October 2015

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Recommended Citation
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 (2011)
Available at: https://via.library.depaul.edu/jhcl/vol14/iss1/5

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NON-CRIMINAL HabeAS CORPUs FOR QUARANTINE AND ISOLATION DETAINEES: SERVING THE PRIVATE RIGHT OR VIOLATING PUBLIC POLICY?

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INTRODUCTION

The writ of habeas corpus has been called the “Great Writ” since it is the most fundamental device we have to protect ourselves from arbitrary arrest or continued confinement without just cause. Protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a constitution that, at the outset, had no Bill of Rights. The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom. Experience taught, however, that the common-law writ all too often had been insufficient to guard against the abuse of monarchial power. This abuse of power is particularly worrying in cases of non-criminal detention, for example, quarantine and isolation where there has been little or no previous judicial review of the cause for detention.

In public health emergencies, such as pandemics, the writ of habeas corpus may serve as a limited means for relief. However, a survey of the circumstances under which persons detained for the control of infectious

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3. Id.
4. Id. at 740.
5. See Florida Court Education Council, Pandemic Influenza Bench Guide: Legal Issues Concerning Quarantine and Isolation, 2007 ed., 42, at http://www.flcourts.org/gen_public/courted/bin/pandemic_benchguide.pdf (noting that “the limitation of this remedy is that it would only be available if an order restricted the liberty interests of an individual; if an order affected a corporation, or an individual’s property, livelihood, familial or religious interest, or other protected interest, habeas would not lie.”).
diseases have been granted habeas corpus indicates that the overwhelming majority of such habeas writs are denied, citing either broad police powers or deference to the determinations of health officers. Courts denying the relief tend to conclude that the isolation or quarantine of individuals during a public health emergency serves the public good and that the termination of individuals who are isolated or quarantined violates public policy. On the other hand, use of quarantine or isolation powers may create sensitive issues related to civil liberties, for example, impinging on freedom of movement, right of free association, freedom of religion, and restricting freedom of assembly.

Additionally, it is reasonable to worry about the improper use of quarantine because a significant number of health departments are led by political appointees with little expertise in public health disease control. In some states, there are few or no board-certified public health physicians in any positions of authority. Even more telling, most local and some state health departments may not have staff counsels to advise the heads of departments and employees on the legal ramifications of quarantine and isolation. Moreover, because quarantine is not criminal detention, there is no requirement to provide counsel to quarantined persons. We must therefore be particularly cognizant of how due process limits are applied in quarantine.

For example, it may be easier to limit the due process rights of a disfavored class, such as minorities or the poor, because of stereotypes about susceptibility to communicable diseases. The U.S. Supreme Court has held that the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence. Despite these dangers to civil liberties,
majority of courts routinely uphold quarantine orders and deny habeas writs.

A few courts on the other hand, have granted the writ, while refusing to uphold the quarantine of an individual in cases where the state is unable to meet its burden of proof concerning that individual’s potential danger to others, or if the court views the restriction as unreasonable and or oppressive. Other legal issues, for example, medical costs for an involuntarily confined individual and even discrimination of those who are quarantined, may arise if quarantine, isolation, and other public health measures were used to deal with a widespread public health emergency such as a biological terror attack or an influenza pandemic.

Consequently, there is a tension between the writ’s role in serving the private right, on the one hand, and on the other, its potential to negatively impact public safety and health. This is what drives the central thesis of this paper.

This paper begins by defining quarantine and isolation and gives a brief history of non-criminal habeas corpus as it relates to quarantine and isolation detainees. Part two discusses a brief history of habeas corpus in non-criminal detention observing that despite the long association between habeas corpus and criminal confinement, the writ was available at common law to challenge a broad range of non-criminal confinement, both public and private. Part three talks about the effects of quarantine and isolation on private citizens arguing that both severely curtail the freedom of the individuals to whom they are applied. Parts four and five discuss federal and state laws regarding quarantine with specific reference to procedures for filing a petition for writ of habeas corpus for quarantine or isolation detainees. The paper notes that state quarantine laws are archaic, inconsistent, inadequate, unclear as to whether they apply in the civil

15. Id. at 15.
16. Id.
17. See Richards, supra note 1, (discussing the habeas rulings in People ex rel. Jennie Barmore v. Robertson, 302 Ill. 422 (1922) and Illinois v. Adams, 149 Ill. 2d 331 (1992) and noting that “the principles of public health law did not change between 1922 and 1992 - the testing laws were upheld both times. Something, however, did change - the ‘provider corporate culture’ of many in the public health field shifted from ‘disease prevention’ to what might be best described as a ‘misplaced zeal for civil rights.’”)
20. See Annas, supra note 20, at 46 (noting that “properly worried that many state public health laws are
context of an isolation or quarantine order, and maybe constitutionally troubling. The paper calls for states to update these laws to conform to modern day disease treatment procedures and where applicable, use the least restrictive means possible for quarantine and isolation. In parts six and seven, the paper analyzes cases where the writ was denied, as well as cases granting the writ. It notes that the historic cases indicate that there is little review of process through habeas corpus. This is because in a majority of the cases, courts tended to defer to the decisions made by health officers.

In parts seven and eight, the paper discusses the due process requirements in quarantine and isolation, with specific focus on the need for habeas corpus relief for quarantine and isolation detainees. In these sections, the paper argues that although individuals' constitutionally protected interests maybe trumped by public health emergencies, the decisions of the health authorities, in such situations, should not be arbitrary and capricious. To this end, certain guidelines should be followed. The paper addresses these guidelines in part nine, by asserting that quarantine and isolation guidelines should be consistent with some due process requirements, that is, "requiring an assessment of, inter alia, the risk of an erroneous deprivation of a liberty interest and the probable value, if any, of additional or substitute procedural safeguards." These procedural safeguards should include among others, written notice, availability of legal counsel, and judicial review within reasonable time. More importantly, the paper suggests that all quarantine and isolation orders should contain the constitutional requirements of habeas corpus as a direct challenge to detention.

The paper concludes by stressing that where public health and safety is concerned, quarantine and isolation can be useful tools. But where the

outdated and perhaps inadequate to permit state officials from effectively containing an epidemic caused by a bioterrorist attack, in the wake of 9/11 the CDC advised all states to review the adequacies of their laws with special attention to quarantining people in the event of a smallpox attack.

21. See generally Writs of Habeas Corpus and Personal Restraint Petitions, Public Health Emergency Bench Book, WASHINGTON COURTS, http://www.courts.wa.gov/manuals/?fa=manuals.showManualsPage&manualId=publicHealth&file=publicHealth-07 (last visited Sept. 1, 2011) ("When a writ of habeas corpus is filed in Superior Court, it should probably be considered by the trial court and not transferred to an appellate court."). Dicta by the Supreme Court in a criminal case allows a habeas petition to be transferred to the appellate courts as a personal restraint petition. See Toliver v. Olsen, 746 P.2d 809 (1987) (It is unclear whether this rule applies in the civil context of an isolation or quarantine order).


23. NAT'L CONFERENCE OF STATE LEGISLATURES, supra note 7.

decisions of the health officers might be arbitrary and capricious, the writ of habeas corpus may serve as a limited means for relief without violating public policy.

