored in the U.S. made headlines across the country.2 Concern turned to panic a few weeks later when Thomas Eric Duncan, a traveler from Liberia, was diagnosed with Ebola in Dallas, Texas.3 As fear spread, so too did calls for quarantine,4 perhaps the most ancient and extreme measure that governments deploy to stop epidemics.5

The exact number of people quarantined for Ebola in the fall of 2014 is unknown.6 However, a study by the American Civil

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4. Id. at 239.
Liberties Union and the Yale Global Health Justice Partnership found that “18 states implemented at least 40 formal quarantines and 233 de facto quarantines, in which formal orders were not issued but individuals nonetheless went into quarantine or had their movements severely restricted due to official pressure.”

In addition, at least twenty-three states announced quarantine and movement restrictions that exceeded the guidelines developed by the Centers for Disease Control and Prevention (“CDC”). Among those quarantined were healthcare workers who had gone to West Africa to treat Ebola patients despite warnings by CDC officials that such measures would be counter-productive and could undermine efforts to fight the epidemic at its source in Africa.

One of the healthcare workers quarantined was Kaci Hickox, a nurse who returned to the U.S. after treating Ebola patients in Sierra Leone. Hickox arrived at Liberty International Airport in Newark shortly after New Jersey Governor Chris Christie signed an executive order that called for quarantining asymptomatic travelers from West Africa who had some risk of exposure to Ebola. After Hickox was screened by CDC officials at the airport, she was taken by state officials to a makeshift tent outside of a Newark hospital, where she was kept for several days without access to a TV or even a shower, until she was permitted to

7. Id. at 29.

- The initial version (August 2014) recommended self-monitoring for most exposures, and controlled movement for higher risk exposures, with the goal of applying the least-restrictive measures necessary to protect communities and travelers. In October 2014, CDC issued revised guidance in response to increased concerns related to imported Ebola cases, infections in healthcare workers, and travel by an infected healthcare worker on commercial flights during October 2014.

11. Id. at 585.
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travel to Maine.12 Once she was there, Maine health officials also sought to quarantine her; a state court, however, rejected the state’s petition and freed Hickox.13 She never developed Ebola.14

Louise Mensah-Sieh was also quarantined along with her husband and four children.15 Mensah-Sieh and her family arrived at John F. Kennedy International Airport (“JFK”) from Liberia on October 18, 2014, during the height of the Ebola scare.16 At JFK they were screened by CDC officials and cleared to enter the U.S.17 But after they arrived in West Haven, Connecticut, where they had family, the local Director of Public Health informed them that pursuant to an order issued by the State Commissioner of Public Health, they were not permitted to leave the house for twenty-one days.18 Police officers were placed outside their doors; they were not provided with food or other forms of assistance.19

Police were also stationed outside the apartment door of Laura Skrip, a Yale University public health student who was quarantined after returning from Liberia, where she had provided computer support to the Ministry of Health.20 Connecticut authorities did not provide her with food or basic supplies.21 When she opened the door to pick up supplies left by a friend, a neighbor called the police.22 Like Mensah-Sieh and Hickox, Skrip never developed Ebola; indeed, none of those who were quarantined in the U.S. ever contracted the disease.23

17. Id.
18. Id. at *4–5.
19. Id.
20. Id. at *3.
21. Id. at *4.
23. Id.
After the quarantines were terminated and the Ebola panic had faded, Hickox, Skrip, the Mensah-Siehs, and others who were quarantined in Connecticut filed federal lawsuits claiming that their quarantines violated their rights under the Fourth and Fourteenth Amendments to the Constitution. Based on a reading of lower court cases concerning the isolation of tuberculosis ("TB") patients, as well as the academic literature relating to quarantine, their claims appeared to have merit. Although the case law is relatively sparse, during the three decades prior to the Ebola outbreak, a wide body of academic literature had developed examining the constitutional requirements pertaining to quarantine. The scholars who participated in this discussion disagreed about many points, but for the most part they agreed that the precedent that existed established that the quarantine power, although broad, is subject to significant constitutional restraints. More specifically, they concurred that the extensive body of law that the courts had articulated in the last fifty years expounding upon what due process requires when individuals are civilly committed due to mental illness provided an apt analog to quarantine and made clear that quarantine was

27. See James G. Hodge Jr., Legal Myths of Ebola Preparedness and Response, 29 NOTRE DAME J.L. ETHICS & PUB. POL’Y 355, 368 (2015) (“The only problem is that the use of quarantine powers in [Hickox’s] case was unlawful.”).
29. See infra notes 89–118 and accompanying text.
subject to substantive and procedural due process restraints. At a minimum, these include the requirement that quarantine be imposed only when it is necessary for public health (or is the least-restrictive alternative) and only when it is accompanied by procedural due process protections, including notice, the right to a hearing before an independent decision-maker either before or shortly after confinement, the right to counsel, and the requirement that the state prove its case with clear and convincing evidence. None of these protections were provided to Hickox or the individuals who were quarantined in Connecticut.

But a funny thing happened to the consensus on the way to the courthouse. In both the Hickox and Connecticut cases, the federal district courts dismissed the plaintiffs’ due process and Fourth Amendment claims. In Hickox’s case, the court concluded the defendants were entitled to public official immunity, because they had not violated any clearly established rights, which the Supreme Court requires that plaintiffs must prove in order to receive compensatory relief for constitutional violations by public officials. As the trial court saw it, the civil commitment cases were not sufficiently on-point as to clearly

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31. E.g., LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY & RESTRAINT 213–16 (Univ. Cal. Press., 1st ed. 2000); George Annas, Control of Tuberculosis—The Law and the Public’s Health, 328 N. ENG. J. MED. 585 (1993) (discussing forced isolation for TB); Michelle Daubert, Pandemic Fears and Contemporary Quarantine: Protecting Liberty Through a Continuum of Due Process Rights, 54 BUFF. L. REV. 1299 (2007); Wendy K. Mariner et al., Pandemic Preparedness: A Return to the Rule of Law, 1 DREXEL L. REV. 341 (2009); Eleanor E. Mayer, Comment, Prepare for the Worst: Protecting Civil Liberties in the Modern Age of Bioterrorism, 11 U. PA. J. CONST. L. 1051 (2009); Parmet, AIDS and Quarantine, supra note 5, at 75–89. But see Lacey, supra note 28 (arguing for the implementation of national standards for the use of quarantine). For further discussion, see infra notes 81–118 and accompanying text. Some scholars have also argued that quarantines raise Fourth Amendment issues. E.g., Christopher Ogolla, Non-Criminal Habeas Corpus for Quarantine and Isolation Detainees: Serving the Private Right or Violating Public Policy?, 14 DEPAUL J. HEALTH CARE L. 135, 145 (2011). For purposes of this paper, the focus will remain on due process.

