

4-29-2021

## Ashes to Ashes—The Coronavirus, Ebola, and the Erosion of Liberty and Property Interests in the Fight against Communicable Diseases

Casey C. DeReus

Follow this and additional works at: <https://digitalcommons.law.lsu.edu/lalrev>



Part of the Property Law and Real Estate Commons

---

### Repository Citation

Casey C. DeReus, *Ashes to Ashes—The Coronavirus, Ebola, and the Erosion of Liberty and Property Interests in the Fight against Communicable Diseases*, 81 La. L. Rev. (2021)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol81/iss3/9>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

# Ashes to Ashes—The Coronavirus, Ebola, and the Erosion of Liberty and Property Interests in the Fight against Communicable Diseases

Casey C. DeReus\*

## Table of Contents

Introduction .....	889
I. Contemporary Crises: COVID-19 and Ebola.....	893
A. COVID-19 Pandemic.....	893
B. Ebola Epidemic.....	896
C. Comparing and Contrasting COVID-19 and Ebola.....	899
II. Containing Disease by Restricting Individual Liberty .....	900
A. The Legal Bases for Isolation, Quarantine, and Stay-at-Home Orders .....	901
1. The Federal Power of Isolation and Quarantine.....	902
a. Federalism’s Central Role in Isolation and Quarantine.....	903
b. The PHSA Limits Isolation and Quarantine to Individuals Reasonably Believed to Pose a Threat of Spreading a Communicable Disease, and It Only Allows Isolation and Quarantine for Communicable Diseases That the President Has Enumerated.....	904
c. The PHSA Provides Penalties for Violations of Quarantine Laws .....	906
2. The General Police and Public Health Power of the States.....	906

---

Copyright 2021, by CASEY C. DEREUS.

\* Plaintiff-side civil litigator at Baer Law, LLC. The author focuses her practice on inadequate security cases and catastrophic injury cases at both the trial and appellate levels. The author thanks her husband, Garret S. DeReus, for his support, patience, and thoughtful feedback on this Article—especially for his insights on the Americans with Disabilities Act—and every other project she undertakes. She is also grateful to Andrea Gregory DiSandro, Peyton E. Sorah, and Liz Lorio Baer for their comments on this Article. Highest praise to the Louisiana Law Review editorial team for their hard work and professionalism throughout the editing process.

a.	Historically, Supreme Court Deference to State Authority Regarding Isolation and Quarantine Legislation Has Promoted Federalism at the Expense of Fundamental Rights .....	907
b.	Federal Statutory Limits to State Public Health Powers.....	910
B.	Civil Commitment Law .....	916
1.	The Evolution of Due Process.....	917
2.	Procedural Due Process and Civil Commitment.....	917
3.	Substantive Due Process and Civil Commitment.....	920
C.	Contagious Disease Control through Restrictions on Individual Liberty in Louisiana .....	924
1.	Louisiana's Sanitary Code .....	925
2.	The Influence of the Model State Emergency Health Powers Act in Louisiana.....	928
a.	The Model State Emergency Health Powers Act.....	929
b.	Comparing the Model State Emergency Health Powers Act and the Louisiana Health Emergency Powers Act.....	930
c.	Louisiana Health Emergency Powers Act .....	930
III.	Containing Disease by Seizing Property .....	931
A.	Property under the Public Health Service Act .....	931
B.	The Case of Thomas Duncan: A Texas Perspective .....	932
C.	Property during a Louisiana Health Emergency .....	935
IV.	Proposal.....	936
A.	Heightened Due Process Protections for the Ill and Innocent .....	936
B.	Statutory Precision Regarding the Right to Refuse Medical Treatment.....	937
C.	Prophylactic Measures to Protect Property and Remedies for Violations of Procedural Safeguards .....	938
D.	Text of Proposed Legislation.....	939
	Conclusion.....	942

## INTRODUCTION

The American legal system embeds the principles of life, liberty, and property in its foundation. Yet, there is no consensus about what these words mean. Both political parties espouse these principles while frequently promoting radically different policies in their names. The lofty Lockean triumvirate can also create societal cognitive dissonance in times when its three core principles clash. In responding to the coronavirus, the United States faces questions that pit these values against each other. Should we embrace stay-at-home orders (restricting our physical liberty) to protect the lives of the vulnerable? How should individuals be punished who violate laws designed to protect public health? Can the federal government seize a private business's or a state's supply of masks?

Since the outbreak of COVID-19—colloquially known as the coronavirus—America has grappled with the trade-offs between individual freedoms and the health of society at large. The coronavirus is making people question “Americanness” and fundamental rights in new ways. For example, public and private Fourth of July fireworks celebrations around the nation were cancelled or forced to go digital in 2020 due to COVID-19.<sup>1</sup> Many state and local governments have capped attendance at religious services—including on major religious holidays (like Easter)—and until Justice Amy Coney Barrett replaced Justice Ruth Bader Ginsburg, a majority of the Supreme Court did not reject these types of caps.<sup>2</sup> Coronavirus laws have even restricted citizens' freedom of

---

1. Charles Passy & Wenxin Fan, *July Fourth Celebrations Are Subdued as U.S. Coronavirus Cases Surge*, WALL STREET J. (July 4, 2020, 6:16 PM), <https://www.wsj.com/articles/u-s-coronavirus-cases-surge-into-fourth-of-july-weekend-11593864203> [<https://perma.cc/7AGP-KZFA>] (noting that “[f]or many Americans, the pandemic has upended the traditional holiday celebrations, as fireworks displays have gone virtual or been canceled”).

2. Prior to Justice Amy Coney Barrett joining the Supreme Court, the Court had been more deferential to state authorities on public health measures. *Compare* *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (denying application for injunctive relief from California's cap limiting attendance at religious services to 25% capacity or 100 attendees, whichever is lower), *with* *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (enjoining Governor Cuomo of New York from enforcing an executive order imposing 10- and 25-person occupancy limits pending the disposition of the Second Circuit appeal on Free-Exercise-Clause grounds, and noting that Petitioner's First Amendment challenge was “likely to prevail”). In *South Bay United Pentecostal Church v. Newsom*, the majority reasoned that the California order restricted gatherings, more leniently treated only dissimilar activities (that is, those not involving congregation or extended physical proximity), and noted

movement between and among the states, with many states, such as New York, imposing mandatory quarantines on certain out-of-state travelers.<sup>3</sup>

While many Americans may be confronting these issues for the first time in their lives because of the coronavirus, these issues are far from new, and over the years all levels of government have addressed how to balance communicable disease containment and liberty interests.

This Article discusses the extent to which national and state governments currently exercise their authority to prevent the spread of communicable diseases, using two communicable diseases as examples: COVID-19 and Ebola.<sup>4</sup> These two outbreaks are useful foils for each other, while still having enough similarities to make comparison useful.

---

that the Constitution primarily entrusts the states with the power to regulate issues of health and safety of the people. By contrast, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court noted that other places where individuals congregate, including factories and schools, were treated less harshly than the religious groups, even though those groups had “admirable safety records.” *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67; see also *Temple Baptist Church v. City of Greenville*, 4:20-cv-00064-DMB-JMB, R. Doc. #6 (N. D. Miss. 2020); Jess Bravin, *Supreme Court Rejects Church Challenge to California’s Limits on In-Person Services During the Pandemic*, WALL STREET J. (May 30, 2020, 2:57 AM), <https://www.wsj.com/articles/supreme-court-rejects-church-challenge-to-californias-limits-on-in-person-services-during-the-pandemic-11586903463> [https://perma.cc/7XKW-HNTJ]; Brent Kendall, *Coronavirus Restrictions Can’t Disfavor Churches, Justice Department Says*, WALL STREET J. (Apr. 14, 2020, 8:51 PM), <https://www.wsj.com/articles/coronavirus-restrictions-cant-disfavor-churches-justice-department-says-11586903463> [https://perma.cc/CA98-E53U] (citing the U.S. statement of interest filed in a federal court case addressing church restrictions in the age of the coronavirus, which noted the balance between protecting fundamental rights and the government’s temporary, emergency powers by stating, “There is no pandemic exception . . . to the fundamental liberties the Constitution safeguards . . .” At the same time, the Constitution does not hobble government from taking necessary, temporary measures to meet a genuine emergency).

3. U.S. CONST. amend. XIV (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .”); N.Y. Exec. Order No. 205 (June 24, 2020) (“All travelers entering New York from a state with a positive test rate higher than 10 per 100,000 residents, or higher than a 10% test positivity rate, over a seven day rolling average, will be required to quarantine for a period of 14 days consistent with Department of Health regulations for quarantine.”).

4. There are, of course, other recent examples of viral outbreaks. Zika is a notable example. The Zika virus is substantially less severe than Ebola. Symptoms of Zika include fever, rash, joint pain, conjunctivitis, muscle pain, and headache.

On the one hand, the coronavirus is a comparatively easily transmitted virus with a low mortality rate for the population at large; it has spread worldwide and is a global pandemic the scale of which has not been seen in approximately 100 years. It is commonly described as the “novel coronavirus” because, up until the end of 2019, it was completely unknown.

On the other hand, Ebola is a comparatively difficult-to-transmit virus with a high mortality rate—in the epidemic, of the eleven people treated in the U.S., the fatality rate was 18%—for the population at large; although there were a handful of cases on American soil, it was contained. At the time of the 2014–2016 outbreak, it was generally well understood, since it had been studied since its discovery in 1976.

Both viruses triggered American legal disputes pitting the value of liberty (e.g., freedom of movement) against that of life (e.g., promotion of public health).

This Article does not address all the legal issues raised by contagious disease law, but instead focuses on those involving the rights of physical liberty and property rights through the lens of COVID-19 and Ebola. For the purposes of this Article, physical liberty includes freedom from apprehension and detention and freedom of movement.

In many ways, current quarantine laws and civil commitment laws undermine due process protections of innocent disease victims. System

---

*Zika Virus: Symptoms, Testing, & Treatment*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 3, 2019), <http://www.cdc.gov/zika/symptoms/index.html> [<https://perma.cc/G4T5-QWJW>]. It is rarely fatal. *Id.* It is primarily spread through the bite of an infected *Aedes* species of mosquito, although in rare cases it can be passed through sexual contact or from mother to child during pregnancy or birth. *Zika Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 24, 2019), <https://www.cdc.gov/zika/prevention/transmission-methods.html> [<https://perma.cc/FD6H-FYMA>]. “In 2015 and 2016, large outbreaks of Zika virus occurred in the Americas, resulting in an increase in travel-associated cases in US states, widespread transmission in Puerto Rico and the US Virgin Islands, and limited local transmission in Florida and Texas.” *Zika Virus: Statistics and Maps*, CTRS FOR DISEASE CONTROL & PREVENTION (Nov. 7, 2019), <https://www.cdc.gov/zika/reporting/index.html> [<https://perma.cc/QSR9-3BTH>]. In 2016 alone, there were 5,168 symptomatic Zika virus disease cases reported in the United States and an additional 36,512 in United States Territories. *Zika Virus: 2016 Case Counts in the US*, CTRS FOR DISEASE CONTROL & PREVENTION (Apr. 24, 2019), <https://www.cdc.gov/zika/reporting/2016-case-counts.html> [<https://perma.cc/8MVC-7CG7>]. By 2017, “the number of reported Zika virus disease cases in the United States started to decline.” *Zika Virus: Statistics and Maps*, *supra*.

failures during the Ebola outbreak show that state laws can erode the property rights of Americans and suggest that when panic sweeps the nation, the current system fails to protect public health or safeguard individual rights, prioritizing fear-based reactions over responses based on medical science.<sup>5</sup> Other failures have plagued the American coronavirus response, including a similar unwillingness to make science-based decisions as well as many individuals conflating their personal perspectives and opinions regarding liberty with constitutional rights.

To address these failures, Section I of this Article sets forth a general introduction to COVID-19 and Ebola and provides the factual background of the current pandemic and the 2014–2016 Ebola epidemic.<sup>6</sup> It also compares and contrasts COVID-19 and Ebola to illuminate how legal violations during the United States' two most notable recent outbreaks threaten liberty interests. Section II explains the liberty interests at stake and the threats that current federal and Louisiana laws pose to these liberty interests. Section III analyzes how current laws threaten property interests, as seen through a detailed discussion of Thomas Eric Duncan, an Ebola victim in Texas, and through the Louisiana Emergency Health Powers Act. Finally, Section IV offers a proposal for striking a scientifically-informed

---

5. For example, public health failures in the case of Thomas Eric Duncan include a hospital's failure to screen him for Ebola even though he went to the hospital on September 25, 2014—in the midst of the Ebola outbreak. Greg Botelho, *U.S. Ebola Patient: The Travels and Health Travails of Thomas Eric Duncan*, CNN (Oct. 2, 2014, 9:29 PM), <http://www.cnn.com/2014/10/01/health/us-ebola-patient/> [<https://perma.cc/GZ8A-5XJJ>]. Even though he reportedly informed the health care workers at the hospital that he had recently traveled to Liberia, the hospital did not screen him for Ebola, and he was discharged after spending a mere five hours in the hospital because his symptoms were “not . . . specific to Ebola.” *Id.* On the other hand, the destruction of the contents of his apartment reflects a failure to safeguard private property rights. *See infra* notes 205–26 and text accompanying.

6. There have been numerous Ebola outbreaks from 2014 through the time of this writing. The largest, and the only multinational outbreak, started in March 2014 and lasted for two-and-a-half years. It spanned multiple countries in West Africa. For the purposes of this paper, “Ebola outbreak” refers to this large, West African epidemic. Separate outbreaks occurred in the Democratic Republic of the Congo from August to November 2014 and in certain regions of the Democratic Republic of the Congo in 2017, 2018, and 2020. *History of Ebola Virus Disease (EVD) Outbreaks*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 22, 2020), <https://www.cdc.gov/vhf/ebola/history/chronology.html> [<https://perma.cc/MZU4-P4TM>]; *2014–2016 Ebola Outbreak in West Africa*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 8, 2019), <https://www.cdc.gov/vhf/ebola/history/2014-2016-outbreak/index.html> [<https://perma.cc/W7ZA-WZ6A>].

balance between public health and liberty laws in Louisiana. As discussed in greater detail below, the proposal requires that Louisiana lawmakers: (1) specifically grant due process protections to those who are considered to be a “disease risk”; (2) protect fundamental rights by enacting least-restrictive alternative requirements in the communicable disease context; (3) restrict the seizure and destruction of potentially contaminated property unless necessary and insulate property-holders from paying for decontamination or destruction measures; and (4) provide a remedy for individuals whose rights under the amended law are violated.

## I. CONTEMPORARY CRISES: COVID-19 AND EBOLA

During the 10-year period from 2011 to 2021, a number of viral infections have threatened American shores. Two of these—COVID-19 & Ebola—are addressed in this Article.

### A. COVID-19 Pandemic

The novel coronavirus first appeared in China at the end of 2019.<sup>7</sup> Based on field investigations, epidemiologists determined the virus possibly came from an animal sold at a wet market in China, meaning that it was likely zoonotic in origin.<sup>8</sup> Despite the strong evidence that the wet market played a role in spreading the virus early on, the exact origins of the disease are not definitively known, with some—including former President Trump—speculating that the virus actually originated at the nearby Wuhan Institute of Virology.<sup>9</sup>

---

7. *COVID-19: Identifying the Source of the Outbreak*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 1, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/about-epidemiology/identifying-source-outbreak.html> [<https://perma.cc/EE2M-CHHC>].