I. ISOLATION AND QUARANTINE

Isolation is used to separate ill persons who have a communicable disease from those who are healthy. Isolation restricts the movement of ill persons to help stop the spread of certain diseases.\(^{25}\) Quarantine, on the other hand, is used to separate and restrict the movement of well persons who may have been exposed to a communicable disease to see if they become ill.\(^{26}\) These people may have been exposed to a disease and do not know it, or they may have the disease but do not show symptoms. Quarantine can also help limit the spread of communicable disease.\(^{27}\) By Executive Order of the President,\(^{28}\) federal isolation and quarantine are authorized for the following diseases: cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers, Severe Acute Respiratory Syndrome (SARS), and flu that can cause a pandemic.\(^{29}\) Some of these diseases have afflicted the nation since its founding, for example, flu and yellow fever,\(^{30}\) whereas others like, SARS, have recently emerged.\(^{31}\) In the early days of the nation, quarantine was a common tool of disease control.\(^{32}\) Broad powers to lock up people for the simple reason that they may be sick and potentially contagious have coexisted comfortably with the criminal justice system for hundreds of

26. Id.
27. Id.
28. See EXECUTIVE ORDER 13295, Revised List of Quarantinable Communicable Diseases (April 4, 2003); see also EXECUTIVE ORDER 13375 (April 1, 2005) (amending the Executive Order of April 1, 2003 by adding “influenza caused by novel or re-emergent influenza viruses that are causing, or have the potential to cause, a pandemic” to the list of quarantinable communicable diseases).
29. CTRS. DISEASE CONTROL AND PREVENTION, supra note 25.
31. Severe Acute Respiratory Syndrome (SARS) is a viral respiratory illness caused by a coronavirus, called SARS-associated coronavirus (SARS-CoV). SARS was first reported in Asia in February 2003. According to the World Health Organization (WHO), a total of 8,098 people worldwide became sick with SARS during the 2003 outbreak. Of these, 774 died. See CDC Fact Sheet, Basic Information About SARS, CTRS. DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/ncidod/sars/factsheet.htm (last visited Sept 1, 2011).
32. See, e.g., The Quarantine Question. Meeting of the Citizens of Richmond County, N.Y. TIMES, Sept 21, 1858 (reporting on the burning of the Quarantine Hospital in Richmond County, NY).
years. In such situations, habeas corpus "provided for meaningful and independent judicial inquiry regarding the factual basis for detention, including consideration of additional evidence." It is therefore essential to understand the role of habeas corpus in non-criminal detention from an historical perspective.

II. HISTORY OF HABEAS CORPUS IN NON-CRIMINAL DETENTION

Habeas corpus is an ancient remedy whose original purpose was to contest detention by the king. Historically, such challenges represented the "core" circumstances in which the habeas right has operated. English courts provided common law protections to petitioners by compelling the executive to turn over factual information and then test the government's allegations against facts developed by the petitioner. The heart of these common law protections was eventually codified in the Habeas Corpus Act of 1816, which extended statutory protection to habeas applicants who were being held in non-criminal detention. The American colonists brought with them to this country the remedy by habeas corpus as it existed in England as part of the common law. From the seventeenth century on, the English battles over the meaning of habeas and the depth and breadth of its procedures were followed in the American colonies.

By the time of the framing of the Constitution, the writ was enshrined in the Suspension Clause.

Article I, Section 9 of the U.S. Constitution provides in pertinent part that 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. Federal courts have been authorized to issue writs of habeas corpus since the enactment of the Judiciary Act of 1789. Section 2241 of the

37. Id. at 977.
38. Id.
39. 39 C.J.S. Habeas Corpus § 3 (June 2011).
40. Falkoff, supra note 36, at 977.
41. Id.
Judicial Code provides that federal judges may grant the writ of habeas corpus on the application of a prisoner held “in custody in violation of the Constitution or laws or treaties of the United States.” Thus, the writ has long been associated with criminal confinement.

Despite the long association between habeas corpus and criminal confinement, the writ was available at common law to challenge a broad range of non-criminal confinement, both public and private. At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention. Here in the U.S., during the formative years of our government, the writ of habeas corpus was available to non-enemy aliens as well as to citizens. The writ enabled them to challenge executive and private detention in civil cases as well as criminal ones.

The issuance of the writ was not limited to challenges to the jurisdiction of the custodian, but encompassed detentions based on errors of law, including the erroneous application or interpretation of statutes. The common-law habeas court’s role was most extensive in cases of pretrial and non-criminal detention, where there had been little or no previous judicial review of the cause for detention. Thus, it was used to command the discharge of seamen who had a statutory exemption from impressment into the British Navy, to emancipate slaves, and to obtain the freedom of apprentices and asylum inmates.

In terms of public health, non-criminal habeas corpus has been used as a limited means for relief from quarantine detention. Once a person has

44. Id.
45. The federal system requires that a state prisoner exhaust the available state remedies before a federal court may issue a writ of habeas corpus. O’Sullivan v. Boerckel, 526 U.S. 838 (1999). According to 28 U.S.C. § 2241(c) (2006), the writ of habeas corpus shall not extend to a prisoner unless: (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or (5) It is necessary to bring him into court to testify or for trial.
46. Hafetz, supra note 18, at 2522.
47. INS, 533 U.S. at 301.
48. Id.
49. Id. at 302.
50. Id.
51. Boumediene, 553 U.S. at 780.
52. INS, 533 U.S. at 302.
been isolated or quarantined, the Constitution guarantees due process through a habeas process proceeding. Historically, the writ has been used as the appropriate remedy to question the legality of the detention of one held under quarantine or health regulations as suspected of infection with a contagious or infectious disease, one known to be infected with such a disease or having been exposed to the contagion, or as an excessive user of narcotics and drugs. Recently, it has been used to challenge confinement on grounds of refusal to undergo HIV AIDS testing, tuberculosis infection, and "civil commitment of persons, who, due to a mental abnormality, or a personality disorder, are likely to engage in predatory acts of sexual violence."

III. EFFECTS OF QUARANTINE AND ISOLATION ON PRIVATE CITIZENS

Quarantine and isolation severely curtail the freedom of the individuals to whom they are applied. The most obvious ones are impinging on the individual's "freedom of movement, right of free association, possibly freedom of religion and almost surely restricting freedom of assembly." Although the Constitution does not specifically grant a right to travel, the Supreme Court has held that there is fundamental right to travel. However, quarantine and isolation almost always impose individual restrictions on travel. Additionally, individuals who are isolated and or quarantined are likely to face stigma. In May 2009 for example, fearing an outbreak of swine flu from a Mexican airline passenger, "Chinese authorities began confining dozens of seemingly healthy Mexicans to hotels and hospitals, even escorting some from their hotels in the middle of the night for testing." The Mexicans felt they had

54. Quarantine and Health, 29 C.J. § 91 (1922).
56. See Judge's Memorandum, Livingston v. Maryland Division of Corrections et al., Civil Action NO: WDO-09-682 (D. Md. Sept. 18, 2009), at http://docs.justia.com/cases/federal/district-courts/maryland/mddce/1:2009cv00682/166639/18/0.pdf (Plaintiff, who was diagnosed with Multi-drug resistant TB walked away from the hospital against medical advice. Plaintiff was then charged with behaving in a disorderly manner, leaving quarantine placement and failing to comply with the quarantine order.).
58. Daubert, supra note 19.
59. McNelis, supra note 8, at 1157.
60. Swendiman & Jones, supra note 6 at 30 (citing United States v. Guest, 383 U.S. 745 (1966); Shapiro v. Thompson, 394 U.S. 618 (1969)).
61. Marc Lacey & Andrew Jacobs, Even as Fears of Flu Ebb, Mexicans Feel Stigma, N.Y. TIMES, May 5,
been typecast as disease carriers and subjected to humiliating treatment.\textsuperscript{62} It is worth noting here that in addition to stigma, individuals who are isolated are sometimes viewed, rightly or wrongly, as dangerous patients.\textsuperscript{63} As Professor Wendy Parmet notes, the dangerous patient "perspective is marked by several interrelated characteristics. Most notable is the individualization of disease, the belief that a disease is caused by a single, so-called dangerous patient. Thus, the perspective views an individual, rather than a pathogen or broader social determinants, as the source of danger. As a result, an infected individual becomes seen not a disease's victim, but as its vector."\textsuperscript{64}

Besides causing stigma, quarantine and isolation may affect an individual's economic status as well. For example, according to a survey conducted for the Trust for America's Health in 2007, "...among the 10 percent who say they would not adhere to the government's request of a voluntary quarantine, most indicate that they could not stay at home due to fears of losing needed income (64 percent) or losing their jobs altogether (39 percent)."\textsuperscript{65} In many cases, as the movement of people and goods are restricted, businesses cannot freely sell their products and services, nor can they compete fairly with those who are not fettered by the exercise of control measures.\textsuperscript{66} This may result in closure of community institutions such as churches, grocery stores and schools.\textsuperscript{67}

Because use of quarantine or isolation powers may have significant impacts on individuals' liberties, isolation or quarantine must be carried out in the least restrictive setting necessary to maintain public health.\textsuperscript{68} Federal and state laws for quarantine and isolation should therefore take the aforementioned issues (i.e. restriction of various freedoms) into consideration. It is these federal and state quarantine laws that this

\textsuperscript{62} Id.
\textsuperscript{64} Wendy Parmet, Dangerous Perspectives: The Perils of Individualizing Public Health Problems, 30 J. Legal Med. 83, 88 (2009).
\textsuperscript{65} Nat'l Conference of State Legislatures, supra note 7.
\textsuperscript{67} See, e.g., Swendiman & Jones, supra note 6, at 16 (noting that "since children tend to be more susceptible than adults to infection and are responsible for more secondary transmission, studies have suggested that community-wide school closures may help mitigate the impact of an influenza pandemic)."
\textsuperscript{68} See Daubert, supra note 19, at 1353; Nat'l Conference of State Legislatures, supra note 65.\textsuperscript{66}
discussion now turns to.