32. Id.

33. Id.


establish rights with respect to quarantine.³⁷ Using similar reasoning, the district court in the Connecticut case, *Liberian Community Association v. Malloy*, held that public official immunity barred the plaintiffs’ constitutional claims for compensatory relief.³⁸ That court further concluded that the plaintiffs’ claims for prospective relief had to be dismissed for lack of standing.³⁹ The court’s decision in *Liberian Community Association* is currently under review by the Second Circuit.⁴⁰

In this Article, I look at the practical and doctrinal barriers that have moved courts to ignore the scholarly consensus and dismiss the due process claims brought by Hickox and the Connecticut plaintiffs. Rather than focusing on the merits of their constitutional claims, I consider the practical and doctrinal barriers that have led the courts to conclude that the due process rights of individuals who are quarantined have not been clearly established. These impediments, I argue, have impeded what Pamela Karlan would call the “refinement” of the constitutional law of quarantine: the process by which broad constitutional commands—such as due process—which are applicable to quarantine are developed into “regulatory codes of conduct” that can guide officials in actual cases.⁴¹ By forestalling the refinement of the constitutional law of quarantine, these barriers have effectively quarantined the law of quarantine, separating it from contemporary constitutional constraints on the deprivation of...
liberty to the detriment not only of those who are quarantined but also the public’s health.42

Part I begins by defining quarantine, reviewing its historical application, and explaining the development of the consensus. In Part II, I discuss both the practical and jurisdictional factors that have precluded the refinement of the constitutional law of quarantine. My goal here is not to provide a comprehensive analysis of all of the jurisdictional issues that may arise in a quarantine case, or discuss all of the ways in which quarantine may be litigated, but rather to explain some of the factors that may have led to courts finding that the constitutional law of quarantine has not been clearly established. In Part III, I consider why the lack of refinement is troubling from a public health perspective and offer some tentative thoughts about how we can release the constitutional law of quarantine from quarantine.

I. THE HISTORY AND LAW OF QUARANTINE

For millennia societies have separated individuals (and livestock and goods) in an effort to stop the spread of disease.43 In lay discourse, as well as in American law, this practice is often called “quarantine.”44 Contemporary public health practice, however, distinguishes between different forms of enforced separation of individuals, preserving the term quarantine for the separation of individuals or groups who are not ill but are thought to be at risk of becoming infectious.45 “Isolation,” in contrast, refers to the separation of someone who is already ill.46 Although statutes, regulations, and case law often treat both practices similarly, quarantine may be more susceptible to misuse—as it does not depend on an actual diagnosis—but rather on the belief

42. See id.
43. For a discussion of quarantine in the U.S., see Felice Batlan, Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future, 80 TEMPLE L. REV. 53 (2007); Parmet, AIDS and Quarantine, supra note 5, at 37–71. The discussion that follows focuses on quarantines that apply to individuals, rather than livestock or goods.
44. See Batlan, supra note 43, at 62–63.
46. Id. For a discussion of the distinctions between quarantine and isolation, and the particular problems associated with quarantine, see Mark A. Rothstein, From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine, 12 IND. HEALTH L. REV. 227, 234–39 (2015).
that the individual has been exposed to a communicable disease and may at some future time become infectious.\textsuperscript{47} Isolation, moreover, often occurs in a health care setting concomitant with a patient’s treatment; thus it may be seen as providing some benefit for the patient.\textsuperscript{48} In contrast, with quarantine the detention is imposed on individuals who are well, and it is not done for their benefit.\textsuperscript{49} Indeed, depending upon how and where people are detained, quarantine may increase an individual’s risk of contracting the feared disease by confining those who are not infected alongside some who may be infected and will become contagious over the course of their confinement.\textsuperscript{50}

Both isolation and quarantine may be either voluntary or involuntary.\textsuperscript{51} Truly voluntary quarantines occur when individuals are willing to stay at home (or in some other location) for a few days if they are advised to do so by a physician or health authority.\textsuperscript{52} Sometimes, however, health officials tell individuals that they will be forcibly quarantined if they do not submit voluntarily.\textsuperscript{53} If the individual complies, the quarantine is usually thought of as voluntary, even though there is some (significant) element of coercion. Involuntary quarantines occur when health


\textsuperscript{48} Isolation of TB patients complicates the picture and the distinction between isolation and quarantine. TB patients are sometimes detained even when they are not symptomatic because they have failed to take their medication consistently and are thus perceived to be at risk for developing and becoming infectious with drug-resistant TB. In such cases, as in quarantine, the individual may not be infectious and therefore is merely perceived as being at risk for becoming contagious in the future. On the other hand, as with isolation, the TB diagnosis is usually certain, and the isolation is designed to compel treatment, which in the long run will benefit the individual. For a discussion of the use of isolation and quarantine for TB, see Rothstein, \textit{supra} note 46, at 248–49; see also Rothenberg & Lovoy, \textit{supra} note 47.

\textsuperscript{49} Rothenberg & Lovoy, \textit{supra} note 47, at 759–60.

\textsuperscript{50} E.g., \textit{STANLEY M. LEMON ET AL., INST. OF MED. OF THE NAT’L ACAD., ETHICAL AND LEGAL CONSIDERATIONS IN MITIGATING PANDEMIC DISEASE: WORKSHOP SUMMARY 88–89} (2007), https://www.ncbi.nlm.nih.gov/books/NBK54163 (“Quarantine and isolation can be accomplished by various means, including confining people to their own homes, restricting travel out of an affected area, and keeping people at a designated facility. Whatever techniques are used, it is important to treat symptomatic, potentially infected, and non-exposed populations differently. For example, it would be inappropriate to place infected individuals in the same room as those who are only possibly exposed.”) (citation omitted).

\textsuperscript{51} \textit{Id.} at 89.

\textsuperscript{52} \textit{Id.} at 101.

\textsuperscript{53} Rothenberg & Lovoy, \textit{supra} note 47, at 755–56.
Prior to World War II, involuntary quarantines were relatively common. They were also frequently applied disparately and invidiously against vulnerable populations. One well-known example is the racially-motivated quarantine of San Francisco’s Chinese-American community in response to bubonic plague in 1900. Less well-known was the mass quarantining of prostitutes who were thought to pose a risk of sexually transmitted diseases during World War I. The history of quarantine is full of other troubling examples in which minorities and other vulnerable populations were blamed for a disease and detained in ways that were more punitive than preventive.

San Francisco’s racially-based quarantine was struck down by a federal court in 1900 for violating the Fourteenth Amendment. As that court explained, the quarantine was in “practical operation” discriminatory, and the city’s purpose was “to enforce it ‘with an evil eye and unequal hand,’” in violation of the Fourteenth Amendment. More often courts upheld quarantines even when they were enforced in a disparate manner against vulnerable populations.

Judicial deference to quarantine goes back to the earliest days of the Constitution when the nation was repeatedly threatened by horrific epidemics, and the protection of

54. Id. at 736–37.
56. For a discussion of the history and misuse of quarantine, see id.; see also Daubert, supra note 31, at 1313–17.
57. Jew Ho v. Williamson, 103 F. 10 (C.C.N.D. Cal. 1900); see also NAYAN SHAH, CONTAGIOUS DIVIDES: EPIDEMICS AND RACE IN SAN FRANCISCO’S CHINATOWN 143–44 (2011).
60. See generally Jew Ho, 103 F. at 24–27.
61. Id. at 24–27 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886)). The court in Jew Ho never explicitly pegged its ruling to the Equal Protection Clause; however, its concerns were those that we would today tie to that Clause. Id.
population health was viewed as one of the primary responsibilities of governments. In 1824, in *Gibbons v. Ogden*, the Supreme Court cited quarantine laws as an example of laws that were clearly within the police powers of the states. In the decades following *Gibbons*, the Court continued to hold that states had the right to employ quarantines to prevent the spread of infectious disease. The Court expounded upon this view in 1902 in *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health*, which rejected both Commerce Clause and due process challenges to a state law that barred all healthy noncontagious immigrants from entering areas of the state in which there was disease. A few years later, while upholding a vaccine mandate in *Jacobson v. Massachusetts*, the Court explained that an individual could be held “in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared.”

