

Chicago-Kent College of Law

From the Selected Works of Felice J Batlan

February, 2007

Law in the Time of Cholera: Disease, State Power, and Quarantine Past and Future

Felice J Batlan, *Chicago-Kent College of Law*

ARTICLES

LAW IN THE TIME OF CHOLERA: DISEASE, STATE POWER, AND QUARANTINES PAST AND FUTURE

*Felice Batlan**

TABLE OF CONTENTS

I.	INTRODUCTION.....	54
II.	A BRIEF HISTORY OF QUARANTINE.....	62
III.	THE 1892 THREATENED EPIDEMICS: IMMIGRANTS, PESTHOUSES, AND OYSTERS.....	68
	A. <i>Methodology</i>	68
	B. <i>The Most Modern of Facilities: The New York City Board of Health</i>	69
	C. <i>Frontiers: Immigration and Typhus</i>	72
	D. <i>The Erasure of the Juridical Being</i>	76
	E. <i>Awaiting Cholera</i>	79
	F. <i>Cholera and State Action</i>	81
	G. <i>Cholera, the Public Sphere, and the Market</i>	84
	H. <i>The Enslaved White Gentleman and the Failure of Lawyers</i>	86
	I. <i>Fire Island: Vigilantism, Oysters, and Homes</i>	89
	J. <i>The Aftermath</i>	95
IV.	A LEGAL AND SOCIAL HISTORY OF QUARANTINE AFTER THE 1892 EPIDEMICS.....	97
	A. <i>Hawaii: Bubonic Plague and Fire</i>	97
	B. <i>Courts and the Abrogation of Authority</i>	99
	C. <i>The Repressed Dissent</i>	105
V.	BACK TO THE FUTURE AND LESSONS FROM THE PAST.....	110

* Assistant Professor of Law, Chicago Kent College of Law. B.A., Smith College; J.D., Harvard Law School; Ph.D., New York University. My apologies for butchering Gabriel García Márquez's poignant title *Love in the Time of Cholera*. Daniel Hamilton, Katherine Baker, Howard Eglit, Christopher Leslie, and Jancy Hoeffel provided important, expeditious, and insightful comments. Many thanks to the Chicago-Kent faculty symposium for providing useful remarks. William E. Nelson and the NYU Legal History Colloquium, Linda Gordon, and Thomas Bender provided meaningful critiques of an earlier draft. Thomas Gaylord is a research librarian extraordinaire and Thoerrin Oldenbourg, Kristin Lyman, and Gina Rinaldi worked overtime and with great care as research assistants.

A.	<i>The 2006 National Strategy for a Pandemic and the CDC's Proposed Rules</i>	110
B.	<i>Looking to the Future</i>	119
VI.	CONCLUSION.....	121

I. INTRODUCTION

When the World Trade Center Twin Towers fell in 2001, the United States entered a period of what seems like perpetual crisis—a country increasingly threatened from within and outside its borders.¹ In the aftermath of 9/11, Arab Americans, as well as other foreign nationals, worried about their immigration status and the potential violence they might face and feared that they would be painted as enemies of the United States.² In law enforcement initiatives following the attacks, Arab American men were jailed, often for significant periods of time, on charges that were at best specious.³ Likewise, enemy

1. See, e.g., Katherine Eban, *Waiting for Bioterror: Is Our Public Health System Ready?*, THE NATION, Dec. 9, 2002, at 11 (discussing bioterror precautions implemented by Centers for Disease Control (“CDC”) in wake of 9/11 in addition to perhaps more visible security measures at airports and bridges); Erin Emery, *Northern Command Takes Reins Today: Springs Center Will Coordinate National Defense*, DENVER POST, Oct. 1, 2002, at A1 (describing creation of Northern Command, a unified, standing military operation whose role in defending United States includes assisting civilian agencies in event of major disasters or attack); Linda Greenhouse, *Ideas & Trends: Executive Decisions; A Penchant for Secrecy*, N.Y. TIMES, May 5, 2002, § 4, at 1 (commenting that threat of terrorist attacks have markedly shifted balance between individual rights and national security toward security).

2. See Nina Bernstein, *From Immigrants, Stories of Scrutiny, and Struggle*, N.Y. TIMES, July 20, 2004, at B3 (illustrating widespread sentiment in immigrant communities that their residents are no longer safe in United States); Andrea Elliott, *After 9/11, Arab-Americans Fear Police Acts, Study Finds*, N.Y. TIMES, June 12, 2006, at A15 (reporting two-year study commissioned by U.S. Department of Justice that concluded Arab Americans now “have a greater fear of racial profiling and immigration enforcement than of falling victim to hate crimes”); Danny Hakim & Nick Madigan, *A Nation at War: Iraqi-Americans; Immigrants Questioned by F.B.I.*, N.Y. TIMES, Mar. 22, 2003, at B12 (noting that Iraqi immigrants perceive government scrutiny of people of Arab descent to be constant); Amy Miller, *Arab Americans Fear Backlash*, ASHEVILLE CITIZEN-TIMES, Mar. 24, 2003, at 2A (expressing fear of Arab Americans and American Muslims that war in Iraq may “fuel a widespread backlash against them,” leading to “erosion of their civil liberties”); Jonathan Raban, *The Prisoners Speak*, NEW YORK REVIEW OF BOOKS, Oct. 5, 2006, at 25, 27 (discussing Ehab Elmaghraby, Egyptian national with restaurant in New York City’s Times Square, who after 9/11 was detained for two years in Metropolitan Correctional Facility before being deported and recently settled a suit with U.S. government for \$300,000); Rachel Swarns, *Arab-Americans Gather to Build Their Civil Rights Activism*, N.Y. TIMES, June 14, 2003, at A12 (discussing growing trend among Arab Americans to unify in opposition to President Bush’s antiterrorism strategy); Jodi Wilgoren, *Immigrants: Going by “Joe,” Not “Yussef,” but Still Feeling Like an Outcast*, N.Y. TIMES, Sept. 11, 2002, at G15 (describing increasing alienation in Arab and Muslim communities since 9/11).

3. See, e.g., Nina Bernstein, *U.S. is Settling Detainee’s Suit in 9/11 Sweep*, N.Y. TIMES, Feb. 28, 2006, at A1 (describing settlement between U.S. government and Egyptian national who was among dozens of Muslims held in federal detention for months and then deported after being cleared of suspicions of involvement in terrorism); John Broder, *Threats and Responses: The Dagnet; U.S. Starts Freeing Foreigners Detained in Antiterror Sweep*, N.Y. TIMES, Dec. 20, 2002, at A24 (reporting Immigration and Naturalization Service’s frustration with Justice Department’s program requiring foreign-born men from mostly Arab and Muslim nations who voluntarily reported for “special

combatants in Guantánamo Bay have essentially been quarantined, cut off from the political body, so that their potential ideas and actions cannot harm those within the United States.⁴ Such preemptive imprisonments are intended to contain any threat to the well-being of the United States.⁵ We might understand such detentions as political quarantines.⁶ It was of course in the wake of 9/11 that Congress created the Department of Homeland Security ("DHS").⁷ As its name implies, DHS's mission is to secure the delineated domestic space of the nation from dangers both internal and external.⁸

In many ways the threat of terrorism from an unseen enemy, the fear and sense of crisis that it engenders, and the use of preventative quarantines are not new. Throughout the course of the nineteenth and twentieth centuries, the United States faced multiple epidemics of deadly diseases. In the face of such epidemics, and often in moments of panic, governments instituted significant

registration" be detained for several days on minor visa violations); Andrea Elliott, *You Can't Talk to an F.B.I. Agent that Way, Or Can You?*, N.Y. TIMES, June 4, 2005, at B1 (discussing meeting in New York during which Muslim residents aired complaints about methods employed by FBI's counterterrorism division); Danny Hakim, *A Nation Challenged: The Detainees; Transcripts Offer First Look at Secret Federal Hearings*, N.Y. TIMES, Apr. 22, 2002, at A15 (revealing that transcripts made public in federal detention case show no clear evidence of wrongdoing by Muslim detainee); see also Linda Greenhouse, *News Groups Seek to Open Secret Case*, N.Y. TIMES, Jan. 5, 2004, at A12 (describing attempts by news and legal organizations to obtain public access to documents in connection with sealed detention case before United States Supreme Court).

4. George Edmondson, *Judge: Terror Inmate Tribunals Deny Rights*, AUSTIN AM.-STATESMAN, Feb. 1, 2005, at A3; David Rohde, *Threats and Responses: The Detainees: Afghans Freed from Guantánamo Speak of Heat and Isolation*, N.Y. TIMES, Oct. 29, 2002, at A18.

5. See, e.g., Neil A. Lewis, *Guantánamo Prisoners Getting Their Day, But Hardly in Court*, N.Y. TIMES, Nov. 8, 2004, at A1 (noting that United States had released more than 150 detainees because "they no longer posed a threat" and that detainees found to be "unlawful enemy combatants" by combatant status review tribunals will have opportunity to argue in future proceedings that they no longer pose a threat); Neil A. Lewis & Eric Schmitt, *Cuba Detentions May Last Years*, N.Y. TIMES, Feb. 13, 2004, at A1 (discussing creation of panel to perform annual review of long-term detention cases to evaluate whether prisoners continue to pose threat or can be released); Greg Miller, Mark Mazzetti & Josh Meyer, *Documents Reveal the Stories of Prisoners at Guantánamo Bay*, L.A. TIMES, Mar. 4, 2006, at A1 (explaining that review board decisions focus on two criteria: (1) whether detainee continues to pose threat, and (2) whether prisoner has undisclosed information useful as intelligence); Carol J. Williams, *Guantánamo Prepares for Renovations; The U.S. Military Seeks Funding to Streamline Operations at its Base in Cuba, Even Though the Number of Detainees is Likely to Decline*, L.A. TIMES, Jan. 19, 2005, at A11 (noting military officials desire to upgrade detention facilities at Guantánamo despite expectation that number of detainees will decrease to be indicative of assumption detentions will continue).

6. See Sarah A. Whalin, *National Security Versus Due Process: Korematsu Raises its Ugly Head Sixty Years Later in Hamdi and Padilla*, 22 GA. ST. U. L. REV. 711, 720-36 (2006) (discussing effects of post-9/11 legislation and Supreme Court decisions on U.S. detention of suspected terrorists). One of the largest quarantines was, of course, the detention of Japanese Americans during World War II, which the Supreme Court upheld in *Korematsu v. United States*, 323 U.S. 214, 218-20 (1945).

7. Congress created DHS in the Homeland Security Act of 2002, Pub. L. No. 107-296, § 101(a), 116 Stat. 2135, 2142 (2002) (to be codified at 6 U.S.C. § 111).

8. Department of Homeland Security – DHS, <http://www.healthfinder.gov/orgs/HR3585.htm> (last visited Apr. 16, 2007). "The Department of Homeland Security (DHS) has three primary missions: Prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism, and minimize the damage from potential attacks and natural disasters." *Id.*

quarantines. As in the case of the so-called war against terror, public officials understood quarantines as crucial to protecting the literal well-being of the nation. Such quarantines most harshly affected those who stood on the margins of society, often poor immigrants and nonwhites. Further, as one court insightfully recognized:

The claim of "disease" in a domestic setting has the same kind of power as the claim of "national security" in matters relating to foreign policy. Both claims are very powerful arguments for executive action. Both claims are among those least likely to be questioned by any other branch of government and therefore subject to abuse.⁹

Terrorism and deadly epidemics raise the difficult questions of how we respond as a nation to fear, how much liberty we are willing to sacrifice for an abstract concept of the general welfare of the nation, and who we are willing to designate as experts. They also provoke the questions of precisely whose liberty is at stake and how we define those who will be included or excluded from the community that deserves protection.

The White House Homeland Security Council ("HSC") recently released a quite remarkable document, the National Strategy for Pandemic Influenza: Implementation Plan¹⁰ ("Plan"). The Plan addresses what would happen in the event of an outbreak of avian flu or another pandemic¹¹ in the United States.¹² Like threats of terrorism, an avian flu pandemic is imagined as a foreign invader, lodging itself among the population and threatening the domestic peace and security of the United States.¹³ The Plan creates the overall and unsettling sense

9. *City of Newark v. J.S.*, 652 A.2d 265, 271 (N.J. Super. Ct. Law Div. 1993).

10. HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA: IMPLEMENTATION PLAN (2006), available at http://www.whitehouse.gov/homeland/nsip_implementation.pdf [hereinafter PLAN].

11. Pandemic refers to "an exceptionally widespread epidemic, that is, a disease or outbreak that affects very high proportions of the population, or populations throughout the world." TABER'S CYCLOPEDIA MEDICAL DICTIONARY 1580 (15th ed. 2005).

12. The Plan states:

Today, we face a new threat. A new influenza strain — influenza A (H5N1) — is spreading through bird populations across Asia, Africa, and Europe, infecting domesticated birds . . . and long-range migratory birds. The first recorded appearance of H5N1 in humans occurred in Hong Kong in 1997. Since then, the virus has infected over 200 people in the Eastern Hemisphere, with a mortality rate of over 50 percent.

PLAN, *supra* note 10, at vii. The World Health Organization ("WHO") recently admitted that it lacks an accurate count of the cases of human-to-human transmission and resulting deaths. Donald G. McNeil, *Human Flu Transfers May Exceed Reports*, N.Y. TIMES, June 4, 2006, § 1, at 4. As of November 29, 2006, the WHO reported that avian flu has infected 258 people, killing 154. Donald G. McNeil, Jr., *2 More Die as Bird Flu Continues Spreading to Humans in Egypt*, N.Y. TIMES, Dec. 27, 2006, at A7. Indonesia had the most deaths followed by Vietnam and Thailand. *Id.* Most recently, two people have died from bird flu in Egypt. *Id.* A flu pandemic occurs when a new strain of influenza emerges that has the ability to infect humans and can be transmitted from one human to another. PLAN, *supra* note 10, at 1. Because the strain is new, humans have little immunity to it. *Id.*

13. See, e.g., Editorial, *Staying Ahead of the Avian Flu*, CHI. TRIB., Mar. 7, 2005, at 14 (noting threat avian flu poses to U.S. population if virus mutates).

that, like the next terrorist strike, a pandemic outbreak is only a matter of time.¹⁴ Again, a looming pandemic reminds us of the permeable nature of our national borders and the perceived dangers that lurk beyond them.¹⁵ HSC itself draws the similarities between a response to a pandemic and a response to terrorist threats.¹⁶

The Plan is not comforting. Some current models predict that avian flu could lead to the deaths of between 200,000 and 2,000,000 people in the United States.¹⁷ Absentee rates of up to forty percent of the work force could cause the disintegration of the nation's infrastructure, threatening the ability to supply and access critical goods and services and crippling the economy.¹⁸ At least for some, "the avian influenza outbreaks have provoked fears of an influenza pandemic reminiscent of the great plagues in world history."¹⁹ The Plan addresses the possibility of a variety of different types of quarantines, significant domestic

14. E.g., PLAN, *supra* note 10, at 1 ("[A]vian, or bird, viruses played a role in the last three pandemics. The current concern for a pandemic arises from an unprecedented outbreak of H5N1 influenza in birds . . ."); *id.* at 15 ("It is impossible to predict whether the H5N1 virus will lead to a pandemic, but history suggests that if it does not, another novel influenza virus will emerge at some point in the future and threaten an unprotected human population."); see also JOHN BARRY, THE GREAT INFLUENZA: THE EPIC STORY OF THE DEADLIEST PANDEMIC IN HISTORY 450 (2004) (emphasizing that "[t]he World Health Organization, the National Academy of Sciences . . . and the U.S. Centers for Disease Control and Prevention all agree that influenza pandemics are virtually certain to occur"). Some of these organizations caution that they probably can occur in the immediate future. See, e.g., *id.* at 449 ("Every expert on influenza agrees that the ability of the influenza virus to reassort genes means that another pandemic not only can happen. It almost certainly will happen."); WORLD HEALTH ORG., AVIAN INFLUENZA: ASSESSING THE PANDEMIC THREAT 3 (2005), available at <http://www.who.int/csr/disease/influenza/H5N1-9reduit.pdf> (noting that WHO monitoring has "produced many signs that a pandemic may be imminent"). Additionally, the prerequisites for an influenza pandemic have been fulfilled. Lawrence Gostin writes:

There are three essential prerequisites for an influenza pandemic: (1) the identification of a novel viral subtype in animal populations such as swine or poultry, (2) viral replication causing disease in humans, and (3) efficient human-to-human transmission. . . . [T]he viral strain responsible for the ongoing avian influenza outbreaks[] has a worrying capacity to jump species.

Lawrence O. Gostin, *Pandemic Influenza: Public Health Preparedness for the Next Global Health Emergency*, 32 J.L. MED. & ETHICS 565, 565-66 (2004).

15. Ironically, in the early 1990s, Guantánamo Bay was used to house and process Haitian refugees waiting to enter the United States. Some of these refugees were denied admission to the United States on the ground that they tested positive for HIV. See *Haitian Ctrs. Council v. McNary*, 789 F. Supp. 541, 546 (E.D.N.Y. 1992) (denying asylum not only to Haitian refugees who tested HIV-positive but also to those who had been "screened in" at Guantánamo); ALAN M. KRAUT, SILENT TRAVELERS: GERMS, GENES, AND THE "IMMIGRANT MENACE" 1 (1994) (noting role of xenophobia in immigration policies regarding HIV-positive Haitian refugees).

16. See PLAN, *supra* note 10, at 28 (stating that "[g]overnment response to terrorist attacks, major disasters, and other emergencies will form the basis of the Federal pandemic response").

17. PLAN, *supra* note 10, at 1, 15.

18. *Id.* at 13, 15-16.

19. Gostin, *supra* note 14, at 566. The Institute of Medicine of the National Academies writes that "the threat of an influenza pandemic is real and imminent." Mark S. Smolinski et al., *Preface to MICROBIAL THREATS TO HEALTH: THE THREAT OF PANDEMIC INFLUENZA*, at ix (Mark S. Smolinski et al. eds., 2005).

travel restrictions, and the closure of U.S. borders.²⁰ President Bush has endorsed the use of the military to maintain quarantines. As George Annas wrote in October 2005:

[W]e have moved quickly in the past month, at least metaphorically, from the global war on terror to a proposed war on hurricanes, to a proposed war on bird flu.

Of all these proposals, the use of the military to attempt to contain a flu pandemic on US soil is the most dangerous.²¹

In addition to the Plan, significant new rules are pending ("Proposed Rules"), which would provide the Centers for Disease Control ("CDC") with substantial new powers regarding the federal government's response to the outbreak of certain communicable illnesses, including the power to quarantine those potentially exposed to such diseases.²² A new form of detention, labeled

20. PLAN, *supra* note 10, at 7. "Quarantine is defined as the restriction of movement of persons exposed to infection to prevent them from infecting others . . ." Control of Communicable Diseases, 70 Fed. Reg. 71,892, 71,892 (proposed Nov. 30, 2005) (to be codified at 42 C.F.R. pts. 70, 71).