**IV. FEDERAL AND STATE QUARANTINE LAWS**

The federal government has quarantine power over persons arriving from foreign countries into the United States or traveling from one state or possession into another. In addition, the federal government may assist with or take over the management of an intrastate incident if requested by state or if the federal government determines local efforts are inadequate.

In 1796, Congress enacted the first federal quarantine law in response to a yellow fever epidemic. This was repealed in 1799 and replaced with an Act Respecting Quarantine and Health Laws. Several years and changes later, Congress passed the Public Health Service Act in 1944. Through this Act, the federal government took the lead in regard to quarantine activities whose purposes were controlling the spread of communicable diseases at the international and interstate levels.

The Public Health Service Act outlines the federal government’s quarantine and isolation power. Under section 361 of the Public Health Service (PHS) Act, 42 U.S.C. § 264, the Surgeon General, with the approval of the Secretary of Health and Human Services (HHS) is authorized to make and enforce regulations necessary “to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.” This section further provides that “[r]egulations prescribed under this section shall not provide for the apprehension, detention, or conditional release of individuals except for the purpose of preventing the introduction, transmission, or spread of such communicable diseases as may be specified from time to time in Executive orders of the President upon the recommendation of the Secretary, in consultation with the Surgeon General.”

Although the federal government plays a role in domestic quarantine
and isolation, the preservation of public health has historically been the responsibility of the state and local governments. The public health authority of the states derives from the police powers reserved to them by the Tenth Amendment to the U.S. Constitution. Although every state has the authority to pass and enforce quarantine laws as an exercise of their police powers, these laws vary widely by state.

In Alabama, for instance, an officer or guard carrying out quarantine may arrest without warrant anyone who attempts to violate quarantine regulations and move them to the designated detention area or in front of an officer with jurisdiction over the offense. The arrest without a warrant may likely raise Fourth Amendment questions. In Alaska, isolation and quarantine shall be by the least restrictive means necessary to prevent the spread of a contagious or possibly contagious disease that poses a significant risk to public health and that isolation and quarantine may include confinement to private homes or other private and public premises; absent exceptional circumstances that would jeopardize public health, a person shall be allowed to choose confinement in the person's home. Minnesota also allows isolation and quarantine in private homes or other private or public premises.

Mississippi quarantine law stands as an outlier providing that "for the purpose of enforcing such orders of the State Health Officer, persons employed by the department as investigators shall have general arrest powers. All law enforcement officers are authorized and directed to assist in the enforcement of such orders of the state health officer."

Granting arrest powers to public health workers can be problematic on several fronts. First, law enforcement and public health workers have different roles. State health department investigators are not peace

78. Swendiman & Elsea, supra note 14.
79. Id.
80. Id. at 8.
81. ALA. CODE § 22-12-26 (2011).
82. In Camara v. Municipal Court, 387 U.S. 523 (1967), a department of health inspector entered a home, without a warrant, to make routine annual inspections for possible violations of the city's housing code. The homeowner refused to permit warrantless inspection of his premises. In finding for the homeowner, the Supreme Court noted that "we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.'" It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. Camara, 387 U.S. at 523.
83. ALASKA STAT. § 18.15.385 (a) (b) (1) (2011).
84. MINN. STAT. §§ 144.419 (4) (b) (2011).
86. Cf: Edward P. Richards, Collaboration Between Public Health and Law Enforcement: The
officers nor should they be. Second, public health workers do not have the training and experience to properly exert police power. Third, keeping public health and police roles separate is also important because public health searches depend on cooperation. Finally, in some communities, having public health investigators identified with the police could endanger their lives. This is not to say, however, that public health officials cannot conduct inspections if it involves compliance with public health laws and regulations. Sometimes, this may be coterminous with law enforcement activities, especially for public safety reasons. Nevertheless this paper asserts that the power to arrest and detain should still be within the province of law enforcement, because health investigations should not be used as a proxy for criminal investigations.

In summary, state quarantine and isolation laws show great variance from state to state, with some providing for minimum due process requirements, whereas others greatly expand the powers of health officers. Authority and enforcement mechanisms also differ. Besides the variation in these laws, the procedures for filing petitions for writ of habeas corpus for quarantine or isolation detainees are also not well enumerated in the states.

V. PROCEDURES FOR FILING FOR HABEAS PETITIONS FOR NON-CRIMINAL DETAINES

Persons detained by the state may file a habeas corpus petition and demand that a court review their detention. What is unclear, however, is whether the procedures for filing for habeas corpus petitions for non-

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Constitutional Challenge, 8 Emerg. Infect Dis. 1157, 1158 (2002) (noting that “[b]ioterrorism investigations require close cooperation between public health and law enforcement, which entails some blurring of their usual roles,” but cautions that “[p]ublic health officials cannot use their powers to circumvent the criminal law protections provided by the Constitution” and “[i]nformation gained from public health investigations that do not meet criminal due process standards cannot be used in criminal prosecutions, and if such information is relied on by the police, it may contaminate their subsequent investigations and render all their evidence inadmissible.”).

88. Id.
90. See Richards, supra note 86 (noting that “[c]ertain public health functions, such as sexually transmitted diseases (STD) control, have always involved cooperation with the police.”); Victoria Sutton, Dual Purpose Bioterrorism Investigations in Law Enforcement and Public Health Protection: How to Make Them Work Consistent With the Rule of Law, 6 Hous. J. Health L. & Pol’y 151 (2005) (noting that “the dual efforts of law enforcement and public health personnel are important to the governmental purpose of protecting citizen health and safety”).
criminal detainees, such as quarantine and isolation detainees, are the same, slightly or substantially different from those of criminal detainees. In the State of Washington, for example, petitions for a writ of habeas corpus are governed by chapter 7.36 RCW (Washington Revised Code).92 However, the Washington Administrative Code, WAC 246-100-055 also establishes procedures for relief from isolation and quarantine in some circumstances.93

Under RCW 7.36, the writs can be filed in the Supreme Court, the Court of Appeals, or Superior Court.94 Application for the writ shall be made by petition, signed and verified either by the plaintiff or by some person in his behalf, and shall specify by whom the petitioner is restrained of his liberty, the place where, the cause or pretense of the restraint according to the best of the knowledge and belief of the applicant and if the restraint be alleged to be illegal, in what the illegality consists.95 Few, if any, state statutes dealing with quarantine and isolation directly provide for habeas corpus relief. States that do mention habeas corpus in reference to old case law mostly deal with sexually transmitted diseases. The following examples illustrate this point.

In California every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint.96 Although it states “every person unlawfully imprisoned or restrained” this provision falls under the California Penal Code suggesting that it is for criminal detainees.97

For public health detainees, the California Health and Safety Code provides that a mere suspicion unsupported by facts giving rise to reasonable or probable cause affords no justification for depriving persons of their liberty and subjecting them to virtual imprisonment under a purported order of quarantine.98 Additionally, where the health authorities

93. See WASH. ADMIN. CODE § 246-100-055 (2011) (“Any person or group of persons detained by order of a local health officer pursuant to WAC 246-100-040(3) may apply to the court for an order to show cause why the individual or group should not be released; (a) the court shall rule on the application to show cause within forty-eight hours of its filing; (b) if the court grants the application, the court shall schedule a hearing on the order to show cause as soon as practicable; and that (c) the issuance of an order to show cause shall not stay or enjoin an isolation or quarantine order.”).
97. See id. This section is titled Part 2 of Criminal Procedure, Title 12 of Special Proceedings of a Criminal Nature, and Chapter 1 of the Writ of Habeas Corpus.
rely upon the claim that a person quarantined is a prostitute and hence likely to be afflicted with venereal disease, the burden of proof is upon such authorities to establish the fact that the person is of that class and character, and in the absence of such proof, she is entitled to her discharge on habeas corpus.\textsuperscript{99} This language comes from a 1921 case where the petitioner was arrested, charged with prostitution, paid bail but the chief of police refused to release her because she refused to submit to a medical examination to determine whether she was infected with a communicable, infectious or quarantinable disease.\textsuperscript{100} The Health and Safety Code does not explain specific procedures for filing for habeas writs for those with quarantinable diseases. It is however assumed that "habeas corpus is part of the overall California statutory framework and is universally available for the express purpose of challenging an allegedly unlawful restraint."\textsuperscript{101}