8. *Id.*; *Listings of WHO’s Response to COVID-19*, WORLD HEALTH ORG. (June 29, 2020), <https://www.who.int/news-room/detail/29-06-2020-covidtime-line> [<https://perma.cc/C8KN-P294>].

9. Jon Cohen, *Mining Coronavirus Genomes for Clues to the Outbreak’s Origins*, SCIENCE (Jan. 31, 2020, 6:20 PM), <https://www.sciencemag.org/news/2020/01/mining-coronavirus-genomes-clues-outbreak-s-origins> [<https://perma.cc/9AEW-8R65>] (explaining, “Strong evidence suggests the marketplace played an early role in spreading 2019-nCoV, but whether it was the origin of the outbreak remains uncertain. Many of the initially confirmed 2019-nCoV cases—27 of the first 41 in one report, 26 of 47 in another—were connected to the Wuhan market, but up to 45%, including the earliest handful, were not. This raises the possibility that the initial jump into



In the following months, the coronavirus case count exploded, spreading around the world and leading the World Health Organization to characterize it as a pandemic—or an epidemic that has spread over a large area—on March 11, 2020.<sup>10</sup>

Due to the novel nature of the coronavirus—as well as its ongoing mutation and rapidly spreading new strains—the modes of transmission remain unclear. Indisputably, transmission can occur through contact or droplet transmission—“direct, indirect, or close contact with infected people through infected secretions such as saliva and respiratory secretions or their respiratory droplets, which are expelled when an infected person coughs, sneezes, talks or sings.”<sup>11</sup>

More than a year after the novel virus was first identified, the possibility of true, airborne transmission was still up in the air.<sup>12</sup> The World Health Organization defines airborne transmission “as the spread of an infectious agent caused by the dissemination of droplet nuclei (aerosols) that remain infectious when suspended in air over long distances and time.”<sup>13</sup> While it is clear that airborne transmission is possible during

people happened elsewhere,” and referencing conspiracy theories implicating the Wuhan Institute of Virology).

10. *Listings of WHO’s Response to COVID-19*, *supra* note 8. The definition of a pandemic is “an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people.” A DICTIONARY OF EPIDEMIOLOGY 185 (John M. Last ed., 4th ed. 2001).

11. *Transmission of SARS-CoV-2: Implications for Infection Prevention Precautions*, WORLD HEALTH ORG. (July 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions> [<https://perma.cc/3JBD-8J3A>].

12. Brian Resnick, *Scientists Say the Coronavirus Is Airborne. Here’s What That Means.*, VOX, <https://www.vox.com/science-and-health/2020/7/13/21315879/covid-19-airborne-who-aerosol-droplet-transmission> [<https://perma.cc/WT6D-7793>] (last updated Oct. 5, 2020). In the field of public health, airborne transmission and droplet transmission are similar but distinct concepts. *Scientific Brief: SARS-CoV-2 and Potential Airborne Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html> [<https://perma.cc/UR8C-6WCW>] (last updated Oct. 5, 2020). While both refer to spread through respiratory droplets, airborne transmission is characterized by smaller droplets and particles than can remain suspended in the air over longer distances (usually farther than 6 feet) and periods of time (hours). *Id.* Although the possibility of true airborne transmission remains unclear, it is clear that the primary mode of exposure is through respiratory droplets. *Id.*

13. *Transmission of SARS-CoV-2: Implications for Infection Prevention Precautions*, *supra* note 11.

medical procedures that produce aerosols, it is not clear if the coronavirus can be spread through aerosols *without* aerosol-generating procedures.<sup>14</sup>

Other possible modes of transmission include fomite transmission, or transmission through contaminated surfaces (no specific reports directly demonstrating transmission, despite consistent evidence that the virus can contaminate and survive on certain surfaces); bloodborne transmission (possible but unlikely); and intrauterine transmission (no evidence so far, but data are limited).<sup>15</sup>

The incubation period for the coronavirus is up to 14 days after exposure, with a median time of 4 to 5 days from exposure.<sup>16</sup> The coronavirus impacts individuals in different ways. As of November 2020, the estimated proportion of asymptomatic individuals testing positive for COVID-19 varied widely, with estimates ranging from 20% to 40% for the general population.<sup>17</sup> The risk of a severe case of the coronavirus increases with age; the greatest risk for severe illness from COVID-19 is for those 85 or older.<sup>18</sup> Those with underlying medical conditions are also at increased risk for severe illness.<sup>19</sup> The most common symptoms include fever, dry cough, and tiredness.<sup>20</sup> Yet, a range of less common symptoms occur as well, including aches and pains, sore throat, diarrhea, conjunctivitis, headache, loss of taste or smell, skin rash, and discoloration of fingers or toes.<sup>21</sup> In severe cases, symptoms include difficulty breathing or shortness of breath, chest pain or pressure, and loss of speech or movement.<sup>22</sup>

---

14. *Id.*

15. *Id.*

16. *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html> [<https://perma.cc/MT4X-B8YD>] (last updated Dec. 8, 2020).

17. *COVID-19 Science Update Released: November 17, 2020 Edition 65*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/library/covid19/111720\\_covidupdate.html](https://www.cdc.gov/library/covid19/111720_covidupdate.html) [<https://perma.cc/MB2T-73PX>] (last updated Jan. 20, 2021).

18. *Older Adults*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> [<https://perma.cc/Z72A-ULE2>] (last updated Dec. 13, 2020).

19. *Id.*

20. *Coronavirus: Symptoms*, WORLD HEALTH ORG., [https://www.who.int/health-topics/coronavirus#tab=tab\\_3](https://www.who.int/health-topics/coronavirus#tab=tab_3) [<https://perma.cc/NW76-RKW4>] (last visited Jan. 16, 2021).

21. *Id.*

22. *Id.*

The early symptoms, which include fever and sore throat, can be easily mistaken as symptoms of a less lethal illness.<sup>23</sup> Unfortunately, these mild early symptoms likely lead patients to delay diagnosing and treating their illness. Additionally, nonspecific symptoms sometimes hinder medical professionals from accurately diagnosing the virus, since these symptoms are often associated with more common, less lethal diseases.<sup>24</sup> As of January 27, 2021, the CDC reports 25,152,433 cases of COVID-19 in the United States.<sup>25</sup> As of that same date, 2,149,700 people have died worldwide due to COVID-19.<sup>26</sup>

### B. Ebola Epidemic

During the autumn of 2014, the spread of the Ebola virus from West Africa to developed Western nations triggered a wave of international anxiety.<sup>27</sup> The outbreak likely spread from a single boy who played near fruit bats in Guinea to approximately 28,603 individuals in 10 countries, illustrating the dangers of the spread of communicable diseases in the world today.<sup>28</sup> Although only 11 people were treated for Ebola in the United States during this epidemic and only two of them died from it, the outbreak lingered for two and a half years, ravaging West Africa and

---

23. See *infra* note 43 and text accompanying, discussing similar early symptoms in the Ebola context.

24. *Ebola (Ebola Virus Disease): Diagnosis*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 5, 2019), <http://www.cdc.gov/vhf/ebola/diagnosis/index.html> [<https://perma.cc/UCP8-7JLE>].

25. *Coronavirus Disease 2019 (COVID-19): CDC COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesper100klast7days](https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days) [<https://perma.cc/S9J3-6MXE>] (last visited Jan. 27, 2021).

26. As of January 27, 2021, the WHO reported 2,149,700 COVID-19-related cases worldwide. *WHO Coronavirus Disease (COVID-19) Dashboard*, WORLD HEALTH ORG., <http://www.who.int/csr/disease/ebola/overview-august-2014/en/> [<https://perma.cc/F7LZ-JVK3>] (last visited Jan. 27, 2021).

27. See, e.g., Amy Maxmen, *Ebola Panic Looks Familiar to AIDS Activists*, NEWSWEEK (Nov. 3, 2014, 4:38 PM) <http://www.newsweek.com/2014/11/14/ebola-panic-looks-familiar-aids-activists-281545.html> [<https://perma.cc/4Y8M-2MAS>]; Russell Berman, *The Quiet End to the U.S. Ebola Panic*, ATLANTIC (Nov. 11, 2014), <http://www.theatlantic.com/health/archive/2014/11/the-quiet-end-to-the-us-ebola-panic-craig-spencer/382623/> [<https://perma.cc/9WTM-URQ9>]; Carter Evans, *Ebola Panic Spreading Much Faster Than Disease in U.S.*, CBS NEWS (Oct. 18, 2014, 10:23 PM), <https://www.cbsnews.com/news/ebola-panic-in-us-spreading-much-faster-than-disease/> [<https://perma.cc/23KZ-K2T6>].

28. *History of Ebola Virus Disease (EVD) Outbreaks*, *supra* note 6.

killing 11,325 people.<sup>29</sup> The persistence of the outbreak is in part explained by the pathological origins of the Ebola virus. The virus was likely zoonotic in origin.<sup>30</sup> In other words, it is carried by animal vectors<sup>31</sup> and can be transmitted by these animals to humans.<sup>32</sup> However, the long-term host animal, or the animal reservoir, of Ebola has traditionally been difficult to pinpoint.<sup>33</sup> Although a certain species of African bat is thought to be the animal reservoir of Ebola, these animals do not display symptoms of the virus.<sup>34</sup>

Contrary to rumors during the outbreak, Ebola is not airborne; humans can only become infected with Ebola through (1) direct contact with the blood or body fluids of infected animals (either vectors or animals sick with Ebola), (2) with the blood or body fluids of a person who is suffering from Ebola, or (3) with objects contaminated with blood or body fluids from animals or other humans.<sup>35</sup> Direct contact with bodily fluids of an

---

29. *2014–2016 Ebola Outbreak in West Africa*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 8, 2019), <https://www.cdc.gov/vhf/ebola/history/2014-2016-outbreak/> [<https://perma.cc/WS89-JQ7X>].

30. Almudena Mari Saéz et al., *Investigating the Zoonotic Origin of the West African Ebola Epidemic*, 7.1 EMBO MOLECULAR MED. 17, 17–18 (2015); David M. Pigott et al., *Mapping the Zoonotic Niche of Ebola Virus Disease in Africa*, J. OF EPIDEMIOLOGY & GLOB. HEALTH 1, 3 (2014).

31. A DICTIONARY OF EPIDEMIOLOGY, *supra* note 10 (“In infectious disease epidemiology, [a vector species is] an insect or any living carrier that transports an infectious agent from an infected individual or its wastes to a susceptible individual or its food or immediate surroundings. The organism may or may not pass through a developmental cycle within the vector.”).

32. Great apes contract Ebola, but they are probably dead-end hosts, like humans; however, there is evidence that the human outbreaks are linked to bats, which suggests that bats are the underlying reservoir species. David M. Pigott et al., *supra* note 30; *see also* Almudena Mari Saéz et al., *supra* note 30.

33. A recent study of the origins of the current Ebola outbreak “expand[ed] the range of plausible Ebola virus sources to include insectivorous bats.” Almudena Mari Saéz et al., *supra* note 30.

34. *Guinea Ebola Outbreak: Bat-Eating Banned to Curb Virus*, BBC NEWS (Mar. 25, 2014, 4:50 PM), <https://www.bbc.com/news/world-africa-26735118> [<https://perma.cc/F7X4-3SJS>].

35. Anna Almendral, *The Most Destructive Myths about Ebola Virus, Debunked*, HUFFPOST HEALTHY LIVING (Aug. 6, 2014, 4:53 PM), [http://www.huffingtonpost.com/2014/08/06/ebola-myths\\_n\\_5655662.html](http://www.huffingtonpost.com/2014/08/06/ebola-myths_n_5655662.html) [<https://perma.cc/SUX7-63LF>] (discussing rumors about Ebola); *Ebola (Ebola Virus Disease): Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 5, 2019), <http://www.cdc.gov/vhf/ebola/transmission/> [<https://perma.cc/LL58-T9VY>].

infected person can occur during medical procedures, home care, burial practices, and other ways.<sup>36</sup> Since vector species can transport and spread the disease without manifesting outward signs that they are carriers, the zoonotic origins of Ebola suggest that it will be difficult, perhaps impossible, to eradicate all forms of the virus.<sup>37</sup>

To date, five Ebola species have been identified, and of the five subtypes, *Zaire ebolavirus* (ZEBOV) is the particular strand of the virus underlying the 2014 Ebola outbreaks.<sup>38</sup> ZEBOV is the most lethal strain of Ebola.<sup>39</sup> If contracted, the Ebola virus can affect humans in a number of ways. The Ebola virus is a severe hemorrhagic fever that causes capillary linings to leak.<sup>40</sup> As the leaking continues, it drains the blood until there is not enough for proper circulation to continue, eventually leading to multiple organ failure.<sup>41</sup>

The incubation period for ZEBOV is 2 to 21 days after contact with the virus.<sup>42</sup> The early symptoms, which include fever, sore throat, and muscle and joint pain, can be easily mistaken as symptoms of a less lethal illness.<sup>43</sup> Unfortunately, these mild, early symptoms likely lead patients to delay diagnosing and treating their illness. Additionally, nonspecific symptoms sometimes hinder medical professionals from accurately diagnosing the virus, since these symptoms are often associated with more

---

36. *Barriers to Rapid Containment of the Ebola Outbreak*, WORLD HEALTH ORG. (Aug. 11, 2014), <http://www.who.int/csr/disease/ebola/overview-august-2014/en/> [<https://perma.cc/AYB4-RKHQ>].

37. See A DICTIONARY OF EPIDEMIOLOGY, *supra* note 10; see *supra* note 31 (defining vector species).

38. Almudena Mari Saéz et al., *supra* note 30; Nadia Wauquier et al., *Human Fatal Zaire Ebola Virus Infection Is Associated with an Aberrant Innate Immunity and with Massive Lymphocyte Apoptosis*, 4 PLOS NEGLECTED TROPICAL DISEASES 1 (2010); *History of Ebola Virus Disease (EVD) Outbreaks*, *supra* note 6.

39. Wauquier et al., *supra* note 38, at 1.

40. *Haemorrhagic Fevers, Viral*, WORLD HEALTH ORG., [http://www.who.int/topics/haemorrhagic\\_fever\\_viral/en/](http://www.who.int/topics/haemorrhagic_fever_viral/en/) [<https://perma.cc/P2XQ-3JBY>] (last accessed Jan. 16, 2021); DAVID B. JACOBY & R. M. YOUNGSON, *ENCYCLOPEDIA OF FAMILY HEALTH* 540 (3d ed. 2005); Wauquier et al., *supra* note 38, at 1–2 (discussing the effects of ZEBOV compared to other strains of the virus in animals and stating that more research is needed to know the exact human responses to ZEBOV).

41. JACOBY & YOUNGSON, *supra* note 40, at 540.

42. *Ebola (Ebola Virus Disease): Signs and Symptoms*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 5, 2019), <https://www.cdc.gov/vhf/ebola/symptoms/index.html> [<https://perma.cc/DD4L-7HJ4>].

43. Early symptoms also include severe frontal headache and loss of appetite. JACOBY & YOUNGSON, *supra* note 40, at 540.

common, less lethal diseases.<sup>44</sup> If not addressed at its earliest stages, additional symptoms arise, such as diarrhea, vomiting, bleeding from orifices and gums, the failure of blood to clot, and multiple organ failure.<sup>45</sup> Many cases end ultimately in death.<sup>46</sup> By the end of the 2014 to 2016 outbreak, 11,325 people had died from ZEBOV.<sup>47</sup> Eleven people—mostly medical workers—were treated for Ebola in the United States during the recent epidemic.<sup>48</sup>

### *C. Comparing and Contrasting COVID-19 and Ebola*

Subsections I.A and I.B above outline the characteristics of COVID-19 and Ebola that are needed to understand the legal discussion that follows. For the convenience of the reader, the chart below summarizes the key characteristics of each disease.