Since *Compagnie Francaise*, the Supreme Court has not ruled on a case concerning the quarantining of an individual, as opposed to goods in commerce. At times, as in *Jacobson*, the

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Justices have cited quarantine as an example of a constitutionally-sanctioned deprivation of liberty while reviewing other government actions,69 but in the last century, the Supreme Court has never ruled on what the Due Process Clauses of either the Fifth or Fourteenth Amendments require when individuals are quarantined for a communicable disease.70

Nor have many federal courts reviewed such questions in the modern era.71 For reasons discussed below, there have been few quarantine cases since World War II, and even fewer in the federal courts.72 In 1963, in U.S. ex rel. Siegel v. Shinnick, a federal district court in New York denied a motion for habeas corpus brought by a woman who was quarantined for smallpox after arriving in New York from Stockholm without a certificate of vaccination.73 Without considering any constitutional issues, the court upheld the quarantine, stating that the opinions of the health officers “reached in obvious good faith, cannot be challenged on the ground that they had no evidence of the exposure of Realtor to disease.”74 Ten years later in Reynolds v. McNichols, the Tenth Circuit cited Jacobson and Compagnie Francaise to uphold the detention of a prostitute so that she could be examined and treated for sexually transmitted infections.75 The Reynolds court also rejected the plaintiff’s equal protection claim, ruling that the Constitution was not offended by the fact that the state detained female prostitutes but not their male customers.76

it applies to goods and the commerce clause in several other commerce clause cases. E.g., City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978).

69. E.g., Hamdi v. Rumsfeld, 542 U.S. 507, 556 (2004) (Scalia J., dissenting); id. at 579, 592 (Thomas, J., dissenting); Ratchford v. Gay Lib, 434 U.S. 1080, 1084 (1978) (Rehnquist, J., dissenting) (comparing university’s refusal to countenance certain speech advocating acts that violated the law as “akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measles suffer be quarantined.”); O’Connor v. Donaldson, 422 U.S. 563, 586 (1975) (Burger, C.J., concurring).

70. C.f., Kathleen C. Chen, Comment, Pennsylvania’s Bioterrorism Act: Better Prevention from Better Preparation, 15 TEMP. POL. & CIV. RTS. L. REV. 165, 174 (2005) (discussing cases that upheld the state’s power to quarantine, but did not impose specific requirements).

71. See infra notes 72–80 and accompanying text.

72. See id.; see infra 107–13 and accompanying text.


74. Id. at 791.

75. Reynolds v. McNichols, 488 F.2d. 1378, 1382 (10th Cir. 1973).

76. Id. at 1383.
Since Siegel and Reynolds, only two federal district courts have published opinions relating to the detention of individuals (who were not already prisoners) to prevent the spread of communicable disease. In Haitian Centers Council v. Sale, a federal district court ruled that the detention of HIV-positive Haitian refugees at Guantanamo Bay, was unconstitutional. In Best v. St. Vincent’s Hospital, a lower court upheld an order requiring the treatment and confinement of a noncompliant TB patient. In an unpublished decision, the Second Circuit vacated the lower court’s dismissal of the claims against the public hospital finding that the court below erroneously treated a motion to dismiss as a motion for summary judgment and upheld the dismissal of the claims against the private hospital on factual grounds.

Although the Supreme Court has not reviewed a quarantine case in the modern era, it has considered the substantive and procedural due process rights of individuals who suffer a loss of liberty in other circumstances. In its seminal procedural due process case, Matthews v. Eldridge, which was decided a few years after Reynolds, the Court explained that the specific demands of procedural due process depended upon “three distinct factors:” (1) the nature of the individual interest, (2) the risk of an erroneous deprivation of such interest, and (3) the government’s interest. And in a series of cases beginning with O’Connor v. Donaldson in 1975, the Supreme Court reviewed what due process requires when individuals are civilly committed on the basis of being either mentally ill or sexually dangerous. Without exploring the details of these cases, or the many lower court opinions that have elaborated upon them, suffice it to say that the courts have made clear that due process imposes

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83. See Fink, supra note 22.
significant substantive and procedural restraints on civil commitment.84

Isolation and quarantine share many characteristics with civil commitment for mental illness or for being sexually dangerous.85 In each case individuals are detained civilly, ostensibly not to punish them but to prevent future harm.86 Hence, the confinement is based upon a prediction of a future occurrence, rather than a judgment about a past action.87 Given these key similarities, it perhaps is not that surprising that as the law of civil commitment developed, courts and commentators began to see its applicability to isolation and quarantine.

The first court to do so was the West Virginia Supreme Court. In 1979, in Greene v. Edwards, the court looked to mental health cases to determine what process is due when an individual is detained for treatment of TB.88 Noting that “involuntary commitment for having communicable tuberculosis impinges upon the right to ‘liberty, full and complete liberty’ no less than involuntary commitment for being mentally ill,” the court concluded that the rights applicable in mental health cases applied to TB cases.89 A few years later, in an article analyzing the potential applicability of quarantine law to HIV, I wrote that “[c]ivil commitment for mental illness provides an interesting analogy (for quarantine)” and concluded that courts were likely to apply the substantive and procedural due process protections articulated in the mental health cases to quarantine.90

In the years that followed, lower courts reviewing TB isolation cases generally came to similar conclusions. For example,

84. See supra notes 71–81 and accompanying text. It is worth noting that the courts have not always been crystal clear as to whether the rights enunciated in these cases are procedural or substantive in nature. Id.
85. Nathan A. Bostick et al., Ethical Obligations of Physicians Participating in Public Health Quarantine and Isolation Measures, 123 PUB. HEALTH REPORTS at 3–8 (2008) (discussing how quarantine and isolation can be analogous to the situation of mental health civil commitment).
86. Id. at 4.
87. See Hamdi, 542 U.S. at 518; Hendricks, 521 U.S. at 351; Fouche, 504 U.S. at 75.
88. Greene v. Edwards, 263 S.E.2d 661, 663 (W. Va. 1980). Strictly speaking, Greene was not a constitutional case. Id. The court interpreted the state’s TB control statute to require the same procedural protections that the court had previously demanded as a constitutional manner in the case of commitment for mental health. Id.
89. Id. at 663 (quoting State ex rel. Hawkes v. Lazaro, 202 S.E.2d 109, 112 (W. Va. 1974)).
90. Parmet, AIDS and Quarantine, supra note 5, at 79–80 (footnotes omitted).
in 1993, a New Jersey trial court extensively examined the state’s power to isolate someone for TB treatment in *City of Newark v. J.S.* After noting that “many commentators have suggested that the most apt analogy for commitments for medical reasons is the model of civil commitments for mental illness,” the court concluded that individuals who are detained must be provided with notice, a hearing, periodic review, and counsel. The court held further that confinement had to be the least-restrictive alternative, and it was only constitutional if the state could establish by “clear and convincing evidence” that the individual presented a “significant risk to others unless isolated.” Importantly, the court saw the adoption of these protections as providing the means for reconciling the protection of public health and individual rights.