In Florida, a person may be detained if he or she is infected with a sexually transmitted disease; engages in behaviors which create an immediate and substantial threat to the public; evidences an intentional disregard for the health of the public and refuses to conduct himself or herself in such a manner as to not place others at risk and the person, among others, will continue to expose the public to the risk of a sexually transmissible disease until his or her hearing date.\textsuperscript{102} A person detained under this section may apply for a writ of habeas corpus attacking the detention.\textsuperscript{103}

In North Dakota, an appeal from an order of the judge of a district court authorizing a specified medical facility to receive a person for care, treatment, quarantine and isolation may be taken to the Supreme Court.\textsuperscript{104} All persons placed in the custody of the state health officer for care, treatment, quarantine and isolation are entitled to the benefit of the writ of habeas corpus, and a determination as to whether the person has TB has to be made at the hearing.\textsuperscript{105}

Finally, in Texas, the Health and Safety Code only provides that the

\begin{itemize}
\item \textsuperscript{99} Id. citing In re Application of Arata, 198 P. 814, 1921 (Cal. App. 1921); see also CAL. PENAL CODE § 1473 (2011).
\item \textsuperscript{100} Arata, 198 P. at 814.
\item \textsuperscript{102} See FLA. STAT. § 384.281 (2011).
\item \textsuperscript{103} Id.
\item \textsuperscript{104} N.D. CENT. CODE, § 23-07.1-09 (2011).
\item \textsuperscript{105} Id.
\end{itemize}
chapter does not limit a person's right to obtain a writ of habeas corpus.  

These divergent laws on habeas show a lack of a coherent body of law dealing with habeas writs in quarantine and isolation detention. However, despite the divergences of state quarantine and isolation laws and the procedures for filing petitions for writ of habeas corpus, the one common theme among states is that overwhelming majority of such habeas writs are denied citing either broad police powers or deference to the determinations of health officers.

A. Cases Denying The Writ

Public health practitioners can claim many successes in courtrooms when it comes to non-criminal habeas corpus as it relates to quarantine and isolation detainees. Since the 1900s, high courts in several states have upheld these detentions, denying the writs on the grounds that private rights are subordinate to the general interest of the public. For example, in State ex rel. McBride v. Superior Court for King County, the court held that determination by the Board of Health that a quarantine detainee was afflicted with a contagious disease was final, conclusive, and not subject to judicial review. The case required a construction of the quarantine regulations of the city of Seattle and the state law creating a state board of health and defining its powers and duties. The detainee petitioned for writ of habeas corpus, alleging that he was committed to the isolation unit in a hospital because the Health Commissioner found him to be afflicted with a dangerous, infectious, and contagious disease. The detainee challenged the power of the health officer to detain him. In finding for the Commissioner, the court held that it was within the police power of the legislature, in dealing with the problems of public health, to make the determination of a fact by a properly constituted health officer final and binding upon the public as well as upon the courts.

This absolute deference to public health authorities is also seen in

107. State ex rel. McBride v. Superior Court for King County, 103 Wash. 409, 413 (1918) ("Private rights must be deemed to be subordinate to the general interest of the public. And in respect of personal rights every citizen is bound to conform his conduct and the pursuit of his calling to such general rules as are adopted by society, from time to time, for the common welfare.").
108. Id.
109. Id. at 420.
110. Id. at 409
111. Id.
112. Id. at 420.

In Barmore,118 petitioner sought a writ of habeas corpus contending that the health department unlawfully restrained her liberty by ordering her quarantined and confined to her home. She was placed under quarantine after tests showed she was a typhoid carrier. In upholding the quarantine order and denying the writ, the court reasoned that:

“Generally speaking, what laws or regulations are necessary to protect public health and secure public comfort is a legislative question, and appropriate measures intended and calculated to accomplish these ends are not subject to judicial review. The exercise of the police power is a matter resting in the discretion of the legislature or the board or tribunal to which the power is delegated, and the courts will not interfere with the exercise of this power except where the regulations adopted for the protection of the public health are arbitrary, oppressive and unreasonable. The court has nothing to do with the wisdom or expediency of the measures adopted.”119

Similarly, in Ex parte Company,120 petitioners filed applications for writs of habeas corpus seeking to be released from quarantine which was imposed by the health commissioner. The women were charged with unlawfully occupying a building for the purpose of prostitution, lewdness, and assignation.121 They were placed on quarantine because they had been found to have venereal diseases. In upholding the power of the Commissioner to quarantine the petitioners, the Ohio Supreme Court held that the Commissioner properly exercised his power to quarantine the detainees because the protection of the health and lives of the public was paramount. It noted “that the legislature in the exercise of its constitutional authority may lawfully confer on boards of health the power to enact sanitary ordinances having the force of law within the districts over which

113. 302 Ill. 422 (1922).
114. 139 N.E. 204 (Ohio 1922).
115. 15 So. 2d 267 (Fla. 1943).
116. 57 So. 2d 648 (Fla. 1952).
117. 246 Cal. App. 2d. 553, 556 (1966) (noting that health regulations enacted by the state under its police power and providing even drastic measures for the elimination of disease, whether in human beings, crops or cattle, in a general way are not affected by constitutional provisions, either of the state or national government).
118. 302 Ill. at 422.
119. Id. at 817.
120. 139 N.E. at 204.
121. Id.
their jurisdiction extends, is not an open question.”122 Again here, we see the great deference to the executive.

In *Varholy*, petitioner sought review of the order from the circuit court, which denied her petition for writ of habeas corpus to secure her release from the county jail. She alleged that she was charged with the offense of being drunk and disorderly. The county sheriff however stated that he was holding her by virtue of a commitment and order of quarantine by the health officer.123 The health officer testified that petitioner had voluntarily submitted to an examination and that the laboratory reports showed that the she was infected with a venereal disease, though there was a negative report as to the presence of syphilis.124 The circuit court ordered that petitioner remain under quarantine for treatment until she was cured of the disease. In affirming the circuit court, the Supreme Court of Florida noted that generally speaking, rules and regulations necessary to protect the public health are legislative questions, and appropriate methods intended and calculated to accomplish these ends will not be disturbed by the courts.125 But unlike the two previous cases, the *Varholy* court went on to state that the constitutional guarantees of personal liberty and private property cannot be unreasonably and arbitrarily invaded. The courts have the right to inquire into any alleged unconstitutional exercise or abuse of the policepowers of the legislature, or of the health authorities in the enactment of statutes or regulations, or the abuse or misuse by the boards of health or their officers and agents of such authority as may be lawfully vested in them by such statutes or regulations.126

Almost a decade later, the Florida Supreme Court was faced with a similar case in *Moore*.127 In that case, petitioner, who had tuberculosis, was confined in a state sanitarium pursuant to a commitment issued by the county judge.128 Petitioner filed a writ of habeas corpus, claiming that his confinement was unlawful and denied him due process because the statute under which he was committed was unconstitutional. The Supreme Court affirmed the lower court, essentially restating the Illinois Supreme Court’s holding in *Barmore*,129 to wit:

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122. *Id.* at 206.
123. *Varholy*, 15 So. 2d at 268.
124. *Id.*
125. *Id.* at 269
126. *Id.*
127. 57 So. 2d 648 (Fla. 1952).
128. *Id.*
129. 302 Ill. at 422.
[W]hat laws or regulations are necessary to protect public health and secure public comfort is a legislative question, and appropriate measures intended and calculated to accomplish these ends are not subject to judicial review. The exercise of the police power is a matter resting in the discretion of the Legislature or the board or tribunal to which the power is delegated, and the courts will not interfere with the exercise of this power except where the regulations adopted for the protection of the public health are arbitrary, oppressive and unreasonable. The court has nothing to do with the wisdom or expediency of the measures adopted.¹³⁰