---

44. *Ebola (Ebola Virus Disease): Diagnosis*, *supra* note 24.

45. JACOBY & YOUNGSON, *supra* note 40, at 540.

46. The Ebola outbreak resulted in 11,325 deaths. *2014–2016 Ebola Outbreak in West Africa*, *supra* note 29.

47. *Id.*

48. *Id.*

Figure 1: Comparing &amp; Contrasting the Coronavirus and Ebola

	<b>Coronavirus</b>	<b>Ebola</b>
<b>Origin</b>	Likely zoonotic, but not confirmed	Zoonotic
<b>Transmission</b>	Contact or droplet transmission; possibility of airborne transmission; other modes of transmission uncertain	Direct contact with contaminated blood or body fluids required; not airborne
<b>Extent of Spread</b>	Worldwide pandemic	Epidemic (primarily in West Africa)
<b>Incubation Period</b>	Up to 14 days; median of 4 to 5 days from exposure to symptom onset	2 to 21 days
<b>Range of Symptoms</b>	Asymptomatic; mild to moderate; severe; death	Generally severe, often deadly
<b>Demographics</b>	Elderly and those with pre-existing, chronic medical conditions at higher risk of severe complications or death	N/A
<b>Medical Knowledge</b>	Still developing; novel virus	Reasonably well-understood at the time of the outbreak
<b>Confirmed Cases in U.S. as of 1/27/21</b>	25,152,433	11 (final number treated in U.S., mostly healthcare workers)
<b>Worldwide fatalities as of 1/27/21</b>	2,149,700	11,325 (final number)

## II. CONTAINING DISEASE BY RESTRICTING INDIVIDUAL LIBERTY

There are two bodies of law that authorize, at least in some circumstances, restrictions on an individual's right to physical liberty through confinement to prevent the spread of contagious diseases:

(1) isolation and quarantine law and (2) civil commitment law.<sup>49</sup> This Section discusses these two areas of law in further detail. Subsection A analyzes federal and state isolation and quarantine laws and the ostensible federal limits to state power regarding isolation and quarantine. Subsection B surveys civil commitment law. Finally, Subsection C evaluates how Louisiana balances these two avenues to restrict individual liberty with each individual's fundamental rights.

#### *A. The Legal Bases for Isolation, Quarantine, and Stay-at-Home Orders*

Although in common parlance people use the term “quarantine” to describe the gamut of liberty-restricting measures used to combat the spread of communicable diseases, isolation, quarantine, and stay-at-home orders are all distinct concepts. The CDC defines quarantine as “separat[ing] and restrict[ing] the movement of people who were exposed to a contagious disease to see if they become sick.”<sup>50</sup> This is distinguishable from isolation, which “separates sick people with a contagious disease from people who are not sick.”<sup>51</sup> Although not a quarantine in a medical sense, U.S. courts allow for states to implement quarantine-type laws of every description, and stay-at-home orders are part of this general quarantine power.<sup>52</sup> For this reason, this Article considers true, medical quarantine and stay-at-home orders together. Isolation and quarantine laws allow for the involuntary detention of contagious individuals (isolation), the restriction of the movement of people who were exposed to a contagious disease to see if they become sick (true quarantine), and the requirement of all individuals to stay home, regardless of their status as contagious, exposed, or otherwise (broad stay-at-home orders).

This Subsection discusses: (1) the federal government's public health powers, especially those relating to quarantine and isolation, and (2) the

---

49. Paula Mindes, *Tuberculosis Quarantine: A Review of Legal Issues in Ohio and Other States*, 10 J. L. & HEALTH 403, 408–09 (1996) (concisely describing the applicability of these two bodies of law to the containment of communicable diseases).

50. *Quarantine and Isolation*, CTNS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/quarantine/> [<https://perma.cc/BA9R-NKP3>] (Sept. 29, 2017).

51. *Id.*

52. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (the Supreme Court “has distinctly recognized the authority of a state to enact quarantine laws and ‘health laws of every description;’ indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states”).



states' general police power to regulate for purposes of health, safety, and welfare, including isolation and quarantine issues.

### 1. *The Federal Power of Isolation and Quarantine*

The federal government's response to the coronavirus outbreak is the most recent example in a long line of governmental measures used to combat communicable disease.<sup>53</sup> At the federal level, Congress may pass laws for public health purposes, but it must do so subject to constitutional limits.<sup>54</sup> More specifically, since the U.S. government is one of enumerated powers, it must ground any legislative initiatives on a constitutionally-enumerated power, and traditionally it has regulated public health through one of its most expansive powers—the power to regulate interstate and international commerce.<sup>55</sup>

Today, the federal government is empowered to control communicable diseases pursuant to the Public Health Service Act (PHSA).<sup>56</sup> In particular, the PHSA provides that the surgeon general, with the approval of the secretary of health, education, and welfare, may “make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from

---

53. Act of May 27, 1796, ch. 31, 1 Stat. 474 (repealed 1799).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and he is hereby authorized, to direct the revenue officers and the officers commanding forts and revenue cutters, to aid in the execution of quarantine, and also in the execution of the health laws of the states, respectively, in such manner as may to him appear necessary.

*Id.* Even in this early act, the federal government recognized the importance of *state* health laws. *See also* Exec. Order No. 13,909, 85 Fed. Reg. 16,227 (Mar. 23, 2020) (using executive power under the Defense Production Act of 1950 to allow for the prioritization and allocation of medical resources, including personal protective equipment, due to COVID-19); Exec. Order No. 14,001, 86 Fed. Reg. 7219 (Jan. 21, 2021) (using executive power to, *inter alia*, address public health supply chain to take inventory of resources, address pricing, create a supply chain strategy, and allow access to the Strategic National Stockpile).

54. U.S. CONST. art. I, § 1.

55. *Id.* art. I, § 8, cl. 3 (authorizing Congress to regulate commerce with foreign nations, Indian tribes, and among the states).

56. 42 U.S.C. § 264. Congress acted pursuant to its commerce power in enacting the PHSA. U.S. CONST. art. I, § 8, cl. 3; 42 U.S.C. § 264 (authorizing regulations necessary to prevent the introduction and spread of diseases from foreign countries into the United States or among the states).

foreign countries into the States or possessions, or from one State or possession into any other State or possession.”<sup>57</sup>

*a. Federalism’s Central Role in Isolation and Quarantine*

As explained above, the PHSA is designed to control communicable diseases in the transnational or interstate context. At the same time, the PHSA acknowledges the paramount role of states in handling public health matters like communicable disease outbreaks, clarifying that for preemption purposes none of the PHSA’s general isolation and quarantine laws (which the PHSA refers to as apprehension, detention, and release laws) should be construed as superseding any provision under state law, except to the extent that the state law conflicts with a specific exercise of federal authority.<sup>58</sup>

During the coronavirus pandemic, the Supreme Court reaffirmed the paramount role of the states in the field of public health and communicable disease response. In *South Bay United Pentecostal Church*, the Court considered California’s cap limiting attendance at religious services to 25% capacity or 100 attendees, whichever is lower, and ultimately denied an application for injunctive relief from this cap, with Chief Justice Roberts specifically noting in his concurrence that the Constitution primarily entrusts the states with the power to regulate issues of health and safety.<sup>59</sup>

The plain text of the PHSA and the Supreme Court’s *South Bay* decision both show that promoting public health and safety is first and foremost a state issue, and the federal government defers to states on these issues except in enumerated circumstances, such as to protect fundamental rights or to combat specific communicable diseases identified by the president from interstate or transnational spread.

---

57. 42 U.S.C. § 264(a). The language of the statute clarifies that there must be an interstate or foreign connection “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*,” thus satisfying the Commerce Clause requirement. *Id.* (emphasis added); U.S. CONST. art. I, § 8, cl. 3.

58. 42 U.S.C. § 264(e). The preemption provisions also address 42 U.S.C. § 266, which deals with special quarantine powers in time of war.

59. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020). *But see* *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020). For a comparison of these two cases, see *supra* note 2.

*b. The PHSA Limits Isolation and Quarantine to Individuals Reasonably Believed to Pose a Threat of Spreading a Communicable Disease, and It Only Allows Isolation and Quarantine for Communicable Diseases That the President Has Enumerated*

The PHSA provides that individuals may be apprehended and examined if it is “reasonably believed” that they are infected with a communicable disease that is either in a communicable stage or in “a precommunicable stage, if the disease would be likely to cause a public health emergency if transmitted to other individuals.”<sup>60</sup> The law limits these apprehension and examination powers in five ways—(1) an enumerated-disease requirement, (2) an interstate-or-border-control requirement, (3) a proper-purpose requirement, (4) a reasonable-belief requirement, and (5) a qualifying-stage requirement. In this way, the law is designed to address issues that arguably are beyond a state’s power, to lower the chance of less risky diseases resulting in isolation or quarantine, and to attempt—at least in theory—to limit pretextual detentions or abuses to cases of actual necessity.

First, the requirement that apprehension, detention, and conditional release powers only apply to communicable diseases identified by the president through executive orders limits the PHSA’s scope.<sup>61</sup> The current list of articulated communicable diseases includes Ebola by name and likely covers the coronavirus in the broader category of severe acute respiratory syndromes.<sup>62</sup> Perhaps because the broad respiratory syndrome category should cover COVID-19 anyway, former President Trump chose not to amend the list and include COVID-19 by name.<sup>63</sup> Thus, the federal government is only empowered to isolate or quarantine individuals to combat a subset of communicable diseases—those that the president has identified.

Second, the interstate-or-border-control requirement means that regulations enacted pursuant to the PHSA can only allow for apprehension and examination if an individual risks interstate spread of the

---

60. 42 U.S.C. § 264(d)(1)–(2).

61. *Id.* § 264(b) (applying to 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”); *see* Exec. Order No. 13,295, 3 C.F.R. 13295 (2004); Exec. Order No. 13,674, 3 C.F.R. 45671 (2015).

62. Exec. Order No. 13,295, 3 C.F.R. 13295 (2004); Exec. Order No. 13,674, 3 C.F.R. 45671 (2015).

63. Exec. Order No. 13,295, 3 C.F.R. 13295 (2004); Exec. Order No. 13,674, 3 C.F.R. 45671 (2015).

communicable disease or risks bringing the communicable disease into the United States.<sup>64</sup> This provision implicitly acknowledges federalism principles explicitly addressed in the preemption provision, by deferring to states as the starting point for public health law, and limits the federal involvement to interstate and international border issues.<sup>65</sup>

The third, fourth, and fifth requirements—proper purpose, reasonable belief, and qualifying stage—provide at least some safeguards to prevent pretextual detention or abuse of federal detention power. These requirements show that the subtext of the PHS Act addresses potential due process violations by limiting detention of individuals to those who pose an actual health threat, specifically *because* they pose a public health threat.<sup>66</sup>

The proper-purpose requirement only authorizes federal regulations providing for the apprehension, detention, or conditional release of individuals “for the purpose of preventing the introduction, transmission, or spread” of communicable diseases identified by the president; in other words, this provision prohibits pretextual detention of individuals for reasons other than combatting the spread of communicable disease.<sup>67</sup>

The reasonable-relief requirement grants the surgeon general broad regulatory authority to combat communicable disease outbreaks by allowing for apprehension and examination of those “reasonably believed to be infected with a communicable disease in a qualifying stage.”<sup>68</sup> Yet, there is no definition of what constitutes a “reasonable belief.”

Finally, the qualifying-stage requirement theoretically limits the ability to apprehend or examine an individual to those individuals who pose an actual, live risk of transmission, rather than a hypothetical risk of

---

64. Apprehension is restraining the physical liberty of an individual through detention measures like isolation or quarantine. 42 U.S.C. § 264(d)(1) (apprehension and examination only available if the individual is moving or about to move from one state to another or could be a probable source of infection to individuals who will be moving from one state to another); *id.* § 264(c) (regarding regulations for persons entering from foreign countries).

65. *See supra* Section II.A.1.a.

66. *Id.* § 264(a) (articulating that the purpose is to prevent the introduction, transmission, or spread of such communicable diseases without listing any other reasons).

67. *Id.* § 264(b). Although the principle of *inclusion unis et exclusion alterius* should make this obvious, the statute should go further and—to be crystal clear—explicitly state that the sole motive for apprehension or detention must be preventing the introduction, transmission, or spread of a communicable disease. Because this Article’s focus is on Louisiana legislative reform, this proposal is not further discussed.

68. *Id.* § 264(d)(1).

transmission. With respect to a communicable disease under the PHSA, a “qualifying stage” means either a communicable stage or a precommunicable stage, but only if the disease would cause a public health emergency if transmitted to other people.<sup>69</sup> In theory, if an individual with the disease in a precommunicable stage poses no risk of creating a public health emergency—for example, if the disease is mild enough that its spread would not cause a public emergency, or that can only be spread under unique and rare conditions—then isolation and quarantine should not be available. Interestingly, this presupposes an understanding of how and when a disease is communicable—which, as the COVID-19 pandemic has shown, is not always known or knowable at the time of government action. Likewise, the risk of a public health emergency is not always clear for novel diseases.

*c. The PHSA Provides Penalties for Violations of Quarantine Laws*

Any person who breaks quarantine regulations, including apprehension or detention regulation, shall be punished by “a fine of not more than \$1,000 or by imprisonment for not more than one year, or both.”<sup>70</sup>

*2. The General Police and Public Health Power of the States*

Although the PHSA grants the federal government vast quarantine and isolation authority—with no definition of what constitutes a “reasonable belief,” no restrictions on mixed motives (thus opening the door to pretextual apprehension and detention), and no definition of what would cause a qualifying public health emergency if an individual who is not in the communicable stage is detained—the bulk of quarantine and isolation authority actually resides with the states.<sup>71</sup> In a long line of cases, the Supreme Court has addressed and embraced the sweeping extent of state power regarding quarantine and isolation, prioritizing federalism over fundamental rights. This case law clashes with constitutional guarantees that protect individuals from arbitrary state action and state-sanctioned discrimination.

---

69. *Id.* § 264(d)(2).

70. *Id.* § 271 (these mandatory penalties are for regulations prescribed under § 264, which is what this Article has addressed; § 266, which governs special quarantine powers in time of war; and § 269, which governs bills of health).

71. General police power is reserved to the states. U.S. CONST. amend. X. For a discussion of the interplay between the Americans with Disabilities Act and quarantine and isolation law, see *infra* notes 94–124 and accompanying text.

*a. Historically, Supreme Court Deference to State Authority Regarding Isolation and Quarantine Legislation Has Promoted Federalism at the Expense of Fundamental Rights*

Some cases have contemplated the Commerce Clause as an avenue for limiting state government authority regarding isolation and quarantine through federal action.<sup>72</sup> The Supreme Court has traditionally interpreted the Commerce Clause narrowly when considering the constitutionality of state isolation and quarantine legislation.<sup>73</sup> For example, in *Gibbons v. Ogden*, the Court emphasized that quarantine laws were fundamentally public health laws within the purview of state legislative authority, even while acknowledging that quarantine laws affect interstate commerce.<sup>74</sup>

The Supreme Court decided *Compagnie Francaise De Navigation A Vapeur v. Louisiana State Board of Health* in the same vein.<sup>75</sup> In that case, the Court upheld a Louisiana statute that empowered the Louisiana Board of Health to prohibit the introduction of immigrants into any infected portion of the state when the board judged that their introduction would increase the prevalence of the disease.<sup>76</sup> It reasoned that even though such a prohibition would affect interstate and foreign commerce, the statute was a valid exercise of Louisiana's state power, at least absent congressional action on the issue.<sup>77</sup> The Supreme Court has not addressed how Congress's passage of the PHSA—including provisions related to interstate and international travel—impact the *Compagnie Francaise* rule, although because of the preemption clause, the primary power would likely continue to reside with the states unless the surgeon general passed regulations that created an actual conflict with a state law. As *Gibbons* and *Compagnie Francaise* show, Commerce Clause challenges to state isolation and quarantine laws have generally been unsuccessful.