21. George J. Annas, *Bush's Risky Flu Pandemic Plan*, BOSTON GLOBE, Oct. 8, 2005, at A15.

22. Control of Communicable Diseases, 70 Fed. Reg. at 71,892-71,948. Whether or not the Proposed Rules are adopted, they raise significant legal and policy issues, which the federal government must ultimately address. The importance of clear and concise quarantine regulations and enhanced cooperation between federal, state, and international health authorities became abundantly clear in May 2007 when the CDC issued its first isolation order since the 1960s. Centers for Disease Control, Public Health investigation seeks people who may have been exposed to extensively drug resistant tuberculosis (XDR TB) infected person (May 29, 2007) (transcript of press conference), available at <http://www.cdc.gov/od/oc/media/transcripts/t070529.htm>. Although the facts still remain murky, an Atlanta attorney, Andrew Speaker, who had extensively drug-resistant tuberculosis, traveled to Greece to partake in his wedding. Lawrence K. Altman, *Agent at Border, Aware of Alert, Did Not Detain Man Who Has TB*, N.Y. TIMES, June 1, 2007, at A1; Alison Young, *Atlantan Quarantined with Deadly TB Strain*, ATLANTA JOURNAL-CONSTITUTION, May 29, 2007, at A1. Before Speaker's departure, local health officials, supposedly in contact with the CDC, advised him against traveling but did not prohibit him from doing so. Lawrence K. Altman & John Schwartz, *Near Misses Allowed Man With Tuberculosis to Fly to and From Europe, Health Officials Say*, N.Y. TIMES, May 31, 2007, at A18. While honeymooning in Rome, the CDC informed Speaker that he had a highly dangerous form of TB and told him to remain in Italy and not to travel on a commercial airliner back to the United States as there was a risk of infecting other passengers. *Id.* Believing that he needed to be in the United States for the most effective treatment, Speaker and his new wife flew to Canada and drove to New York City, during which time he contacted the CDC, which directed him to a New York City hospital. *Id.* The CDC was deeply concerned that Speaker may have infected other airline passengers, although the risk of transmission was very low. *Id.* The CDC then used its powers to provisionally quarantine him and issue an order of isolation. Some experts have praised the CDC as appropriately balancing the need to protect the public in this case versus respecting Speaker's constitutional rights. Others, however, have criticized it for using too much force against a man who was essentially in fear for his life and for its ineffectiveness in coordinating efforts among local, state, and international authorities. Mike Stobbe, *TB Quarantine Raises Legal Questions*, ASSOCIATED PRESS, June 1, 2007. As discussed further below, the federal government has the power to enact and enforce quarantines when there is a risk of infection spreading across state lines. The CDC is charged with managing federal quarantines and may call in support from other governmental agencies, such as the Federal Emergency Management Agency ("FEMA"). The federal government may also assert authority over intrastate quarantines if requested to do so by a state or if the federal government believes that a state's actions are ineffective. Joseph Barbera et al., *Large-Scale Quarantine Following Biological Terrorism in the United States: Scientific Examination, Logistic and Legal Limits, and*

"provisional quarantine," would permit CDC health officials to quarantine those potentially exposed to a disease for up to three business days without a hearing. Other provisions in the Proposed Rules raise equally difficult issues involving civil rights and civil liberties.

Quarantine as a response to a threatened pandemic appears imminently reasonable and justified. It is a method of protecting a community, however community is defined, at the expense of a smaller number of people. Yet, the medical and public health community is divided over the efficacy of large scale quarantines.²³ Most troubling is that quarantines give the government extraordinary powers to detain individuals with little oversight.²⁴ Furthermore, the local, state, and federal governments each have overlapping jurisdiction for quarantines, thereby creating the potential for legal conflicts, confusion, chaos, and inefficient bureaucracies in which individuals in need of aid become trapped and others are not actually protected from infection.

Although the use of "enemy quarantines" such as Guantánamo Bay has attracted much attention and resulted in a burgeoning body of legal literature and court cases, the potential for large-scale medical quarantines has attracted the interest of few legal scholars or public intellectuals in the last decade.²⁵ Little

Possible Consequences, 286 JAMA 2711, 2713 (2001). Understanding the distinction between the terms quarantine and isolation is crucial: "Quarantine refers to the restriction of movement of persons who have been exposed to a communicable disease but who are not yet ill. Isolation on the other hand is the restriction of movement of persons ill with a communicable disease in a stage where transmission is possible." Control of Communicable Diseases, 70 Fed. Reg. at 71,904; *see also* PLAN, *supra* note 10, at 7, 12 (distinguishing between quarantine and isolation); Marty Cetron, Remarks at the Concurrent Session of the 3d Annual Partnership Conference on Public Health Law (June 14-16, 2004), in Lawrence O. Gostin et al., *Quarantine: Voluntary or Not?*, 32 J.L. MED. & ETHICS 83, 83 (2004) (same).

23. *E.g.*, Jennifer B. Nuzzo et al., Comments from the Center for Biosecurity of UPMC on Proposed Revisions to 42 CFR 70 and 71 (Quarantine Rules) 1 (Jan. 27, 2006), available at http://www.cdc.gov/ncidod/dq/nprm/comments/2006Jan28_UPMC.pdf (rejecting premises relied on in the proposed revisions as "highly questionable and unsupported by data" and arguing that proposed changes would be extremely expensive and largely ineffective means of attempting to control spread of influenza).

24. *See, e.g.*, SUSAN CRADDOCK, CITY OF PLAGUES: DISEASE, POVERTY, AND DEVIANCE IN SAN FRANCISCO 61-102 (2000) (discussing medical scapegoating of Chinese in San Francisco in nineteenth century); JUDITH WALZER LEAVITT, TYPHOID MARY: CAPTIVE TO THE PUBLIC'S HEALTH, at xvii-xviii (1996) (discussing the way in which "Typhoid Mary" was defined as deviant and deemed deadly threat to public health).

25. For example, the Supreme Court's Guantánamo detainee trinity consists of *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); and *Rasul v. Bush*, 542 U.S. 466 (2004). In turn, these cases have already spawned competing interpretations when applied to the very same issue by two judges of the same court. Compare *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 445 (D.D.C. 2005) (holding that Fifth Amendment's Due Process Clause applies to Guantánamo Bay detainees), with *Khalid v. Bush*, 355 F. Supp. 2d 311, 320-21 (D.D.C. 2004) (rejecting application of Due Process Clause to Guantánamo detainees). The Guantánamo detainee trinity has also sparked academic commentary. *See, e.g.*, Diane M. Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 265 (2004) (arguing that U.S. courts should draw from international human rights law when determining validity of detentions, allowing liberty interests to overcome deference grounded in separation of powers); American Society of International Law, *Treatment of U.S. Detainees at Guantánamo Bay*, 99 AM. J. INT'L L. 261, 261 (2005) (reporting *Hamdi* and *Hamdan*

public discussion about the possibility of quarantines currently exists outside the public health community. In part, this is because there has not been a widespread medical quarantine in the United States for at least eighty years.²⁶ As one scholar of public health writes about the United States, "Throughout the twentieth century, quarantine increasingly faded from use as a public health measure for disease control . . . its mere discussion by public health officials elicited suspicion."²⁷ An additional reason for such absence is that legal scholars seem ready to cede authority to medical experts who will supposedly exercise their power in a neutral, scientific, and objective manner. History, however, has demonstrated repeatedly that this has not always—or even usually—been the case.²⁸ Rather, in the past, quarantines have been infused with issues of race, class, and gender, placing the greatest hardships on those who failed to conform to white middle-class norms of behavior. In the past, quarantine has been a form of stigma inflicted on those who are already stigmatized.

This Article closely examines two episodes of threatened epidemics that occurred in 1892 in New York City. Both of these potential epidemics, one involving typhus and the other cholera, resulted in the quarantine of thousands of people, the large majority of whom were poor immigrants, primarily Italians and Russian Jews. The Article explores the events surrounding these epidemics and the roles that local, state, and federal governments played. It also analyzes

decisions); K. Elizabeth Dahlstrom, *The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantánamo Bay*, 21 BERKELEY J. INT'L. L. 662, 677-81 (2003) (discussing legal challenges to Guantánamo detentions); Alan Tauber, *Ninety Miles from Freedom? The Constitutional Rights of the Guantánamo Bay Detainees*, 18 ST. THOMAS L. REV. 77, 78 (2005) (concluding detainees entitled to Fifth Amendment due process protection but not Sixth Amendment criminal trial protections); Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantánamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149, 188-210 (2005) (advocating use of military rather than criminal detention model for those captured during military conflicts with nonstate actors).

In contrast, the last significant wave of scholarship regarding medical quarantine involved various proposals in the 1990s to quarantine those infected with AIDS. No such widespread quarantines of people in the United States actually occurred. *See generally* Wendy E. Parmet, *Aids and Quarantine: The Revival of An Archaic Doctrine*, 14 HOFSTRA L. REV. 53 (1985) (discussing AIDS and quarantine); Kathleen M. Sullivan & Martha Field, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. REV. 139 (1988) (same). In the name of public health, however, city public health officials shut down gay gathering spaces such as bath houses. *See* Steven Aden, *A Tale of Two Cities in the Gay Rights Kulturkampf: Are the Federal Courts Presiding Over the Cultural Balkanization of America*, 35 WAKE FOREST L. REV. 295, 307 (2000) (discussing closure of bath houses in San Francisco).

26. The authors of one interdisciplinary report on quarantine write: "A review of the medical literature found no large-scale human quarantine implemented within US borders during the past 8 decades." Barbera et al., *supra* note 22, at 2712.

27. Howard Markel, Remarks at the Concurrent Session of the 3d Annual Partnership Conference on Public Health Law (June 14-16, 2004), in Gostin et al., *supra* note 22, at 85, 86.

28. Gostin, *supra* note 14, at 571 (stating that "[h]istory demonstrates the potential for over-reaction, stigma, and discrimination in the face of a severe epidemic"); *see also* CRADDOCK, *supra* note 24, at 3 (noting that interpretations of disease by public health officials are often used as political tools to relabel deviance and thereby exclude particular communities from society at large); LEAVITT, *supra* note 24, at 70-95 (discussing long-term quarantine of Mary Mallon, also known as Typhoid Mary).

how the legal system ultimately failed to protect some of the most vulnerable people—those who were seen as having the capacity to pollute the country and the body politic. The Article then goes on to examine a number of other large-scale quarantines that occurred at the turn of the century and the often troubling jurisprudence that they produced.

An analysis of the 1892 threatened epidemics allows us to observe how powerful discourses of civilization, law, science, xenophobia, militarism, and the state's police power intersected to produce a number of terrifying historical moments. Such epidemics were terrifying both for those quarantined as well as those who believed that a massive epidemic could kill thousands in the United States, as cholera was in fact doing in Europe. Using 1892 as a case study, this Article attempts to create a usable past. Part of what is so fascinating about the White House's current Plan for a pandemic is how so much of the discourse is similar to that used by officials in 1892. Study of the 1892 epidemics and resulting quarantines is also important because they can be understood as two of the first modern epidemics occurring after the rudiments of germ theory were accepted and during a period of significant breakthroughs in public health.²⁹ At the same time, a sophisticated bureaucratic and regulatory state was quickly developing with the capacity to observe, police, and regulate its citizens.³⁰

Although epidemics, and the medical and scientific response to them, might be imagined as standing outside issues of race, gender, and class, history shows how these issues play significant roles in defining, detecting, and responding to outbreaks of disease.³¹ In other words, disease and society's response to crisis are anything but apolitical and are not independent from the cultures in which they are embedded. In the wake of Hurricane Katrina, we have once again learned the extraordinary force of race and class and how they can mark government response.³²

29. On the history of public health, see generally PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 190-97* (1982).

30. On the rise of the regulatory state, see generally WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992); BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865-1920* (2001).

31. See, e.g., LEAVITT, *supra* note 24, at 97 (discussing Typhoid Mary and how issues of race, gender, and class combined to create her vilification). See generally ALLAN M. BRANDT, *NO MAGIC BULLET: A SOCIAL HISTORY OF VENEREAL DISEASE IN THE UNITED STATES SINCE 1880* (1987) (noting venereal disease research and treatment heavily influenced by social forces and government adoption of moral approbrium); JAMES H. JONES, *BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT* (1993) (providing history of experiments in which African American subjects were intentionally infected with syphilis without their knowledge in order to study the disease).

32. Cheryl Harris writes: "The images of suffering that washed over New Orleans in the wake of Hurricane Katrina seemed to provide incontrovertible evidence of the significance of race and persistence of racial inequality in contemporary U.S. society." Cheryl I. Harris, *Review Essay: Whitewashing Race: Scapegoating Culture*, 94 CAL. L. REV. 907, 907 (2006); accord Susannah Sirkin, *The Debacle of Hurricane Katrina: A Human Rights Response*, 30 FLETCHER F. WORLD AFF. 223, 224-25 (2006) (discussing disparate impact of Hurricane Katrina on poor, minority residents).

This Article proceeds as follows: Part II provides a brief history of quarantine, especially the long-standing conflict between state and federal government regarding jurisdiction over quarantine. Part III is a detailed account of two threatened epidemics that occurred in New York City in 1892 and the response of local, state, and federal officials. This Part looks closely at how immigrants were situated as sources of contagion and the ways in which a variety of laws allowed for the quarantine of thousands of healthy people in dangerous conditions without due process. Furthermore, conflicts between municipal, state, and the federal government over quarantine jurisdiction resulted in inordinate difficulties and served to create a sort of legal limbo for some of those quarantined.

Part IV provides a social and intellectual history of how quarantine law developed after 1892 and examines a number of large-scale quarantines that involved United States Pacific Rim Chinatowns. This Part illustrates that while most courts upheld quarantines, a minority of courts placed substantial limits on the state's power to quarantine and even found affirmative duties on the part of the state to provide adequate care. Part V analyzes the federal government's current plans regarding quarantine in connection with a potential outbreak of avian influenza. In doing so, it examines the HSC's Plan and the Proposed Rules. This Part compares the problems with the Plan and the Proposed Rules to those that arose in earlier quarantines. It argues that future quarantines must take account of the ways in which quarantine powers have been abused and provide clear and concise rules to prevent such abuses from occurring in the future. The Conclusion offers crucial recommendations regarding the Proposed Rules and the role that law and the courts must play in the event of future quarantines. In sum, quarantines occurring as a response to avian flu or other new influenzas create an acute need to understand the history of quarantines and the difficult legal questions that they raise. There are, in fact, lessons to be learned from the past.

II. A BRIEF HISTORY OF QUARANTINE

This Part provides a brief history of quarantine. It illustrates the long-standing use of quarantine in this country and the tremendous political conflict over whether the states or the federal government should have jurisdiction over quarantine. Some form of quarantine has existed since ancient times—if we understand quarantine simply to mean the isolation of the ill from the healthy.³³ More modern quarantine, however, can be traced back to fourteenth century Europe. During the period of the Black Death, Venice, along with other southern European coastal trading cities, began to impose quarantines on arriving ships and travelers coming by land.³⁴ Indeed “quarantine” is derived

33. Cetron, *supra* note 22, at 83; Elizabeth C. Tandy, *Local Quarantine and Inoculation for Smallpox in the American Colonies (1620-1775)*, 13 AM. J. PUB. HEALTH 203, 203-04 (1923).

34. Paul S. Sehdev, *The Origin of Quarantine*, 35 CLINICAL INFECTIOUS DISEASES 1071, 1072 (2002).

from the Italian word *quarantina*, meaning forty days.³⁵ By the seventeenth century, numerous European cities instituted quarantines when plague had broken out elsewhere.³⁶ Quarantines also appeared in parts of the Ottoman Empire during the eighteenth century.³⁷ At times, quarantines had significant political ramifications, including war, when disagreements erupted regarding responsibility for goods confiscated or vessels detained, or when quarantines triggered urban riots.³⁸

The Massachusetts Bay Colony passed the first quarantine law in the American colonies in 1647 as a precaution against plague carried by Caribbean ships.³⁹ Within the next decade, some townships began to enact land-based quarantine laws. For instance, in 1662 East Hampton, Long Island passed a law prohibiting Native Americans with smallpox from entering the town.⁴⁰ This, of course, is particularly ironic and reflects the connection between disease and the fear of the *other*, as it was Europeans who brought smallpox to Native Americans.⁴¹ By the beginning of the eighteenth century, the Massachusetts Bay Colony passed a broader law regarding the isolation of the ill. The law provided the selectmen of the town with the ability to remove and place ill people into separate houses.⁴² Importantly, the law also required that the selectmen provide “nurses, tendance and other assistance and necessaries” for those isolated.⁴³ Hence, the ability to quarantine came with the attendant responsibility to provide care.

In 1799, Congress passed An Act Respecting Quarantine and Health Laws,⁴⁴ which specifically authorized federal officers to assist state officials in quarantines.⁴⁵ Yet, for the most part, quarantine laws were within the purview of the states, and the United States Supreme Court consistently confirmed that states possessed quarantine powers.⁴⁶ Such a view was so entrenched that in 1829, when the Secretary of the Treasury asked the Attorney General whether

35. NEW OXFORD AMERICAN DICTIONARY 1385 (2d ed. 2005); *see also* Markel, *supra* note 27, at 86 (describing use of “restrictive, forty-day public health control measure” in fourteenth-century Italy).

36. Sehdev, *supra* note 34, at 1072.

37. NANCY E. GALLAGHER, *MEDICINE AND POWER IN TUNISIA, 1780-1900*, at 7 (1983).

38. *Id.* at 24, 41; *see also* Katherine L. Vanderhook, A History of Federal Control of Communicable Diseases: Section 361 of the Public Health Services Act 9 (April 30, 2002) (unpublished manuscript, on file with Harvard Law School) (chronicling 1856 incident in which displeasure with quarantine laws resulted in the barricade of quarantine station and destruction of quarantine hospital).

39. Tandy, *supra* note 33, at 203.

40. *Id.* at 204.

41. John Duffy, *Smallpox and the Indians in the American Colonies*, 25 BULL. HIST. MED. 324, 327-29 (1951).

42. Tandy, *supra* note 33, at 204.

43. *Id.*

44. Act of Feb. 25, 1799, ch. 12, 1 Stat. 619.

45. *Id.* §§ 2-3, 1 Stat. at 619-20.

46. *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 29 (1824) (discussing quarantine laws as example of state legislation that is valid despite effects on interstate commerce).

the Treasury Department could issue quarantine regulations, the response came back in the negative.⁴⁷

Quarantine was especially relevant for port cities through which goods and people entered and intermingled. Boston enacted a quarantine law in 1808 that required ships arriving from tropical ports in the months of May through October (when threats of yellow fever were greatest) to be quarantined on arrival for three days or until twenty-five days had passed since departure.⁴⁸ This period represented the amount of time in which it was believed that symptoms of yellow fever would appear.

New York State took a slightly different approach in 1784. New York created a quarantine station with a port physician. On suspicion of disease, he inspected ships and reported their condition to the Governor and the Mayor of New York City, who would then determine whether the ship, its cargo, and passengers should be quarantined. By 1855, New York opened Castle Garden on the tip of Manhattan as a state immigration arrival center. Immigrants were then subjected to individual medical examinations before entering the United States. In addition, the state required every ship to anchor at the quarantine station. There, a state official boarded the ship and obtained information regarding the health of the passengers and the sanitary conditions of the ship. This information was then transmitted to Castle Garden. Passengers believed to have contagious diseases were sent to quarantine.⁴⁹

Throughout the first half of the nineteenth century, other port cities instituted similar procedures.⁵⁰ Interestingly, such quarantine regulations came under continuous attack by reformers who believed they were both ineffective and oppressive.⁵¹

Following the Civil War, the federal government sought to assert greater quarantine powers. In 1866, Congress passed a law allowing the Secretary of the Treasury "to make and carry into effect such orders and regulations of quarantine as . . . may be deemed necessary and proper, in aid of State or municipal authorities."⁵² Although this Act provoked tremendous controversy for its supposed usurpation of states' quarantine powers, it resulted in only a slight enhancement of federal power over quarantine. Those who argued against quarantine based their position on the need to take into account local conditions with which the states were most likely to be familiar and on the possibility that federal quarantine legislation was unconstitutional and an infringement on

47. Michael Les Benedict, *Contagion and the Constitution: Quarantine Agitation from 1859 to 1866*, 25 J. HIST. MED. & ALLIED SCI. 177, 178 (1970).