The line of historical cases dealing with habeas corpus in quarantine and isolation are identical in their steadfast refusal to overturn quarantine orders.¹³¹ It is acknowledged here that the standard developed by the Florida and Illinois Supreme Courts (i.e., the standard for reviewing the constitutionality of state regulations permitting public health detentions), has reasonable policy justification for the protection of the public's health. However, what stands out most from the other historical cases is that most of these courts grant agencies wide discretion and seemingly place quarantine orders out of judicial review. This then implicates a second standard of reviewing administrative decisions made by health officials. Regarding the ability of courts to review agency decisions, Professor Richards has noted that:

A key issue in administrative law is the relationship between courts and agencies. If courts review all agency decisions de novo, rehearing expert witnesses and substituting their decisions for those of the agencies, the government loses the value of agency expertise and flexibility. However, if courts do not review agency actions, this inaction will undermine the separation of powers. This is a core issue in administrative law, with the Supreme Court limiting judicial efforts to impose additional requirements on agency decision-making, upholding significant deference to agencies for some actions, but establishing rules for when such deference is limited.¹³²

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¹³⁰ 57 So. 2d at 649.
But agency deference has its limits.\textsuperscript{133} Agency deference prevents opponents of public actions from being able to contest the decisions.\textsuperscript{134} One of the crucial benefits of habeas review in non-criminal contexts is that habeas is often the only means by which the executive branch can be induced to disclose information it may possess regarding detention, and to justify publicly the detention.\textsuperscript{135} This important function is frequently overlooked in the context of post-conviction review of criminal sentences, because an adequate trial procedure will have revealed the asserted factual and legal basis of the petitioner's detention. Where there has been no trial, however, habeas corpus may be the only way that the petitioner, and the public at large, will learn of the asserted basis for detention.\textsuperscript{136}

Another problem with the cases denying the writ is that they primarily date from the early part of the 20th century, with limited examples after the 1920s. If one assumes that in those days, epidemics were widespread, and disease testing and treatment procedures were not as developed as today, then it would be logical for courts to give deference to the decisions of the health officers in sacrificing individuals rights for the greater good. As professor Edward Richards notes,

The drafters of the Constitution lived in an age when death from communicable disease was the norm, when almost every family had lost a child to illness, and when the fundamental security of the nation was frequently under threat from external enemies and conflicts with native peoples. The threat of disease was not just to the individual, but to the state itself . . . . The severity of these threats was in the minds of the judges who would review governmental actions against dangerous persons and conditions, the legislators who passed the acts enabling these actions, and the citizens whose support the government needed to function. Individuals might resist, but there was a societal consensus that the protection of society was more important than the rights of the individual.\textsuperscript{137}

\textsuperscript{133} See, e.g., \textit{Ken Zhen Zhao v. United States Dep't of Justice}, 265 F.3d 83, 86 (2nd Cir. 2001) ("Courts ordinarily defer to such discretionary administrative determinations, lest a court substitute a judicial view for an agency's experience and expertise. But granting deference to administrative tribunals does not mean we have clothed their rulings with that kind of power expressed in the maxim the 'king can do no wrong.' ").

\textsuperscript{134} Richards, \textit{supra} note 132 at 69.


\textsuperscript{136} Id.

\textsuperscript{137} Richards, \textit{supra} note 87, at 31.
But almost a hundred years later, "neither medicine nor constitutional law is the same."\(^{138}\) Although the policy considerations remain the same, it is simply not true that we must always sacrifice individual rights and liberty to take effective public health action against contagious diseases.\(^{139}\) Indeed this point was the driving force among the courts granting the writ.

### B. Cases Granting the Writ

The grounds upon which habeas corpus has been awarded to individuals seeking relief from quarantine or isolation detention fall largely into one of two camps: violations of procedural due process,\(^{140}\) and requirements for an evidentiary basis justifying detention.

Beginning with the procedural defects that can give rise to a favorable habeas ruling, *Greene v. Edwards*,\(^{141}\) awarded habeas corpus relief to a tuberculosis patient involuntarily confined to a hospital. In that case, a petition alleging that Mr. Greene was suffering from active communicable tuberculosis was filed with the circuit court under the West Virginia Tuberculosis Control Act.\(^{142}\) After receiving the petition, the court fixed a hearing date and had the papers served upon Mr. Greene. The papers served did not notify Mr. Greene that he was entitled to be represented by counsel at the hearing. He was not appointed counsel until after the commencement of his hospitalization commitment hearing, leaving counsel no time to prepare for his defense.\(^{143}\) Mr. Greene challenged his commitment arguing among others that the Tuberculosis Control Act did not afford him procedural due process because: "(1) it fail[ed] to guarantee the alleged tubercular a right to counsel; (2) it fail[ed] to insure that he may cross-examine, confront and present witnesses; and (3) it fail[ed] to require that he be committed only upon clear, cogent and convincing proof."\(^{144}\) The court agreed, reasoning that the Tuberculosis Control Act provided authority for this type of commitment but lacked adequate procedural safeguards by both comparing the statute to the

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\(^{138}\) Annas, *supra* note 20, at 55.

\(^{139}\) *Id.* at 34.

\(^{140}\) See, e.g., In re Mossie Jarrel, 28 Ohio N.P. 473 (1930) (Defendant was arrested by Cincinnati city police and put in the city's workhouse, where she was examined by a doctor who reported that she had a venereal disease. She was then quarantined and filed a *habeas corpus* petition for release. The court granted it because the proper procedures had not been followed in confining her.); see also Mindes, *supra* note 131, at 423.

\(^{141}\) 263 S.E.2d 661 (W. Va. 1980).

\(^{142}\) *Id.* at 663.

\(^{143}\) *Id.* at 662.
safeguards provided for in the commitment of mentally ill patients and likening the timely appointment of counsel to criminal procedural requirements. The court concluded that persons charged under the act "must be afforded: (1) an adequate written notice detailing the grounds and underlying facts on which commitment is sought; (2) the right to counsel and, if indigent, the right to appointed counsel; (3) the right to be present, to cross-examine, to confront and to present witnesses; (4) the standard of proof . . . to be by clear, cogent and convincing evidence; and (5) the right to a verbatim transcript of the proceedings for purposes of appeal."\(^{145}\)

This case sought to strike a balance between the individual's right and the public health good. Above all, it focused procedural due process rights in quarantine and isolation cases.

*Ex parte Hardcastle* decided in Texas in 1919 touched on another procedural consideration determining that the decision of a health officer to arrest a person suspected of being infected with gonorrhea is final for the purposes of judicial review.\(^ {146}\) In that case, the relator was held under an order of the city health officer, by virtue of quarantine regulations established in accord with an act of the legislature, on the basis that she was affected with gonorrhea. The issue was whether or not the decision of the health officer was final or whether it could be challenged by writ of habeas corpus.\(^ {147}\) The court stated that "We conclude that under the Act of the Legislature in question the relator had the right to a hearing on writ of habeas corpus, and therein to prove the non-existence of the facts necessary to authorize her continued detention and thereby obtain release."\(^ {148}\) Here the court granted habeas and referred the petitioner to a hearing for determination of whether facts existed to justify the quarantine restraint.

The second overarching category of circumstances under which quarantined persons have successfully obtained habeas relief is where the state failed to carry its burden of demonstrating that detention for the control of infectious disease is supported by evidence such that it is not arbitrary or oppressive. A set of companion cases, *Caves v. Hilbert*,\(^ {149}\) and *Hill v. Hilbert*\(^ {150}\) decided in Oklahoma in 1950, granted habeas to male and female business partners detained in the quarantine or venereal health

145. *Id.* at 663.
147. *Id.*
148. *Id.*
clinic section of the city jail following their arrest for “occupying a [hotel] room for immoral purposes.” The evidence showed that the petitioner (Hill) and Mrs. Caves were having an affair, that after their arrest, each had been given the first test for venereal disease and that results of the test were negative. However, under the rules of the clinic, persons held for examination were required to remain in quarantine for 48 hours so that a further examination could be made. “This second examination was required on the theory that the person held might have been exposed to a venereal disease just prior to the arrest, which might not be detectable until after forty-eight hours had passed.” The court disagreed. Since there was no evidence that the woman was a prostitute or that she and her business partner had used the hotel room for sexual relations, the court determined that there were insufficient facts to justify the pair’s restraint pending venereal disease test results. The court concluded that such detention was “arbitrary and oppressive” and arbitrarily exercised merely to impose additional punishment.