Other cases instead focused on the Fourteenth Amendment as a limitation on state isolation or quarantine powers. For instance, in *Jacobson v. Massachusetts*, a landmark public health case, the Supreme Court stated, "Although this court has refrained . . . from any attempt to define the limits of that [general police] power, yet it has distinctly recognized the authority of a state to enact quarantine laws and 'health

---

72. *Gibbons v. Ogden*, 22 U.S. 1, 20, 71–72 (1824); *Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 385, 388 (1902).

73. *Gibbons*, 22 U.S. at 20, 71–72; *Compagnie*, 186 U.S. at 385 at 388.

74. *Gibbons*, 22 U.S. at 1, 71–72.

75. 186 U.S. at 385, 388.

76. *Id.*

77. *Id.*

laws of every description.”<sup>78</sup> In *Jacobson*, the Court ultimately rejected the defendant’s Fourteenth Amendment objection to a statute authorizing a local board to require an arguably dangerous<sup>79</sup> smallpox vaccination and to fine all those who refused to comply.<sup>80</sup> The Court reasoned that the liberty guaranteed by the Constitution was not absolute and that living in an organized society requires and justifies many restrictions on constitutional liberties to promote the safety of the public.<sup>81</sup> Thus, *Jacobson* prioritized public safety over individual safety and bodily autonomy by allowing states to forcibly vaccinate individuals.

State courts have joined the *Jacobson* Court in rejecting Fourteenth Amendment objections to state quarantine laws. In *Ex parte Company*, the Supreme Court of Ohio also explicitly rejected Fourteenth Amendment challenges to the state exercise of police power within the context of quarantine legislation.<sup>82</sup> Similarly, in *Moore v. Draper*, the Florida Supreme Court upheld a state quarantine statute when presented with a habeas corpus request challenging detention, reasoning that Equal Protection and Due Process Clauses were not intended to limit state police power any more in the field of state quarantine laws than they were in any other field.<sup>83</sup> Taken together, *Jacobson*, *Ex parte Company*, and *Moore* show that courts have historically prioritized state quarantine laws and public health powers over the Fourteenth Amendment.

Finally, courts have also considered the isolation and quarantine law in the context of the writ of habeas corpus. The Constitution prohibits the suspension of the writ of habeas corpus “unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>84</sup> The “Great Writ”—as it is called—“was designed to protect every person from being detained, restrained, or confined by any branch or agency of

---

78. 197 U.S. 11, 24–25 (1905).

79. *See id.* at 37 (discussing the potential dangers of the vaccine).

80. *Id.* at 39.

81. *Id.* at 26.

But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.

*Id.*

82. 139 N.E. 204, 205–07 (Ohio 1922).

83. 57 So. 2d 648, 649–50 (Fla. 1952).

84. U.S. CONST. art. I, § 9, cl. 2.

government.”<sup>85</sup> The Supreme Court has stated, “The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers.”<sup>86</sup> In *O’Connor v. Donaldson*, the Supreme Court considered a writ of habeas corpus in a non-criminal case—albeit in a civil-commitment context rather than a quarantine-or-isolation context.<sup>87</sup> In that case, Donaldson filed a class action complaint asking for habeas corpus relief for himself and all members of the class.<sup>88</sup> On appeal, the Supreme Court considered the civil commitment standard, reasoning that “a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members and friends.”<sup>89</sup>

Yet, earlier state courts addressed communicable-disease-based confinement in the context of a habeas corpus challenge, reaching more questionable conclusions. In *In re Caselli*, a detained woman (allegedly a prostitute) suffering from gonorrhea applied for a writ of habeas corpus to the Montana Supreme Court because she was detained without a hearing and based on factual challenges regarding her affliction or the threat she posed through her conduct.<sup>90</sup> In that case, Chief Justice Brantly expressed his disbelief that the Framers of the United States and Montana Constitutions could have envisioned a system that prevented a state from protecting itself through “prompt and speedy action from the spread of a contagion.”<sup>91</sup> The Montana Supreme Court ultimately discharged the writ and remanded the detainee to custody “until she shall become cured or until she may be safely allowed to go at large.”<sup>92</sup> The *Caselli* court implicitly addressed how gonorrhea could be transmitted by focusing on the detainee’s status as a prostitute (presumably because that is how the disease could spread), but did not discuss any of the following: lesser measures for preventing spread, the risk of disproportionately targeting traditionally disenfranchised groups, or any timeline for her release other

---

85. *Scaggs v. Larsen*, 396 U.S. 1206, 1208 (1969).

86. *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

87. *O’Connor v. Donaldson*, 422 U.S. 563, 565 n.1 (1975). The civil commitment aspect of this case is discussed in more detail in *infra* Subsection II.B.3.

88. *O’Connor*, 422 U.S. at 565 n.1.

89. *Id.* at 576.

90. 204 P. 364, 365 (Mont. 1922).

91. *Id.* at 364–65. The opinion specifically rejects the application of the Fourteenth Amendment to this line of cases. *Id.* at 364.

92. *Id.*



than until she was “cured” or could safely be allowed to go at large again—whatever that means. Similarly, in *In re McGee*, the Supreme Court of Kansas denied habeas relief to detainees allegedly suffering from venereal disease who had been moved to a state penitentiary for lack of other available space.<sup>93</sup>

Together, *O’Connor* and *Caselli* suggest that the writ of habeas corpus is one of the most powerful constitutional tools a detainee can use to challenge curtailment of physical liberty through improper isolation or quarantine.

*b. Federal Statutory Limits to State Public Health Powers*

Despite the lack of success of frontal Commerce Clause and Fourteenth Amendment challenges to isolation and quarantine law, they remain key federal limits to improper detention based on discriminatory state laws through the Americans with Disabilities Act (ADA) and the Americans with Disabilities Amendments Act of 2008 (ADAAA) (collectively referred to herein as “ADA”).

Congress used its powers under the Fourteenth Amendment and the Commerce Clause to enact the ADA, which became law in 1990.<sup>94</sup> In particular, the ADA relies on the Equal Protection Clause to protect a class

---

93. 185 P. 14 (Kan. 1919) (denying habeas relief to detainees allegedly suffering from venereal disease who had been moved to a state penitentiary for lack of other available space); *see also infra* notes 118–124 and text accompanying.

94. 42 U.S.C. § 12101 (2018). In the introductory fact-findings in the initial version of the ADA, Congress stated as follows:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions . . . .

42 U.S.C. § 12101(a)(7) (1990). This language evokes the language in footnote four in the case of *United States v. Carolene Products Co.* 304 U.S. 144, 152 n.4 (1938) (promoting heightened scrutiny for classes of discrete and insular minorities). Interestingly, in 2008 Congress amended this portion of the ADA, deleting the section on individuals in discrete and insular minorities. Pub. L. No. 110-325, 22 Stat. 3554 (codified at 29 U.S.C. § 705); *see also* Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes be Undone?*, 8 J. L. & HEALTH 15, 15–16 (1993) (discussing the constitutional importance of the prior language for Fourteenth Amendment claims under the ADA); 42 U.S.C. § 12101(b)(4) (2018).

of people—individuals with disabilities—from discrimination.<sup>95</sup> Since the congressional power underlying the ADA springs from the Constitution, it preempts state quarantine laws that violate constitutional strictures.<sup>96</sup> The ADA defines an individual with a disability as one who has a “physical or mental impairment that substantially limits one or more major life activities of such individual” or as one who has “a record of such impairment.” Individuals who are merely “regarded as having such an impairment,” even if, in fact, they do not have a qualifying impairment, still receive the protection of the ADA; however, an individual cannot be “regarded as having such an impairment” for impairments that “are transitory or minor.”<sup>97</sup>

Communicable diseases can, but do not always, qualify as disabilities under the ADA; for example, the Supreme Court has applied the ADA to cases involving tuberculosis and human immunodeficiency virus (HIV).<sup>98</sup> However, there is a “direct threat” defense to the ADA.<sup>99</sup> Under Title I of the ADA, which governs employment, the direct threat defense allows for an employer to use qualification standards, including “a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace,” to screen or deny a job or benefit to an individual with a disability.<sup>100</sup> Similarly, Title III of the ADA, which governs private entities open to the public, provides a direct threat

---

95. Perlin, *supra* note 94, at 15–16.

96. See *supra* Section II.A.2.a (discussing cases involving state laws which, if decided today, would need to consider the ADA when assessing compliance with federal law); see also U.S. CONST. art. VI, § 2 (the Supremacy Clause).

97. 42 U.S.C. § 12102(1)–(3); 42 U.S.C. § 12102(3)(B). A transitory impairment is one “with an actual or expected duration of 6 months or less.” 42 U.S.C.A. § 12102(3)(B).

98. Individuals with tuberculosis can qualify for ADA protection. *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 280–81 (1987) (tuberculosis can qualify as a handicap under the Rehabilitation Act); *Bragdon v. Abbott*, 524 U.S. 624, 630–32 (1998) (construing the ADA to grant at least as much protection to individuals with disabilities as the Rehabilitation Act and holding that an HIV infection that had not yet progressed to the symptomatic phase was nonetheless a disability under the ADA because an HIV infection prior to the symptomatic phase qualifies as a “physical or mental impairment that substantially limits one or more . . . of the major life activities [of an infected individual]”).

99. 42 U.S.C. §§ 12111, 12113(b) (direct threat in employment context); 28 C.F.R. § 35.139 (direct threat and public entities); 28 C.F.R. § 36.208 (direct threat and places of public accommodations).

100. 42 U.S.C. § 12113(a)–(b).

exception.<sup>101</sup> Finally, and most importantly for the purposes of government legislation regarding communicable diseases, Title II of the ADA, which applies to government entities, incorporates a similar defense.<sup>102</sup>

Title II prohibits discrimination by public entities, including state and local governments and their departments and agencies, for public services.<sup>103</sup> It states: “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>104</sup> Although forced detention based on state power is arguably not a qualifying “benefit,” as such, it would still likely be covered by Title II based on the broad right of individuals with disabilities to be free of “discrimination by such entity.”<sup>105</sup> Furthermore, even though detention is not in and of itself a qualifying “benefit,” if some quarantined detainees were denied benefits given to other patients, such as certain food options or family visitation rights, then they would still have a claim under the “benefits of services, programs, or activities” clause.<sup>106</sup>

Of the three types of the physical liberty restrictions in the communicable disease context— isolation, quarantine, and stay-at-home

---

101. 42 U.S.C. § 12182.

Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term “direct threat” means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

*Id.* § 12182(b)(3).

102. *Id.* §§ 12131–34; *id.* §§ 12141–50; *id.* §§ 12161–65.

103. *Id.* § 12131(1).

104. *Id.* § 12132. For the purpose of the ADA, a “qualified individual with a disability” is an individual who “meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” *Id.* § 12131(2).

105. Carlos A. Ball & Mark Barnes, *Public Health and Individual Rights: Tuberculosis Control and Detention Procedures in New York City*, 12 YALE L. & POL’Y REV. 38, 58–59 (1994) (questioning whether detention for public health purposes involves state entities providing “benefits of services, programs, or activities”).

106. *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 559, 561 (7th Cir. 1996) (affirming a prisoner’s award of damages for lack of program access to, among other things, visitation facilities).

orders—isolation laws are the ones that are most likely to have the direct threat exception apply. Because isolated individuals are separated from others *because* they have a contagious disease the direct threat exception could apply to isolated individuals as long as the disease poses a qualifying significant risk and is not too temporary or minor to qualify. Under these circumstances, the direct threat exception would allow for isolation of these individuals. In other words, state laws that regulate the spread of communicable diseases operate in harmony with the ADA to the extent that individuals with qualifying disabilities, including contagious diseases, pose a direct threat to public health and safety.

To the extent that state laws discriminate against individuals with communicable diseases that qualify as disabilities, even when those individuals do not pose a direct threat, those state laws violate the ADA. Isolating an individual who poses only a hypothetical threat to public safety would likely fail the significant risk requirement. This type of action prioritizes speculation over an individualized assessment of the risks posed by the individual. For example, an Ebola-positive individual may pose a low threat to society at large because that disease is comparatively difficult to transmit, whereas a COVID-19-positive individual may pose a higher threat of transmitting the disease because it can be transmitted through droplets or, possibly, even through the air. Since isolation laws target individuals whose impairments are diseases that could spread to others (which could, depending on the disease, create a significant risk), the ADA probably does not apply to these laws because isolation presupposes the existence of the disease, which in turn could pose a significant risk to the community and qualify as a direct threat.<sup>107</sup>

State quarantines are a different story. Because a true quarantine restricts the liberty of individuals who have merely been exposed to a contagious disease to see if they are in fact infected, the direct threat exception would not apply at all, since the threat of danger is merely hypothetical. However, only a quarantined individual who was later determined to actually have the communicable disease could be a qualifying individual under the ADA.

The legislative history of the ADA shows the thought process behind the direct threat exception:

[I]f a state or locality has a disease control law or any other public health law, which applies to certain people with disabilities (for example, if a state has a law which required people with certain contagious diseases, such as tuberculosis, to take certain

---

107. See *supra* notes 50–52 and text accompanying.

precautions), that law [will] not be preempted by the ADA as long as the requirements of that state or local law were designed to protect against individuals who pose a direct threat to the health or safety of others.<sup>108</sup>

Quarantine laws are designed to target people who have merely been *exposed* to and *potentially* have a communicable disease like the coronavirus or Ebola.<sup>109</sup> Since quarantined individuals may not even be contagious, they might not pose *any* threat—much less a “direct” threat—to the health or safety of others.<sup>110</sup> Nevertheless, since the ADA’s definition of “disability” includes those who are *regarded* as having an impairment, even if it does not actually exist, individuals who have been exposed to a contagious disease—at least one permanent enough to qualify as a disability—would have a statutory right to be free from discrimination based on their perceived impairment.<sup>111</sup> Thus, an analysis of the statutory text suggests that the ADA does not preempt state isolation laws where the disease poses a significant risk, but could preempt state quarantine laws for diseases that count as qualifying disabilities.<sup>112</sup>

The Constitution, the federal statutes, and the case law discussed above reflect state governments’ broad authority to enact isolation and quarantine laws to promote health and safety.<sup>113</sup> Direct Commerce Clause, Fourteenth Amendment, and habeas corpus challenges to state quarantine laws have met with little success.<sup>114</sup> Although the Commerce Clause empowers the federal government to restrict individuals’ liberty, even in foreign and interstate commerce cases the Supreme Court has traditionally

---

108. H.R. CONF. REP. NO. 596, 101st Cong., 2d Sess., 84 (1990).

109. *See supra* notes 50–52 and text accompanying.

110. *See supra* notes 50–52 and text accompanying. Because quarantines are prophylactic measures, they need not confine a threat; they merely confine potential threats as a precaution.

111. 42 U.S.C. § 12102(1)–(3).