48. KRAUT, *supra* note 15, at 24.

49. *Id.*

50. *Id.*

51. See Benedict, *supra* note 47, at 178 (stating that anticontagionists opposed strict quarantines and many espoused that "quarantine was 'the means of producing more deaths ten to one than it has ever saved lives'" (quoting NATIONAL QUARANTINE AND SANITARY CONVENTION, PROCEEDINGS AND DEBATES OF THE THIRD NATIONAL QUARANTINE AND SANITARY CONVENTION, HELD IN THE CITY OF NEW YORK, APRIL 27TH, 28TH, 29TH, AND 30TH, 1859, at 29 (1859))).

52. J. Res. 42, 39th Cong., 14 Stat. 357 (1866).

states' rights.⁵³ More significantly, in 1872, the Reconstruction Congress authorized the Secretary of War to confer with Southern state authorities to create more uniform quarantine laws to prevent yellow fever.⁵⁴ The federal government's primary role was to assist states in enforcing their own quarantine laws. In fact, federal power was so limited that Supervising Surgeon General John Maynard Woodworth described federal quarantine law as a "dead letter."⁵⁵

Yet, through the nineteenth century multiple epidemics continued to occur in the United States, which killed thousands. The 1878 yellow fever epidemic, which began in the Port of New Orleans and spread along the Mississippi, was particularly devastating and killed over 5000 people in Memphis alone.⁵⁶ Fear became so great that armed men would meet trains preventing passengers from disembarking for fear of infection.⁵⁷ Many residents fleeing infected cities were denied shelter and some died of starvation and exposure. Hastily erected quarantines at state borders proved ineffective at curtailing the epidemic but halted commerce throughout the South.⁵⁸ Epidemics such as these once again prompted what proved to be controversial and inadequate federal action.⁵⁹

In 1878, Congress created the Division of Quarantine within the Marine Hospital Service.⁶⁰ The Division was responsible for inspecting all incoming vessels and collecting information about epidemics in foreign cities. The law also authorized the Surgeon General to create rules and regulations regarding federal quarantine.⁶¹ Such rules, however, could not conflict with or impair state quarantine laws.⁶²

One year later, Congress established the National Board of Health, which was to provide advice and support to state and local health officials.⁶³ The Board, in 1880, was charged with the authority to provide monetary support to state and local boards when needed to prevent the spread of disease, and the Board essentially became the national agency responsible for creating a modern quarantine system, especially in connection with the South and yellow fever.⁶⁴ The Board advocated for the disinfection of ships and cargo and the inspection of arriving passengers. As contemporaries argued, a modern quarantine stood in contrast to the extreme of prohibiting all trade with infected places. This older form of quarantine they considered "barbarous," "inhuman," and a "return to

53. Benedict, *supra* note 47, at 190-92.

54. J. Res. 6, 42d Cong., 17 Stat. 396 (2d Sess. 1872).

55. FITZHUGH MULLAN, *PLAGUES AND POLITICS: THE STORY OF THE UNITED STATES PUBLIC HEALTH SERVICE* 23-25 (1989).

56. MARGRET HUMPHREYS, *YELLOW FEVER AND THE SOUTH* 5 (1992).

57. *Id.* at 61.

58. *Id.*

59. *Id.*

60. Vanderhook, *supra* note 38, at 16.

61. Act of Apr. 29, 1878, ch. 66, § 2, 20 Stat. 37, 38; Vanderhook, *supra* note 38, at 16.

62. § 2, 20 Stat. at 38; Vanderhook, *supra* note 38, at 16-17.

63. Vanderhook, *supra* note 38, at 18-19.

64. HUMPHREYS, *supra* note 56, at 64.

the dark ages."⁶⁵ In multiple locations, state officials and the National Board clashed regarding perceived insults and a fear that the federal government was illegally taking control of state quarantines and would eventually destroy state commerce.⁶⁶ After three years, the National Board's mandate expired and it was not renewed by Congress.⁶⁷

Thus, federal quarantine jurisdiction remained limited to goods and people flowing into and out of the United States, and Congress showed little interest in domestic quarantines. In fact, any effort to federalize quarantine law still met with staunch opposition. The Southern states argued that federal control would allow "eastern capitalists" to shut down Southern ports, forcing goods to be transported by railroads owned by Northern capitalists.⁶⁸ The United States Supreme Court, in 1886, also weighed in on the issue of who had jurisdiction over quarantine. The Court held that quarantine laws were within the sole province of the states, at least until Congress chose to act on the issue.⁶⁹ In part, the decision turned on the question of whether such laws regulated commerce, which was within federal control, or health, which was exclusively within state control. The Court opined that although quarantine regulated commerce, it was also a health regulation. Looking at the long history of state control, it upheld state quarantine laws.⁷⁰

In the wake of additional epidemics, in 1888 Congress provided half a million dollars to the Marine Hospital Service to build seven federal quarantine stations, which now competed with state quarantine facilities.⁷¹ Finally, in 1890, Congress passed a bill, based on the Commerce Clause, which, on direction of the President, authorized the Secretary of the Treasury to create rules and regulations to prevent the spread of certain diseases from one state to another.⁷²

65. *Id.* at 67 (quoting NAT'L HEALTH BD. BULLETIN, INSPECTION AND PURIFICATION OF PASSENGERS, BAGGAGE, AND FREIGHT 41 (1879)).

66. *Id.* at 73-76.

67. *Id.* at 65.

68. JOSEPH HOLT, PESTILENTIAL FOREIGN INVASION AS A QUESTION OF STATE'S RIGHTS AND THE CONSTITUTION 19-20 (1892). Joseph Holt had served as the president of the New Orleans Board of Health and was a leading southern health expert. He and his attorneys claimed that Article I of the U.S. Constitution, which states that "[n]o preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another," further prohibited federal control of quarantine. *Id.* at 20. For a brief discussion of the history of various states' quarantine provisions, see GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 31-32 (1996).

69. *Morgan's La. & T.R. & S.S. Co. v. La. Bd. of Health*, 118 U.S. 455, 464 (1886).

70. *Id.* at 461-66; *accord* *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 142-43 (1837) (upholding New York's requirement that ships provide passenger lists and bonds as part of state's police power). In contrast, in 1849, the Court struck down a New York head tax on immigrants declaring that only Congress could regulate commerce. *The Passenger Cases*, 48 U.S. (7 How.) 283, 400-01 (1849). For a brief discussion of these cases, see NEUMAN, *supra* note 68, at 44-46. A leading treatise on public health also strongly endorsed states' rights to control quarantine. LEROY PARKER & ROBERT H. WORTHINGTON, *THE LAW OF PUBLIC HEALTH AND SAFETY, AND THE POWERS AND DUTIES OF BOARDS OF HEALTH* 32-33 (1892).

71. HUMPHREYS, *supra* note 56, at 129-30.

72. Act of Mar. 27, 1890, ch. 51, § 1, 26 Stat. 31, 31.

The following year, Congress adopted a law that provided for the medical inspection of immigrants entering the United States.⁷³ Now immigrants underwent individual health inspections before departure from a foreign port and after arrival in the United States.⁷⁴ Such federal power was soon increased by an act that provided authority to the Marine Hospital Service to approve state and local quarantine facilities and bring them up to federal standards. The Service was also charged with enforcing federal quarantine rules. This 1893 law provided compensation to states that transferred their quarantine facilities to the federal government.⁷⁵

As the federal government attempted to assert greater control but not preemption over quarantine, overlapping state and federal jurisdiction produced at best confusion and duplication as states still asserted jurisdiction over quarantines located within their borders. For example, ships entering the port of New York first went through state quarantine and then federal quarantine.⁷⁶ One turn of the century federal quarantine official wrote that his "task was complicated by the intense rivalry which . . . existed between State and Federal authorities over the administration of a quarantine law."⁷⁷ Indeed, at one point this federal official came close to being arrested for violating state quarantine law while conducting his duties.⁷⁸

Slowly, however, through the course of the first half of the twentieth century, the federal government came to exert considerable control over quarantine. In 1944, Congress passed the Public Health Service Act,⁷⁹ which consolidated the power of the federal government over quarantine in relation to the movement of goods and people into the United States as well as across state lines.⁸⁰ Even such consolidation of federal power, however, did not displace the states' traditional power of quarantine within their own boundaries. This complicated patchwork of multiple jurisdictions maps and shapes the face of quarantine today.

73. Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084, 1085-86.

74. KRAUT, *supra* note 15, at 51.

75. *Id.* at 59-60.

76. *Id.* at 60.

77. VICTOR GEORGE HEISER, AN AMERICAN DOCTOR'S ODYSSEY: ADVENTURES IN FORTY-FIVE COUNTRIES 16 (1936).

78. *Id.* at 17.

79. Pub. L. No. 78-410, 58 Stat. 682 (1944) (codified as amended at 42 U.S.C. §§ 201-300hh (2000)).

80. See Public Health Service Act §§ 311, 322, 364-370 (current version at 42 U.S.C. §§ 267-272 (2000)) (granting federal officers various powers to control and manage quarantines).

III. THE 1892 THREATENED EPIDEMICS: IMMIGRANTS, PESTHOUSES, AND OYSTERS

A. Methodology

Viewing epidemics and resulting quarantines through one prism, we can understand them as objective phenomena, taking place in the realm of science, epidemiology, germs, and diseased bodies. From another perspective, however, they are cultural phenomena, providing a window into issues of state power, individual rights, the role of law, class, gender, race, and a society's anxieties. As one historian writes, epidemics can function as "mirrors or magnifying glasses reflecting and revealing underlying social forces and conflicts and changes in values and attitudes."⁸¹

As some would argue, the very process of naming, delineating, and defining disease allows for the medicalization of the body and the subsequent ability of the state to assert regulation and discipline over the individual.⁸² Historian Susan Craddock writes that "the inscription of disease . . . rationalize[s] a degree of surveillance and control that would otherwise [be] untenable."⁸³ Gender theorist Linda Singer, analyzing state action in connection with AIDS, posits:

An epidemic is already a situation that is figured as out of control, hence at least indirectly a recognition of the limits of existing responses, hence a call for new ones. Because the destabilization effect is also represented as a threat, a threat to the very order of things, epidemic conditions tend to evoke a kind of panic logic which seeks immediate and dramatic responses to the situation at hand.⁸⁴

Indeed, epidemics function as a "socially authoritative discourse," which creates the need for greater and previously unacceptable state intervention into people's lives and bodies while also "mobilizing social assets and resources."⁸⁵

This Article places the 1892 epidemics in such a cultural context. Discussions surrounding these epidemics reveal how various individuals and groups understood the roles that they were to play in public life and how various people, organizations, institutions, and government officials made bids for power on the local and national levels. Indeed, as shown by the 1892 epidemics, epidemics provide one means through which a state may consolidate power and increase the regulation of people's daily lives. They also provide a channel for a society to collectively determine who constitutes the community entitled to protection and who becomes defined as an outsider that endangers the community.

81. GALLAGHER, *supra* note 37, at 2.

82. For a discussion of the work of Michael Foucault and its application to epidemics, see CRADDOCK, *supra* note 24, at 3-5, and LINDA SINGER, *Erotic Welfare*, in *EROTIC WELFARE: SEXUAL THEORY AND POLITICS IN THE AGE OF EPIDEMIC* 17, 30 (1993).

83. CRADDOCK, *supra* note 24, at 63.

84. SINGER, *supra* note 82, at 28.

85. *Id.* at 30.

The 1892 epidemics allowed diverse residents and officials of the city, state, and country to project deep-seated concerns. Central to the various debates surrounding the epidemics were issues of property, citizenship, immigration, individual rights, capitalism, and the power of the state. For instance, the epidemics brought to the fore such questions as the extent to which the state had a duty to protect property and whose property it should protect when multiple claims conflicted. Furthermore, elite and middle-class New Yorkers urged an extraordinarily strong state response to the threatened epidemics, believing that such state power would be exerted to control the bodies of immigrants. When the elite and middle class became the subject of such power, however, the state came under intense criticism. At the same time, the language used to describe the epidemics and those understood as potential agents of contamination highlights how important discourse is to law. On the most simplistic level, how we describe people may reflect back and serve to construct the legal rights to which they are entitled.⁸⁶

B. *The Most Modern of Facilities: The New York City Board of Health*

Prior to 1892, New York City had experienced a number of epidemics. Health experts, city politicians, and ordinary people understood that it was only a matter of time until the next epidemic erupted.⁸⁷ Individual citizens and groups demanded anything from the removal of a neighbor's stable to the paving of a city street, justifying their demands by claiming that the improvement would prevent future epidemics, as both experts and lay people believed that filth was at least one cause of disease.⁸⁸

Past epidemics provoked a great deal of hand-wringing, quickly improvised efforts to clean city streets, and the mass exodus of those wealthy enough to leave the city.⁸⁹ By the mid-1880s, however, optimistic city officials believed that they were fully equipped to handle any epidemic. A couple of factors fed their

86. Cheryl Harris, examining the role of images, discourse, and media following Hurricane Katrina, writes:

[C]itizens initially saw Blacks as victims of both the hurricane and the failed governmental response As time progressed, the social currency of the image of Blacks as citizens of the state to whom the government owed a duty of care diminished. That image rubbed uneasily against the more familiar racial framing of poor Black people as lazy, undeserving and inherently criminal.

Harris, *supra* note 32, at 937.

87. HOWARD MARKEL, QUARANTINE! EAST EUROPEAN JEWISH IMMIGRANTS AND THE NEW YORK CITY EPIDEMICS OF 1892, at 9 (1999).

88. Felice Batlan, Gender in the Path of the Law: Public Bodies, State Power, and the Politics of Reform in Late Nineteenth Century New York City 267-74 (Jan. 13, 2005) (unpublished Ph.D. dissertation, New York University) (on file with author).

89. See, e.g., Elizabeth Blackmar, *Accountability for Public Health: Regulating the Housing Market in Nineteenth-Century New York City*, in HIVES OF SICKNESS: PUBLIC HEALTH AND EPIDEMICS IN NEW YORK CITY 42, 54 (David Rosner ed., 1995) (noting early-nineteenth-century epidemics typically engendered official calls for street cleaning); *id.* at 44 (noting contemporary observers reported flight of "opulent" New Yorkers during peak months of yellow fever epidemic in late eighteenth century).

confidence. First, the city's health establishment had come to accept the rudiments of germ theory, and this new and supposedly empirical knowledge empowered them as experts.⁹⁰ They could see and understand what others could not.⁹¹ Second, many recognized that it was no longer feasible to shut the city down for an epidemic.⁹² New York City was now the commercial hub of the nation; business could not be suspended because of a germ. The germ, and those who might carry it, had to be disciplined to the needs of the market. Instead of escaping the city, officials armed with scientific knowledge determined to stand their ground and engage in battle. As New York City sought to be recognized (and to recognize itself) as an imperial city equal to (if not exceeding) London, Paris, and Berlin, its ability to fight and eradicate epidemics became one mark of its status.

In the mid-1880s, New York City and New York State spent significant sums of money updating their quarantine facilities. An 1888 report commissioned by New York State roundly criticized quarantine facilities in the Port of New York, and the state sought to remedy some of the most flagrant problems.⁹³ New York City also sought to update its own quarantine facilities.⁹⁴ After substantial research, the New York City Board of Health installed new machinery to disinfect goods, believing that such equipment was the most efficient and modern that money could buy. As disinfectant machinery was installed and quarantine facilities renovated and repaired, such stations became an elite tourist destination; the city sponsored boat trips for illustrious New Yorkers to view and inspect what city and state officials proclaimed to be the most modern of public health facilities.⁹⁵

The agency at the forefront of this modernization of public health was the New York City Board of Health. Throughout the 1880s, the New York City

90. Germ theory replaced an understanding that dirt and filth generated disease. This understanding is often referred to as the miasma theory of illness. Although there was a great deal of opposition to germ theory within the scientific and medical communities, the New York City Department of Health had embraced it. See EVELYNN MAXINE HAMMONDS, *CHILDHOOD'S DEADLY SCOURGE: THE CAMPAIGN TO CONTROL DIPHTHERIA IN NEW YORK CITY, 1880-1930*, at 46-87 (1999) (discussing city's acceptance of bacteriology as necessary protective measure against epidemic and Board of Health's resultant creation of Division of Pathology, Bacteriology and Disinfection).

91. On improvements at the turn of the century in medical science and public health, see Charles McClain, *Of Medicine, Race, and American Law: The Bubonic Plague Outbreak of 1900*, 13 *LAW & SOC. INQUIRY* 447, 457-58 (1988).

92. COMMITTEE ON FOREIGN COMMERCE AND REVENUE LAWS, REPORT OF A COMMITTEE OF THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK ON THE BILL BEFORE THE LEGISLATURE PROVIDING FOR THE PAYMENT OF A SALARY TO THE HEALTH OFFICER OF THE PORT OF NEW YORK AND ABOLISHING FEES, TOGETHER WITH PROPOSED AMENDMENTS TO THE BILL 5 (1886); HOLT, *supra* note 68, at 15, 19-20.

93. *Bad Quarantine Methods: A Report Finding the Protection from the Plague Very Imperfect*, N.Y. TIMES, Dec. 31, 1887, at 5; *Danger at Quarantine: Great Changes Demanded Immediately*, N.Y. TIMES, Jan. 3, 1888, at 3; *Quarantine Improvements*, N.Y. TIMES, May 23, 1888, at 9; *The Quarantine Islands: Progress of the Improvements - An Official Visit Yesterday*, N.Y. TIMES, Dec. 4, 1889, at 8.

94. MARKEL, *supra* note 87, at 8.

95. *Business and Pleasure*, N.Y. TIMES, Oct. 24, 1889, at 5; *Hospitals in the Bay*, N.Y. TIMES, Jan. 20, 1889, at 16.

Board of Health had been accumulating power. At least some in the late-nineteenth-century New York City legal community recognized the agency's power and feared the threat it presented to individuals and property. In 1887, the city's corporation counsel advised Mayor Abram S. Hewitt: "The Board of Health possesses under the law as it stands to-day, probably as despotic powers as are lodged anywhere on earth under a free government."⁹⁶ He emphasized that citizens might not countenance the Department's ability to invade homes at will. The corporation counsel's words may have been a slight exaggeration, but the New York City Board of Health did possess significant legal power over goods, property, and the space of the city. Although the Board often was reluctant to use its power and seems to have preferred negotiation to launching actions of condemnation and confiscation, its officials sometimes exercised their powers. For instance, during the month of February 1885, the Sanitary Bureau of the Department of Health summarily seized and destroyed 17,975 pounds of meat from one company.⁹⁷

Furthermore, a proposed law of 1887, which the Board of Health drafted, gave the Board, on its own motion, the power to quarantine—essentially to seal off—any building where a contagious or infectious disease existed, as long as the Mayor also approved such quarantine.⁹⁸ The proposed law further provided that any person in such house could be quarantined either in the house or at a quarantine station for fifteen days after the last case of disease appeared and that those who were ill could be forcibly hospitalized. The Board of Health was also authorized to remove all goods and effects of a person quarantined. At the time of the law's enactment, the Board recognized the extraordinary powers the law conferred and assured Mayor Hewitt that it included "safeguards against undue exercise of power."⁹⁹ The Board did not specify what these safeguards might be.