Similarly, in *Best v. St. Vincent’s Hospital*, the trial court looked to civil commitment cases and concluded that “[t]he central requirements set out by the Court are the right to a particularized assessment of an individual’s danger to self or others and the right to less restrictive alternatives.” The court further found that New York’s TB statute, which provided for notice, the provision of counsel, and a hearing, was constitutional in light of *Mathews* and the civil commitment cases. In an unpublished opinion that vacated part of the lower court’s opinion on procedural grounds, the Second Circuit stated that “had the court not considered at this stage of the proceedings the documentary record supporting involuntary confinement, it would have had to conclude that [the plaintiff] set forth facially valid claims of his substantive and procedural due process rights.”

Following such cases, numerous commentators agreed that the quarantine power is subject to the due process protections.

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92. *Id.* at 275.
93. *Id.* at 276. The court added that isolation can be justified only when there was a substantial risk of contagion, as explained by the Supreme Court in the Rehabilitation Act case of *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 287–90 (1987).
95. *Id.* at *11–13.
96. *Id.* at *11–13.
applicable to civil commitment. 99 In their seminal article on infectious disease law, Lawrence O. Gostin, Scott Burris, and Zita Lazzarini argued that updated state laws should require that coercion be used only when it was the least-restrictive alternative. 100 They also stated that “[c]ourts have reasoned that little difference exists between loss of liberty for mental health purposes and loss of liberty for public health purposes” and that individuals who are coerced for public health protection should receive “written notice of the behaviors or conditions said to pose a risk, assistance of counsel, a full and impartial hearing, and an appeal.” 101 They added that the state should have to prove its case by “clear and convincing evidence,” as is required for civil commitment. 102

Gostin offered similar views in the first edition of his influential treatise on public health law, explaining that “constitutional doctrine [had] changed markedly” in the years since quarantine was common, and that now “[t]he power to detain persons with infectious disease would be put to a strict legal test.” 103 According to Gostin, that meant that the state would have to show that it had a compelling state interest, that the intervention was well targeted and the least-restrictive alternative, and that the individual had been afforded a wide range of procedural protections. 104

After the 2001 terrorist attacks, including the anthrax attacks on the U.S. mail, Gostin became more concerned with ensuring that states had sufficient authority to protect public health in the face of bioterrorism or naturally occurring outbreaks. 105 At the request of the CDC, he drafted the Model State

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99. Edward P. Richards, however, continued to emphasize the breadth of quarantine law, arguing that “[a]ll due process does is increase the cost and delay of the quarantine.” Edward P. Richards et al., Quarantine Laws and Public Health Realities, 33 J.L. MED. & ETHICS 69, 70 (2005).


101. Id. at 122.

102. Id.

103. GOSTIN, supra note 31, at 213.

104. Id. at 214–15.

Emergency Health Powers Act ("MSEHPA"),\(^\text{106}\) which sought to update and expand states’ public health powers, including the power to quarantine.\(^\text{107}\) Many commentators criticized the model act for providing insufficient due process protections.\(^\text{108}\) Although Gostin disagreed with his critics on the details as to what due process required, as well as the need for updated public health emergency laws, he did not question that contemporary notions of due process applied to coercive public health powers.\(^\text{109}\) To the contrary, he defended the MSEHPA by arguing for the need for new state laws that reflected contemporary constitutional norms.\(^\text{110}\) Not all commentators agreed with his conclusion that the MSEHPA comported with all of contemporary due process standards,\(^\text{111}\) but neither Gostin nor his critics questioned the applicability of the law of civil commitment to quarantine.\(^\text{112}\)

In the years following the publication of the MSEHPA, quarantine returned to prominence as fear of SARS, pandemic influenza, and later Ebola swept through the nation.\(^\text{113}\) Once again scholars disagreed about quarantine’s role in the public health armamentarium, as well as the specifics that due process required in particular cases.\(^\text{114}\) Experts, however, continued to accept that although the quarantine power was very broad, it was subject to

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106. Id.

107. Id. at 6.


110. Id. at 10–13.


112. See, e.g., id.

113. In 2003, Gostin and colleagues drafted another model act, the Turning Point Model State Public Health Act. LAWRENCE O. GOSTIN ET AL., THE MODEL STATE PUBLIC HEALTH ACT (2003), https://law.asu.edu/sites/default/files/multimedia/faculty-research/centers/phil/turning-point-model-act.pdf. It would have provided even further procedural protections than those offered under the MSEHPA for individuals who were subject to quarantine. See Daubert, *supra* note 31, at 1337–45.

contemporary norms of substantive and procedural due process, as articulated in the civil commitment cases. For example, in her study of quarantine in 2007, Michelle Daubert wrote: “An analogy to civil commitment of the mentally ill, who have not committed any crime but are dangerous to themselves or others, is appropriate because those ill with infectious diseases are dangerous to others as well.”\textsuperscript{115} In 2011, Christopher Ogolla pointed to civil commitment law to note the gravity of due process interests applicable in quarantine cases, while criticizing courts for being too deferential to health authorities in habeas cases.\textsuperscript{116} And in the first “nutshell” on public health, James G. Hodge, Jr. asserted that contemporary notions of substantive and procedural due process applied to quarantine.\textsuperscript{117} This remained the consensus view in 2014 when Ebola came to the United States.\textsuperscript{118}

II. QUARANTINING QUARANTINE

Although calls for quarantine are quite common when frightening new communicable diseases emerge, involuntary quarantine has been applied infrequently in the last fifty years.\textsuperscript{119} No doubt that this is largely due to developments in the understanding and treatment of infectious disease. Vaccination has eradicated smallpox, and antibiotics and vaccines now prevent or treat many of the other infectious diseases, such as syphilis, which had once triggered quarantines.\textsuperscript{120} Moreover, we now understand that many infectious diseases, such as bubonic plague or yellow fever, are spread by insects and animal vectors.\textsuperscript{121} In such

\begin{itemize}
  \item \textsuperscript{115} Daubert, supra note 31, at 1334.
  \item \textsuperscript{116} Ogolla, supra note 31, at 149–59.
  \item \textsuperscript{117} James G. Hodge, Jr., Bioterrorism Law and Policy: Critical Choices in Public Health, 30 J.L. MED. & ETHICS 254 (2002).
  \item \textsuperscript{118} See generally Hickox v. Christie, 205 F. Supp. 3d 579 (D.N.J. 2016).
  \item \textsuperscript{119} See Legal Authorities for Isolation and Quarantine, CDC (Oct. 4, 2014), https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html.
\end{itemize}
cases, quarantining individuals will usually prove ineffective.\textsuperscript{122} Other infectious diseases, including cholera, are waterborne and are best prevented by ensuring a clean water supply.\textsuperscript{123} And in many cases, diseases that are spread from person-to-person, such as Ebola, do not become contagious until individuals become ill; for those diseases, active monitoring and careful isolation of patients is more effective than quarantine.\textsuperscript{124}

Changing attitudes about public health authorities and civil liberties may also play a role in quarantine’s decline. As Mark A. Rothstein has suggested, quarantines can be costly and run counter to the high regard that Americans place on autonomy.\textsuperscript{125} Whatever the reasons, the decline in the use of involuntary quarantines means that there are few cases that can make their way to court, never mind to a published opinion on the merits.