112. Although it is conceivable that an individual could pose a direct threat by merely being a possible carrier of a communicable disease, the definition of direct threat suggests that such a determination would have to be made on a case-by-case basis. *Id.* § 12182 (b)(3). The “significant risk” element of direct threat suggests that *quarantine* would be available only for the most highly communicable diseases (likely those that are airborne). Similarly, the modification element would mean that any quarantine would require ad hoc analysis of possible alternative modifications (other than quarantine) that could eliminate the risk. Under this view, state quarantine laws might not violate the ADA on their face and yet still violate it in their application.

113. *See supra* notes 50–112 and text accompanying.

114. *See supra* notes 72–93 and text accompanying.

deferred to states in the field of isolation and quarantine law; state quarantine laws have been upheld when no federal legislation addressed the issue.<sup>115</sup> These generalizations about federalism, coupled with the apportionment of most isolation and quarantine power to states within our system, have at times led to shocking results.<sup>116</sup>

For instance, in *Ex parte McGee*, a case out of the Supreme Court of Kansas in 1919, the court considered a Kansas statute that empowered the board of health to regulate for isolation and quarantine purposes.<sup>117</sup> In *McGee*, detainees were allegedly suffering from “venereal disease.”<sup>118</sup> The board’s subsequent regulations granted health officers wide-ranging authority to uncover occurrences of certain venereal diseases, to isolate persons with or reasonably suspected of having the diseases, and to quarantine and treat such persons.<sup>119</sup> The detained individuals were in custody, and a health officer sought to move them to a state penitentiary for lack of other available space.<sup>120</sup> The court denied habeas corpus to the detainees with venereal disease, even though uncovering their venereal diseases involved invasive examination, and the non-criminal detainees were held in a penitentiary.<sup>121</sup> The scenario presented in *McGee* highlights the dangers that extreme state legislation can pose: discrimination against

---

115. See *supra* notes 72–77 and text accompanying.

116. *Ex parte McGee*, 185 P. 14 (Kan. 1919) (denying habeas relief to detainees allegedly suffering from venereal disease who had been moved to a state penitentiary for lack of other available space).

117. *Id.* at 14–15.

118. *Id.* at 16–17. The *McGee* court used the term “venereal disease.” I have retained the use of that outdated term in referring to this case because it shows how quarantine and isolation laws can be used to target disfavored groups or individuals with disabilities.

119. *Id.* at 15–17.

120. *Id.* at 15, 17.

121. *Id.* at 15, 16–17. The rules and regulations promulgated by the state board of health discriminated against pimps and prostitutes by authorizing health officers or their representatives “[t]o make examinations of all persons reasonably suspected of having [certain venereal diseases]. Owing to the prevalence of such diseases among pimps and prostitutes, *all such persons may be considered in the above class.*” *Id.* at 15 (emphasis added). The court brushed aside the argument that the detainees could not be confined in a penitentiary for disease by making an unclear distinction between the penitentiary itself and mere utilization of penitentiary facilities and equipment. Furthermore, it reasoned that even though the detainees were detained “[in] physical facilities constituting part of the penitentiary equipment,” the “interned persons [were] in no sense confined in the penitentiary, and [were] not subject to the peculiar obloquy which attends such confinement.” *Id.* at 17.

certain groups of people suspected of having a communicable disease; discrimination against those suffering from a disease; invasive physical examination of the ill or those suspected of being ill; confinement of the innocent in a penitentiary (or, as the Supreme Court of Kansas phrased it, in the “physical facilities constituting part of the penitentiary equipment”);<sup>122</sup> and denial of habeas relief.<sup>123</sup>

As this subsection has shown, the federal and state governments share the power to enact public health legislation. The federal government oversees quarantine and isolation through the Commerce Clause via the PHSA, whereas state governments retain broad authority to regulate for purposes of health, safety, and welfare, including quarantine and isolation issues. The writ of habeas corpus and the ADA are two federal limits to this expansive exercise of state legislative power of isolation and quarantine.

### B. Civil Commitment Law

States are not limited to their vast authority under quarantine and isolation laws when stopping the spread of infectious diseases; they may also rely on civil commitment procedures to deprive individuals of their physical liberty. Public health federalism cases like *Gibbons* and *Compagnie Francaise* developed in a legal environment preceding the strengthening of due process requirements and the evolution of the Fourteenth Amendment jurisprudence that evolved during the Civil Rights era.<sup>124</sup> These developments have led to a shift in how the law addresses involuntary incarceration in public health and civil commitment cases.<sup>125</sup> As a result, there is a gap between precedent involving isolation and quarantine and the modern understanding of due process rights.<sup>126</sup> This subsection discusses procedural and substantive due process in the civil commitment context. First, it outlines the development of due process

---

122. *Id.* at 15.

123. *Id.*

124. Rosemary G. Reilly, *Combating the Tuberculosis Epidemic: The Legality of Coercive Treatment Measures*, 27 COLUM. J. L. & SOC. PROBS. 101, 109–30 (1993) (discussing the separate evolution of public health law and civil commitment law and the emergence of expanded due process rights to address contagious disease control).

125. *Id.* at 109–30; Mindes, *supra* note 49, at 413–14.

126. Reilly, *supra* note 124, at 118 (discussing the difference between these two bodies of law and AIDS); Mindes, *supra* note 49, at 416–18 (discussing the difference of these two bodies of law and tuberculosis).

jurisprudence during the 20th century. Second, it analyzes procedural due process. Finally, it surveys substantive due process.

### 1. *The Evolution of Due Process*

Beginning mid-century, the Supreme Court started to expand the strict scrutiny analysis to protect fundamental rights.<sup>127</sup> Later, the Court acknowledged other fundamental rights of particular relevance in the field of public health, including the right to privacy and the right to refuse medical treatment.<sup>128</sup> Also, starting in the late 1960s, the Supreme Court started to apply procedural due process protections to all deprivations of liberty and property.<sup>129</sup> The application of this new understanding of substantive and procedural rights to civil commitment cases starting during the second half of the 20th century—as cases like *O'Connor* show—led to a body of law that presents an alternative legal field for tackling contagious disease control.

The Due Process Clauses of the Fifth and Fourteenth Amendments guarantee procedural fairness whenever federal or state practices deprive an individual of life, liberty, or property.<sup>130</sup>

### 2. *Procedural Due Process and Civil Commitment*

Procedural due process rights are particularly important in civil commitment cases because they ensure that an individual will be given notice and a hearing before an impartial tribunal.<sup>131</sup> However, a hearing

---

127. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (fundamental right to marry); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (fundamental right to procreate); Reilly, *supra* note 124, at 119 (discussing fundamental-rights jurisprudence in the 1960s).

128. *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965) (recognizing a “penumbral” constitutional right of privacy); *Whalen v. Roe*, 429 U.S. 589, 598–604 (1977) (recognizing a constitutionally protected zone of privacy but holding that the right to privacy was not violated by a New York statute requiring patient prescription identification to the state); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 279–80 (1990) (upholding the standard that individuals have the right to refuse medical treatment, but approving of a state requirement of clear and convincing evidence of an individual’s desire to withdraw medical treatment).

129. Reilly, *supra* note 124, at 120.

130. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

131. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314–15 (1950) (discussing the notice requirement); *Baldwin v. Hale*, 68 U.S. 223, 233 (1863) (discussing the requirement of a hearing); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (discussing the right to a neutral forum in civil proceedings).



need not precede detention, so long as the government's interest is important, the deprivation of rights is not severe, and a hearing follows promptly.<sup>132</sup>

Civil commitment jurisprudence has addressed procedural due process guarantees.<sup>133</sup> In *Addington v. Texas*, the Supreme Court recognized that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."<sup>134</sup> In that case, the Court held that due process required, at a minimum, clear and convincing evidence for civil commitment.<sup>135</sup>

In *Vitek v. Jones*, the Supreme Court, in a plurality opinion, held that even prisoners are entitled to certain procedural protections before they may be involuntarily transferred to a mental hospital for treatment.<sup>136</sup> The plurality recognized that transfer to a mental hospital for treatment was essentially a medical question, but stated, "The medical nature of the inquiry . . . does not justify dispensing with due process requirements. It is precisely '[the] subtleties and nuances of psychiatric diagnoses' that justify the requirement of adversary hearings."<sup>137</sup>

In *Greene v. Edwards*, the West Virginia Supreme Court extended the protections of procedural due process in the context of civil commitment to commitment in the contagious disease context.<sup>138</sup> In that case, Mr. Greene, an allegedly tubercular individual, was committed under the West Virginia Tuberculosis Control Act.<sup>139</sup> A petition alleged that he was

---

132. *Mathews v. Eldridge*, 424 U.S. 319, 333–34, 339–40 (1976) (holding that due process does not require an evidentiary hearing prior to termination of disability benefits); *Barry v. Barchi*, 443 U.S. 55, 60–61, 63–64, 66 (1979) (holding that a New York law providing for a suspension of a racehorse-trainer license without a prior hearing was unconstitutional because it failed to require assurance of a *prompt* post-suspension hearing).

133. See *Ball & Barnes*, *supra* note 105, at 84–89; *Reilly*, *supra* note 124, at 123–25; see also *supra* notes 101–11 and text accompanying.

134. 441 U.S. 418, 425 (1979).

135. *Id.* at 432–33.

136. The plurality approved of the procedural safeguards that the district court acknowledged. These included: written notice; a hearing at which the individual can be heard and present documentary evidence; an opportunity to present testimony of witnesses and to cross-examine the state's witnesses; an independent decisionmaker; a written statement by the factfinder providing the evidence on which the factfinder relied and the reasons for transfer; legal counsel; and effective and timely notice of rights. 445 U.S. 480, 482–83, 491, 493–95 (1980).

137. *Id.* at 495.

138. 263 S.E.2d 661, 663 (W. Va. 1980).

139. *Id.* at 662.

suffering from active, communicable tuberculosis, and he was subsequently notified of a hearing; however, he was not notified of his right to be represented by counsel at the hearing.<sup>140</sup> Mr. Greene was unrepresented, so after the start of the hearing the court appointed an attorney to Mr. Greene on the spot.<sup>141</sup> It then continued with the proceedings without taking a recess for Mr. Greene and his attorney to consult in private.<sup>142</sup> The court analogized commitment under the Tuberculosis Control Act to civil commitment of the mentally ill, and it reasoned that since commitment under both laws impinged on the right to “full and complete liberty,” the procedural safeguards of civil commitment must apply in the tuberculosis context.<sup>143</sup> Ultimately, the court granted Mr. Greene’s writ of habeas corpus, reasoning that “[u]nder the circumstances, counsel could not have been properly prepared to defend [him].”<sup>144</sup> *Greene* is a path-breaking case because in it, for the first time, a court analogized civil commitment procedural protections to the contagious disease context, thus opening the jurisprudential door for quarantined and isolated individuals to argue that they are entitled to civil commitment procedural guarantees.

In its response to the coronavirus, the Louisiana Supreme Court has consistently prioritized and ordered Louisiana courts to prioritize public health matters related to the COVID-19 crisis as well as other matters necessary to protect health, safety, and liberty “as determined by each court” when managing their dockets and setting trials and hearings.<sup>145</sup> It

---

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 663.

144. *Id.* at 663–64.

145. ORDER, LA. SUP. CT. (Mar. 16, 2020), available at [https://www.lasc.org/COVID19/Orders/2020-03-16\\_LASCOrder.pdf](https://www.lasc.org/COVID19/Orders/2020-03-16_LASCOrder.pdf) [<https://perma.cc/9ZGP-HVZY>]; ORDER, LA. SUP. CT. (Mar. 20, 2020), available at [https://www.lasc.org/COVID19/orders/2020-03-20\\_LASC\\_DEADLINES.pdf](https://www.lasc.org/COVID19/orders/2020-03-20_LASC_DEADLINES.pdf) [<https://perma.cc/A33G-AZ82>] (amending the Court’s Order of March 16, 2020); ORDER, LA. SUP. CT. (Mar. 23, 2020), available at [https://www.lasc.org/COVID19/orders/2020-03-23\\_LASC.pdf](https://www.lasc.org/COVID19/orders/2020-03-23_LASC.pdf) [<https://perma.cc/4657-W7DP>]; ORDER, LA. SUP. CT. (Apr. 6, 2020), available at [https://www.lasc.org/COVID19/Orders/2020-04-06\\_LASC\\_DEADLINES.pdf](https://www.lasc.org/COVID19/Orders/2020-04-06_LASC_DEADLINES.pdf) [<https://perma.cc/2MEA-5E8J>] (limiting in-person proceedings to emergency matters that could not be resolved virtually, including criminal matters and COVID-19-related civil matters) (repealing and replacing the Orders dated March 16, March 20, and March 23, 2020); ORDER, LA. SUP. CT. (Apr. 29, 2020), available at [https://www.lasc.org/COVID19/Orders/2020-04-29\\_LASC\\_DEADLINES.pdf](https://www.lasc.org/COVID19/Orders/2020-04-29_LASC_DEADLINES.pdf) [<https://perma.cc/GX3H-DA6M>]; ORDER, LA. SUP.

categorized these issues as “emergency matters” worthy of an in-person hearing, while relegating non-emergency matters to remote hearings.<sup>146</sup> While laudable in its goal, the Louisiana Supreme Court’s orders do not go far enough because they allow a court-by-court determination of what is “necessary to protect . . . liberty.”<sup>147</sup> Because “civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection,” this language affords too much discretion to individual judges and opens the door to procedural due process violations.<sup>148</sup> While the Louisiana Supreme Court’s coronavirus orders generally promote procedural due process by generally prioritizing hearings before Louisiana judges in cases where liberty interests are at stake, including criminal matters and COVID-19 related matters, legislative safeguards could codify these types of due process protections. As it stands, the Louisiana Supreme Court could change these orders at any time—and indeed, it has altered these orders during the course of the coronavirus pandemic. In particular, the legislature should codify three things. First, the legislature should specifically state that there is a right to a hearing before a judge. Second, the legislature should prioritize all cases that could result in disease-related deprivation of liberty for hearings to avoid prolonged detention. Finally, the legislature should add a procedural safeguard not contemplated by the Louisiana Supreme Court—the right to be represented by prepared counsel (as in *Greene*). Taken together, these three changes would remove judicial discretion as to the necessity of a hearing involving liberty interests and make sure that individuals’ procedural rights are protected.

### 3. *Substantive Due Process and Civil Commitment*

In addition to procedural due process, civil commitment also implicates substantive due process rights.<sup>149</sup> In *O’Connor v. Donaldson*, the Court held that a state cannot constitutionally confine an individual who is not a safety risk if that person is capable of living safely in

---

CT. (Jan. 11, 2021), available at [https://www.lasc.org/COVID19/Orders/2021-01-11\\_LASC\\_ORDER.pdf](https://www.lasc.org/COVID19/Orders/2021-01-11_LASC_ORDER.pdf) [<https://perma.cc/SB6F-USDR>] (encouraging the use of remote proceedings for all matters with the consent of all parties and the judge)

146. ORDER (Apr. 6, 2020), *supra* note 145; ORDER (Jan. 11, 2021), *supra* note 145.

147. ORDER (Mar. 16, 2020), *supra* note 145; ORDER (Apr. 6, 2020), *supra* note 145.

148. 441 U.S. 418, 425 (1979).