Although this proposed law might strike the modern legal scholar as unconstitutional for its lack of due process or judicial oversight, in late-

96. Memorandum from the Office of the Counsel to the Corporation to Hon. Abram Hewitt, Mayor (Jan. 26, 1887) (on file with New York Municipal Archives [hereinafter "NYMA"], Mayor's Papers, Abram Hewitt Correspondence, Law Department, Box 1346).

97. REPORT OF SHIPMENTS OF BOB'S VEAL (1885) (on file with NYMA, Mayor's Papers, William Grace Correspondence, Box 1327, Folder 42).

98. Memorandum from James C. Bayles, Comm'r of Health & Pres. of the Bd., to Hon. Abram Hewitt, Mayor 4 (Sept. 30, 1887) (on file with NYMA, Mayor's Papers, Hewitt Correspondence, Department of Health, Box 1343).

99. *Id.* In late-nineteenth-century France, the use of quarantine was rejected as conflicting with republicanism and the rights of the individual. ANDREW R. AISENBERG, *CONTAGION: DISEASE, GOVERNMENT AND THE "SOCIAL QUESTION" IN NINETEENTH-CENTURY FRANCE 180-81* (1999). Quarantine was specifically associated with the 1822 Restoration Law, which sought to prevent the spread of yellow fever into France by establishing quarantine stations on the Franco-Spanish border and imposed the death penalty on transgressors. E.A. Heamen, *The Rise and Fall of Anticontagionism in France*, 12 CANADIAN BULL. MED. HIST. 3, 9 (1995), available at http://www.cbmh.ca/archive/00000320/01/cbmhbchm_v12n1heaman.pdf. Both medical experts and politicians understood quarantine as part of the repressive epoch of the Restoration. AISENBERG, *supra*, at 122, 142. It was not until 1894 and 1905 respectively that Germany and Prussia adopted quarantine laws, as there was considerable opposition to such laws on the ground that they infringed on individual liberty. PAUL JULIAN WEINDLING, *EPIDEMICS AND GENOCIDE IN EASTERN EUROPE, 1890-1945*, at 51-56 (2000).

nineteenth-century New York such unfettered authority was not necessarily unconstitutional. No New York case required safeguards against such government intrusion. While the leading legal treatise on public health stated that it might be necessary for health authorities to procure a warrant when removing sick patients from home to quarantine, the treatise understood the warrant not as a constitutional requirement but rather a means to compel state officers to act on its behalf. The treatise stated:

The power of removal . . . is unconditional and unqualified. . . . [It] is designed, not to cripple and impair the powers conferred upon the authorities, but to make such powers more effectual. . . . [B]y means of a warrant, they can compel executive officers to act. They can remove a sick person without the aid of a warrant, or they can use that instrumentality to enforce obedience to their commands It is difficult to perceive how it can be of importance to a sick man, whether a warrant is obtained or not. It would be the merest form in the world, so far as he is concerned. There is, in the statutes, no provision for any examination by the magistrates, nor for notice to any parties to be heard, nor can appeal be taken.¹⁰⁰

In addition, the Department was becoming highly rationalized and prided itself on its efficiency. For example, the Board boasted that it had divided the city into seven sanitary districts with a "diagnostician" on call twenty-four hours a day.¹⁰¹ It also employed the most modern of conveniences, the telephone, and used the news services to monitor disease throughout the world.¹⁰² As explored below, the Department of Health embodied efficiency, rationality, science, and at times militarism. The importance of this militaristic and martial strain cannot be neglected as it appears throughout the various discussions on the epidemics. As will be seen, militarism not only functioned as a metaphor but had material consequences as federal and state officials later sent in soldiers to maintain order, sparking a national debate regarding who had jurisdiction over quarantines.

C. *Frontiers: Immigration and Typhus*

We might think of the Port of New York in 1892 as a frontier.¹⁰³ Like most frontiers, it was remarkably porous and was a space that delineated the nation while blurring national, state, and local boundaries, as it was the principal gateway through which people, goods, and ships passed into and out of the United States.¹⁰⁴ Frontiers are places in which various cultures and authorities

100. PARKER & WORTHINGTON, *supra* note 70, at 131-32.

101. NEW YORK CITY BOARD OF HEALTH ANNUAL REPORT 28 (1892) [hereinafter NYC ANNUAL REPORT].

102. *Id.* at 28.

103. On questions of frontiers, borders, power, and law, see generally JOHN PHILLIP REID, *LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL* (1980).

104. Historian David Hammack writes that at the turn of the century, the Port of New York "provided the symbolic image of the metropolis and its economy." DAVID C. HAMMACK, *POWER AND SOCIETY: GREATER NEW YORK AT THE TURN OF THE CENTURY* 31 (1987).

collide. The Port was no exception. As people and goods moved through it, they fell under multiple regulatory schemes, much as they continue to do in the present. Immigration and international commerce, the movement of people and goods into the United States, was governed by federal law and specifically came within the domain of the Treasury Department. Yet, the physical space of the Port was within the jurisdiction of New York State, and Port quarantines, whether of goods or people, were under the control of the State Quarantine Commission and the state health officer of the Port. Finally, as people passed on to the island of Manhattan, they entered the legal jurisdiction of New York City, where city, state, and federal laws all functioned. As people moved outside New York City, they came within other local jurisdictions, which had their own peculiar mix of city and county laws. Such jurisdictional overlays were and are especially true in the case of public health. By the late nineteenth century, many city and county health boards functioned with extraordinary power to pass a multitude of regulations that might or might not conflict with state laws.¹⁰⁵ This was federalism with a vengeance and, as will be seen, lines of jurisdiction repeatedly crossed, overlapped, blurred, and were disputed and negotiated. This uneasy and unstable patchwork of local, state, and federal jurisdiction, often entailing inconsistent laws, produced multiple and repeated conflicts.¹⁰⁶

A vivid illustration of this *mélange* of laws is provided by the events concerning the *Massilia*. The *Massilia*, a steerage steamship, anchored in New York harbor in February 1892. The passengers on board, primarily Russian Jews and Italians, believed that they were at the end of a long and arduous trip.¹⁰⁷ For the Russian Jews aboard, their terrifying journey had begun months earlier. Russia was in the midst of a devastating famine, and Jews suffered tremendously.¹⁰⁸ They were expelled from numerous Russian provinces and cities, including 1168 who fled Odessa.¹⁰⁹ These men, women, and children found their way to Constantinople, where authorities refused them permission to stay. Eventually, the newly created Baron de Hirsch Fund embraced these refugees, sending 900 to Argentina and 268 to Marseille, France to board the *Massilia* for passage to the United States.¹¹⁰ Before the ship began its Atlantic crossing, it stopped in Naples to take on board 470 Italian passengers.¹¹¹ The trip was

105. This basic public health structure of city, county, state, and federal control of public health and the prevention of communicable disease remains in effect today. See, e.g., James G. Hodge, Jr., *The Role of New Federalism and Public Health Law*, 12 J.L. & HEALTH 309, 325 (1997) (discussing evolution of state and local police power to protect public health in various jurisdictions); Shenna Bradshaw, Note, *Quarantined: Is Missouri Prepared to Sacrifice Some of its Constitutional Freedoms to Ensure Public Health Safety in an Outbreak?*, 71 UMKC L. REV. 939, 943 (2003) (providing outline of local and state responsibilities in overall quarantine organizational scheme).

106. Robert Barde, *Prelude to the Plague: Public Health and Politics at America's Pacific Gateway, 1899*, 58 J. HIST. MED. 153, 169-70 (2003).

107. For the best account of the journey and the immigrants' subsequent treatment, see generally MARKEL, *supra* note 87.

108. *Id.* at 23.

109. *Id.* at 22.

110. *Id.* at 23.

111. *Id.*

difficult; the passengers endured almost four weeks of bad weather, heavy seas, little food or water, and the stench and dirt produced by more than a thousand bodies densely packed together.¹¹²

As the passengers went through United States immigration, whose procedures included a cursory health inspection, none were detained for medical reasons.¹¹³ The United Hebrew Charities ("UHC") had agreed to care for these refugees and had guaranteed that they would not become public charges. Newspaper articles emphasized the destitution of these refugees who were dependent on the UHC and hinted that they should not have been allowed into the country.¹¹⁴

At first, there was little to distinguish the *Massilia* from other steerage ships that entered New York harbor or its passengers from the thousands of immigrants who passed through Ellis Island and settled in New York City. This soon changed. On February 11, 1892, a UHC doctor reported to New York City Board of Health's Chief Sanitary Inspector, Dr. Cyrus Edson, that he had diagnosed four cases of typhus in a house on Twelfth Street, which UHC used to board new immigrants.¹¹⁵ In 1892, the scientific community understood that typhus was caused by a specific bacillus. Diagnosis, however, depended on symptoms, and typhus's means of transmission were unknown.¹¹⁶ As the Health Department pronounced, typhus had become "almost an unknown disease in New York City since 1886."¹¹⁷ The appearance of typhus was unusual enough that Dr. Edson immediately went to the house and diagnosed an additional fifteen cases.¹¹⁸

Each of the initial typhus victims was a Russian Jewish passenger from the *Massilia*, and the New York City Department of Health immediately began a search to round up, inspect, and quarantine all the ship's Russian Jewish passengers. Those who exhibited any sign of illness were sent to quarantine on

112. MARKEL, *supra* note 87, at 23. Part of what may have made the journey so difficult and lowered resistance to typhus is that some Jewish passengers refused to eat nonkosher food on the voyage. See THE AM. ISRAELITE, Feb., 25, 1892, at 5 (urging Rabbis to encourage their congregations to relax dietary restrictions when traveling by sea until typhus epidemic ends). In 1892, a total of 52,134 Jewish steerage passengers arrived in the United States. UNITED HEBREW CHARITIES ANNUAL REPORT 22, 42 (1892) [hereinafter UHC ANNUAL REPORT]. Of these, 41,456 were Russian Jews. *Id.* In 1891, the number of Jewish immigrants arriving was approximately 62,000. *Id.*

113. MARKEL, *supra* note 87, at 26.

114. See, e.g., *Watching and Waiting: Eleven New Cases of Typhus Here and on Ellis Island Yesterday*, SUN (New York), Feb. 13, 1892, at 1 (chronicling transfer of several people from their homes to hospitals over course of a single day); *Shall We Honor Baron Hirsh's Drafts*, LAB. LEADER, Mar. 19, 1892 (noting despondent condition of immigrants but questioning whether United States has duty to welcome those who bring "disease, pestilence, and death").

115. MARKEL, *supra* note 87, at 46.

116. Typhus first spread in epidemic form in fifteenth-century Europe. The symptoms of typhus include a spotted rash, nausea, chills, and fever. In 1909, a doctor working in Tunis discovered that typhus was transmitted by body lice. In 1914, scientists discovered the virus that causes typhus. GALLAGHER, *supra* note 37, at 6-7.

117. NYC ANNUAL REPORT, *supra* note 101, at 30.

118. MARKEL, *supra* note 87, at 47.

North Brothers Island; other passengers who showed no sign of illness were herded together in specific houses and quarantined.¹¹⁹ The houses from which they were removed were then fumigated. In one of those ubiquitous late nineteenth century moments when private agencies morphed into quasi-state agencies, the Board of Health directed UHC to maintain the passengers that it was caring for in “custody” and to track down and round up all Massilia passengers who had traveled outside New York City. UHC proudly reported that it rendered full cooperation to the Board.¹²⁰

On February 12, the New York papers first printed the story. By February 13, news of typhus moved to the front page of the city’s major newspapers, and there it remained for the next two weeks.¹²¹ Newspaper descriptions of the passengers referred to them primarily as “cases” or “suspects.”¹²² Later, the Department referred to such people as “inmates.”¹²³ In addition, the Department expanded its dragnet to include the Italian passengers as well as “New-York Jews among whom the Russian refugees have freely mixed since landing.”¹²⁴ Although it is unclear whether these New York residents were American citizens or how long they had lived in the city, the actions of the Board of Health essentially removed them from the body politic of the city. If previously authorities constructed the enemy as external—the immigrant passenger—now they expanded the threat to include an internal enemy—the resident Russian Jewish immigrant. By way of contrast, neither the newspapers nor the Board showed any concern for the health of Massilia crew members, Ellis Island personnel, medical personnel, the primarily elite and middle-class German Jewish UHC personnel who had contact with the passengers, or anyone who was not a Russian Jewish or Italian immigrant with whom the passengers had contact. Rather, the Department targeted the bodies of poor immigrant Jews and Italians as vessels of contagion.¹²⁵

119. *Id.* at 52-53.

120. UHC ANNUAL REPORT, *supra* note 112, at 10; UHC Executive Board Minutes (Feb. 16, 1892) (on file with UHC Collection, YIVO Institute for Jewish Research, Box 7).

121. *More Typhus Cases Found*, N.Y. TIMES, Feb. 13, 1892, at 1; *Looking Out For Typhus*, N.Y. TIMES, Feb. 15, 1892, at 1; *New Typhus Fever Cases*, N.Y. TIMES, Feb. 16, 1892, at 1.

122. *E.g.*, *Progress of the Typhus: Five More Cases Here, Four in Newburg, One in Baltimore*, N.Y. TIMES, Feb. 14, 1892, at 2 (reporting that discovery of four infected Italian immigrants led officials to increase efforts to locate balance of Massilia’s Italian passengers); *Looking Out for Typhus: Hundreds of Immigrants Kept at Quarantine*, N.Y. TIMES, Feb. 15, 1892, at 1 (describing postvoyage disinfection of Russian Jews who “were of the impoverished, unkempt class . . . and of the kind that such a scourge as typhus would be likely to mark as its own”); *New Typhus Fever Cases: Nine More Found in this City Yesterday*, N.Y. TIMES, Feb. 16, 1892, at 1 (stating locations of Italian passengers of the Massilia, some of whom were infected with typhus); *Still Finding Typhus: Two New Cases Yesterday Bring the Total Up to 116*, N.Y. TIMES, Feb. 28, 1892, at 11 (noting two more infected Russian Jews found).

123. NYC ANNUAL REPORT, *supra* note 101, at 30.

124. *More Typhus Cases Found: Sixty-Eight Patients Now on North Brother Island*, N.Y. TIMES, Feb. 13, 1892, at 1.

125. For a discussion of germs, contagion, and immigration in U.S. history, see generally KRAUT, *supra* note 15; MARKEL, *supra* note 87; and Alan M. Kraut, *Plagues and Prejudice: Nativism’s*

The Department eventually took the drastic measure of quarantining all Russian Jewish immigrants passing through Ellis Island regardless of the ship on which they had arrived or whether an outbreak of typhus had appeared on their ship.¹²⁶ These men, women, and children were detained for twenty-one days after *the last case* of typhus developed among any of those quarantined.¹²⁷ As thousands of immigrants and city residents were detained in quarantine, the death rate among residents began to rise dramatically. Although the Health Department found it perplexing that the death rate from typhus was small for passengers and high among residents, the conditions of quarantine itself may have produced these deaths.¹²⁸ The quarantine represented a tremendous mobilization of essentially unchecked municipal power with serious life and death consequences. Yet, exactly how city officials managed to quarantine thousands of people with little criticism requires us to explore the interrelationship between the home, citizenship, legal rights, and an understanding of who belonged to the community.

D. *The Erasure of the Juridical Being*

A striking feature of most of the dozens of newspaper articles that discussed those quarantined as well as the reports of the Board is the invisibility of any human traits of those quarantined and any legal process. When describing passengers and those quarantined, pronouns are missing, as are any defining traits or family roles such as husband or wife, or even identities as workers. Rather, the ill or suspected ill are simply described as Russians, Hebrews, Russian Hebrews, or Italians. With few exceptions, their individual histories and personal characteristics are absent.¹²⁹ They were simply defined by their immigrant status and potential to contaminate others. Little concern was shown for their own suffering or their need for adequate care. The language used to describe the Massilia passengers and later those quarantined on the Lower East Side functioned to “dehumanize” them, resulting in the creation of the nonjuridical being—a person without legal rights barely rising to the level of being human.

We can see how this process worked in the few newspaper descriptions of the locale in which immigrant Russian Jews lived. The *Sun* reported that the Massilia passengers had mingled with their countrymen on the Lower East Side

Construction of Disease in Nineteenth and Twentieth Century New York City, in *HIVES OF SICKNESS*, *supra* note 89, at 65, 68-82.

126. MARKEL, *supra* note 87, at 54.

127. *Id.* at 59.

128. According to the Board of Health, there were 138 cases of typhus from passengers on the Massilia, of whom 13 died; 83 cases among New York residents, of whom 27 died; and 13 cases among “nurses, helpers and police,” four of whom died. NYC ANNUAL REPORT, *supra* note 101, at 31.

129. Sarah Deutsch identifies a similar tendency of erasing names when the Boston press identified women strikers who were assaulted at the turn of the century. She remarks that Jewish women’s names were erased where Irish women’s names often appeared, reflecting the greater political power of the Irish in Boston. SARAH DEUTSCH, *WOMEN AND THE CITY: GENDER, SPACE, AND POWER IN BOSTON, 1870-1940*, at 198 (2000).

of New York, describing such inhabitants of the "Jewish quarter" as of a "weak, debilitated physique" and that there was nothing to do but "disinfect and fumigate . . . the squalid quarters of these people."¹³⁰ Here Russian Jewish immigrants as a whole took on the quality of being sickly and their homes dirty and disordered.

Unlike the idealized white, Protestant, middle-class home of the late nineteenth century, which was symbolically represented as a sanitized refuge from the world, these immigrant homes were primarily depicted by newspapers as places of danger and contagion—not really homes at all.¹³¹ Newspapers and officials presented the houses in which poor Russian Jews lived as places of contamination and contagion. These homes were not portrayed as family dwellings, which women cleaned and supervised and where children lived, but rather as locations that deadly germs occupied. Furthermore, this failure to recognize immigrant homes as real homes, but rather as spaces that endangered the life of the city, created a further justification for state intrusion into the home.¹³² Although elite and middle-class New Yorkers widely perceived tenement houses where immigrants lived as filthy, disease ridden, and often unfit for habitation, women tenement dwellers spent tremendous energy maintaining clean homes despite the lack of running water and crowded conditions. Indeed, it was tenement dwellers' failure to conform to American middle-class norms rather than actual dirt and disorder that created the association between dirty and diseased immigrants and their homes.¹³³ Lillian Wald, the founder of Hull House on the Lower East Side of New York who spent many years visiting immigrant homes, praised them as "scrupulously kept rooms, plants by the windows, happiness and a real home."¹³⁴ Other contemporaries recount the tremendous amount of time and labor that immigrant housewives expended in maintaining clean homes and how such women's self-identity and reputation in the community was based on such domestic skills.¹³⁵

Despite this reality of immigrant households, the perceived absence of appropriate homes helped erase any recognition by newspapers and government officials of the passengers' and poor Russian Jews' humanity. After the

130. *Watching and Waiting*, *supra* note 114.