In that same vein, the court in Ex parte Dillon, a California case from 1919, released a man and woman charged with violation of an ordinance prohibiting extra-marital relations because there were insufficient facts to show they had committed a misdemeanor, thereby making this detention a “pretended quarantine” without “reasonable cause.” The court went further to state that even if the arrest were proper, extended detention for venereal disease testing was not warranted because there is no adequate, rational correlation between those arrested for violating the ordinance and people actually at risk for venereal disease. The state must make some further showing that a given person is likely to be infected.

The court in a 1921 case, Ex parte Roman granted habeas for a girl detained in a correctional school on the suspicion that she had venereal

151. Id. at 168.
152. Id. at 168.
153. Id. at 174.
155. Id. at 172 (“The question that we finally reach here is as to whether the health department may reasonably assume, without any previous knowledge, information, or report as to the individual concerned, that every person arrested by officers and booked at the city jail as having violated the ‘Rooming-house Ordinance’ is reasonably likely to be afflicted with a quarantinable venereal disease. If it could be assumed that every person who had sexual intercourse with another to whom he or she was not married, at a hotel or lodging-house at which they might meet for the purpose, was a person given to promiscuous acts of sexual intercourse, then we might agree that, in part, the practice of the chief of police and health department in such cases as has been herein outlined finds some justification in the law. But we do not agree that any such general deduction should be made, in view of the great concern of the law for the liberty of individuals. We think that for such detention to be legally justified, the return of the officer should show some further reason why the persons so detained are suspected of being afflicted with disease.”).
disease after the completion of her sentence. Although this particular case was moot given that Roman was already released following negative test results, the court espoused the same sentiment that facts must exist to justify restraint.

These cases, though few, recognize the gravity of civil commitment particularly in quarantine and isolation. They also establish that in some instances, "health authorities do not always exercise their discretion in value neutral, scientific ways." Consequently, the need for due process protections, particularly procedural due process rights, is paramount. As the West Virginia Supreme Court remarked:

[W]e examined the procedural safeguards which must be extended to persons charged under our statute governing the involuntary hospitalization of the mentally ill. We noted that Article 3, Section 10 of the West Virginia Constitution and the Fifth Amendment to the United States Constitution provide that no person shall be deprived of life, liberty, or property without due process of law; we stated: "This Court recognized in the case of Schutte v. Schutte, 86 W.Va. 701, 104 S.E. 108 (1920) that, 'liberty, full and complete liberty, is a right of the very highest nature. It stands next in order to life itself. The Constitution guarantees and safeguards it. An adjudication of insanity is a partial deprivation of it.'"

"Given the obvious liberty interests implicated when individuals are involuntarily confined, sufficient due process in quarantine regulations is imperative." Confinement for both public health and mental health is based upon the principle that restriction of individual rights is justified by the avoidance of future harm to the wider community. However, "courts now constitutionally require precise criteria for civil commitment based upon dangerousness, and strict due process procedural safeguards." It is these due process protections that the paper now turns to.

157. Id. at 581.
158. LAWRENCE GOSTIN, PUBLIC HEALTH LAW. POWER, DUTY, RESTRANINT, 216 (Univ. of Ca. Press, 2000).
160. Daubert, supra note 19, at 1300.
162. Id.
VI. PROCEDURAL DUE PROCESS IN QUARANTINE AND ISOLATION

Freedom from physical restraint has always been at the core of the liberty protected by the due process clause from arbitrary governmental action. Chief Justice Burger writing for the majority in *Addington v. Texas* noted that the “Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” This principle was further reiterated in *Foucha v. Louisiana* when the majority stated that “the loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement. Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed.”

However, “an individual’s constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context.” In *Foucha*, Justice Thomas writing for the majority observed that “[w]e have also held that in certain narrow circumstances persons who pose a danger to others or to the community may be subject to limited confinement.”

But how narrow are these circumstances? One such circumstance would seem to be when an individual is “a dangerous patient.” Public health authorities possess a variety of authorities to restrict the autonomy or liberty of persons who pose a danger to the public. These may include selecting and implementing relevant interventions, such as contact and partner tracing, post exposure prophylaxis, and separation of infected and unexposed susceptibles through the use of isolation, cohorting or

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163. Hendricks, 521 U.S. at 356; see also Addington, 441 U.S. at 418.
164. Addington, 441 U.S. at 425.
166. Hendricks, 521 U.S. at 356.
167. Foucha, 504 U.S. at 80.
168. See O’Connor v. Donaldson, 422 U.S. 563, 576 (1975) (where the Supreme Court held that “a State cannot constitutionally confine without more, a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends”); see also Richard Goodman, The “Dangerous” Infected Patient: An Approach to Characterizing The Risks Posed by Persons With Communicable Infectious Diseases, 30 J. LEGAL MED. 13, 14 (2009) (writing that “from a medical and public health perspective, not all persons who are infected with communicable pathogens represent identical risks and threats to others, thus prompting consideration of alternatives to the term ‘dangerous patient’ that may be better suited for exploring the risk implications of persons who are infected with serious communicable pathogens. For this reason, I begin by suggesting use of an alternative term—the ‘potentially dangerous infected person’—in place of the dangerous patient.”).
169. Gostin, supra note 158 at 209.
quarantine.\textsuperscript{170}

In one of the most arbitrary uses of the dangerous patient exception, the Ohio Supreme Court upheld a quarantine regulation that "all known prostitutes and people associated with them shall be considered as reasonably suspected of having a venereal disease."\textsuperscript{171} This is an example of an arbitrary decision, i.e., imposing quarantine based on unfounded assumptions.

In another arbitrary detention case, in May 2007 the American Civil Liberties Union (ACLU) of Arizona filed a lawsuit on behalf of Robert Daniels, a tuberculosis patient who had been held in the jail ward at the Maricopa Medical Center for nine months.\textsuperscript{172} Daniels was involuntarily committed after Maricopa County Public Health Department officials claimed he was a serious public health risk for not wearing a mask while visiting a local convenience store.\textsuperscript{173} The ACLU argued in its lawsuit that the county was violating Daniels' Fifth and Fourteenth Amendment rights to due process and equal treatment and had substantially deprived him of his fundamental rights to liberty, travel and privacy.\textsuperscript{174} Commenting on the same case, Professor Wendy Parmet writes:

\[\text{The story of Robert Daniels may, in fact, be a more typical tale of what happens when an individual is viewed as dangerous on account of being infected. Daniels was a 27-year-old Russian immigrant living in Arizona when he was diagnosed (incorrectly) with XDR-TB. In July of 2006, he was involuntarily quarantined in Phoenix, Arizona for disobeying a court order requiring him to wear a face mask in public at all times. He was then turned over to the Maricopa County Sheriff, who kept Daniels in solitary confinement in the county jail for nearly a year without access to showers, reading material, or even a view of the outdoors. Eventually, after the American Civil Liberties Union took the case, Daniels was sent to the National Jewish Medical Center for treatment, where . . . physicians determined that he did not in fact have XDR-TB. But even after he was released, Daniels was treated like a criminal;}\]

\textsuperscript{170} Goodman, supra note 168, at 18 (2009).
\textsuperscript{171} Gostin, supra note 158, at 212 citing Ex parte Company, 139 N.E. 204, 205 (Ohio 1922)).
\textsuperscript{173} Id.
\textsuperscript{174} Id.
once he returned to Phoenix, the Sheriff threatened him with prosecution for his pre-quarantine behavior. Perhaps not surprisingly, Daniels fled the Sheriff’s jurisdiction, returning to Russia.\footnote{175}

Daniels’ case is an example of the panic of the majority.\footnote{176} Historically, government agents have used health scares as a form of moral panic.\footnote{177} Courts must, therefore, guard against the risk that governmental action may be grounded in popular myths, irrational fears, or noxious fallacies rather than well-founded science.\footnote{178} Indeed this is what makes habeas challenge necessary in public health detentions.