Without doubt, the paucity of published opinions is also due to both practical and doctrinal factors internal to the legal system. As Pamela Karlan explains, the fact that criminal defendants are granted counsel and a right to a trial, has provided the impetus for the development of a robust body of law relating to the constitutional rights of criminal defendants.\textsuperscript{126} No such steady venue exists for quarantine.\textsuperscript{127} Although the consensus asserts that the Constitution requires that individuals who are quarantined should be granted a hearing (either before or shortly after they are confined) and provided with counsel,\textsuperscript{128} many

\textsuperscript{122} E.g., Kristi L. Koenig, Quarantine for Zika Virus? Where is the Science?, 10 DISASTER MED. & PUB. HEALTH PREPAREDNESS 704, 704 (2016) (concluding that quarantine would not be advisable for Zika, which is largely spread by insects and noting that “[i]n general, in order for quarantine to be considered as a public health action, the disease in question must be transmissible from person to person, and this must be possible prior to symptom onset”).

\textsuperscript{123} E.g., Water-Related Diseases, WORLD HEALTH ORGANIZATION (2001), http://www.who.int/water_sanitation_health/diseases-risks/diseases/cholera/en/.

\textsuperscript{124} See Troy Day, When is Quarantine a Useful Control Strategy for Emerging Infectious Diseases? 163 AM. J. EPIDEMIOLOGY 479 (2006) (arguing that isolation is generally more effective than quarantine; but that quarantine may be effective when there is significant asymptomatic transmission during a period which is neither too long nor too short).

\textsuperscript{125} See Mark A. Rothstein, Quarantine and Isolation: Lessons Learned from SARS: A REPORT TO THE CENTERS FOR DISEASE CONTROL AND PREVENTION, 4, 26 (Nov. 2003), https://biotech.law.lsu.edu/blaw/cdc/SARS_REPORT.pdf.

\textsuperscript{126} See Karlan, supra note 41, at 1915–16.


\textsuperscript{128} See supra notes 99–118 and accompanying text.
jurisdictions do not require officials to seek the court’s approval for a quarantine order, and not all states guarantee the appointment of counsel. This failure to provide individuals who are quarantined with a judicial hearing and appointed counsel is probably the most glaring constitutional violation associated with quarantine. It is also a violation that may be self-perpetuating, as the absence of a regularized review process means that courts have few opportunities to expound upon what due process requires.

In the absence of a state-initiated hearing to impose or review quarantine orders, judicial review—and the refinement of the constitutional law of quarantine—depends upon those who are quarantined to instigate litigation. This can occur in one of two ways: (1) either the individual may seek judicial review of an ongoing quarantine, or (2) the individual may commence litigation after the quarantine has ended. In either case, the individual will face numerous practical and jurisdictional hurdles.

A. Review of Ongoing Quarantines

Most of what we know about the law of quarantine comes from reviews of habeas corpus petitions, which formed the traditional path by which individuals challenged quarantines. Yet while the writ remains available to those who are detained by

129. E.g., N.D. CENT. CODE § 25-07.6-03 (2012) (stating that a court order is not required for temporary quarantine when delay in imposing quarantine would “significantly jeopardize” the ability to stop spread of the contagion; but a court order must be requested in a petition within ten days of the original written directive authorizing quarantine); KAN. STAT. ANN. § 65-129c (Supp. 2017); VA. CODE ANN. § 32.1-48.09 (2015) (allowing initial quarantine without court approval, but requiring petition to be filed with court to continue the quarantine).

130. At least twenty states provide for appointment of counsel in quarantine cases. E.g., ALASKA STAT. § 18.85.100 (2016); CONN. GEN. STAT. ANN. § 19a-131b(g) (West Supp. 2017); DEL. CODE ANN. tit. 20, § 3136(7)b (2013); 405 ILL. COMP. STAT. ANN. 5/3-805 (West 2011); MINN. STAT. ANN. § 144.4195 (West 2017); S.C. CODE ANN. § 44-4-540(F) (2017); UTAH CODE ANN. § 26-6b-4 (LexisNexis 2013). Other states, however, only appear to require appointment of counsel in cases of confinement for TB and/or mental illness. E.g., MASS. ANN. LAWS ch. 111, § 94C(1) (LexisNexis 2015); MO. ANN. STAT. § 199.200 (West 2017). See also NAT’L CONF. OF ST. LEGS., State Quarantine and Isolation Statutes (Oct. 29, 2014), http://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx (discussing quarantine statutes).

131. Parmet, AIDS and Quarantine, supra note 5, at 81.

132. Id. at 80.

133. Id. at 83.

134. See Ogolla, supra note 31, at 142.
the state and lack any other recourse, as a practical matter it provides a poor substitute for laws that require health officials to seek a court order and ensure the appointment of counsel. For one thing, habeas depends on individuals knowing about and initiating the petition. For most individuals who are detained, this will be challenging, especially if counsel is not provided before the petition is filed. Moreover, the lack of damages available under habeas means that there are no financial incentives for counsel to take such cases, except in those rare cases when the petitioners can pay for counsel or attain pro bono representation. And, in contrast to civil commitment, which can last for years, most (but not all) quarantines are relatively short-lived. The brief duration makes the possibility of attaining habeas relief before a petition is mooted especially daunting.

There is another problem with obtaining prospective relief for an ongoing quarantine via habeas corpus. History teaches that quarantines are usually applied during periods of great fear. On the one hand, these are the times when quarantine is most ripe for abuse and when judicial review is most urgently needed. On the other hand, the middle of a germ panic may well be the most difficult time to convince a court to expand upon the rights applicable to individuals who are quarantined. As a New Jersey court explained in a TB isolation case, “[t]he claim of ‘disease’ in a domestic setting has the same kind of power as the claim of ‘national security’ in matters relating to foreign policy.” In such circumstances, courts may understandably be hesitant to expound

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135. Most quarantine habeas cases are brought in state court. For prisoners held by the federal government, the relevant statute is 28 U.S.C. § 2241. State detainees can seek federal habeas under 28 U.S.C. § 2254. However, this statute requires the petitioner to exhaust state remedies, where they exist and have not been shown to be ineffective. See 28 U.S.C. § 2254(b)(1).


139. See Rothstein, supra note 46, at 256 (describing a quarantine period of twenty-one days for travelers to West Africa as unnecessarily long).

140. See id. at 222–24.

141. See Price, supra note 14, at 501.

142. See Rothstein, supra note 46, at 255.

upon the constitutional rights of those who are detained. When viewed from this perspective, Hickox v. Mayhew,144 the case in which a Maine state court judge ordered Hickox’s release from quarantine,145 is a rare example of a court that was willing to question the necessity of quarantine in the midst of a panic.