131. *See, e.g., id.* (describing immigrants' homes as primarily incubators of disease). On the importance of the home and domesticity in the nineteenth century, see generally KATHRYN KISH SKLAR, *CATHERINE BEECHER: A STUDY IN AMERICAN DOMESTICITY* (1973); GWENDOLYN WRIGHT, *MORALISM AND THE MODEL HOME: DOMESTIC ARCHITECTURE AND CULTURAL CONFLICT IN CHICAGO, 1873-1913* (1980); Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 *YALE L.J.* 1641 (2003); Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 *YALE L.J.* 1073 (1994); Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 *AM. Q.* 151 (1966).

132. Batlan, *supra* note 88, at 249-53, 288.

133. ELIZABETH EWEN, *IMMIGRANT WOMEN IN THE LAND OF DOLLARS: LIFE AND CULTURE ON THE LOWER EAST SIDE, 1890-1925*, at 154-57 (1985).

134. *Id.* at 156 (quoting R.L. DUFFUS, LILLIAN WALD: NEIGHBOR AND CRUSADER 77-78 (1938)).

135. *See* NANCY TOMES, *THE GOSPEL OF GERMS: MEN, WOMEN, AND THE MICROBE IN AMERICAN LIFE 190-92* (1998) (explaining high degree to which women were valued by themselves and others based largely on creation and maintenance of clean and healthy home).

Department of Health removed people from their homes, it then fumigated, disinfected, and cordoned them off for over two weeks.¹³⁶ The Department confiscated all property from such buildings and sent it to a disinfection station, where in many cases it was incinerated.¹³⁷ Thus, not only did the Department imprison people in quarantine, it also condemned buildings, evicted residents, and destroyed property without legal process and without concern for the suffering of those who had lost their few belongings.

As officials and newspaper articles neglected the humanity of poor immigrants, they presented public health officials as engaging in heroic activity and as embodying professionalism, expertise, experience, discipline, and rationality—everything that the immigrant lacked. The Board also came to view immigrants as burdensome and uncooperative, neglecting the tremendous fear that they must have felt as officials examined bodies, invaded homes, and quarantined individuals. The Department explained that its diagnosticians had to work under circumstances where people “endeavored to conceal cases.”¹³⁸ The Board emphasized the difficulty of diagnosing a disease “in filthy and insufficiently lighted apartments.”¹³⁹ It further reminded the reader that “[t]he work of a diagnostician could only be performed by a physician of experience, tact and judgment.”¹⁴⁰ In other words, the doctors could claim not only scientific expertise but also the status of elite American professionals who attempted to impose order in the face of disorder. This moment of perceived crisis and panic allowed the Department to exert newfound powers and a transformed image. Unlike the Ellis Island health inspectors who had failed to detect the initial cases of typhus, the Department’s officials kept careful watch—defending the country against a foreign enemy, embodied by poor immigrants. As the outbreak subsided, the Health Department claimed that it had “succeeded in stamping it out by a system of well-directed efforts, added to a tireless patience and unceasing vigilance.”¹⁴¹

Another group of men newspapers lauded was an informal committee composed of property holders, which formed to protest the presence of a house in their neighborhood that the Board used to quarantine healthy Massilia passengers. This committee was represented by Judge Charles P. Daley, one of New York City’s most celebrated judges. One article described this committee as a “deputation of citizens, representing the best class.”¹⁴² These men exercised their rights as citizens and property owners, asserting that the presence of quarantined immigrants threatened their homes and families. The Board soon acquiesced to their demands that quarantined Jews be removed from the neighborhood.

136. NYC ANNUAL REPORT, *supra* note 101, at 124.

137. *Id.*

138. *Id.* at 29.

139. *Id.*

140. *Id.*

141. NYC ANNUAL REPORT, *supra* note 101, at 30.

142. *Id.*

Those quarantined were primarily Russian Jewish and Italian passengers of the Massilia, immigrant Russian Jews resident in New York, and Russian Jewish steerage passengers from other steamships. One public health historian estimates that of the approximately 1200 people quarantined, 1150 were healthy.¹⁴³ Yet, newspaper reports and the language and actions of health officials conflated the typhus germ and immigrants so that human victims of disease were portrayed as almost inhuman. This dehumanization consigned immigrants to the perilous situation of nonjuridical beings. The outbreaks of typhus caused authorities to suspend the immigration of Russian Jews for two months, stemming the tide of what had been the peak year of Russian Jewish immigration at a time when Russian Jews were desperately seeking to flee Russia.¹⁴⁴ When the next epidemic struck, seven months later, those quarantined included a much more diverse group of people, and the multiple narratives produced were more complex, with law playing a greater role.

E. Awaiting Cholera

By August 1892, cholera had appeared in famine-plagued Russia, as well as Germany and Eastern Europe.¹⁴⁵ As it did so, U.S. anti-immigration sentiment grew. A *New York Times*' article opined:

With the danger from cholera out of the question, it is plain that the United States would be better off if ignorant Russian Jews and Hungarians were denied a refuge here. . . .

These people are offensive enough at best; under the present circumstances, they are a positive menace to the health of the country. . . . [T]heir mode of life when they settle down makes them always a source of danger. Cholera, it must be remembered, originates in the homes of this human riffraff.¹⁴⁶

Even more so than typhus, cholera was specifically blamed on incorrect home life; according to one author it grew out of "the soiled garments and dirty habits of the poor immigrants."¹⁴⁷ In actuality, cholera was a disease present where fecal matter contaminated water or food; it was not an airborne disease. As recognized by health officials in the 1850s, poor infrastructure, including a lack of sewer and water systems, rather than the habits of the poor, created the

143. MARKEL, *supra* note 87, at 59.

144. See UHC ANNUAL REPORT, *supra* note 112, at 21 (noting that number of Jewish immigrants in 1891 would have been "unprecedented" but for typhus outbreak).

145. For an incredibly thorough account of the cholera epidemic in Hamburg, Germany, see RICHARD J. EVANS, *DEATH IN HAMBURG: SOCIETY AND POLITICS IN THE CHOLERA YEARS 1830-1910* (2005).

146. *No Way to Stop Immigration: Quarantine the Only Safeguard Against the Cholera*, N.Y. TIMES, Aug. 29, 1892, at 5.

147. *Discussed by Physicians: Doctors Talk About Features of the Cholera*, N.Y. TIMES, Sept. 20, 1892, at 3 (quoting Dr. A.L. Carroll, Address Before the Public Health Section of Academy of Medicine: How Long Shall a Cholera-Infected Vessel be Detained at Quarantine? (Sept. 19, 1892)).

conditions for cholera.¹⁴⁸ Yet, in 1892, before cholera even made its appearance in the United States, physicians, journalists, and government officials imagined the immigrant home to be the source of disease and contamination that ultimately could endanger the American citizen and the nation.

Repeatedly, health officials, politicians, physicians, and journalists perceived and portrayed cholera as a disease of the uncivilized East that attacked the civilized Christian West through the body of the immigrant. As the New York City Health Department wrote, cholera marched from Persia to Russia to Hamburg, ultimately making its way to New York.¹⁴⁹ *The North American Review* specified that the outbreak began with a Muslim pilgrimage to Meshed in Persia.¹⁵⁰ The U.S. Surgeon General went even further, arguing that Islamic pilgrimages must be regulated. He insinuated that the combination of Islam and rampant Western capitalism threatened the metropolises of the West. He wrote:

There can be no doubt that the Mohammedan religion is largely responsible for the spread of cholera throughout the nations of Christendom. . . . [D]evotees . . . are to a great extent transported . . . in the vessels of Christian nations who engage in that traffic year after year . . . and thence pursue their commercial avocation as ocean tramps, with their infected hulks and crews, along the Mediterranean and European ports.¹⁵¹

Thus, the Surgeon General implied that the cholera germ escaped an uncivilized, non-Christian East plied by unscrupulous Western merchants ready to take on board anyone who could pay the passage. Only state action could protect the country.¹⁵²

An article appearing in *Frank Leslie's Illustrated Weekly* provided a different map of cholera, claiming that it originated in India, spread to Russia, and then was carried to Hamburg by Russian Jews escaping Czarist Russia. The paper wrote, the Czar, "[a]n enemy of civilization . . . should be abhorrent to every free man, for from the brutalities of his imperial household emanate famine, pestilence and anarchy."¹⁵³ Thus, the article played with the association among Jews, disease, and the household. It was not the immigrant Jew's

148. Sharon Guynup, *Cholera: Tracking the First Truly Global Disease*, NAT'L GEOGRAPHIC NEWS, June 14, 2004, at 2, http://news.nationalgeographic.com/news/2004/06/0614_040614_tvcholera_2.html.

149. Cyrus Edson, *Apropos of Cholera*, 155 N. AM. REV. 376, 376 (1892); Charles G. Wilson, *Safeguards Against the Cholera*, 155 N. AM. REV. 491, 491 (1892).

150. Edson, *supra* note 149, at 376; Wilson *supra* note 149, at 491.

151. Walter Wyman, *Safeguards Against the Cholera*, 155 N. AM. REV. 483, 490 (1892).

152. Blaming contagion on the immigrant was by no means an American phenomenon. In France, contagious disease was blamed on Algerian immigrants, and in Prussia and Germany it was blamed on immigrants from the East. AISENBERG, *supra* note 99, at 118-23; WEINDLING, *supra* note 99, at 49-72. One American health expert also pronounced that France, concerned with the contagion spread by immigrants to Mecca and Medina, placed French health officers at Red Sea and Mediterranean ports. OAKLEY VANDERPOEL, QUARANTINE 8 (1904) (on file with New York Public Library, Microfiche "Miscellaneous").

153. *Something About the Cholera*, FRANK LESLIE'S ILLUSTRATED WKLY., Sept. 15, 1892, at 195.

household per se that was disordered, but rather the Czar's household, for autocracy itself generated disease. The well-ordered country and the well-ordered household together would protect the health of the nation. Few contemplated that the bodies of true American citizens might be the source of contagion.

In the days before cholera made its appearance, New Yorkers assured one another that, as an imperial city of the Western world, New York was well equipped to handle cholera. New Yorkers congratulated themselves on their pure water supply, the healthful climate, and the general hardiness of the population.¹⁵⁴ By the end of the summer of 1892, the Board of Health further proclaimed its faith in bacteriology by creating a bacteriology laboratory within its new division of Pathology, Bacteriology and Disinfection. The Health Department, employing militaristic rhetoric, boasted that it was fully prepared to "fight the pest," that it was "high noon" in New York, and that Health Department officials were willing to lay down their lives to protect the city.¹⁵⁵ The Board claimed that they had carefully prepared for cholera and that they had "mapped out" the "campaign."¹⁵⁶

As city officials prepared their strategy, Dr. William T. Jenkins, Chief Health Officer of the Port of New York who was in charge of New York State's quarantine stations, had his own maps on which he carefully tracked the appearance of cholera across the globe.¹⁵⁷ In addition to city and state officials, various citizens' groups began to prepare for cholera. In April, the Medico Legal Society sponsored a discussion entitled, "How Can We Prevent Cholera?" It advertised that a prominent doctor would speak, along with city officials, and it invited doctors and lawyers to attend the presentation.¹⁵⁸ Unlike typhus, which had taken the city by surprise, the topic of cholera was part of the public dialogue.

F. Cholera and State Action

On August 30, 1892 a ship anchored in the Port of New York with steerage passengers suffering from cholera. Three days later, the luxury ship *Normannia* arrived carrying two cholera-stricken, cabin-class passengers. This was the first time in twenty-six years that cholera was diagnosed in New York.¹⁵⁹ September was a particularly busy month for the Port of New York, as wealthy Americans

154. Edson, *supra* note 149, at 377-78.

155. Wilson, *supra* note 149, at 491.

156. *Id.* at 492.

157. William T. Jenkins, *Quarantine at New York*, 155 N. AM. REV. 585, 585 (1892).

158. Letter from Clark Bell to Mayor Thomas Gilroy (April 5, 1893) (on file with NYMA, Mayor's Correspondence, Thomas Gilroy Correspondence, Health Department, Box 1448, Folder 105).

159. NYC ANNUAL REPORT, *supra* note 101, at 28. The first ship to arrive on August 30 was the *Moravia*, which reported twenty-two deaths at sea from cholera. MARKEL, *supra* note 87, at 93. On September 3, both the *Normannia* and the *Rugia* arrived. Each reported deaths at sea from cholera. *Id.* at 93, 101-103.

returned from their summer vacations abroad.¹⁶⁰ Within days, numerous cases of cholera appeared. On at least some ships, the source of cholera was traced to the water supply, shared by all passengers, which had been taken from the Elbe River in Hamburg. Other passengers may have consumed contaminated water before leaving Europe.¹⁶¹

President Benjamin Harrison immediately issued a circular quarantining all steerage-class passengers for twenty days.¹⁶² The circular did not impose a similar quarantine on cabin-class passengers.¹⁶³ Jenkins, armed with the opinion of the New York Attorney General, and supported by City Hall and the New York Governor, refused to recognize federal jurisdiction, claiming that the Port of New York fell under state authority and that his officers would determine who and what vessels would be quarantined.¹⁶⁴ The New York State Attorney General, Sam Rosendale, in a strongly worded opinion, wrote Jenkins that it was his duty to enforce the state's laws and that any federal claim of jurisdiction that conflicted with state authority was invalid.¹⁶⁵

Heeding the New York Attorney General's advice, Jenkins refused to abide by the rules set forth in the federal circular and instead ordered his officers to inspect each ship's passengers and to quarantine all passengers on the Normannia.¹⁶⁶ Within a day, as cholera cases appeared on other ships and public pressure mounted, Jenkins made the decision to quarantine all ships and their passengers, thereby exceeding the stringency of Harrison's circular.¹⁶⁷ He ordered that cabin-class passengers be left on board ship and that their luggage be disinfected.¹⁶⁸ Officials sent steerage-class passengers to quarantine on Hoffman Island.¹⁶⁹ There, such officers required them to undress, bathe in salt water and bichloride of mercury, and wait for their disinfected clothing.¹⁷⁰

As state health officials quarantined thousands of travelers, it became clear that Hoffman Island did not have the capacity to house all quarantined steerage passengers and that New York State did not have and could not muster the

160. Between August 31 and October 14, 1892, 80,777 passengers passed through the Port of New York. MARKEL, *supra* note 87, at 91.

161. *Id.* at 103-04.

162. *Id.* at 97-98.

163. *Id.* at 98.

164. *Id.* at 99. Under the Tenth Amendment of the U.S. Constitution, police powers were reserved to the states, and the Port and quarantine fell under state control. Morgan's La. & T.R. & S.S. Co. v. La. Bd. of Health, 118 U.S. 455, 461-66 (1886); *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824) (stating that health and quarantine laws were part of the "immense mass of legislation which embraces everything within a territory of a state, not surrendered to the general government").

165. Letter from S.W. Rosendale to William T. Jenkins (Sept. 2, 1892), in STATE OF N.Y. ATTORNEY-GENERAL'S OFFICE, REPORT 275, 275-79 (1893).

166. MARKEL, *supra* note 87, at 100-04; Wyman, *supra* note 151, at 483.

167. MARKEL, *supra* note 87, at 109-10.

168. *Id.* at 92.

169. *Id.* at 115.

170. Jenkins, *supra* note 157, at 587.

finances or labor to build quickly additional facilities.¹⁷¹ By September 8, the lack of space reached a breaking point, and the federal government began mobilizing its resources to build a quarantine station at Camp Low at Sandy Hook, New Jersey. Under the stewardship of the Secretary of the Treasury and General John B. Hamilton, supervising surgeon in the Marine Hospital Service, the camp was built and equipped within eight days. At this point, military efficiency ceased to be a metaphor and became a reality. As the War Department furnished tents and sent soldiers to construct the station, the Navy used their boats to transfer material and 211 marines patrolled the waters surrounding the quarantine.¹⁷² Hamilton even boasted that he specially constructed and placed the camp latrines so that "suspects" bowel movements could be monitored, isolated, and inspected by officials.¹⁷³ This was the panoptican state becoming real.¹⁷⁴

Cholera cases also began to appear in the city proper. Between September 6 and 13, five people died. New York City health officials went into high gear, exercising immense police powers.¹⁷⁵ In a public address Mayor Hugh Grant stated that the Health Department

has so far shown its ability to arrest the disease promptly

. . . [It is] fully equipped to arrest and care for every case, and stamp it out

. . . .

I therefore feel justified in calling upon you to have confidence . . . in our Health Department, to master this grim monster, Cholera, that has come to us from foreign lands.¹⁷⁶

171. By September 13, seven steamers had arrived in New York with at least one case of cholera aboard, and seventy-six people had died at sea. MARKEL, *supra* note 87, at 130-31. Since being in port, an additional forty-four people had died. *Id.*

172. JOHN B. HAMILTON, THE ESTABLISHMENT OF A NATIONAL QUARANTINE STATION NEAR NEW YORK HARBOR 7-8 (1892).

173. *Id.*

174. In 1787, Jeremy Bentham proposed a model for a panoptical prison, which would be in the form of a wheel allowing the warden, located in the center, to survey the entire prison. Michel Foucault used the panoptical prison as an analogy for a state in which the body is constantly disciplined through numerous forces and is continually under invisible surveillance. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 200-09 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975). For a further discussion of Foucault and Bentham, see James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177 (1997).

175. See Chamber of Commerce, *Statement of the Sanitary Condition of the City* [hereinafter *Sanitary Condition*], in REPORT OF THE SPECIAL COMMITTEE OF THE CHAMBER OF COMMERCE OF THE STATE OF NEW-YORK ON QUARANTINE AT THE PORT OF NEW-YORK DURING THE CHOLERA OF 1892, at 21, 26-28 (Alexander Orr et al. eds., 1892) [hereinafter REP. OF SPEC. COMM.] (reporting and formalizing extensive measures proposed by the committee at emergency meeting convened September 14). Again, we must be aware of multiple and overlapping jurisdictions. Where Jenkins was in charge of quarantine at the Port, the New York City Board of Health was responsible for all cases of cholera within New York City. MARKEL, *supra* note 87, at 90, 97.

176. Hon. Hugh Grant, Mayor, Address to the Public (Sept. 15, 1892) (transcript available in NYMA, Mayors' Correspondence, Hugh Grant Correspondence, Cholera, Folder 284).

By its own estimate, the Department summarily seized over 1,197,950 pounds of meat, fish, fruit, vegetables, and milk during the epidemic. It also claimed to have inspected over 39,000 tenement buildings.¹⁷⁷ The city had each of its employees deputized as a special sanitary inspector charged with enforcing the laws, rules, and regulations of the Health Department. Not only were all city employees to be on the alert for health violations, but the *Jewish Messenger*, rather than being wary of the power of the Board, urged its readers to cooperate fully and specifically asked physicians and philanthropic workers who visited "crowded tenements" to report health violations to the authorities, warning that it was the duty of "every resident, native or foreign" to comply with such laws.¹⁷⁸

G. *Cholera, the Public Sphere, and the Market*

Almost as soon as cholera appeared, it became intertwined with issues of the market and property. As early as September 1892, the Board of Health began to receive demands for compensation for confiscated articles. The Department, however, announced that it would not provide compensation for infected goods, arguing that such articles already had been destroyed by cholera. On the other hand, it claimed that it paid for goods wrongly destroyed.¹⁷⁹ Although no extant documents show what claims were denied or paid, the Department's position that it could determine whether a good was destroyed by cholera is suspicious. The diagnosis of cholera depended on having bodily fluid, usually from the intestine, to examine. It is hardly reasonable to believe that all goods confiscated were examined or exhibited the necessary evidence. Other than that, it is entirely unclear how the Department may have made such a determination.