149. See Ball & Barnes, *supra* note 105, at 53–56; Reilly, *supra* note 124.

freedom.<sup>150</sup> The Supreme Court has accepted that a legitimate, substantial governmental purpose could support restrictions of fundamental personal liberties, but such infringements must be narrowly tailored so that the purpose is achieved through the least restrictive means necessary.<sup>151</sup> The constitutional, least-restrictive-alternative standard has been applied in civil commitment cases.

For example, in *Lessard v. Schmidt*, a district court enumerated guidelines for the least-restrictive-alternative standard in the involuntary civil commitment context: “[T]he person recommending full-time involuntary hospitalization must bear the burden of proving (1) what alternatives are available; (2) what alternatives were investigated; and (3) why the investigated alternatives were not deemed suitable.”<sup>152</sup> In *Covington v. Harris*, the District of Columbia Court of Appeals emphasized that since civil commitment is a severe deprivation of liberty, alternatives needed to be considered.<sup>153</sup> Thus, the *Harris* court applied the least-restrictive-alternative standard in the civil commitment context and, in so doing, placed the burden on the state to show the necessity of its action and the unfeasibility of less restrictive means of achieving the same, necessary goal.

In the context of Ebola, panic trumped reason through quarantine and isolation measures that were not the least restrictive alternative available. Unlike the coronavirus, Ebola was well-understood at the time of the outbreak. Federal, state, and local governments understood methods of transmission, namely, via bodily fluids. Yet, despite this, in one famous case—that of Kaci Hickox—the government overstepped its authority and implemented quarantine measures based on fear rather than reason. Even if there had been a reason for some restriction of liberty, the restrictions were not the least restrictive alternative.

The Hickox case made headlines at the time of the outbreak. After spending a month volunteering in Sierra Leone, nurse Kaci Hickox returned to the United States.<sup>154</sup> Although she twice tested negative for Ebola, she was “sequestered in a medical tent for days because New Jersey

---

150. 422 U.S. 563, 576 (1975).

151. *Shelton v. Tucker*, 364 U.S. 479, 488, 490 (1960) (striking down as unconstitutionally broad an Arkansas statute that required teachers in state schools to file affidavits listing organizational affiliations and contributions).

152. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1096 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974).

153. 419 F.2d 617, 623–24 (D.C. Cir. 1969).

154. David Sharp, *Ebola Nurse to Remain a Voice against Quarantines*, HUFFPOST POLITICS (Nov. 9, 2014), <https://apnews.com/article/5f7d56ffde54b5196896fcc8f75c66c> [<https://perma.cc/N6ZL-PPH3>].

announced new Ebola regulations the day she arrived.”<sup>155</sup> When she was eventually able to travel to her home state of Maine, the state tried to impose a “voluntary quarantine.”<sup>156</sup> A state judge rejected ultimately rejected these attempts to restrict her movements, and she herself refused to stay inside and took a bike ride.<sup>157</sup>

Ebola was understood, tests were available, and Hickox tested negative twice. Yet, despite no scientific basis for the detention, she was forcibly detained in a medical tent for days. Moreover, when she arrived in Maine, she was subjected to a not-so-voluntary voluntary quarantine, which ultimately was struck down by a judge since she did not pose a threat. The two-week quarantine was completely unnecessary because she had twice tested negative for Ebola at that point. Even if she had Ebola, it is highly unlikely that a full quarantine was the least-restrictive alternative—indeed, it seems unlikely that it would be since Ebola is only transmitted through bodily-fluids. Our society should move past quarantining and civilly committing individuals with hard-to-transmit diseases like HIV and sexually transmitted viruses and diseases. The risk of an individual spreading these diseases is low, and liberty restrictions can be tailored to avoid full-on detention. For example, *if* Nurse Hickox had been Ebola-positive, a court could have ordered her to avoid any activity that risked sharing or spreading her bodily fluids. Bike riding would not have posed a significant risk (although of course it would pose *some* risk—for example, if she had an accident and needed mouth-to-mouth, that could pose a risk to health care workers; even forcing her to stay home would not eliminate *all* risk, since she could have a medical emergency in the house as well). Restrictions on liberty due to fear—and that go against medical science showing that they are not necessary—are exactly the types of dangers that arise when isolation and quarantine laws run amok.

In the context of the coronavirus, the mortality rate has been difficult to pin down, especially because of testing issues and because it is difficult

---

155. *Maine Nurse to Remain Advocate against Ebola Quarantines*, CBS NEWS (Nov. 9, 2014, 11:21 AM), <https://www.cbsnews.com/news/ebola-outbreak-maine-nurse-kaci-hickox-to-remain-advocate-against-quarantines/> [<https://perma.cc/V6H8-XBFV>].

156. Sharp, *supra* note 154.

157. *Ebola Outbreak: Nurse Kaci Hickox Defies Quarantine*, BBC NEWS (Oct. 30, 2014), <https://www.bbc.com/news/world-us-canada-29836550> [<https://perma.cc/W5ED-7AKE>]; *Maine Nurse to Remain Advocate against Ebola Quarantines*, *supra* note 155.

to measure a moving target.<sup>158</sup> The novel nature of the coronavirus also meant that modes of transmission were equally—and to some extent remain—unclear.<sup>159</sup> What is clear is that it is much more easily transmitted than Ebola; it can definitely spread through respiratory droplets and may even be airborne. These two uncertainties create tension from a due process perspective. On the one hand, especially early on, the uncertainties surrounding the virus and a messy disaster response worked against each other. For example, the fatality rate was unknown, which likely made it harder for governments to weigh the public health need against a given individual's liberty (in the early days of the pandemic, the fatality rate was likely higher, but the development and use of therapeutics and vaccines has no doubt changed the fatality rate over time). On the other hand, in many cases, alternatives such as testing or mandatory n-95 mask wearing existed in theory, but practically speaking were unavailable due to shortages and logistical failures.

At least under the prevailing, current theory of respiratory droplet transmission, mask mandates in public places are a *less* restrictive alternative that should accomplish the same goal of preventing the spread of the disease—although whether they are the *least* restrictive alternative is an open question. At any rate, given the constitutional approbation of physical apprehension and detention, it is clear that—despite what anti-mask protesters may say—mandatory mask wearing does not violate the Constitution, at least in instances where it is the least restrictive alternative to stop the spread of communicable disease. Although mandatory mask wearing could pass constitutional muster, that does not necessarily mean that it is legal under federal law. In some circumstances it may clash with the ADA. An individual who challenges a grocery store's mask mandate on Title III ADA grounds could hypothetically have an ADA claim, but the strength of the claim will depend on the circumstances. If the individual genuinely suffers from a qualifying disability that prevents the wearing of a mask, the question then becomes whether the direct threat exception applies and—if so—if the grocery store could offer an accommodation to mitigate the exclusion. The answer to that question, in turn, depends on the type of communicable disease at issue. While failure to wear a mask would not likely pose a direct threat for a disease like Ebola or HIV, it could pose such a threat for more easily transmissible diseases, possibly including the coronavirus.

---

158. Donald G. McNeil, Jr., *The Pandemic's Big Mystery: How Deadly Is the Coronavirus?*, N.Y. TIMES, <https://www.nytimes.com/2020/07/04/health/coronavirus-death-rate.html> [<https://perma.cc/PSC6-WUYS>] (last updated Oct. 29, 2020).

159. *Transmission of SARS-CoV-2: Implications for Infection Prevention Precautions*, *supra* note 11; Resnick, *supra* note 12.

Since the evolution of the line of cases on the least-restrictive-alternative standard, other standards have been applied as well.<sup>160</sup> In *Youngberg v. Romeo*, the Court enumerated the substantive rights of involuntarily committed persons with intellectual disabilities.<sup>161</sup> In *Youngberg*, the Supreme Court enunciated the standard required for protecting the substantive due process rights of individuals with intellectual disabilities who are detained.<sup>162</sup> The Court held that a detainee has a right to safe conditions, freedom from bodily restraint, and a right to minimally adequate habilitations.<sup>163</sup>

Even if this less stringent standard is applied, it raises the question of where and how patients who are highly contagious can be detained. Typical places where ill or dangerous people are held—hospitals and prisons, respectively—have been hotbeds of coronavirus outbreaks, and do not meet the “safe conditions” requirement of the *Youngberg* standard. In fact, prisons have been so rife with the coronavirus that some prisons have released prisoners to slow the spread.<sup>164</sup> To minimize the safe-conditions requirement in the communicable-disease context, governments should minimize the number of detentions, isolations, and quarantines in group settings and opt for lesser options under the least-restrictive-alternative standard instead.

### *C. Contagious Disease Control through Restrictions on Individual Liberty in Louisiana*

Because of its subtropical climate, its prominence in international trade, and its destination as a tourist hotspot—especially for events like Mardi Gras—Louisiana, and New Orleans in particular, is a likely candidate for the spread of tropical diseases in the United States. Indeed,

---

160. *Woe v. Cuomo*, 729 F.2d 96, 104 n.7 (2d Cir. 1984) (discussing the different standards and rationales and their current relevance).

161. 457 U.S. 307, 315 (1982).

162. *Id.* at 309.

163. *Id.* at 315–16, 319. Courts have questioned the compatibility of the different standards of the right of treatment in light of the *Youngberg* decision. *Woe*, 729 F.2d at 104 n.7.

164. Bill Chappell, *California Will Release Up to 8,000 Prisoners Due to Coronavirus*, NPR (July 10, 2020, 5:00 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/07/10/889861014/california-will-release-up-to-8-000-prisoners-due-to-coronavirus> [<https://perma.cc/2TJ7-PK34>].

some have speculated that Mardi Gras festivities triggered New Orleans' early surge in cases.<sup>165</sup>

### 1. Louisiana's Sanitary Code

Pursuant to its general power to regulate for the purposes of health, safety, and welfare, in Louisiana the state health officer has broad authority to quarantine individuals.<sup>166</sup> The secretary of the Department of Health designates a state health officer who must be a "licensed and practicing physician in the state of Louisiana."<sup>167</sup> The secretary of health must approve all of the state health officer's orders, rules, and regulations.<sup>168</sup> However, in the event that the secretary of health appoints himself as state health officer, a possibility explicitly allowed under the law, there is no provision for oversight of the secretary.<sup>169</sup> The Sanitary Code specifically provides for an immunization program and requires "the reporting[,] . . . investigation, and application and implementation of appropriate control measures [for the prevention of the occurrence and spread of communicable diseases]."<sup>170</sup> These control measures "expressly include isolation and quarantine proceedings and measures, for all communicable diseases of public health significance."<sup>171</sup> Thus, the Louisiana Legislature has specifically availed itself of its power to restrain innocent yet sick *or potentially sick* individuals to promote public health.<sup>172</sup>

The Sanitary Code also provides penalties for its violation:

Whoever violates those provisions of the sanitary code dealing with the isolation or quarantine of communicable disease, or any person having such a communicable disease that may cause a severe health hazard to the community and who, after having been

---

165. Ramon Antonio Vargas, *CDC: Mardi Gras Quickened Spread of Coronavirus in Louisiana; Cancelling Was Never Recommended*, NOLA.COM (Apr. 11, 2020, 10:12 AM), [https://www.nola.com/news/coronavirus/article\\_dedfb5e4-7c2a-11ea-901f-6720fa25be5a.html](https://www.nola.com/news/coronavirus/article_dedfb5e4-7c2a-11ea-901f-6720fa25be5a.html) [<https://perma.cc/YH5K-Z73P>].

166. LA. REV. STAT. § 40:5 (2020).

167. *Id.* § 40:2.

168. *Id.*

169. *Id.*

170. *Id.* § 40:4(A)(2).

171. *Id.*

172. *Id.*; see also *supra* note 50 and text accompanying (defining quarantine as applying to people who have been exposed to a disease to see if they become sick).



officially isolated or quarantined . . . violates the provisions of the isolation or quarantine shall be fined not less than fifty dollars nor more than one hundred dollars or be imprisoned for not more than two years or both.<sup>173</sup>

This means that under Louisiana law the state can restrict the movement of both ill individuals through its isolation powers or potentially ill individual who have been exposed to a communicable disease through its quarantine powers.<sup>174</sup> Furthermore, if these individuals violate their isolation or quarantine, even though it was detention based on illness rather than on criminal culpability, they could be subject to up to a \$100 fine and two years' imprisonment.<sup>175</sup> An individual convicted of violating the provisions of the code relating to isolation or quarantine "may be confined either to the parish jail, to any state-operated hospital, or to the hospital section of the state penitentiary."<sup>176</sup> This introduces a perverse situation in which individuals who have had their liberty (in some cases unconstitutionally) restrained can be punished for violating their restraints with further restraint. (The Nurse Hickox example shows the type of unjustified detention which runs afoul of Constitution, based as it was on fear rather than any reasonable, scientific belief, since she had already tested negative twice).

Although the choice among alternative locations of confinement is at the court's discretion, these options highlight the criminal and punitive facets of public health law.<sup>177</sup> The law is silent as to where a quarantined or isolated individual will be confined, but conceivably the individual could be contained not only in his or her home, but also in a state-operated hospital at the discretion of the state health officer or forcibly confined in the same hospital at the court's discretion.<sup>178</sup> This in turn raises the issue of safe conditions of confinement discussed above—isolation or quarantine in one's home would, perhaps with an ankle monitor to ensure

---

173. *Id.* § 40:6(B)(1).

174. *Id.* § 40:4(A)(2).

175. *Id.* § 40:6(B)(1).

176. *Id.* § 40:6(B)(2).

177. *Id.*

178. See the Louisiana Sanitary Code for the shocking silence of the Louisiana Legislature regarding what constitutes isolation or quarantine. *Id.* § 40:4–16. For the almost imperceptible line between confinement and penal confinement in some public health cases, consider that the former allows a state health officer to "isolate or quarantine for the care and control of communicable disease within the state" and the latter penalizes any person for violating the isolation or quarantine with a fine, imprisonment, or both. *Id.* § 40:5(A)(1); *id.* § 40:6(B)(1)–(2).

enforcement, in most cases be the least restrictive confinement option, and it would pose the lowest public health threat due to a smaller number of individuals being exposed, but that is not always the case. For instance, if a person were being prophylactically quarantined in their home with another individual who is being isolated in that same home after having tested positive, then the quarantined individual (who may not have the disease) is confined with someone who could give them the disease. In more worrisome cases, both the law-abiding detainee in isolation or quarantine and the criminal detainee can be deprived of their freedom of movement: the detainee either submits to official confinement or is potentially punished with confinement. They could end up in the same place—a prison.

The legislature does provide that if any person so confined in either a state-operated hospital or the hospital of a state penitentiary ceases to harbor the communicable disease or if the disease is no longer in a communicable or infectious state, then a district court *may*, in its discretion, commute the sentence.<sup>179</sup> In other words, under current Louisiana law, the state may isolate or quarantine an individual, and if the individual violates isolation or quarantine provisions, he or she may be detained in a hospital or prison. If the individual is convicted and subsequently detained, then his or her penal confinement for violating the prior detainment provisions can continue at the court's discretion, *even after* that individual is no longer a public health threat, such as when a COVID-19 patient is no longer in a phase that allows for disease transmission. Yet, the legislature has not included a requirement that isolation or quarantine be the least restrictive alternative.

Although the Sanitary Code's provisions allow for "voluntary" and forcible confinement of innocent individuals, the Louisiana Legislature did superficially acknowledge the constitutional right to decline medical treatment, without elaborating on the how any such right would survive the expansive Louisiana isolation and quarantine laws:

Nothing in this Section is to be construed as depriving any individual of the right to decline any medical treatment or to provide other care or treatment for himself or herself at his or her own expense, which care does not cause a severe health hazard to the community, provided that the sanitary and quarantine laws, rules, and regulations relating to communicable disease are complied with.<sup>180</sup>

---

179. *Id.* § 40:6(B)(2).