Yet even that case did not add to the refinement of the constitutional law of quarantine.146 The only reason Hickox’s quarantine came before a Maine court was that Maine’s quarantine statute required health officials to seek a judicial order for quarantine.147 This provided Hickox with the judicial review to which the consensus held she was entitled, but because the statute required review,148 her litigation offered no opportunity to test whether the consensus was right in claiming she was entitled to such review.149 Indeed, under the doctrine of constitutional avoidance, courts will generally refrain from addressing what the Constitution demands when statutory theories can resolve the case.150 Hence, one of the paradoxes of quarantine is that while statutory rights of review may help to ensure that due process is provided, they may do little to aid the development of the constitutional law of quarantine.151

To be sure, those who are quarantined may have other paths for redress. For example, individuals who are subject to federal quarantines pursuant to the new federal quarantine regulations may be able to pursue relief through the federal Administrative Procedure Act.152 Similar options may also exist under state administrative law for challenging state and local

145. Id.
146. Ulrich & Mariner, supra note 64, at 409.
148. Id.
149. See Mayhew, 2014 Me. Trial Order LEXIS 1.
152. 5 U.S.C. § 702 (2012). The regulations provide for a medical review process internal to the CDC. 42 C.F.R. § 70.16 (2017). It is not at all clear if this forum would provide any avenue for challenging the constitutionality of the regulations themselves. It is also uncertain whether federal courts would assert jurisdiction over an ongoing quarantine case under the Administrative Procedure Act or would conclude that habeas corpus remains the appropriate jurisdictional vehicle. A full discussion of these issues is beyond the scope of this article.
quarantines.\textsuperscript{153} These theoretical possibilities, however, would face many if not all of the same challenges that pertain to habeas petitions. Once again, the petitioner would need to find and be able to attain counsel and initiate the petition. And once again the problem of mootness would hang over the case. In addition, administrative law actions may face their own set of hurdles, such as exhaustion.\textsuperscript{154} Like the statutory remedy provided to Hickox, they may not offer an ideal forum for the refinement of the constitutional law of quarantine. Indeed, although the possibility of administrative review should not be forgotten, no such cases have been reported in the modern era.\textsuperscript{155}

\textbf{B. Section 1983 Claims}

The elaboration of the rights of individuals who are civilly committed for mental illness has, for the most part, occurred in affirmative litigation commenced under 42 U.S.C. § 1983 or equivalent state laws.\textsuperscript{156} Unfortunately for the refinement of the law of quarantine, litigants seeking review of constitutional quarantine claims under such statutes face numerous barriers.\textsuperscript{157} The discussion below explores only some of the many obstacles.

For those who would seek prospective relief, the most significant problem is standing. Under \textit{City of Los Angeles v. Lyons} and its progeny,\textsuperscript{158} plaintiffs who seek prospective relief have the burden of showing that they face an immediate and direct

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\textsuperscript{153} See \textsc{NAT’L CONF. OF ST. LEGS.}, \textit{supra} note 130. Many states include provisions in their statutes that instruct those quarantined of their rights and the duties of the respective administrative body responsible for overseeing state-administered quarantine procedures.

\textsuperscript{154} \textit{E.g.}, Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938) (“\textit{N}o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.”).

\textsuperscript{155} Parmet, \textit{AIDS and Quarantine}, \textit{supra} note 5, at 54–55, 66–68, 82 (1985) (discussing the dramatic decline of infectious diseases in the last fifty years resulting in fewer instances of quarantine).

\textsuperscript{156} \textsc{GOSTIN}, \textit{supra} note 31, at 122–23.

\textsuperscript{157} See \textit{supra} notes 128–33.

\textsuperscript{158} \textit{City of Los Angeles v. Lyons}, 461 U.S. 95, 111 (1983) (“The equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again—a ‘likelihood of substantial and immediate irreparable injury.’ The speculative nature of Lyons’ claim of future injury requires a finding that this prerequisite of equitable relief has not been fulfilled.”) (citing \textit{O’Shea v. Littleton}, 414 U.S. 488, 502 (1974)).
threat of future injury. In cases of civil commitment, in which the detention may last for a relatively long period of time, standing is often simple: the individual can show an ongoing injury. Even if the detention has ended, the chronic nature of mental illness means that the threat of future harm is high.

Establishing standing for purposes of prospective relief will often be challenging in the case of quarantine. As noted previously, quarantines are usually short-lived, and will often be lifted before a case can be heard by a court. Moreover, once the quarantine has ended, the individual who was quarantined will likely find it difficult, if not impossible, to establish a continuing threat of future injury. For example, in the Liberian Community Association case, the plaintiffs claimed that they faced a future threat of quarantine, because they hoped to return to West Africa, which continued to experience Ebola cases. The district court found those facts insufficient to establish standing, concluding that the risk that the plaintiffs would again be placed in quarantine was simply too low to establish standing. Given the rarity of quarantine, most plaintiffs will face similar problems establishing that they face a real and immediate threat of future detentions, as required by Lyons to establish standing for prospective relief.

With prospective relief unlikely, the constitutional law of quarantine may depend for its refinement on post-quarantine cases seeking compensatory relief. Here, too, litigants face a

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159. Id. at 101–02.
161. See id. at 139; see also Comment, Due Process for All–Constitutional Standards for Involuntary Civil Commitment and Release, 34 U. CHI. L. REV. 633, 637–38 (1967) (explaining the mental health problems stemming from involuntary commitment).
164. Id.
165. Id.
host of practical and jurisdictional hurdles. On the practical side, the pecuniary damages for short-lived quarantines will often be relatively low. Coupled with the lack of clearly established supportive precedent, it may make it hard for plaintiffs to find counsel willing to take their case.

On the jurisdictional front, immunities, both sovereign and official, create the most formidable barriers. Without reviewing the complexities of sovereign immunity law, suffice it to say that under both federal common law and the Eleventh Amendment, individuals cannot bring damage actions in federal court against either the federal government or the states unless the defendants have consented to such actions. The federal government has given that consent for many actions via the Federal Tort Claims Act, but that statute has a specific exemption for claims relating to quarantine. Many state tort claims acts have a similar provisions, blocking damage actions against the state in state court.

When quarantines are imposed by local governments, claims for compensatory relief may be available under 42 U.S.C. § 1983. Nevertheless, formidable obstacles remain. Establishing municipal or county liability for purposes of 42 U.S.C. § 1983 is “exceptionally difficult” and requires plaintiffs to demonstrate that the alleged wrong constitutes a “policy or custom” of the local government. This might be possible in some quarantine cases, especially when plaintiffs challenge actions taken by local boards that acted pursuant to clearly delegated municipal or county authority. However, in many states even local health officials

168. Id.
169. Id.
173. See Monnell v. Dep’t of Social Services, 436 U.S. 658, 690 (1978) (determining that municipalities are persons for purposes of § 1983).
175. Monnell, 436 U.S. at 694.
176. Id. at 690–91.
may be viewed as working for the state rather than the local government.177

Given the many barriers to suing governmental entities, plaintiffs challenging quarantine will often be forced to sue government officials in their individual capacity, as the plaintiffs did in the Hickox and Liberian Community Association cases.178 Here too plaintiffs face a myriad of problems. Perhaps the most daunting is official immunity.179

Under settled Supreme Court doctrine, public officials cannot be held liable for compensatory damages in constitutional claims, unless they have violated rights that were “clearly established” at the time of their conduct.180 According to the Court, a right is clearly established if there is “any pertinent Supreme Court or controlling circuit decision or a consensus of persuasive authority.”181 While the controlling precedent does not need to be “directly on point,” it “must have placed the statutory or constitutional question beyond debate”182 and be “‘particularized’ to the facts of the case.”183

Following the Supreme Court’s direction, the circuit courts have generally taken a strict approach to deciding what lower courts are capable of clearly establishing the law.184 The Second


179. Plaintiffs suing federal officials may also face the problem that the Supreme Court has been reluctant to extend private right of actions—so called Bivens actions—to new areas. See Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (outlining the process the Court uses to determine if it should recognize a new constitutional damage action against a federal official under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971)).