A slightly later exchange of letters regarding the destruction of property is illustrative of department policy. On August 23, 1893, Dr. M. Jackson wrote a letter to the Board of Health on behalf of Mrs. McGrath, a woman he described as very poor. Two months earlier, the Department had confiscated her bed and bedding from her residence due to typhus. Dr. Jackson explained that since that time, Mrs. McGrath had no bed to sleep on and nothing with which to cover herself. He requested that her possessions be returned. The Board did not respond, and he sent another letter to Mayor Thomas Gilroy, who in turn contacted the Board. The Board answered the Mayor, stating that because these possessions were "infected with typhus fever" it could not approve any claim for payment.¹⁸⁰ Mrs. McGrath, despite her poverty, was simply not entitled to any government compensation or aid.

177. NYC ANNUAL REPORT, *supra* note 101, at 34.

178. *Our Gossip*, JEWISH MESSENGER, Sept. 9, 1892, at 1.

179. NYC ANNUAL REPORT, *supra* note 101, at 85.

180. Letter from Dr. M. Jackson to Hon. Thomas Gilroy, Mayor (Aug. 29, 1892) (on file with NYMA, Mayors' Correspondence, Thomas Gilroy Correspondence, Health Department, Box 1446, Folder 81); Letter from the Health Department to Willis Holley, secretary to Mayor Gilroy (Sept. 5, 1893) (on file with NYMA, Mayors' Correspondence, Thomas Gilroy Correspondence, Health Department, Box 1446, Folder 81).

Various citizens also wrote to public officials, often articulating their concerns about cholera through the language of commerce. For example, one writer urged the Mayor to call on the President to cease all immigration and return all imported goods.¹⁸¹ Although recognizing the harm to international trade, he argued that protection of the domestic economy from the ravages of cholera was a priority.¹⁸² Other writers blamed the steamship companies, who in pursuit of greater profit crowded together steerage passengers.¹⁸³ Some businessmen stepped forward, pledging financial support to the city.¹⁸⁴ The private organization that exerted the greatest influence over city and state actions was the elite Chamber of Commerce of the State of New York, which quickly connected cholera to the well-being of the market.¹⁸⁵ The Chamber sought to allay the fears of the nation and to ensure that business went on as usual. It praised the actions of the New York City Board of Health and proudly announced that cholera had not caught the city unaware or unprepared. It further urged that city residents conduct business as usual. As it wrote: "[T]he sensible thing for all to do is to pursue their usual avocations, to continue their customary intercourse with all parts of the country, and to avoid paralyzing business through vague fears, more than the cholera itself has done."¹⁸⁶

Yet, the Chamber was worried enough about cholera that immediately following news of its appearance, the Chamber established a special quarantine committee whose members included Seth Low (President of Columbia University and later Mayor of New York City) and J. Pierpont Morgan. One purpose of the Committee was to raise \$250,000 for use in connection with the epidemic.¹⁸⁷ The creation of this fund was not entirely altruistic, as the Chamber wanted and expected to provide counsel to federal, state, and city authorities. The Chamber presented itself, perhaps correctly, as possessing greater finances, power, and access to expertise than did the state in its various incarnations.¹⁸⁸

181. Letter from G.G. Brill to Hon. Hugh Grant, Mayor (Sept. 1892) (on file with NYMA, Mayors' Correspondence, Hugh Grant Correspondence, Cholera, Folder 284).

182. *Id.*

183. See Wyman, *supra* note 151, at 483 (arguing that primary solution to cholera spread should be construction of quarantine facilities along coastlines).

184. For example, the president of the Mutual Life Insurance Company offered a \$2000 donation to the city to be used "in warding off the danger of pestilence that threatens our homes and every interest." Letter from Richard McCurdy to Mayor Hugh Grant (Sept. 12, 1892) (on file with NYMA, Mayors' Correspondence, Hugh Grant Correspondence, Cholera, Folder 284).

185. For a discussion of New York's Chamber of Commerce and the elite nature of its members, see SVEN BECKERT, *THE MONIED METROPOLIS: NEW YORK CITY AND THE CONSOLIDATION OF THE AMERICAN BOURGEOISIE, 1850-1896*, at 58 (2003).

186. *Sanitary Condition*, *supra* note 175, at 47.

187. CHAMBER OF COMMERCE APPEAL CARD (1892) (on file with NYMA, Mayors' Correspondence, Hugh Grant Correspondence, Cholera, Folder 284).

188. RESOLUTIONS OF THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK (Sept. 9, 1892) (on file with NYMA, Mayors' Correspondence, Hugh Grant, General Correspondence, Cholera, Folder 284). The Chamber found itself in the position of advancing \$25,000 to New York State to expand quarantine facilities on Hoffman Island. Letter from T.S. Williams, N.Y. Sec'y of State, to A.E. Orr (Sept. 28, 1892), *reprinted in* REP. OF SPEC. COMM., *supra* note 175, at 45.

H. *The Enslaved White Gentleman and the Failure of Lawyers*

As health officials imprisoned steerage-class passengers in hastily built quarantine stations, cabin-class passengers remained quarantined on board ship. From such ships, committees of men from first class wrote appeals to the public for release, claiming that health officials had violated their rights as citizens and appealing to other citizens for the restoration of such rights. In one letter, the writer accused Dr. Jenkins of exercising "pitiless rule" and a "despotism stronger than the power of a throned King."¹⁸⁹ By refusing to recognize his rights as a citizen, Jenkins stood accused of subverting democracy. The writer alternated between describing himself as "helpless" and demanding his legal rights as a citizen. He charged that he was "obliged to call out for help," for he had been reduced to the state of a slave waiting for "an emancipation proclamation."¹⁹⁰

Others attacked not only Jenkins but elite New Yorkers who had failed to put a stop to the quarantine. Indeed, as the state quarantined elite and middle-class American men and women, articles and letters demonized state officials. According to such letters, the real threat came not from cholera but from state action, which many believed to be illegal. An article in *The Nation* argued that the "intelligent" and "well to do" men in New York had lost their courage by engaging in cholera hysteria and failing to demand that state officials abide by the law, which it claimed required the immediate removal of people from infected vessels.¹⁹¹ As the article implied, the elite men of New York had succumbed to fear. The article also claimed that the quarantine of healthy passengers was blatantly illegal and asked why the lawyers of the city had failed to bring suit. The author continued, "[W]hat is there in the danger of cholera to convert us into helpless cravens, ready to resort to . . . any means, however cruel, or illegal, or unscientific in order to avoid it."¹⁹² For this quarantined man, the quarantine and the failure of law threatened civilization itself. The author concluded by calling on elite and middle-class men not to pick up arms but rather to assert power through the use of the courts.¹⁹³

The Nation raised an important question: Why were no lawsuits brought by quarantined passengers? What would such a legal argument have even looked like? New York State's Port Quarantine statute clearly gave the Port's health officer the authority to quarantine people arriving in the port who actually had a contagious disease. These ill people were to be removed from the ship and sent

189. F.S. Longworth, Letter to the Editor, *Trials of Wyoming Passengers: A Statement of Facts and an Appeal in Their Behalf*, N.Y. TIMES, Sept. 22, 1892, at 2.

190. *Id.*

191. *Dr. Jenkins and the Other Doctors*, THE NATION, Sept. 22, 1892, at 214. Use of the word "hysteria" is important for it referred to the archetypical late-nineteenth-century disease of women and was the antonym of the rational man of action. For a discussion of hysteria in the late nineteenth century, see ELAINE SHOWALTER, *SEXUAL ANARCHY: GENDER AND CULTURE AT THE FIN DE SIECLE* 100-08 (1990). Showalter writes that by the 1880s, doctors had diagnosed hysteria in men. *Id.* at 105-06. Doctors described male hysterics as "timid and fearful." *Id.* at 106.

192. *Dr. Jenkins and the Other Doctors*, *supra* note 191, at 214.

193. *Id.*

to a designated hospital.¹⁹⁴ The port officer also had authority to quarantine passengers arriving from a place "where a quarantinable disease existed at the time of departure" or where an outbreak of a quarantinable disease had occurred during the voyage.¹⁹⁵ In part, the statute read, "On the arrival of an infected vessel all well persons on board shall have their freedom as soon as possible."¹⁹⁶ What this might mean in practice was left entirely unclear. Further, if a ship did not depart from an infected port and had no cases of quarantinable disease on board, the port officer only had power to inspect the ship and its passengers and then release it from quarantine.¹⁹⁷ Thus, at least for those passengers who arrived from ports where cholera was not present, Jenkins, it seems, was exceeding his authority.

Yet, in 1892 there was no developed case law in New York or other states involving the release of a person from quarantine, and certainly no case law regarding the New York State Port Quarantine statute. A smattering of cases existed involving habeas corpus petitions brought by patients in hospitals, as well as suits against health departments for damages resulting from the quarantine of ships and other property.¹⁹⁸ Although one might think that a case could have been brought under the Fourteenth Amendment, it was not until 1895 in New York that such a legal theory was tested. In *In re Smith*,¹⁹⁹ the New York Court of Appeals, on a habeas petition, released two men from house quarantine imposed by the health commissioner of Brooklyn.²⁰⁰ These men, one the owner of a delivery service and the other his employee, refused to be vaccinated for smallpox. Due to their refusal, they were quarantined until they consented to the vaccination. The commissioner justified his action on the ground that there was an outbreak of smallpox in Brooklyn and vaccination would prevent its further spread.²⁰¹ The court recognized that quarantine deprived these men of liberty and the right to pursue their vocation. It held that although the Health Department had broad powers and a wide range of discretion, it could only quarantine those who were infected with a contagious disease or exposed to it.²⁰² A mere possibility of exposure was not enough to warrant quarantine.²⁰³

How the *Smith* analysis might have been applied during the 1892 cholera scare is unclear. Passengers on ships where a person was ill with cholera might well have been considered to have been exposed to cholera. In addition, those sailing from cities like Hamburg where thousands had died from cholera might

194. 1892 N.Y. Laws 968, ch. 486, § 29.

195. *Id.* § 22.

196. *Id.* § 26.

197. *Id.* § 22.

198. See, e.g., *Sumner v. Philadelphia*, 23 F. Cas. 392, 397-98 (E.D. Pa. 1873) (No. 13,611) (finding damages from detention of ship kept in quarantine for a number of months); *In re Baker*, 29 How. Pr. 485, 489 (N.Y. Sup. Ct. 1865) (releasing patient of asylum on habeas corpus).

199. 40 N.E. 497 (N.Y. 1895).

200. *In re Smith*, 40 N.E. at 498-99.

201. *Id.* at 498.

202. *Id.*

203. *Id.*

also have been considered exposed.²⁰⁴ Passengers from ships and ports with no cholera, however, might have won their liberty under *Smith* and the New York State Port Quarantine statute. Yet, in the midst of a cholera scare, one must wonder whether a court would have released passengers, even elite American citizens, from quarantine. Would the liberty of a couple of thousand passengers outweigh the security of the city and perhaps even the nation? Would a court take such a risk when it remained unclear how cholera spread? Perhaps attorneys realized the difficulty of a court victory and thus shied away from bringing suit.

Although no litigation occurred regarding passengers' release from quarantine during the cholera epidemic, the Chamber of Commerce quickly became one of the most outspoken critics of the quarantine, state action, and surprisingly, the treatment of steerage-class passengers. Increasingly, it depicted local and state government officials as indecisive, ignorant, and overwhelmed. The Chamber's quarantine committee, as well as a subcommittee of medical experts, borrowed a yacht from William Randolph Hearst and toured the quarantine camps. Contradicting the glowing reports of some newspapers, which presented them as the height of modernity, the committee found them in a state of disorder—dirty, overcrowded, lacking proper laundry and toilet facilities, and possessing an exposed water supply.²⁰⁵

Of all the discussions of the epidemic, the quarantine committee's report (composed by some of the most elite of New Yorkers) best expressed the horrors of steerage quarantine. The report found that quarantine stations were inadequate and that even with advance knowledge of the possibility of a cholera outbreak, officials had failed to make adequate preparations to care for those quarantined or to have procedures in place to ensure the expedient release of healthy quarantined passengers. Due to these conditions, steerage passengers needlessly contracted cholera. In part, they blamed this on the strained relations between state and federal officials.²⁰⁶ As a special committee of medical experts inspected quarantine facilities on behalf of the Chamber, they were appalled at the conditions in which steerage passengers were kept. They found inadequate separation between ill passengers and healthy passengers. More specifically, the committee observed that toilet facilities were nonexistent, that few tubs for bathing existed, and that drinking water may have been contaminated. Because of such meager facilities, quarantined passengers used the exposed areas on a rocky beach to relieve themselves, as well as for bathing and washing their clothing. This water, the committee observed, was polluted with the excrement of hundreds of quarantined people.²⁰⁷ Seething with indignation, the committee wrote that conditions were "so deplorable and unsanitary that it is difficult for

204. See EVANS, *supra* note 145, at 316-18 (describing American officials' apprehensions concerning ships arriving from Hamburg, resulting in immediate quarantine of Normannia on arrival).

205. Report of the Medical Advisory Committee, in REP. OF SPEC. COMM., *supra* note 175, at 4, 28-29.

206. *Id.* at 4-9.

207. *Id.* at 29.

your Committee to describe it in temperate language.”²⁰⁸ As the committee articulated, these areas were “filthy,” “disgusting,” and “fraught with danger of fresh infection.”²⁰⁹

The committee found that the camps acted only as “a system of simple human storage under decidedly unfavorable sanitary conditions.”²¹⁰ It alleged that those in charge believed that “these people all might justly be treated very much like cattle, because the natural condition of many of them was that of desperate uncleanness, and because many of them were accustomed to be herded like brutes.”²¹¹ Such poor overall conditions also lead to an outbreak of measles among quarantined passengers.²¹² The committee objected to the treatment of those quarantined on two grounds. First, among “these uncleanly brutal foreigners [were] American citizens . . . [and] cleanly respectable immigrants.”²¹³ Second, quarantine officials needed to enforce cleanliness.²¹⁴ To remedy this second point, the committee recommended greater surveillance and discipline of the “suspects.”²¹⁵ Shortly after submitting its report, the subcommittee retired in frustration, believing that government officials refused to listen to it and that the quarantines resulted in “useless personal suffering.”²¹⁶ Yet this report raised important questions, such as what duty the state owed to those who were quarantined? The report implied that the state had a duty to provide those detained with a minimum of comfort and at the very least to protect them from exposure to disease. Here, the state had entirely failed.

I. *Fire Island: Vigilantism, Oysters, and Homes*

As cabin-class passengers’ complaints grew louder and the Chamber of Commerce disputed the legality of leaving passengers on board the ship, New York State quickly purchased a hotel and a large tract of land on Fire Island (located just off Long Island) with the intent of housing cabin-class passengers.²¹⁷ Fire Island at the time was a remote location with access only by private boat. It had already become an escape for wealthy urbanites.²¹⁸ The Beach Surf Hotel,

208. *Id.*

209. *Id.*

210. Report of the Medical Advisory Committee, *supra* note 205, at 29-30.

211. *Id.* at 31.

212. *Id.* at 38-39.

213. *Id.* at 31.

214. *Id.*

215. Report of the Medical Advisory Committee, *supra* note 205, at 31.

216. Letter from Medical Advisory Committee to A.E. Orr (Oct. 19, 1892), in REP. OF SPEC. COMM., *supra* note 175, at 42, 42-43.

217. Because it was unclear where the funds for the down payment could be immediately obtained, Governor Roswell P. Flower personally advanced \$50,000 in hopes that he would be reimbursed when the assembly could pass a bill authorizing the purchase. *The Fire Island Purchase*, N.Y. TIMES, Mar. 19, 1892, at 1. The full purchase price of the hotel was \$210,000. STATE OF NEW YORK, PUBLIC PAPERS OF ROSWELL P. FLOWER 59 (1894) [hereinafter PUBLIC PAPERS].

218. In 1855, S.S. Sammons bought 118 acres of property and built the huge Beach Surf Hotel. It was from him that the state bought the property. In 1869, the Long Island Railroad completed its

with 1500 rooms, attracted a large summer crowd of wealthy New Yorkers who enjoyed the island's cool breezes and fishing, hunting, and sailing opportunities. Fire Island was not just a playground for the rich, however; its waters provided the livelihood for many Suffolk County residents who harvested blue point oysters and clammed in the Great South Bay.²¹⁹ South Shore residents proclaimed that Great South Bay oysters were the finest in the world, and various corporations were formed to exploit these resources. The town rented oyster beds, which were then planted and harvested. One local historian estimated that in the late 1890s the clam and oyster industry employed over 1100 local men and shipped over 70,000 barrels of oysters to points in the United States and Europe.²²⁰

Although the state believed that it was solving one crisis by purchasing the hotel, it created another as diverse property interests and jurisdictional claims collided. On learning of the state's purchase of the hotel to house quarantine passengers, Suffolk County officials and residents of the South Shore became irate, vowing to block any attempt to establish a quarantine camp on the island. Suffolk officials claimed that the state's actions were illegal and threatened to use county forces to prevent the state's "seizure" of land. Residents and local officials began to quickly organize a campaign against housing the quarantined passengers on the island. Meanwhile, state quarantine officials hastily removed cabin-class passengers from the Normannia to the Stonington (donated by J.P. Morgan) and then to the ferry boat Cepheus, which steamed toward Fire Island. New York's Governor Roswell P. Flower responded to the threats of Suffolk residents and officials by proclaiming that the state had legal jurisdiction over the island that could not be trumped by county officials.²²¹

On September 10, 1892, the Islip Board of Health, which had jurisdiction over Fire Island, issued a resolution asserting that a quarantine station would endanger the lives and property of Fire Island residents. It also passed a provision declaring that the landing of quarantined passengers was illegal and that any violation would result in a penalty of \$100 per passenger. The resolution further authorized the Islip Board to appoint fifty special sanitary police to prevent any landing of passengers. On September 12, the Islip Board filed suit for an injunction in the Brooklyn Supreme Court prohibiting the state, the Governor, and Jenkins from landing passengers. The complaint, hastily drawn up

South Shore Branch, allowing for train travel from New York City to Patchogue, which stands across the Great South Bay from Fire Island. For a short history of Fire Island and the Surf Hotel, see MADELINE C. JOHNSON, *FIRE ISLAND 1650s-1980s*, at 32-40 (1983).

219. Directly opposite Fire Island on the mainland were the south shore beach communities of Suffolk County. These communities consisted of farmers, small businessmen, and increasingly wealthy urbanites who built large summer homes. The Vanderbilts and the Whitneys owned country homes in Islip. See generally HARRY W. HAVEMEYER, *ALONG THE GREAT SOUTH BAY: FROM OAKDALE TO BABYLON: THE STORY OF A SUMMER SPA, 1840-1940*, at 113-25 (1996) (describing summer migration of affluent New Yorkers to Islip).