180. *Id.*

Under this section, an ill individual may ostensibly deny treatment so long as such denial does not cause a “severe” health hazard.<sup>181</sup> The statute does not define what constitutes a severe hazard, which leaves open the possibility of forced medical treatment in a myriad of undefined circumstances, potentially in violation of the individual’s constitutional rights.

Furthermore, the state health officer’s quarantine powers are not limited to restricting individuals’ liberty; they also extend to geographic areas.<sup>182</sup> The Sanitary Code empowers the state health officer to quarantine an entire parish or municipality if it becomes infected “to such an extent as to threaten the spread of the disease to the other portions of the state.”<sup>183</sup> While in some cases this extreme action may be necessary, the open-ended nature of this regional quarantine power is problematic, especially given the possibility of no oversight, as in instances where the secretary of health and the state health officer are one in the same. Once this quarantine has commenced, the state health officer may prohibit other individuals from entering “the infected portion” of the state.<sup>184</sup> For example, the state health officer, an unelected official, could prohibit a mother who works in one uninfected parish from returning home to her children in another, infected parish, even if she was willing to enter and remain in the infected parish.<sup>185</sup> Finally, the state health officer must issue instructions to other local sanitary authorities regarding measures for quarantining persons and property coming from the quarantined area.<sup>186</sup> Thus, the Sanitary Code allows not only for the quarantine of individuals, but also for the quarantine of entire parishes and municipalities, and ingress and egress from such quarantined localities are almost exclusively regulated by one individual, the state health officer.

## 2. *The Influence of the Model State Emergency Health Powers Act in Louisiana*

Although the Sanitary Act provisions discussed above provide the state health officer with extensive authority to manage communicable disease outbreaks, the provisions do not expressly address bioterrorism. However, in the wake of the September 11 attacks and the subsequent

---

181. *Id.*

182. *Id.* § 40:7.

183. *Id.*

184. *Id.*

185. *Id.*; *id.* § 40:2.

186. *Id.* § 40:7.

anthrax scare, the CDC asked Georgetown and Johns Hopkins universities to draft the Model State Emergency Health Powers Act (MSEHPA).<sup>187</sup> In 2003, the Louisiana Legislature incorporated most of the provisions in MSEHPA in the Louisiana Health Emergency Powers Act (LHEPA).<sup>188</sup> Interestingly, Louisiana chose not to adopt the section of the MSEHPA dedicated to isolation and quarantine.<sup>189</sup> However, the legislature did adopt some quarantine and isolation provisions from the MSEHPA.<sup>190</sup> Although the MSEHPA shares many similarities with the LHEPA and also with the Sanitary Code, the LHEPA goes further than the MSEHPA in protecting individual rights in the isolation and quarantine context.<sup>191</sup>

*a. The Model State Emergency Health Powers Act*

In some ways, the MSEHPA pays lip service to constitutional rights and liberties by couching its isolation and quarantine requirements in the language of liberty while simultaneously undermining these constitutional guaranties. For example, it requires isolation and quarantine to be “by the least restrictive means necessary” to prevent the spread of a contagious or possibly contagious disease.<sup>192</sup> In other words, the MSEHPA requires that the deprivation of liberty be the least restrictive deprivation of liberty available. However, the constitutional test requires more than that; not only should the deprivation be the least restrictive *type of deprivation* (e.g., isolation in one’s home versus isolation in a prison), but there must also be no less restrictive alternative short of deprivation (e.g., quarantine

---

187. Lawrence O. Gostin et al., *The Model State Emergency Health Powers Act: Planning for and Response to Bioterrorism and Naturally Occurring Infectious Diseases*, 288.5 HEALTH L. & ETHICS 622, 622 (2002).

188. *Id.* § 29:760–72; THE MODEL STATE EMERGENCY HEALTH POWERS ACT (2001), <https://www.aapsonline.org/legis/msehpa.pdf> [<https://perma.cc/6BX4-6QVP>] [hereinafter MSEHPA].

189. *Id.* § 29:760–72; MSEHPA, *supra* note 188, at art. VI, § 604.

190. MSEHPA, *supra* note 188, at art. II, § 202(5)(11)(13); LA. REV. STAT. § 29:764(A)(5); LA. REV. STAT. § 29:764(A)(11); LA. REV. STAT. § 29:764(A)(3)(a); LA. REV. STAT. § 29:764(A)(5).

191. The legislature did not adopt the MSHEPA article detailing quarantine and isolation measures; it instead chose to incorporate only the quarantine and isolation language sprinkled throughout other sections of the MSHEPA. MSEHPA, *supra* note 188, at art. VI (detailing methods of quarantine and isolation); LA. REV. STAT. § 29:764(A)(4)(d); LA. REV. STAT. § 29:764(A)(5); LA. REV. STAT. § 29:764(A)(6); LA. REV. STAT. § 29:764(A)(7); LA. REV. STAT. § 29:764(A)(8); MSEHPA, *supra* note 188, at art. II, § 202.

192. MSEHPA, *supra* note 188, at art. VI, § 604(b)(1).

versus mandatory masks or 6-feet-apart guidelines). In other ways, the MSEHPA is more progressive. One MSEHPA provision guarantees the “effective operation of the judicial system including, if deemed necessary, the identification and training of personnel to serve as emergency judges regarding matters of isolation and quarantine.”<sup>193</sup>

*b. Comparing the Model State Emergency Health Powers Act and the Louisiana Health Emergency Powers Act*

The Louisiana Legislature has adopted comparable provisions to MSEHPA’s least-restrictive-alternative provision and its effective-judicial-system provision.<sup>194</sup> Thus, although the judicial standard under both the MSEHPA and the LHEPA are lacking, the existence of judicial relief itself is, at least, prioritized in some instances. However, both the MSEHPA and the LHEPA could be improved by elaborating on the implementation of the effective-judicial-system provision by, for example, explaining how emergency judges could be selected and trained. The legislature should amend the LHEPA to clarify that the least restrictive alternative applies both to *types* of detention and the *category* of restriction (liberty deprivation versus something short of liberty deprivation, like masks).

*c. Louisiana Health Emergency Powers Act*

In some ways, the LHEPA places a higher value on civil liberties than does the MSEHPA. For example, under the LHEPA, isolation and quarantine actions on the dockets receive priority.<sup>195</sup> The LHEPA also affirmatively entitles those in isolation or quarantine to have adequate communication with their families.<sup>196</sup> In these ways, the Louisiana Legislature wisely added provisions to address at least some of the problems with the MSEHPA to promote individual rights and human dignity. However, by choosing not to incorporate an ameliorated version of the other MSEHPA provisions into the LHEPA, such as correcting the least-restrictive-alternative provision, the legislature missed an

---

193. *Id.* art. II, § 202(5).

194. LA. REV. STAT. § 29:764(A)(2)(b); LA. REV. STAT. § 29:764(A)(4)(d); *see also supra* notes 151–52 (discussing the least-restrictive alternative standard generally), 189–93 and text accompanying (discussing the provisions of the MSEHPA).

195. LA. REV. STAT. § 29:764(A)(6).

196. *Id.* § 29:764(A)(7).

opportunity to re-evaluate the bulk of its isolation and quarantine law.<sup>197</sup> Yet, the Louisiana Legislature missed an opportunity to harmonize conflicts among its different public health laws and due process requirements.

A body of law dealing with isolation and quarantine and civil commitment has developed at both the federal and state levels, with certain federal limits restricting the exercise of state power in this field. Louisiana has long implemented methods of restricting individual liberty to control communicable diseases, including through the Sanitary Code and LHEPA. When addressing restrictions on physical liberty in the communicable disease context, Louisiana follows the isolation and quarantine route rather than the civil commitment route, and although its provisions are far from ideal, in some instances they do offer some protection to the rights of isolated and quarantined individuals. Louisiana should go a step further and embrace civil commitment law's due process framework in the communicable disease context, much like how the *Greene* court applied it to protect the due process rights of the detainee. This would strengthen liberty protections within Louisiana.

### III. CONTAINING DISEASE BY SEIZING PROPERTY

In addition to permitting restrictions on individuals' physical liberty to contain disease, both the federal government and state governments also allow for the seizure of personal property to contain disease.

#### *A. Property under the Public Health Service Act*

At the federal level, the PHSA allows the surgeon general to deprive individuals of property by, for example, exterminating pets or other animals or destroying infected property.<sup>198</sup> It empowers the surgeon

---

197. See *supra* notes 121–42 (discussing the Louisiana Sanitary Code). The LHEPA only applies in a public health emergency. The LHEPA defines a public health emergency as “an occurrence or imminent threat of an illness or health condition that is believed to be caused by . . . [b]ioterrorism, [t]he appearance of a novel or previously controlled or eradicated infectious agent or biological toxin, [or] a disaster” that “[p]oses a high probability of . . . a large number of deaths . . . [a] large number of serious or long-term disabilities . . . [or] [w]idespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people.” LA. REV. STAT. § 29:762(12). The Louisiana provisions on isolation and quarantine are found in the Sanitary Code. *Id.*; *id.* § 29:764; *id.* § 40:4.

198. 42 U.S.C. § 264(a).

general to inspect, fumigate, disinfect, sanitize, or destroy animals or articles “found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.”<sup>199</sup> In one breath, the law states that these inspection, disinfection, and destruction powers are limited to animals or articles “found to be so infected or contaminated,” and in the next breath it gives the surgeon general power to take “other measures, as in his judgment may be necessary” without any such limiting language.<sup>200</sup>

The vast discretion the PHS Act gives to the surgeon general goes too far by allowing the surgeon general to seize and destroy property even if it is not infected or contaminated, and even if it is not necessary. Property destruction and animal extermination have come up in the Ebola context, with differing results.<sup>201</sup> Although neither of these instances involved the federal government or the surgeon general—instead involving Spanish and Texas authorities dealing with canine exposure to Ebola—the circumstances are illustrative, and there is nothing to prevent the federal government from dealing with the same type of issue.<sup>202</sup> During the Ebola epidemic, Excalibur, the dog of an infected Spanish nurse, was seized and euthanized over fears that it was infected with Ebola or risked spreading it—despite decades of Ebola research without a single, documented case of a dog transmitting Ebola to people.<sup>203</sup> By contrast, Bentley, the dog of a Dallas resident infected with Ebola, was seized and quarantined for 21 days.<sup>204</sup>

### *B. The Case of Thomas Duncan: A Texas Perspective*

State governments have also exercised their isolation and quarantine power to control inanimate personal property to combat Ebola. The events

---

199. *Id.* The statute also empowers the surgeon general to carry out pest extermination for these purposes, although that seems somewhat redundant given his authority to destroy animals. *Id.*

200. *Id.*

201. *Ebola Virus: Spanish Protests as Nurse’s Dog Is Put Down*, BBC (Oct. 9, 2014), <http://www.bbc.com/news/world-europe-29547432> [<https://perma.cc/V92X-3GHH>].

202. *Id.*; *Ebola Patient Nina Pham’s Dog, Bently, Enters Testing Phase*, NBC NEWS (Oct. 20, 2014, 9:16 AM), <https://www.nbcnews.com/storyline/ebola-virus-outbreak/ebola-patient-nina-phams-dog-bentley-enters-testing-phase-n229681> [<https://perma.cc/T3LG-VRL8>].

203. *Ebola Virus: Spanish Protests as Nurse’s Dog Is Put Down*, *supra* note 201.

204. *Ebola Patient Nina Pham’s Dog, Bently, Enters Testing Phase*, *supra* note 202.

surrounding Thomas Duncan's illness and death during the Ebola outbreak demonstrate the extent of this power.<sup>205</sup> Duncan stayed in his Texas apartment prior to his diagnosis.<sup>206</sup> A crew of workers in hazmat suits spent 38 hours emptying his apartment, heaping "shoes, carpets, mattresses, bed sheets, clothes and kids' backpacks into 140 55-gallon drums," which were then decontaminated and removed, and the contents incinerated.<sup>207</sup> In spite of the fact that Ebola can be killed with many disinfectants, such as household bleach, and that it can only survive for several hours on dry surfaces, Duncan's belongings were incinerated.<sup>208</sup> Little was saved from incineration during the cleanup and "decontamination" of the apartment.<sup>209</sup> Once the incineration of almost all of the earthly belongings in the apartment was complete, the ashes were shipped to a landfill in Louisiana.<sup>210</sup> However, Louisiana refused to admit the ashes out of fear that they posed a threat, even though the CDC stated that incinerated Ebola waste was not dangerous (although it is unlikely that the ashes even counted as Ebola waste, since the items were decontaminated prior to incineration).<sup>211</sup>

The Texas Health and Safety Code (THSC) addresses the application of control measures to property in such a scenario.<sup>212</sup> Under the THSC, if the state has reasonable cause to believe that property is infected or contaminated with a communicable disease, it may quarantine the property until it can be analyzed to determine if it is, in fact, infected or contaminated.<sup>213</sup> The state may require the person who owns or controls the property to "impose control measures that are technically feasible to disinfect or decontaminate the property if the property is found to be infected or contaminated."<sup>214</sup> If the control measures are ineffective, the

---

205. See *supra* notes 205–26 and text accompanying.

206. *Ashes from Ebola Victim's Dallas Apartment in Limbo*, DALLAS MORNING NEWS (Oct. 31, 2014, 5:51 PM), <https://www.dallasnews.com/news/2014/10/31/ashes-from-ebola-victims-dallas-apartment-in-limbo/> [<https://perma.cc/GJU7-64J7>].

207. *Id.*

208. *Ebola (Ebola Virus Disease): Transmission*, *supra* note 35; *Ashes from Ebola Victim's Dallas Apartment in Limbo*, *supra* note 206.

209. *Ashes from Ebola Victim's Dallas Apartment in Limbo*, *supra* note 206. Salvaged items include a computer hard drive, legal documents, family photos, and Duncan's grandmother's Bible. *Id.*

210. *Id.*

211. *Id.*

212. TEX. HEALTH & SAFETY CODE ANN. § 81.084 (West 2015).

213. *Id.* § 81.084(a).

214. *Id.* § 81.084(c).



state can continue the quarantine and order the person who owns or controls to property to destroy it.<sup>215</sup> Texas also addresses the costs associated with these control measures: “The person who owns or controls the property shall pay all expenses of implementing control measures, court costs, storage, and other justifiable expenses.”<sup>216</sup> Thus, under Texas law the state can quarantine property and test it, and if the test results show that the property is a threat, it can continue to quarantine the property and order the property’s owner to impose control or decontamination measures at the owner’s expense.

A comparison of Duncan’s case and Texas law provides insight into the actual implementation of property regulations during an epidemic. Once Texas confirmed that Duncan had the Ebola virus, and since Duncan had spent time in his apartment before he was taken to the hospital for treatment, the state acted like it had reasonable cause to believe that Duncan’s household property was infected or contaminated with Ebola.<sup>217</sup> Based on this possible reasonable cause to believe that the property was contaminated, the THSC would likely allow the initial quarantine of Duncan’s property and subsequent analysis of the property. Under the THSC, the state could have also required either Duncan or those controlling the property in his absence to impose control measures to disinfect any contaminated property, and if those measures were ineffective, the state could have further quarantined any contaminated property and ordered its destruction.<sup>218</sup> Finally, Texas could have assessed all costs associated with the control measures—no matter how high—to either Duncan or anyone else with control over the property.<sup>219</sup>

At least judging from the media, this is not what happened. For example, the media do not mention any analysis of potentially contaminated property.<sup>220</sup> Rather, they suggest that the contents of the apartment were emptied into barrels, decontaminated, and then incinerated.<sup>221</sup> Salvaged items included family photographs, a Bible, a hard drive, and legal documents.<sup>222</sup> The media reports do not state whether

---

215. *Id.* § 81.084(d)(1).