184. Blum, et al., supra note 183, at 651–56. For a criticism of the direction in which qualified immunity doctrine has evolved, see Karen M. Blum, Qualified Immunity: Time to Change the Message, 93 NOTRE DAME L. REV. 1887 (2018).
Circuit (where the Liberian Community Association case was heard) and the Eleventh Circuit look only to Supreme Court opinions and appellate cases from within their own circuit in determining whether a right has been clearly established.\(^{185}\) Other circuits are willing to consider a somewhat broader pool of authority.\(^{186}\) Nevertheless, state court decisions and a consensus among legal scholars is unlikely to suffice.

The difficulty of showing that a constitutional right has been clearly established may be especially formidable in quarantine cases. First, as noted above, the Supreme Court has not ruled on a quarantine case in the past hundred years, and the only published circuit court cases relating to quarantine pre-date and do not reflect the development of contemporary due process law, not to mention modern understandings of infectious disease control.\(^{187}\) Moreover, the lower court cases that have adopted the consensus relate to isolation for TB, rather than quarantine.\(^{188}\) Thus, if courts read the “clearly established” demand strictly and rely only on Supreme Court or federal appellate decisions based on extremely similar facts, courts may conclude that the rights of individuals subjected to quarantine have not been clearly established in the modern era.

Adding to the problem is the fact that in \textit{Pearson v. Callahan}, the Supreme Court told lower courts that they could decide whether a right has been clearly established before determining if it has been violated.\(^{189}\) Not surprisingly many lower courts have taken up that invitation.\(^{190}\) From the perspective of judicial economy, this makes sense. Nevertheless, the approach reduces the opportunities for courts to expound upon what the

\(^{185}\) See Thomas \textit{ex rel.} Thomas v. Roberts, 323 F.3d 950, 955 (11th Cir. 2003) (“As we have stated, only Supreme Court cases, Eleventh Circuit caselaw, and Georgia Supreme Court caselaw can ‘clearly establish’ law in this circuit.”); Amelia A. Friedman, \textit{Qualified Immunity in the Fifth Circuit: Identifying the “Obvious” Hole in Clearly Established Law}, 90 TEX. L. REV. 1283, 1288–89 (2012) (citing Moore v. Vega, 371 F.3d 110, 114 (2d Cir. 2004)) (“Only Supreme Court and Second Circuit precedent existing at the time of the alleged violation is relevant in deciding whether a right is clearly established.”).

\(^{186}\) See Blum et al., supra note 181, at 651–56.

\(^{187}\) See supra notes 68–80, 114–17 and accompanying text.

\(^{188}\) See supra notes 86–98 and accompanying text.

\(^{189}\) Pearson v. Callahan, 555 U.S. 223, 236 (2009) (overruling the Court’s earlier decision in Saucier v. Katz, 533 U.S. 194, 200 (2001), which held that courts should normally decide if a right had been violated before determining if the right was clearly established).

\(^{190}\) See Blum et al., supra note 181, at 648–51.
Constitution requires when it comes to quarantine. Moreover, even when, as in the federal Hickox case, courts discuss what the mental health cases may mean for the law of quarantine, they are apt to do so only after concluding that the case must be dismissed because no clearly established rights have been violated. Given that posture, it should not be surprising that the courts may be disinclined to broadly read the rights of those who are quarantined.

As Pamela Karlan has explained, by dismissing claims unless plaintiffs can show the violation of a right that has been clearly established, official immunity doctrine paradoxically forestalls the opportunity for constitutional rights to become clearly established. This occurs in many areas of the law other than quarantine, but the problem seems particularly acute for the law of quarantine due to the rarity of quarantine cases and the difficulties plaintiffs have in seeking other forms of relief. If, as in many cases, compensatory claims provide the only source of relief available once a short-lived quarantine is over, the official immunity doctrine will not only prevent defendants from being held accountable for constitutionally problematic and scientifically inappropriate quarantines; perhaps more importantly, the law will remain unclarified. This is what happened to date with the Ebola cases. Rather than grapple in any serious way with the impact of contemporary due process law on quarantine, or on the implications of advances in public health science for the law of quarantine, the trial courts in both the Hickox and the Liberian Community cases relied upon precedent that derived from a period pre-dating both contemporary due process jurisprudence and modern understandings of the efficacy and role of quarantine in infectious disease control. By so doing, the courts continued to quarantine the law of quarantine, keeping it apart from the developments in both law and science that have taken place in the last fifty years.

193. Prospective relief may also be next to impossible to attain in police abuse cases. See Karlan, supra note 41, at 1915.
194. See supra notes 37–40 and accompanying text.
195. Id.
III. FREEING THE LAW OF QUARANTINE

At first blush, the lack of clarity about the constitutional restraints on quarantine undoubtedly pleases many public health officials. After all, it not only provides them with immunity, it also implicitly affirms that they have almost unfettered discretion to do what they think needs to be done to protect the public from communicable diseases.196

Upon further thought, however, I suspect that many public health officials might wish they had more guidance as to what the Constitution requires of them. In my own experience, most public health officials want to do what the law commands. While committed to protecting the public’s health, they also recognize that they can only do their jobs when they follow the law and work with and respect the rights of those they are charged to protect. For public health officials, clarity from the courts that the Constitution imposes both substantive and procedural limitations on the quarantine power might be extremely helpful in protecting them from pressure from politicians to take actions contrary to public health, even if the ambiguity helps them to establish immunity.

Moreover, the risk to the public’s health of subjecting quarantine to constitutional norms can be easily overstated. After all, the consensus does not deny that the quarantine power is broad, nor that governments have the authority to quarantine individuals when doing so is necessary to protect the public’s health.197 Thus, binding precedent affirming that the due process rights applicable in cases of civil commitment applied in the case of quarantine would not preclude the use of quarantine in appropriate cases.198 And even if the threat of liability deterred officials in some (probably marginal) cases, the risks to public health would be small to non-existent. As noted above, quarantine is rarely an effective public health strategy, and no evidence exists that it has proven effective in reducing morbidity and mortality in

196. The Supreme Court has argued that its qualified immunity doctrine aims in part to ensure that the fear of being sued does not “dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.” Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

197. See supra notes 123–37 and accompanying text.

the U.S. in the last half century. The danger that an official, fearing constitutional litigation, would hesitate to quarantine someone thereby allowing an epidemic to spread is simply fanciful.