220. CHARLES P. DICKERSON, *A HISTORY OF THE SAYVILLE COMMUNITY, INCLUDING BAYPORT, BOHEMIA, WEST SAYVILLE, OAKDALE, AND FIRE ISLAND* ch. XII (1975).

221. *Gov. Flower in Earnest: He Proposed to Have Fire Island and Issues a Proclamation*, N.Y. TIMES, Sept. 13, 1892, at 1.

in a shaky handwriting, claimed that the purchase by Governor Flower was ultra vires, that irreparable harm would result, and that state statutory provisions prohibited the placement of quarantine stations on Long Island.²²² More specifically, the complaint alleged that the hotel lacked the means to disinfect human waste containing cholera germs that would enter the Bay and contaminate valuable shellfish. It further stated that even if the shellfish were not actually infected, the public, fearing contamination, would cease purchasing them and would stop vacationing on Fire Island. The Board also claimed that such a quarantine station would seriously affect the value of property along the coast of the South Shore of Long Island. Affidavits from a local real estate agent and a physician supported the allegations in the complaint.²²³

Thus, in the same manner that the New York State government and the federal government wanted to create an impermeable border through which "contaminated" steerage-class immigrants could not pass into the United States, the Islip Board desired to erect its own border through which cabin-class passengers could not transverse. Both justified these measures as means to protect their homes, towns, and economies from contamination by a foreign other. Yet, now it was the bodies of elite and middle-class citizens that presented the danger of contamination. In addition, just as Jenkins refused to recognize President Harrison's authority over the Port, the Islip Board of Health refused to recognize Governor Flower's authority over Fire Island.

In fact, the Suffolk officials were correct that New York State law prohibited quarantine stations from being placed on Long Island,²²⁴ and Justice Barnard of the Brooklyn Supreme Court issued a temporary injunction.²²⁵ On learning of the injunction, Governor Flower intimated that he had no intention of honoring it and ordered the Suffolk County Sheriff to take possession of the hotel.²²⁶ The Governor further threatened that if the Sheriff or others disobeyed or interfered with his order, he would call up the National Guard.²²⁷ Later the same day, however, the Governor reconsidered, as his legal advisors warned that the injunction was binding. A furious Governor announced, "[I]f I was not Governor I would get the unfortunate passengers . . . on Fire Island if it was in

222. Complaint at 4-5, *Young v. Flower*, 22 N.Y.S. 332 (Sup. Ct. 1893) (No. 1826) (on file with Historic Documents Library, Office of the County Clerk of Suffolk County, Suffolk Court action file 1826).

223. *Id.*

224. 1892 N.Y. Laws 968, ch. 486, § 6.

225. Order of the Special Term Granting Preliminary Injunction, *Young*, 22 N.Y.S. 332 (No. 1826), *vacated*, Order of the General Term Vacating Grant of Preliminary Injunction, *Young*, 22 N.Y.S. 332 (No. 1826). Both documents are on file with Historic Documents Library, Office of the County Clerk of Suffolk County, Suffolk Court action file 1826. Ultimately, in February 1893, Judge Cullen of the New York Supreme Court of Suffolk County dismissed the action for a permanent injunction, deciding that New York State had had the power to land passengers on Fire Island on an emergency basis the previous fall, though not the power asserted by Governor Flower to seize Fire Island for ongoing use as a quarantine facility. *Young*, 22 N.Y.S. at 336.

226. *Gov. Flower in Earnest*, *supra* note 221.

227. *Id.*

my power, even if I had to spend sixty days in jail for doing it."²²⁸ Thus, the Governor seemed to send a message that the injunction should be disobeyed for the higher cause of protecting passengers. Yet, as the attorney who represented the New York State Attorney General's office proclaimed, "But the injunction has issued, and how can we call out the troops the [sic] enforce the law against people who are not disobeying it?"²²⁹

As the Governor arguably hinted at vigilante action to bring the passengers to Fire Island, the Islip Board deputized all male residents of Fire Island and called on other South Shore men to police the island. Hundreds of men responded. On September 13, the Cepheus repeatedly attempted to dock and Islip Board officials, their attorneys, and the citizens' patrols physically prevented each such attempt.²³⁰ The ship then sent out a rowboat with one gray-haired man who pleaded with the crowd that the ship contained two hundred exhausted, hungry, and cold women and children. He asked the crowd to allow the women and children to land for just one night.²³¹ The Fire Island officials demanded to see the captain. The captain refused to come ashore for fear that he would be served with the injunction. Instead, the captain sent U.S. Senator McPherson of New Jersey, one of the quarantined passengers, as his emissary.²³² McPherson stated, "If you will give me your injunction papers I give you my word of honor I will give them to him and he will accept them as legally served."²³³ When the attorneys for Islip demanded the captain's appearance, the Senator continued, "You appear to hesitate over some legal quibble, and your hesitation means unspeakable sufferings, possibly death, to women and children."²³⁴ At this moment, law occupied and shaped a particularly strange space. The Governor hinted at the use of vigilante action, the captain refused to come ashore for fear of being served with the injunction, the Islip attorneys wanted to serve him with it, and the citizens' patrol might have been a purely vigilante group standing outside of the law or formally deputized citizens legitimately acting to enforce the law.²³⁵

Finally, the Senator pleaded:

"I appeal to you, men, in the name of God, not to be longer led into heartless cruelty by this attorney, but to give your consent that these women and children can be taken from this boat . . . Remember your own wives and children. Be manly! Do not bring everlasting disgrace on your names. Be men!"²³⁶

228. *Id.*

229. *Id.* (quoting Professor Collins, counsel for New York State Attorney General's office).

230. *Stopped by a Brutal Mob*, N.Y. TIMES, Sept. 13, 1892.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Stopped by a Brutal Mob*, *supra* note 230.

236. *Id.* (quoting Senator McPherson).

He spoke to the crowd man to man and offered them the opportunity to save the boat's women and children. Conversely, he attacked the attorneys who now represented a heartless and impersonal law and berated them for exercising the letter of the law, a role that in other situations would have earned them praise and respect for vigorously defending their client. A further irony existed in that the Senator urged the crowd to think of their own wives and children when in fact, as we will see shortly, the citizens' patrol claimed that they were doing just that.²³⁷

Meanwhile, a group of male passengers dictated a note to waiting reporters, identifying themselves as American citizens and pleading for release from a quarantine that caused great hardship.²³⁸ The note insisted that the citizens' patrol was a "savage mob" and warned that their actions would cause many deaths.²³⁹ Later in the evening the Governor telegraphed a note to the Sheriff of Suffolk County, asking that he raise a group of citizens to provide food to the ship, entitling his statement "Appeal to the Manhood of the People."²⁴⁰ Eventually, Islip officials sent food and blankets in exchange for the captain accepting service of the injunction directly from the hands of Islip's attorney.²⁴¹

Like the passengers, the newspapers painted a portrait of the Fire Island crowd as a savage and lawless mob. The *New York Times* described such men as brandishing clubs, sticks, and shotguns.²⁴² Repeatedly, the newspapers and state officials failed to see that these "mobs" consisted of resident men worried about their own families and livelihoods. Nor did they acknowledge that they had been deputized to ensure compliance with an injunction.²⁴³

Countering newspaper attacks, South Shore men denied that they were cowards, lawless, or ignoring the pleas of women and children. Rather, they defended themselves as waging a fully justified legal battle for the protection of their livelihoods, on which their own families depended. They positioned themselves as working class men with "pleasant homes" and argued that the loss of business that would result from a "pest-house" would "cause hundreds of families to leave their happy and prosperous firesides."²⁴⁴ They accused the state of menacing their lives, destroying property values, and attempting to throw them "to the very doors of the poorhouse."²⁴⁵ These Fire Island men claimed that they were true American citizens, with properly ordered homes, entitled to the protection of law. In contrast, the passengers were tourists, members of the idle rich.²⁴⁶ The Fire Islanders' claims perfectly echoed those made by the

237. *Id.*

238. *Id.*

239. *Id.*

240. *Stopped by a Brutal Mob, supra* note 230.

241. *Id.*

242. *Id.*

243. *Id.*

244. *The Cholera Row! Islip Town Aroused!!*, SUFFOLK COUNTY NEWS, Sept. 17, 1892, at 1.

245. *Id.*

246. SUFFOLK COUNTY NEWS, Oct. 1, 1892.

Twelfth Street property owners in the typhus epidemic when they sought to expel quarantined Russian Jews. In both cases, questions of property and the protection of the home were intertwined.

Within a day, an appellate court vacated the injunction, thereby allowing the landing of passengers, on the ground that a single judge, sitting at special session, could not issue an injunction against a state officer.²⁴⁷ As the citizens' patrol continued to prevent the landing of passengers, now standing outside rather than inside the proscriptions of law, the Governor deployed the National Guard to Fire Island to protect against "mob" violence and to allow the landing of passengers.²⁴⁸ The Islip Board of Health continued to press its case, and within a week ordered the Sheriff of Suffolk to deputize a group of male residents to clear the island when the first group of passengers left.²⁴⁹ Suffolk residents then held a mass meeting to protest the state's use of Fire Island as a permanent quarantine station. A resolution adopted at the meeting proclaimed the actions of the citizens' patrol lawful and labeled Governor Flower "a Czar" who had illegally invaded their property and endangered their families.²⁵⁰

As the Islip Board of Health's case developed, the legal issue revolved on the conflicting authority of the Islip Board of Health and New York State over quarantine facilities. The county argued that the Islip Board had exclusive power to pass laws preventing the introduction of disease into Suffolk County. The state argued that local boards of health only possessed authority over people within their jurisdiction and could not exclude healthy persons who only potentially had been exposed to a disease from entering the jurisdiction. This, of course, was the opposite position that the state took vis-à-vis the federal government regarding its own power to quarantine. In *Young v. Flower*,²⁵¹ the trial court eventually held that by statute the health officer of the Port of New York was limited to quarantining passengers within the port and could not establish quarantine stations on Long Island.²⁵² Nevertheless, the court found that the cholera scare presented an emergency situation, and pursuant to common law, the state had the power to take reasonable steps to protect the well-being of the citizens of the state, even though the port health officer's jurisdiction was limited by statute.²⁵³ So here, as might have been expected, a court gave government officials extraordinary leeway in the name of a perceived emergency. Such emergency served to excuse any breach of law.

247. *Whipped by the State: The Mob Leaves Fire Island—Its Leaders Are Sullen*, N.Y. TIMES, Sept. 14, 1892, at 1.

248. *Little Rest for Gov. Flower*, N.Y. TIMES, Sept. 14, 1892, at 1.

249. *Islip Board of Health Again: Orders the Sheriff to Clear Off Fire Island*, N.Y. TIMES, Sept. 21, 1892, at 4.

250. *Mass Meeting!!*, SUFFOLK COUNTY NEWS, Sept. 24, 1892, at 1.

251. 22 N.Y.S. 332 (Sup. Ct. 1893).

252. *Young*, 22 N.Y.S. at 336.

253. *Id.* at 334.

J. *The Aftermath*

Although the cholera outbreak quickly subsided, its effects lingered. The Chamber of Commerce produced a scathing final report regarding New York State's handling of the cholera scare.²⁵⁴ It recommended that quarantine be controlled by the federal government rather than by New York State, as the state did not possess the required expertise or capacity to manage large-scale quarantines. In contrast, it argued, the federal government, with the military at its command, possessed the requisite strength and knowledge to manage an effective quarantine. With the military, the Chamber wrote, "Nothing depended upon chance."²⁵⁵ Agreeing with the Chamber of Commerce, the U.S. Surgeon General attacked the overlapping jurisdictions regarding quarantine, arguing that the present federalism grew out of old battles regarding states' rights—and was now "a relic."²⁵⁶ E.L. Godkin, a prominent journalist (and also a passenger aboard one of the quarantined ships), wrote that the Army and Navy, "a subject of national pride," must be given control of quarantine.²⁵⁷ As the Chamber, along with the New York Board of Trade and Transportation, launched a massive campaign to federalize quarantine, the national market took center stage. Prominent medical experts and businessmen argued that state quarantines disrupted the national market and that only federal military control of quarantine would adequately address its national economic impact. The modern nation needed a modern quarantine law that was national in scope.²⁵⁸ In response, Governor Flower argued that "the old-fashioned Jeffersonian theory of self-government" must not "be laid aside for the adoption of a centralized government Jurisdiction over the public health is analogous to jurisdiction over public order and should be kept as closely within the control of the State."²⁵⁹

Similar to the response to past yellow fever epidemics, but now with the added incentive of excluding poor immigrants, Congress began to debate new quarantine laws. Once again, states' rights issues and fears of regional favoritism took center stage.²⁶⁰ Finally, in 1893, Congress put the control of federal quarantine under the Marine Hospital Service and gave the Service the authority to examine the quarantine laws of the various states.²⁶¹ In the event that such quarantine provisions were insufficient, the Surgeon General of the Service, with

254. *Sanitary Condition*, *supra* note 175, at 3-9.

255. *Id.* at 5.

256. Wyman, *supra* note 151, at 486 (quoting previous statement by U.S. Secretary of Treasury Charles Foster).

257. E.L. Godkin, *A Month of Quarantine*, 155 N. AM. REV. 737, 743 (1892).

258. See HOLT, *supra* note 68, at 13-32 (maintaining that federal control of quarantines was preferable to inconsistent state policies); N.Y. BD. OF TRADE & TRANSP., REPORT OF SPECIAL COMMITTEE ON QUARANTINE 5-8 (1893) (arguing quarantines were sufficiently dangerous to be national concern and deeming federal quarantines more "uniformly efficient" than those maintained by state or local authorities).

259. PUBLIC PAPERS, *supra* note 217, at 61.

260. HUMPHREYS, *supra* note 56, at 132-34.

261. *Id.* at 131-32.

the President's approval, could require the adoption of additional regulations. The law also required that all ships coming into the United States be issued a certificate of health before departure and be inspected at a quarantine facility before entering a U.S. port.²⁶² Significant hostility soon emerged between the Service and a number of states and localities, essentially reenacting the conflicts and jurisdictional crises that had occurred in the 1892 epidemics.²⁶³

In later years, as a new health officer of the Port of New York looked back at the cholera outbreak and forward to future epidemics, he wrote that in the modern era quarantines and epidemics always implicate economic issues. He assured his readers that far from this concern causing officials to lose sight of the well-being of those quarantined or the potential violations of such person's rights, interests in individual liberty and capitalism worked in "perfect harmony."²⁶⁴

One more legal case arose from the cholera scare. Alfred B. Beers brought a suit against the Normannia and the Hamburg-American Packet Company. Before boarding the Normannia with his first-class ticket, he queried a ticket agent whether the ship would carry steerage passengers and informed the agent that if it did, he would not sail for fear of cholera. The agent incorrectly assured him that the ship had no steerage class. Like the other cabin-class passengers, upon reaching New York Beers was quarantined for thirteen days, first on board ship and then on Fire Island.²⁶⁵ He sued the shipping line for misrepresentation and breach of contract for not "inspecting and purifying" steerage-class passengers.²⁶⁶ Although the court found that the defendants were not negligent, it did find liability for misrepresentation and awarded damages for the days that Beers was absent from work.²⁶⁷ In doing so, the court affirmed Beers's right as a first-class passenger, an elite white man, to be entirely apart from poor immigrants. The ship might also be viewed as a metaphor for the urban conditions in the late-nineteenth-century United States. Although Mr. Beers was a wealthy man who sought to buy a protected space that was isolated from the poor and their disordered bodies, he was unable to do so. Indeed, the ship and the close proximity of the poor and the rich, the immigrant and the native born, reproduced the very conditions of urban life that continue to define present-day America.

The 1892 epidemics are important to understand for multiple reasons. Most blatantly, the responses to them revealed the racism and xenophobia that mark the American experience. They also tell us more. They highlight the importance of who belongs to a community, who carries the rights of citizenship, and whose bodies are inviolate. The epidemics also lay bare the failure of law in the context

262. *Id.* at 132.

263. *Id.* at 13-47.

264. VANDERPOEL, *supra* note 152, at 8.

265. *Beers v. Hamburg-American Packet Co. (The Normannia)*, 62 F. 469, 470-71 (S.D.N.Y. 1894).

266. *Id.* at 471.

267. *Id.* at 481-82.

of an emergency. Indeed, the very organizations that might have brought a legal case on behalf of immigrants failed to do so but rather chose to cooperate with authorities. The most significant protests against the massive cholera quarantine only emerged as middle-class and elite white Americans began to be detained. As these passengers claimed that the quarantine violated the law and took away their rights of citizenship, New York officials quickly responded by creating a special quarantine station with facilities that far exceeded the hastily built camps where steerage-class passengers were held and put under surveillance. Thus, at every level the quarantines replicated and reproduced larger structures of inequalities based on race and class.

Finally, the multiple and overlapping jurisdictions of local, state, and federal law created a legal morass. Instead of cooperation, officials on every level of government competed with one another to create the strictest quarantines and to corral sole authority for quarantines within their jurisdictions. Repeatedly, quarantined individuals became trapped in the interstices of these competing jurisdictions. Ultimately, elites became convinced that only a federal quarantine law could adequately protect the nation and their own liberty against overreaching state officials. Lurking in this call for the federalization of quarantine was also a tacit understanding that the federal government would be more hesitant to quarantine elite U.S. citizens.

IV. A LEGAL AND SOCIAL HISTORY OF QUARANTINE AFTER THE 1892 EPIDEMICS

This Part explores some of the major quarantines that occurred after 1892, the role that law played or failed to play, and the development of a small but nonetheless important jurisprudence regarding quarantine and state power. In the most drastic quarantines that occurred after 1892, issues of race and class, and a group or person's inability to conform to white bourgeois norms, continued to play dominant roles, often resulting in tremendous human suffering. Echoing the past, significant jurisdictional disputes over control of quarantine continued between municipalities, states, and the federal government. Although most courts upheld quarantines, a small number of courts refused to do so and began to place limits on the state's ability to quarantine. A few courts further ruled that the state had an affirmative duty to protect the health of and care for those quarantined.