VII. THE NEED FOR HABEAS CORPUS RELIEF FOR QUARANTINE AND ISOLATION DETAINEES IN ALL THE STATES

State health laws “permit the detention of people in the absence of criminal charges, and even, in certain instances, following the completion of sentence.”\footnote{179} For example, state and federal statutes provide broad

\footnote{175. Parmet, supra note 64, at 87-88.}

\footnote{176. See Bruce Jennings, On Authority and Justification in Public Health, 55 FLA. L. REV. 1241, 1255-56 (2003) (“People gripped by fear of imminent danger, panic, hatred, and revenge will not be capable of reasoning or the practice of justification under the deliberative model. At such times, even the viability of the judicial model is threatened, and people tend to turn to charismatic leaders who assert rather than argue, provoke rather than persuade. Both liberals and communitarians should be exceedingly nervous at this prospect. At such times political theory can do little but hope that the citizenry returns to its senses quickly and that countervailing checks and balances within the government will prevent the worst abuses of power.”).}

\footnote{177. See generally Ed Jackson & Charles Pou, The University of Georgia, Georgia Info, This Day in Georgia History, http://georgiainfo.galileo.usg.edu/dgh-aug/aug18.htm (last visited Sept. 1, 2011) (In 1908, in response to a national panic in 1907 over typhoid fever outbreaks attributed to ”Typhoid Mary,” the Georgia General Assembly adopted a joint resolution urging Congress to create a U.S. Health Department. The memorial listed a host of reasons why the federal government should act, including the financial cost of treatment and the loss of life from tuberculosis, typhoid fever, and other communicable diseases. It further noted that ”disease and degeneracy are strong factors in the causation of crime”; that national action was needed since only 23 states then maintained vital statistics; and that, ”[i]t is more humane and noble to destroy the enemies of health when they touch our territories rather than allow the conditions that are inviting them in and then undertake to fight them when they are bush whacking us from every side of the road as we travel from section to section and from State to State, watching an opportunity when they might leap from the walls of a house or couch at night or streams as they trickle through the forest or food as we feed out bodies.”); see also Robert Weidner, Methamphetamine in Three Small Midwestern Cities: Evidence of a Moral Panic, J. PSYCHOACTIVE DRUGS, (Sept 2009), at http://findarticles.com/p/articles/mi_6831/is_3_41/ai_n56119760/?tag=mantle_skin;content , (last visited Sept. 1, 2011) (“For more than a century in the United States, ‘social problems have often been blamed on the devastating effects of some harmful substance or chemical, and at various times, different substances have been seen as the major demon figures threatening the nation.’ . . . Drug scares and moral panics are harmful in that they make subjective mountains out of objective molehills.”).


\footnote{179. Klein & Wittes, supra note 33, at 152.}
authority to quarantine people who have communicable diseases. But when decisions to quarantine and isolate are arbitrary and capricious as shown by the historic cases discussed in part VI and the case of Robert Daniels, is there a need for habeas relief? The answer is an obvious yes, but this does not necessarily inspire palpable confidence that states will not make these kinds of arbitrary decisions, unless of course, revisions are made to their public health statutes. This is particularly true for states with old, unrevised statutes that provide no due process protections for quarantine and isolation detainees. One public health attorney has noted that “many of the states have old, broadly worded statutes that may need revision. There is a difference of opinion as to whether these broadly worded laws should be revised or not to include more procedure to follow in imposing quarantine and otherwise reflect modern developments in law."

The need for the states to revise their statutes is certainly imperative in light of modern day emerging diseases like Severe Acute Respiratory Syndrome (SARS) and influenza, A(H1N1) virus. These diseases are capable of striking and spreading fast, therefore, resulting in mass amounts of preventive detentions, some of which may be unnecessary. Due process protections would therefore be paramount. However, critics of including due process protections (particularly criminal law due process standards) in quarantine and isolation orders contend that it “increases the cost of carrying out public health measures, reducing their effectiveness and endangering the public.”

180. Id. at 87.
181. See, e.g., J.S., 652 A.2d at 270 (The court, when commenting on New Jersey’s statutory scheme for dealing with TB which dates from 1912 with only minor amendments made since 1917, stated: “This law allows [the court] to enter an order committing a person to a hospital if he or she is ‘suffering from’ TB and ‘is an actual menace to the community.’ Notice of the hearing is required and was provided. Neither the statute nor the implementing regulation, N.J.A.C. 8:57-1.10, provides any guidance on the procedures to follow when such applications are made, nor what standards are to be used in issuing such orders. There is no case law in New Jersey providing guidance on these and many other related issues.” The court went on to state: “The regulatory schemes in other jurisdictions vary widely... [t]here are older schemes like that in New Jersey which provide little or no guidance. There are those that provide detailed procedural details to guarantee due process while still allowing detention, isolation, quarantine, or confinement in the most extreme cases.”). Id.
182. See Hargan, supra note 69.
183. See Annas, supra note 20, at 65 (noting that “mass involuntary quarantine is generally unnecessary and almost always ineffective because it leads to mistrust of the government.”).
184. Richards, supra note 87, at 28; see also Morales v. Turman, 562 F.2d 994, 997-98 (5th Cir. 1977) (discussing the right to treatment doctrine, and noting that “[w]henever the state detains a person not in retribution for a specific offense, for an unlimited period of time or without the full procedural safeguards of a criminal trial, proponents of this right claim that due process requires that the person deprived of his liberty be in return entitled to treatment.” But this argument is questionable, noted the court because “[t]he
fact that since the 1960s the Supreme Court has stated that persons subject to civil detention are entitled to some procedural due process. As the Supreme Court noted in Addington, "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." Furthermore, some state courts have also held that persons with infectious diseases are entitled to procedural due process protections. Second, some have argued that the power of quarantine and isolation does not see much use today. The use of widespread quarantines has declined in the 20th Century, as improved sanitation, vaccination, and modernized public health practice have reduced the incidence and lethality of contagious diseases in the United States. The argument that procedural due protections would be a burden to public health is therefore unpersuasive. The need for habeas challenge is still critical, because "the law of quarantine still represents a reservoir of power on which public health officers [can still] draw when necessary."  

As stated earlier, habeas is also important in public health because it is often the only way where the decision of the expert can be questioned. The only caveat here is that habeas is normally a collateral challenge to a conviction. Because of the nature of public health detentions where judicial review is done after the detention, the challenge would work best if it is a direct challenge. This is not uncommon since in the federal system, pre-conviction habeas corpus actions may be filed in federal court under 28 U.S.C. § 2241 when a defendant wishes to challenge a state’s right to proceed on criminal charges as a violation of the Double Jeopardy interests of the individual and of society in the particular situation determine the standards for due process. .  

185. Gostin, supra note 158 at 215.  
186. Addington, 441 U.S. at 425.  
187. See, e.g., Greene, 263 S.E. 2d at (noting that "specifically, persons charged under the act (The Tuberculosis Control Act) must be afforded: (1) an adequate written notice detailing the grounds and underlying facts on which commitment is sought; (2) the right to counsel and, if indigent, the right to appointed counsel; (3) the right to be present, to cross-examine, to confront and to present witnesses; (4) the standard of proof to be by clear, cogent and convincing evidence; and (5) the right to a verbatim transcript of the proceedings for purposes of appeal); Hill v. Hilbert, 222 P.2d 166, 168 (Okla. Crim. App. 1950), (noting that "where a person so restrained of his or her liberty questions the power of the health authorities to impose such restraint, the burden is immediately upon the latter to justify by showing facts in support of the order"); J. S., 652 A.2d at 276 ([T]he constitutional concept of due process is designed to prevent irrational discrimination by ensuring a forum that can hear opposing perspectives and by insisting that distinctions are rationally based. The decisive consideration where personal liberty is involved is that each individual's fate must be adjudged on the facts of his own case, not on the general characteristics of a 'class' to which he may be assigned.").  
188. Klein & Wittes, supra note 33, at 170.  
189. Id. at 178.  
190. Id.
Clause.\textsuperscript{191}

Pre-detention habeas challenge can, however, be problematic in public health emergency situations. Quarantine and isolation would provide time for the health authorities to address the pandemic, i.e., time to test the individuals for pathogens, conduct contact tracing, conduct surveillance, start prophylactic treatment and even time to buy and distribute vaccines. One would be hard pressed to argue that habeas challenge should be provided to individuals prior to isolation and or quarantine. But this paper does not argue against states’ power of quarantine and isolation.\textsuperscript{192} It only calls for inclusion of procedural due process protections at the front end, and allowing habeas corpus challenges during the commitment to ensure that decisions of health officers are not arbitrary and capricious. In essence, what the paper is saying is that “you can isolate me from society if you think I pose serious medical risk to others, but prove to me that I truly deserve to be isolated and or quarantined and that there is no other way.”