To the contrary, the public health dangers lie in the opposite direction: in officials imposing quarantine as result of political pressure even when the best scientific evidence points against quarantine’s efficacy. Although politicians and pundits are quick to shout for “quarantine” during an outbreak, inappropriate quarantines can be counter-productive. They can divert scarce resources from more effective interventions, while fanning the flames of panic. They can also cause people to try to flee, risking the spread of infection, as happened when Ebola patients fled an isolation ward during an outbreak in the Democratic Republic of Congo, and in China when it imposed wide-scale quarantines for SARS. Unnecessary quarantines can also undermine the public’s trust in public health officials, thereby reducing people’s willingness to comply with official advice. By clarifying that the Constitution only permits quarantines when there is clear and convincing evidence that they are necessary to protect the public’s health, and by ensuring that those who are quarantined are provided with adequate due process protections, the refinement of the law of quarantine may ensure that quarantine is employed only when it is necessary and under conditions conducive to its success. It may also help health officials resist demands by politicians to impose quarantines when they are likely to be counter-productive. In other words, the

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199. The evidence is disputed as to whether quarantines had a limited impact during the 1918 influenza epidemic. Compare H. Markel et al., Nonpharmaceutical Interventions Implemented by US Cities During the 1918-1919 Influenza Pandemic, 298 JAMA 644, 644–55 (2007) (finding that cities that implemented isolation and quarantine and other nonpharmaceutical interventions early and in a sustained manner had lower death rates), with John M. Barry, Letter to the Editor, Nonpharmaceutical Interventions Implemented During the 1918-1919 Influenza Pandemic, 298 JAMA 2260 (2007) (stating that the evidence refutes the conclusions of Markel et al., at least with respect to New York City).

200. See Sinha & Parmet, supra note 1, at 239–41.


203. Id. at 357–60.

204. AM. CIV. LIBERTIES UNION & YALE GLOB. HEALTH JUSTICE P’SHIP, supra note 6, at 35–36, 43–44.
refinement of the law of quarantine may help health officials do their job and protect the public’s health.

This relates to a broader and perhaps more important point. The protection of public health is one of the most critical functions of governments, and it has long played a central role in our constitutional jurisprudence. The historical law of quarantine reflects that role. But respect for public health’s importance does not demand and should not be equated with blanket deference to the actions taken by public health officials. Sometimes in the name of public health, officials take actions that harm the public’s health. Indeed, the history of quarantine is rife with such examples. Rather than compelling blanket deference, the recognition of public health as a constitutional value demands that courts (like other branches of government) take public health seriously. This means that courts should ensure that quarantine is imposed in conformity with other constitutional norms and in furtherance of public health. Or, to put it another way, respect for public health demands that quarantine be placed securely within our constitutional system and is subject to judicial oversight to ensure that it is used only in circumstances in which evidence points to it being able to protect the public’s health. That doesn’t mean that officials must prove beyond a reasonable doubt that every quarantine was in fact effective, but they should be required to show that when they issued a quarantine order, they had clear and convincing evidence, grounded in science, for believing that it might be the least-restrictive alternative. Anything less invites the possibility that public health powers will be abused for political ends and to the detriment of public health.

In this historical moment, the need for the refinement of the constitutional law of quarantine could not be greater. Not only

206. Id. at 36–37.
207. Compare Eugenia Tognotti, Lessons from the History of Quarantine, from Plague to Influenza A, 19 EMERGING INFECTIOUS DISEASES 254, 256 (2015) (noting that “quarantine inspired a false sense of security, which was dangerous to public health because it diverted persons from taking the correct precautions.”) with Kelly Drews, A Brief History of Quarantine, VA. TECH UNDERGRADUATE HIST. REV. (May 1, 2013), https://vtuhr.org/articles/10.21061/vtuhr.v20.16 (giving examples of where quarantine was effective at preventing the spread of the Black Death in the fourteenth century).
208. See AM. CIV. LIBERTIES UNION & YALE GLOB. HEALTH JUSTICE P’SHP, supra note 6, at 37.
209. Id. at 35–36.
do we face significant and perhaps growing threats from emerging infectious diseases, we are also living in an era marked by high levels of political polarization, deep distrust of government and even science, and intensifying racial and ethnic scapegoating. In this epidemiological and political environment, the risks of misusing quarantine—particularly by targeting minorities—seem especially high. So too is the danger that if and when quarantine is needed to fight an outbreak for which it is well-suited, many members of the public will disbelieve government officials and fail to comply. Under such circumstances, clarity as to what the Constitution demands, and the knowledge that the courts will assure fealty to those demands, may offer the best or only hope we have that quarantine is neither misused nor rendered ineffective.

So, how can we obtain that clarification and open the courthouse doors to quarantine cases? The easiest—and worst—way would be to employ quarantine more frequently, in many settings, and for longer periods of time. With many more cases, and longer periods of confinement, the probability that some habeas petitions would make their way to appellate decisions would increase substantially. For reasons that are obvious, this would not be a happy solution. No one should wish either for an outbreak warranting widespread quarantine or the frequent (mis)use of quarantine in the absence of such an epidemic. Rather, we need the clarification before either occur.

This suggests that we must find ways of enhancing the ability of the rare cases that now arise to make it through the courthouse door and all the way to a judicial opinion. Perhaps the easiest way to do this would be for states (and Congress) to require officials to seek a court order either immediately before or after


212. See McCloskey, supra note 210, at 102–06.


214. Tognotti, supra note 207, at 258.

quarantining someone, while also requiring the court to appoint
counsel to represent the individuals who are quarantined.\textsuperscript{216}
However, as discussed above, because such acts may provide the
most fundamental elements of due process, they may not provide
a ready vehicle for judicial determinations as to what due process
would provide in the absence of such a statute.\textsuperscript{217} Still, such
statutory reforms would allow far more cases to come before
courts, and some number of those cases may raise the
constitutional issues and determine whether the least-restrictive
alternative standard is required.

A legislature that was reluctant to involve courts (or pay for
counsel) in challenges to ongoing quarantines might consider
adding quarantine claims, including constitutional challenges, to
the jurisdiction’s tort claims act. Adding these claims to the
jurisdiction’s tort claims act would ensure that individuals who
were wrongfully quarantined could be compensated, while health
officials maintain personal immunity\textsuperscript{218} and therefore need not
fear the consequences of making a “wrong” quarantine decision.
Perhaps more importantly, the inclusion of quarantine in tort
claims acts would provide an incentive for private lawyers to take
quarantine cases, thereby creating a ready vehicle for courts to
refine the law of quarantine after a disease panic ends.

Of course, in the current political climate, legislative
reform seems unlikely.\textsuperscript{219} In its absence, the refinement of the law
of quarantine may depend upon the willingness of courts to
overlook prudential barriers and use their discretion to hear and
opine about the constitutional law of quarantine. This would
entail recognizing in habeas cases that quarantine is the poster
child for cases in which mootness should be overlooked, because
the issue is one that is “capable of repetition, yet evading
review.”\textsuperscript{220} Likewise in cases for compensatory relief, courts can
and should exercise the discretion that the Supreme Court left

\textsuperscript{216} This would have been the case in the Model Public Health Law put forward by
the Turning Point Commission. \textit{The Model State Public Health Act of 2003}, \textit{supra}
ote 113.

\textsuperscript{217} See \textit{supra} notes 149–52 and accompanying text.

\textsuperscript{218} Christine Coughlin argues persuasively that individuals who are quarantined
should be compensated. \textit{See Coughlin, supra} note 167, at 433–36.

\textsuperscript{219} \textit{See Rothstein, supra} note 46, at 246.

Kemna}, 523 U.S. 1, 17 (1998)).
them in *Pearson* to determine if a right has been violated before concluding that the right was not clearly established. As noted above, such an approach does not provide the ideal posture for refining the law of quarantine, but at least it could help provide officials with some guidance for their future conduct.221

None of these solutions are perfect. Nor are there any guarantees that the courts will adopt the consensus if and when they refine the law of quarantine. Nevertheless, these reforms could help free the law of quarantine from its own constitutional sequester. Such liberation is vital not only for the evolution of the law but also for public health.