216. *Id.* § 81.084(g).

217. *Ashes from Ebola Victim’s Dallas Apartment in Limbo*, *supra* note 206; *id.* § 81.084(a).

218. *Id.* § 81.084(c); *id.* § 81.084(d)(1).

219. *Id.* § 81.084(g).

220. *See, e.g., Ashes from Ebola Victim’s Dallas Apartment in Limbo*, *supra* note 206.

221. *Id.*

222. *Id.*

these salvaged items were analyzed and deemed to be uncontaminated.<sup>223</sup> These reports suggest that, in fact, the government did not bother to test most of the property in the apartment; rather, it merely seized and incinerated it, almost without exception.<sup>224</sup> If this is indeed how the property control measures were implemented, it is a far cry from the already scant protection enumerated in the THSC.

Although the state seemingly ignored some THSC protections, so too did it ignore some provisions that would have been burdensome to Duncan and his estate. For example, instead of following THSC provisions that would have charged Duncan with the exorbitant costs associated with control measures, the state planned to pay for most of them itself.<sup>225</sup> In this way, Texas ignored a provision in its own laws that was clearly unworkable and instead took financial responsibility for its own control actions.<sup>226</sup>

### C. Property during a Louisiana Health Emergency

The case of Duncan in Texas elucidates relevant comparable dangers to property rights in Louisiana because the LHEPA contains some provisions similar to the MSEHPA.<sup>227</sup> Notably, during a health emergency in Louisiana, the state may “decontaminate or cause to be decontaminated, or destroy any material of which there is reasonable cause to believe that it may endanger the public health.”<sup>228</sup> Fortunately, Louisiana does not have

---

223. *Id.*

224. *Id.* The decontamination team was “instructed to strip the place bare, removing carpeting and window blinds.” Todd Unger, *Bill for Cleanup of Ebola-Tainted Apartment: over \$100K*, USA TODAY (Oct. 9, 2014, 5:37 PM), <http://www.usatoday.com/story/news/nation/2014/10/09/ebola-cleanup-crew/16985865/> [<https://perma.cc/94YR-8ARL>].

225. Unger, *supra* note 224.

226. Based on the Duncan case, the Texas cost-assessing provision is unworkable because the cleanup costs were approximately \$100,000 for a single apartment, and the median household income as reported in the 2012 census was only \$51,371. Instead of having unworkable and unfair laws on the books, Louisiana lawmakers should get ahead of the issue and clarify that these types of costs will not be assessed to the individual with the communicable disease. AMANDA NOSS, U.S. CENSUS BUREAU, HOUSEHOLD INCOME: 2012 (2013), <https://fitsnews.com/wp-content/uploads/2013/09/acsbr12-02.pdf> [<https://perma.cc/346Y-FDGB>].

227. *See* LA. REV. STAT. § 29:769 (2020).

228. *Id.* § 29:769(A)(2). More specifically, the provision empowers the governor’s Office of Homeland Security and Emergency Preparedness to act in consultation with the secretary of the Department of Health and Hospitals, and

a provision requiring the property owner to pay for the destruction of his own property in the public health emergency context.<sup>229</sup> However, the example of Duncan shows that in a public health emergency, panic can lead state governments to seize and destroy property without due process of law.<sup>230</sup>

#### IV. PROPOSAL

This Article provides a legislative proposal for Louisiana lawmakers. The Louisiana Legislature should take measures that protect individual liberties to address the outdated state of the isolation and quarantine jurisprudence in the field of communicable diseases and the overbreadth of the Sanitary Code and LHEPA regarding quarantine and isolation of persons and treatment of property.

First, the legislature should enact legislation to explicitly embrace due process protections using the civil commitment standard in the communicable disease context. Second, LHEPA should not stop at requiring that isolation and quarantine be by the least restrictive means necessary (e.g., isolation in one's home versus isolation in a prison), but it should specify that it be the least restrictive type of measure to achieve the government's purpose (e.g., social distancing or mask wearing versus quarantine) (in addition to the form of deprivation as the least restrictive available), and the Sanitary Code should be amended to specifically include a least-restrictive-alternative standard. Third, it should explicitly reject the Texas provisions that burden the property owner. Instead, it should explicitly require: (1) that destruction of property be necessary for the government's purpose and (2) that property destruction is the least restrictive alternative. Third, it should create a remedy for violations of these rights—a private right of action with statutory damages. If the legislature enacts these proposals, it will strike a just balance between individual liberty and property interests, on the one hand, and the safety of the community, on the other.

##### *A. Heightened Due Process Protections for the Ill and Innocent*

The Louisiana Legislature should expressly adopt civil commitment due process protections in communicable disease cases and formalize and expand on the Louisiana Supreme Court's ad hoc orders in the coronavirus

---

state, regional, and local public health emergency agencies. *Id.* § 29:769(A); compare *id.* § 29:769(A), with MSEHPA, *supra* note 188, at art. V, § 501(b).

229. *Id.* § 29:769.

230. See *supra* Section II.A.

context. Like in the criminal context, physical freedom is implicated in isolation and quarantine cases. However, although innocent and uncharged with any wrongdoing, most individuals subject to isolation and quarantine currently have almost no protection for their liberty interests. It is illogical to grant potentially culpable individuals with greater procedural protections than the ill. Because detention is a serious affront to individual liberty, all individuals should have the guarantee of due process, even in the public health context. The Louisiana Legislature should (1) require notice and a hearing before an impartial tribunal, (2) provide docket priority to emergency matters related to the coronavirus that affect liberty and personal property interests, (3) prioritize in-person hearings and trials for these issues when safe to do so and adopt and allow for remote alternatives when in-person hearings are not safe, and (4) ensure that defendants have access to prepared counsel.

In Louisiana, the current isolation and quarantine law is broad, and individuals can be detained with little recourse. Since the right to personal liberty is being infringed, the legislature should also incorporate the least-restrictive-means standard into the Sanitary Code to provide for uniformity between the Sanitary Code and the LHEPA. Additionally, the legislature should amend the LHEPA to require that isolation or quarantine be the least restrictive alternative available before it is implemented.

The legislature should adopt heightened due process standard in cases affecting personal liberty and property rights. Because of the health threat to the community, the legislature should provide for expedited review and limit the time an individual may be held before a hearing to two days. Furthermore, the legislature should provide for out-of-courtroom hearings. The legislature should provide for electronic hearings in these cases. Additionally, where an in-person hearing is essential, the legislature should provide for the court to come to the detainee and conduct the hearing through a sterile partition, which would accommodate the ill and the potentially ill, who may need medical attention or monitoring, by allowing the detainee to remain in a medical facility. These measures would have the added benefit of preventing instances like *Greene*, in which an allegedly tubercular individual was surrounded by those involved in the proceeding. Although it is laudable that the court appointed counsel to *Greene* on the spot, lawyers, judges, and bailiffs should not be exposed to a potentially deadly disease when reasonable alternatives exist.

#### *B. Statutory Precision Regarding the Right to Refuse Medical Treatment*

The Louisiana Legislature should clarify individuals' rights to decline medical treatment or to provide other care or treatment for themselves

when such care does not cause a “severe health hazard to the community.”<sup>231</sup> Currently, the law does not define what constitutes a “severe health hazard to the community.”<sup>232</sup> The legislature should *explicitly allow individuals potentially afflicted* with diseases that can only be spread through contact with bodily fluids, such as Ebola and HIV, *to engage in activities that would not spread these diseases*. The legislature should also specify that only individuals in isolation—in other words, individuals who *actually have a disease and pose a known threat*—can be required to undergo state-mandated medical testing or treatment. The state should allow for mandatory medical testing to determine if an individual is ill, but should prohibit detention if two tests both show negative results (as in the Hickox case). All isolation-and-quarantine decisions and property-destruction decisions for communicable disease purposes should be required to follow prevailing medical opinion when assessing the availability of a less restrictive alternative.

*C. Prophylactic Measures to Protect Property and Remedies for Violations of Procedural Safeguards*

The Louisiana Legislature should also enact legislation that frees innocent individuals from any risk of being held financially responsible for the unlimited cleanup costs associated with mandated decontamination unless it is caused by their gross negligence, willful or wanton misconduct, or intentional actions. If the owners have done nothing wrong, it is unfair to force them to attempt to pay for the State’s unilateral efforts to engage in a sanitation regime. Practically speaking, this is unworkable—few people would be able to absorb the costs of decontamination. Louisiana already requires reasonable cause to believe that property is a public health threat before destruction is an option, but the legislature should expand this to clarify that reasonable cause must be based on prevailing medical opinion so as to avoid tragic situations like the death of Excalibur. Furthermore, the legislature should require analysis of property that may potentially be destroyed (as is done in Texas) to ensure that the property is really a threat. Prior to the destruction or incineration of any property, the legislature should require an assessment showing that destruction is the least restrictive alternative. Finally, if destruction is required, the government should pay the owner reasonable compensation for the seized and destroyed property, enforceable through a private cause of action.

---

231. *Id.* § 40:6(B).

232. *Id.*

Finally, as a prophylactic measure in response to the apparent misapplication of the law in Texas, the Louisiana Legislature should provide a private right of action. This private right of action would entitle any individual who was wrongly detained to sue for statutory damages of \$100 per day of detention or \$5,000 total, whichever is greater; these damage amounts shall be adjusted for inflation every ten (10) years. There should also be a private cause of action for violation of fundamental rights, with statutory damages of \$5,000 for each violation (also to be in justed for inflation every ten (10) years). Finally, the legislature should create a cause of action for damage to destroyed property, entitling the property owner to reasonable compensation for his lost property and, if his property is wrongly seized or destroyed, entitling him to treble the value of the seized or destroyed property. These changes would help ensure compliance with laws that protect property rights and would, hopefully, deter any future disregard for the law as occurred in Duncan's case.

#### *D. Text of Proposed Legislation*

The isolation and quarantine provision of the Sanitary Code—Louisiana Revised Statutes § 40:40(A)(2)—should be amended by adding the following language:

(d) Before implementing isolation or quarantine proceedings or measures, every individual subject to such proceedings or measures must be afforded the same level of due process protections afforded by civil commitment law, including a notice and a hearing before an impartial tribunal.

(i) Isolation or quarantine can only be implemented if it is the least restrictive alternative available to protect public health and safety.

(ii) When isolation or quarantine is the least restrictive alternative available to prevent the spread of a contagious or possibly contagious disease, then the isolation or quarantine must be conducted in the least restrictive way possible.

(iii) Any isolation or quarantine must be reasonable in light of prevailing medical science and recommendations. The reasonableness of isolation or quarantine must take into account the risk of transmission and the severity of the health risks associated with getting the disease.

(iv) Remedies: Any individual may challenge his or her isolation or quarantine through a writ of habeas corpus or a civil lawsuit for damages. Any individual whom a court finds to be wrongly detained or who has been threatened with wrongful detention

will have a private right of action to sue for his or her detention, and shall be entitled to statutory damages of \$100 per day of detention or \$5,000 total, whichever is greater; these damage amounts shall be adjusted for inflation every ten (10) years.

(e) To ensure the public safety, individuals who may be subjected to isolation or quarantine must have an expedited hearing before a neutral magistrate.

(i) Prior to such hearing, no individual shall be held for more than two (2) days.

(ii) The hearings for individuals who are ill or potentially ill with a communicable disease that is transmitted through respiratory droplets or that is airborne shall permit the detained individual to remain in a facility that is medically equipped to: treat the disease or to remain at home and participate in the hearing remotely.

(iii) Such hearings could either take place at the medical facility with proper safeguards or electronically, at the court's discretion.

(iv) An in-person proceeding at the medical facility should only be allowed if the facility is equipped to allow real-time visual and auditory communication between the detainee and the court.

(v) If the facility is not so equipped, the hearing shall be through means of electronic communications.

(vi) Failure to conduct a due process hearing in accordance with this Subsection or invasion of any of the detainee's other fundamental rights shall constitute a wrongful detention under subsection § 40:40(A)(2)(d) and entitle the detainee to bring a private right of action in accordance with the provisions of § 40:40(A)(2)(d).

The least restrictive means provision of the LHEPA—Louisiana Revised Statutes § 29:764(A)(4)—should be amended as follows:

(d) To be justified, isolation and quarantine must be the least restrictive means necessary to prevent the spread of a contagious or possibly contagious disease to others. When isolation or quarantine is the least restrictive alternative available to prevent the spread of a contagious or possibly contagious disease, then the isolation or quarantine must be conducted in the least restrictive way possible.

(i) Any isolation or quarantine must be reasonable in light of prevailing medical science and recommendations. The reasonableness of isolation or quarantine must take into account the risk of transmission and the severity of the health risks associated with getting the disease.

(ii) Remedies: Any individual may challenge his or her isolation or quarantine through a writ of habeas corpus or a lawsuit. Any individual may challenge his or her threatened isolation or quarantine through a lawsuit. Any individual whom a court finds to be wrongfully detained through this writ or who has been threatened with wrongful detention will have a private right of action to sue for his or her detention, and shall be entitled to statutory damages of \$100 per day of detention or \$5,000 total, whichever is greater; these damage amounts shall be adjusted for inflation every ten (10) years.

The emergency measures provision of the LHEPA—Louisiana Revised Statutes § 29:769(A)—should be amended by adding the following:

(3) An individual property owner shall not be held responsible for costs associated with decontamination or destruction of his or her property unless the contamination of the property was the result of the property owner's gross negligence, willful or wanton misconduct, or intentional actions.

(4) No entity shall destroy property in a health care emergency unless a neutral magistrate after a contradictory hearing determines that each piece of property is first (a) found to be infected or contaminated; (b) identified as an actual, direct threat to the public health; and (c) no reasonable methods of decontamination may be applied within a reasonable period of time. Thus, each piece of property must test positive for contaminating agents or communicable diseases before destruction. If the property tests positive, it must be decontaminated and returned to the property owner if reasonable methods of decontamination are available at the expense of the State of Louisiana. Property may only be destroyed if, according to prevailing standards of medical science, such property will pose an actual, direct threat to public health. If the State of Louisiana destroys or orders to be destroyed any personal property under this provision, it shall pay the owner of the property just compensation.

(5) Private property shall not be seized or destroyed during a health care emergency if a less restrictive means exists to protect the public health.

(6) Any violation of provisions (3)-(5) shall give rise to a private right of action to sue. An aggrieved party under these sections



shall be entitled to statutory damages of treble the amount of the repurchase price of the destroyed items.

#### CONCLUSION

The coronavirus, Ebola, and other communicable diseases may pose a great threat to public safety, but the historical responses of state governments to these threats often undermine the core American values of individual freedom and property rights. State and federal isolation and quarantine law and civil commitment law have developed intermittently, and they do not provide adequate protection for individual rights. Louisiana avails itself of sweeping public health powers, but it should reconsider the breadth of its current stance and more narrowly tailor response options to ensure freedom and property rights are protected. The legislature can do this by enacting due process protections in the communicable disease setting, by creating prophylactic measures to protect property rights during a disease outbreak, and by penalizing those who disregard safeguards aimed at protecting liberty and property rights during a public health emergency. Together, these measures will help protect the community while also respecting the principles of freedom and property rights.