\textbf{VIII. SUGGESTED APPROACHES}

In a habeas challenge, the questions to be raised would include facial challenge to the validity of the statute,\textsuperscript{193} whether the disease itself is sufficiently important or infectious to warrant detention, who is making the decision for quarantine and isolation, for example, an health officer versus law enforcement officer, the expertise of the decision maker and whether his or her expertise is being used to advance the panic of the majority. The question then arises, how can this be done without compromising the ability of public health officials to assure the health of the population? Put another way, how can this be done without violating public policy?

First, public health decisions to quarantine and isolate should not be

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\item[193.] Swendiman & Elsea, supra note 14 (noting that, “although the primary function of a writ of habeas corpus is to test the legality of the detention, petitioners often seek a declaration that the statute under which they were quarantined is unconstitutional or violative of due process”).
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tailored to the agency’s point of view more than the petitioner/detainee’s side. Quarantine orders should be issued by an independent judicial authority and only upon clear and convincing evidence from a qualified health professional that the individual possesses an immediate and substantial risk to the community. This will ensure trust between the public and the public health establishment. Second, courts should defer to the decisions of the public health experts only to the extent that their decisions are relevant. The process requires reason, not authority. As a threshold matter, public health experts and legislatures “need to determine which individuals and bodies at local, state and federal levels can declare public health emergencies, under what conditions, and what these declarations mean for public health, officials, funding and authority.” Additionally, “public health officers need to acquire explicit working and knowledge of the jurisdiction’s laws regarding isolation and quarantine.”

Third, only highly contagious diseases should warrant quarantine and isolation, and the confinement should not last longer than the usual incubation period of the disease. Fourth, judicial review must be more frequent depending on the medical diagnosis. Finally, those quarantined

195. Sutton, *supra* note 90, at 153 (noting that “public health personnel . . . are concerned about the ethical responsibility of trust between patient and healthcare giver.”).
197. *Id.* at 315.
198. For example, Executive Order 13295, dated April 4, 2003 and titled “Revised List of Quarantinable Communicable Diseases,” lists Cholera as a quarantinable disease. The World Health Organization, referring to Cholera treatment, however notes: “Cholera is an easily treatable disease. The prompt administration of oral rehydration salts to replace lost fluids nearly always results in cure. In especially severe cases, intravenous administration of fluids may be required to save the patient’s life. Left untreated, however, cholera can kill quickly following the onset of symptoms. This can happen at a speed that has incited fear and paralyzed commerce throughout history. Although such reactions are no longer justified, cholera continues to be perceived by many as a deadly and highly contagious threat that can spread through international trade in food.” See Health Topics, *Treatment of Cholera*, WHO, http://www.who.int/topics/cholera/treatment/en/index.html (last visited Sept. 5, 2011).
199. Here, an analogy can be drawn from an immigration case, Zadvydas v. United States, 533 U.S. 678, 699-700 (2001). In discussing how long the United States Customs and Immigration Services (USCIS) can detain an alien after an order of removal has been entered against him, the majority noted that “in answering that basic question, the habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal. . . . thus if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute.”
200. For example, Rules of the City of New York, 24 RCNY § 11.23 (f), on removal and detention of cases, contacts and carriers who are or may be a danger to public health, provide in pertinent part: “When a person or group is ordered to be detained for a period exceeding three (3) business days, and such person or member of such group requests release, the Commissioner shall make an application for a court order authorizing such detention within three (3) business days after such request by the end of the first business day following such Saturday, Sunday, or legal holiday, which application shall include a request for an expedited hearing. After any such request for release, detention shall not continue for more than five (5)
or isolated should have a right to be represented by counsel if indigent, a right to a hearing, and judicial review, just like in mental health cases. In *Vitek v. Jones* for example, the Supreme Court held that transferring a prisoner to a mental hospital implicated a liberty interest protected by the Due Process Clause. Consequently, "the state was required to observe the following minimum procedures. . . : A. [w]ritten notice to the prisoner that a transfer to a mental hospital was being considered; B. [a] hearing. . . to permit the prisoner to prepare, [and] at which disclosure to the prisoner is made of the evidence being relied upon for the transfer. . . ; C. [a]n opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state. . . ; D. [a]n independent decision maker; E. [a] written statement by the fact-finder as to the evidence relied on and the reasons for transferring the inmate; F. [a]vailability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and G. [e]ffective and timely notice of all the foregoing rights." Because of the nature of infectious diseases, and the need for quarantine and isolation to avoid clear and immediate dangers to others, it is not likely that some of these procedural safeguards can be provided in the context of quarantine and isolation. For example, a patient suffering

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201. For example, Minnesota statute on isolation and quarantine, M.S.A. § 144.4195 subdivision. 5(b) (2011) provides in relevant part: "[A]ny person subject to isolation or quarantine has the right to be represented by counsel. Persons not otherwise represented may request the court to appoint counsel at the expense of the Department of Health or of a local public health board that has entered into a written delegation agreement with the commissioner under subdivision 7. The court shall appoint counsel when so requested and may have one counsel represent a group of persons similarly situated. The appointments shall be only for representation under subdivisions 3 and 4 and for appeals of orders under subdivisions 3 and 4. On counsel's request, the commissioner or an agent of a local board of health authorized under section 145A.04 shall advise counsel of protective measures recommended to protect counsel from possible transmission of the communicable disease. Appointments shall be made and counsel compensated according to procedures developed by the Supreme Court."


203. *Id.* at 494- 95 (1980).

204. See Daubert, *supra* note 19, at 1353 ("[P]ublic health officials and courts should seriously consider applying due process from a continuum framework: the greater the restraint and less definite the diagnosis, the greater the due process protections. This continuum notion is consistent with both substantive and procedural due process requirements. Such a framework will provide flexibility to public health officials and courts while at the same time offering the greatest amount of safeguards possible to protect the valued
from a highly contagious disease such as SARS or XDR TB cannot ask the court to hold a hearing with the person present, prior to issuing an isolation or quarantine order. In emergency situations, there likely will not be time to give such notice. Moreover, such a person cannot expect to confront and cross-examine witnesses relied on by the state. However, other remedies like habeas corpus challenge can be provided to the individual, with little or no harm to society. This will be in consonance with the cases that have found decisions of health officers to quarantine to be arbitrary and capricious.

CONCLUSION

To contain the spread of a contagious illness, public health authorities rely on many strategies. Two of these strategies are isolation and quarantine. In the absence of rapid and definitive diagnostic tests, vaccines, or cures, isolation and quarantine remains public health’s best strategy against the spread of mass illness. However, isolation and quarantine interfere with liberty. Additionally, their effects on economic interests are just as palpable. For example, those quarantined or isolated would be unable to participate normally in daily life costing employers productive workers and requiring people to fill in where necessary. It is therefore necessary that quarantine and isolation be used sparingly, and even more, adhere to the constitutional requirements of habeas corpus. The advantages of including habeas corpus are manifold: habeas is often the only means by which the executive branch can be induced to disclose information it may possess regarding detention, and to justify publicly the detention, it conforms with the Supreme Court’s long line of cases that teach that civil commitment for any purpose constitutes a significant individual right to liberty.”.

205. See Pub. Health Div., Office of the State Pub. Health Director, memo from Shannon O’Fallon, Senior Asst. Atty Gen., OR Dept of Justice, to Hon. Laurie Monnes Anderson, Chair, Senate Health Care, Human Serv’s and Rural Health Pol’y Comm. HB 2111A, Modifies Isolation and Quarantine Law. (May 2, 2011), (on file with author). The link here is wrong and I am unable to find the correct link or document.

206. Id.

207. Id.

208. CDC Fact Sheet, supra note 31.


211. Id.

212. Id.

213. Connolly & Falkoff, supra note 135.
deprivation of liberty that requires due process protection,\textsuperscript{214} and above all, it builds trust with the public. This trust is intended to encourage the [petitioner/ detainee] to disclose otherwise sensitive information allowing the health care giver to render treatment based upon full disclosure of the person's medical condition. \textsuperscript{215} This is an important cornerstone of public health practice. Finally, habeas corpus ensures that decisions of health officers are not arbitrary and capricious. In this sense, habeas corpus for quarantine and isolation detainee cans serve the private right without violating public policy.

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\item Addington, 441 U.S. at 425.
\item Sutton, supra note 90, at 154.
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