A. *Hawaii: Bubonic Plague and Fire*

One of the most tragic quarantines in U.S. history occurred in 1899-1900 in Honolulu, Hawaii.²⁶⁸ During that period, Hawaii had been annexed to the United States but was not yet a territory. The Hawaiian provisional government was headed by white elites from the United States.²⁶⁹ At the end of 1899, a small

268. JAMES C. MOHR, *PLAGUE AND FIRE: BATTLING BLACK DEATH AND THE 1900 BURNING OF HONOLULU'S CHINATOWN* 1-5 (2005).

269. *Id.*

number of cases of bubonic plague appeared in Honolulu's Chinatown, home to Chinese, Japanese, and native Hawaiians.²⁷⁰ As panic spread in the white community, the provisional government literally ceded all of its authority over the Hawaiian archipelago to the Honolulu Board of Health, which consisted of three white American doctors.²⁷¹ The Board immediately ordered a *cordone sanitaire* of Chinatown, which the National Guard enforced.²⁷² Furthermore, all Chinese and Japanese residents were prohibited from leaving the island, and white residents were required to obtain special travel passes.²⁷³ Qualified volunteers deputized by the Board of Health combed Chinatown, inspecting it and all of its residents twice a day.²⁷⁴ Those who were sick or who had come into contact with the ill were quarantined in special camps outside of Chinatown.²⁷⁵ Quarantined residents of Chinatown immediately began to experience food shortages and much of the income of residents ceased as businesses closed and workers were unable to report to work.²⁷⁶

As additional cases of plague appeared, the Board began weighing the possibility of incinerating all buildings where a plague victim had lived, as well as surrounding buildings that they believed to be unsanitary.²⁷⁷ When one official expressed reservations about the legality of destroying buildings without legal process, the territory's Attorney General replied that there were "two ways of going about [it]. The legal one was to serve notice on the owners and occupants for abatement of nuisances[,] giving them time to [make improvements]; the other way was to go in and destroy unsanitary structures[,] leaving the matter of damages to be settled later."²⁷⁸ The Attorney General urged that the latter approach be taken. After some debate, the Board decided to incinerate buildings without legal notice. Inhabitants of destroyed buildings were relocated to quarantine camps.²⁷⁹ Although groups of lawyers representing Chinese merchants threatened to sue the Board, it steadfastly went ahead with its plans.²⁸⁰ As multiple buildings were set on fire, along with most of the occupants' belongings, at least a thousand Asians were placed in quarantine camps.²⁸¹ White residents fearful of a full-scale epidemic began to place considerable pressure on the Board to incinerate all of Chinatown.²⁸²

270. *Id.* at 4-5.

271. *Id.* at 1-2.

272. *Id.* at 2.

273. MOHR, *supra* note 268, at 57.

274. *Id.* at 64.

275. *Id.*

276. *Id.* at 65.

277. *Id.* at 85-86.

278. MOHR, *supra* note 268, at 86 (quoting HAW. BD. OF HEALTH, MINUTES OF THE HONOLULU BOARD OF HEALTH 121 (Dec. 30, 1899)).

279. *Id.* at 89.

280. *Id.* at 93-94, 96-97.

281. *Id.* at 113.

282. *Id.* at 122.

On January 20, 1900, the Honolulu fire department set blaze to a group of buildings in the vicinity of where a plague victim had been found.²⁸³ Despite precautions, with changing winds, the fire soon raged out of control, eventually engulfing most of Chinatown.²⁸⁴ As the conflagration spread, panicked residents ran through the streets carting the few belongings that they could salvage. Meanwhile police, guardsmen, and armed white citizens created a flank so that those fleeing could not escape the quarantined area.²⁸⁵ Miraculously, no one was killed that day, but approximately 4000 residents of Chinatown were left homeless, and many lost all of their possessions, as well as their businesses.²⁸⁶ These refugees were then placed into makeshift quarantine camps.²⁸⁷ Cases of plague also appeared on Maui, and the Board quickly decided to burn that island's Chinatown and to quarantine all of its residents.²⁸⁸

When the danger of plague passed and the Board lifted its quarantine in Honolulu, approximately five months after it had begun, claims for property damage resulting from the fires began to pour into the Board.²⁸⁹ Yet, because the status of Hawaii as a U.S. territory was not yet clear, the Hawaiian Republic Supreme Court ruled that any claims process would have to wait until the U.S. federal government acted.²⁹⁰ Eventually, Congress allocated money to compensate fire victims and established a special claims commission; over 6000 claims were filed.²⁹¹ Adjudication of these claims took years and many, especially the poorest people who had little documentation of their losses, received nothing or very little.²⁹² Like the 1892 epidemics in New York City, law played a small role in the narrative of the epidemics, although Chinese and Japanese merchants did threaten to sue, and they did receive some concessions from the Board of Health. Yet, as demonstrated by the Attorney General's statements, similar to those uttered by New York officials in 1892, in the face of a perceived emergency, law and any due process were simply shunted aside, viewed as a hindrance rather than a necessity.

B. Courts and the Abrogation of Authority

In the years following the New York 1892 panics and the Honolulu disaster of 1900, a small jurisprudence regarding quarantine began to develop. The large bulk of cases decided since the turn of the century upheld quarantines as a

283. MOHR, *supra* note 268, at 125-26.

284. *Id.* at 125-32.

285. *Id.* at 133.

286. *Id.* at 134-41.

287. *Id.* at 139-40.

288. MOHR, *supra* note 268, at 172.

289. *Id.* at 181-88.

290. *Id.* at 182-83.

291. *Id.* at 190.

292. *Id.* at 190-91.

legitimate exercise of the state's police power.²⁹³ Indeed, during the historical period that supposedly marked the zenith of laissez-faire, courts continually upheld quarantines of individuals as well as the destruction of allegedly contaminated goods.²⁹⁴ The United States Supreme Court, in the same year that it decided *Lochner v. New York*,²⁹⁵ also decided *Jacobson v. Massachusetts*.²⁹⁶ *Jacobson* involved a Massachusetts law that empowered local boards of health to require, in the event of a smallpox outbreak, that all adults be vaccinated against smallpox.²⁹⁷ During a supposed outbreak of smallpox, the Cambridge Board of Health instituted compulsory vaccinations.²⁹⁸ Those who refused to be vaccinated faced either fine or imprisonment.²⁹⁹ The Court broadly upheld the law as falling within the state's police power and also addressed the issue of quarantine. The Court stated:

[I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. An American citizen arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection . . . that the danger of the

293. See Alfred J. Sciarrino, *The Grapes of Wrath & the Speckled Monster (Epidemics, Biological Terrorism and the Early Legal History of Two Major Defenses – Quarantine and Vaccination)*, 7 J. MED. & L. 117, 135-54 (2003) (examining cases regarding quarantine and a variety of health regulations); see also, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) (holding that state compulsory vaccination law is exercise of state police power and does not violate right to liberty); *Compagnie Francaise de Navigation a Vapeur v. La. Bd. of Health*, 186 U.S. 380, 392-93 (1902) (upholding state law prohibiting entrance of persons and cargo seeking admission to area infected by contagious disease); *United States ex rel. Siegel v. Shinnick*, 219 F. Supp. 789, 791 (E.D.N.Y. 1963) (holding that reasonable suspicion of exposure to infectious disease justified isolation); *People ex rel. Barmore v. Robertson*, 134 N.E. 815, 819 (Ill. 1922) (upholding quarantine of healthy carrier); *Ex parte Lewis*, 42 S.W.2d 21, 21-23 (Mo. 1931) (finding that ordinance requiring quarantine of any person arrested who has "infectious venereal disease" was reasonably enacted to "protect and promote the health of the people"); *Crayton v. Larabee*, 116 N.E. 355, 358 (N.Y. 1917) (upholding validity of ordinance giving health officer power to quarantine in situations where he deems quarantine essential to public health); *State ex rel. McBride v. Super. Ct.*, 174 P. 973, 976 (Wash. 1918) (upholding quarantine because when protecting public health, public's interest outweighs that of individual).

294. On law and laissez-faire, see MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 9-31 (1992); WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937*, at 7-8 (2001); and David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1, 33-34, 58-59 (2003).

295. 198 U.S. 45 (1905). In *Lochner*, the Supreme Court struck down a maximum hours law for bakers. *Lochner*, 198 U.S. at 53-54. On the history of the case, see PAUL KENS, *JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK* 79-137 (1990).

296. 197 U.S. 11 (1905).

297. *Jacobson*, 197 U.S. at 12.

298. *Id.* at 12-13.

299. *Id.* at 26.

spread of the disease among the community at large has disappeared.³⁰⁰

Thus, the Court clearly recognized and affirmed the broad power of the state to quarantine. Yet, even here such power had limits. The Court emphasized that a quarantine or health law could not be "arbitrary," "oppressive," "cruel," or "inhuman."³⁰¹ As the Court wrote:

[I]t might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all, might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.³⁰²

Furthermore, the example the Court provided of a legitimate quarantine was quite narrow. It entailed a passenger on board a ship where an actual outbreak of disease had occurred. It did not involve a passenger merely traveling from an infected port. Finally, the Court emphasized that any quarantine had to be reasonable both as to who was quarantined and the conditions of quarantine.³⁰³

Over the course of the twentieth century, courts also consistently upheld what might be called individual or one-off quarantines. Such cases involved not a *cordon sanitaire* but the quarantine of one person or a relatively small group of people. Even in these more narrow cases, we can see how issues of race, class, and gender functioned to impinge or enhance a court's understanding of due process rights and the reasonableness of the quarantine. Almost all of these cases involved people standing at the social margins whose conduct failed to conform to a variety of societal norms. For instance, in the decades during and after World War I, numerous cities and other state and federal authorities created regulations that permitted the arrest and forced examination of prostitutes.³⁰⁴ Under such laws, more than 30,000 prostitutes were quarantined or incarcerated in an effort to curb the spread of venereal disease.³⁰⁵ Historian Allan Brandt has called this effort "the most concerted attack on civil liberties in the name of public health in American history."³⁰⁶ Such "lewd" or "loose" women were considered particularly dangerous to the nation's welfare as they supposedly exposed men in the military to sexually transmitted diseases.³⁰⁷ No such concern

300. *Id.* at 29.

301. *Id.* at 38-39.

302. *Jacobson*, 197 U.S. at 28.

303. *Id.*

304. PUB. BROAD. SERV., HISTORY OF QUARANTINE (2004), <http://www.pbs.org/wgbh/nova/typhoid/quarantine.html> [hereinafter HISTORY OF QUARANTINE].

305. *Id.*

306. *Id.*

307. Minouche Kandel, *Whores in Court: Judicial Processing of Prostitutes in the Boston Municipal Court in 1990*, 4 YALE J.L. & FEMINISM 329, 342-43 (1992); Ann M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 BERKELEY WOMEN'S L.J. 47, 54-55 (1995).

existed over the transmittal of venereal disease from military men to women. If after arrest and examination, the woman tested positive for venereal disease, she was quarantined in a hospital and required to undergo treatment. Few legal cases were brought, but of those that were, courts almost uniformly upheld such regulations, often finding that because the quarantine was not criminal in nature due process rights did not attach and that quarantine was necessary to protect the nation's well-being.³⁰⁸

Other cases involved individuals who were allegedly exposed to a disease or health officials believed to be healthy carriers. Once again these cases tended to be upheld. For instance, in 1917, the New York Court of Appeals decided a case involving a woman who had been quarantined for fifteen days in her home because her neighbor was ill with smallpox.³⁰⁹ The plaintiff claimed that there was no reasonable cause to believe that she had been exposed to smallpox.³¹⁰ The court found that the health officer had the authority to quarantine and that the quarantine was lawful.³¹¹ In dicta, however, the court cautioned that quarantine could not be "arbitrary, unreasonable, or oppressive."³¹²

Mary Mallon, "Typhoid Mary," is probably the best-known case involving the quarantine of healthy carriers. Mallon, a cook and probably a carrier of typhoid who never herself became ill, was quarantined for almost thirty years by the New York City Board of Health. In 1909, after two years of being quarantined on North Brothers Island without a hearing, her attorney brought a habeas corpus petition claiming that her imprisonment violated her due process rights. He further argued that she was not a carrier of typhoid.³¹³ The case brought into question how much power the New York City Board of Health possessed to quarantine people indefinitely on its own determination that they were healthy carriers. As her lawyer warned:

"It is quite a problem if a municipality can, without legal warrant, or due process of law, clap some one in jail upon the word of some medical man. If the Board of Health can act this way . . . then it can put thousands . . . in confinement."³¹⁴

Yet, on the basis of the Board's positive laboratory tests for the presence of typhoid (which were contradicted by Mallon's negative laboratory results), the court dismissed the habeas petition.³¹⁵

During the next decades, Mallon would not have another hearing and she eventually died in quarantine. Mallon was certainly not the only healthy carrier

308. Lucas, *supra* note 307, at 55; see also *Ex parte Lewis*, 42 S.W.2d 21, 21, 23 (Mo. 1931) (holding quarantine of prostitute did not violate due process because no criminal prosecution occurred); *In re Threatt*, 151 P.2d 816, 817 (Okla. Crim. App. 1944) (holding confinement of "colored girl" with gonorrhea acceptable because she consented to medical treatment).

309. Crayton v. Larabee, 116 N.E. 355, 356 (N.Y. 1917).

310. *Id.*

311. *Id.* at 358-59.

312. *Id.* at 358.

313. LEAVITT, *supra* note 24, at 70-83.

314. *Id.* at 83 (quoting N.Y. AM., Dec. 3, 1911, at 5).

315. *Id.* at 90.

of typhoid, and many healthy carriers were not quarantined. Rather, the Board of Health deemed Mallon untrustworthy of monitoring her own behavior and actions.³¹⁶ Part of what created Mallon's infamy and what led to her permanent detention was her status as a working-class, single Irish immigrant woman who failed to conform to social norms and refused to accept her isolation or the Board of Health's determination of her status as a carrier. As historian Judith Walzer Leavitt writes regarding Mallon's ordeal:

Many people, including some of the bacteriologists and physicians in whose care she found herself, came to think of her as expendable in the fight to protect the public health of all New Yorkers. Influenced by social prejudices, they blamed Mallon for her own fate. The microbe was not at fault, its carrier was.³¹⁷

In fact, in cases regarding quarantine, courts often abjured or disclaimed their authority to substantively review the determination of boards of health to quarantine. In a 1918 case involving a man quarantined with syphilis, the court held that it had no power to interfere with a determination that quarantine was necessary.³¹⁸ Rather, the Board of Health, as medical experts, was entitled to deference.³¹⁹ In *United States ex rel. Siegel v. Shinnick*,³²⁰ a habeas petition was brought on behalf of a woman who had visited Stockholm during a smallpox outbreak.³²¹ No evidence was produced that she was actually exposed to the disease. The court, in denying the petition, stated that the determination of exposure had to be "that of a public health officer and not of a lawyer" and that mere opportunity for exposure constituted sufficient evidence to quarantine.³²²

Indeed, the difficulty of winning a legal case involving quarantine was so considerable that through the course of the twentieth century few cases have been brought, creating a less than mature and developed jurisprudence in the area. In 1916, during a polio epidemic, New York City, as well as other towns, forcibly separated children from parents and placed such children, often the children of immigrants, in quarantine. Parents were then prevented from visiting their children. New York City, along with other New York towns and counties,

316. Sometime after Mallon's voluntary release by the Board of Health in 1910, she returned to cooking and an additional outbreak of typhoid was traced to her. She was returned to quarantine in 1915 and died in quarantine in 1938. A number of scholars have argued that the Board of Health failed to provide her with job training, which would have allowed her to support herself through means other than cooking. *E.g.*, Judith Walzer Leavitt, *Typhoid Mary: Villain or Victim?*, NOVA, Aug. 2004, <http://www.pbs.org/wgbh/nova/typhoid/mary.html> (criticizing Board of Health for failing to facilitate Mallon's "long-term gainful employment").

317. LEAVITT, *supra* note 24, at 10. Similarly, in 1922, the Supreme Court of Illinois decided the constitutionality of the quarantine of a woman who was allegedly a healthy carrier of typhoid. *People ex rel. Barmore v. Robertson*, 134 N.E. 815, 816 (Ill. 1922). The woman, formerly a boarding house operator, had been placed under permanent house quarantine with a sign on her door warning others of the quarantine. *Id.* The court upheld the quarantine. *Id.* at 820-21.

318. *State ex rel. McBride v. Super. Ct.*, 174 P. 973, 978-79 (Wash. 1918).

319. *Id.*

320. 219 F. Supp. 789 (E.D.N.Y. 1963).

321. *Siegel*, 219 F. Supp. at 790.

322. *Id.* at 791.

also essentially sealed their borders, preventing people from fleeing the epidemic or finding towns that would provide refuge. Although there was considerable popular protest over the quarantine and travel restrictions, there are no published legal cases challenging officials' actions.³²³ Further, multiple quarantines occurred during the 1918 influenza pandemic. In Colorado and elsewhere, a number of towns essentially closed their borders, entirely prohibiting outsiders from entering and arresting any who did.³²⁴ Again, it does not appear that any legal cases were brought challenging such *cordons sanitaires*.

More recently, the debate surrounding quarantine has primarily focused on the power of government to forcibly hospitalize and treat patients with tuberculosis. With few exceptions, such patients stand on the margins of society. They are often poor, minorities, drug users, and suffer from mental illness. The majority of states provide statutory authority for such involuntary hospitalization, with provisions for quarantine and compulsory treatment.³²⁵ The primary issue associated with these statutes is the lack of due process rights granted to affected individuals.³²⁶ Some scholars and courts have analogized the rights implicated by the involuntary hospitalization and quarantine of tuberculosis patients to those of the mentally ill who face compulsory institutionalization.³²⁷ Accordingly, they argue that tuberculosis patients subject to involuntary hospitalization and quarantine are entitled to the "right to a particularized assessment of [the] individual's danger to self or others and the right to less restrictive alternatives."³²⁸ Courts, however, have in many cases upheld such forced hospitalizations and quarantines.³²⁹

323. Guenter B. Risse, *Revolt Against Quarantine: Community Response to the 1916 Polio Epidemic*, Oyster Bay, New York, TRANSACTIONS & STUDIES COLL. PHYSICIANS PHILA., Mar. 1992, at 23, 23-24.

324. BARRY, *supra* note 14, at 345, 359.

325. Josephine Gittler, *Controlling Resurgent Tuberculosis: Public Health Agencies, Public Policy, and Law*, 19 J. HEALTH POL. POL'Y & L. 107, 124 (1994); Lawrence O. Gostin, *Controlling the Resurgent Tuberculosis Epidemic: A 50-State Survey of TB Statutes and Proposals for Reform*, 269 JAMA 255, 255-59 (1993); *see also* Newark v. J.S., 652 A.2d 265, 276-77 (N.J. Super. Ct. Law Div. 1993) (stating that if proper procedure is adhered to, civil commitment of contagious person is appropriate); New York v. Antoinette R., 630 N.Y.S.2d 1008, 1011-12 (Sup. Ct. 1995) (allowing detention of a patient who demonstrated an inability to voluntarily accept treatment).

326. 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, 51-54 (1994); Gittler, *supra* note 325, at 124-27; Gostin, *supra* note 325, at 259; Carrie Lacey, *Abuse of Quarantine Authority: The Case for a Federal Approach to Infectious Disease Containment*, 24 J. LEGAL MED. 199, 203-05 (2003).

327. *See* Ball & Barnes, *supra* note 326, at 51-52 (importing guidance from civil commitment law to inform constitutionality of quarantine); Lawrence O. Gostin, *Tuberculosis and the Power of the State: Toward the Development of Rational Standards for the Review of Compulsory Public Health Powers*, 2 U. CHI. L. SCH. ROUNDTABLE 219, 263-64 (1995) ("Confinement of persons with mental illness under civil commitment provides an apt analogy to tuberculosis detention.").

328. Ball & Barnes, *supra* note 326, at 53.

329. *See, e.g., In re Halko*, 54 Cal. Rptr. 661, 664 (Ct. App. 1966) (upholding forced hospitalization of tuberculosis patient who repeatedly left hospital without permission); *Moore v. Armstrong*, 149 So. 2d 36, 37-38 (Fla. 1963) (allowing quarantine of tuberculosis patient for duration of infection).

C. *The Repressed Dissent*

In a small number of cases in the late nineteenth and early twentieth centuries, courts found that specific quarantines were unconstitutional. These cases can provide guidance in creating boundaries and limitations on the power of the state. Furthermore, a discussion of these cases and the quarantines that gave rise to them provides a more complete history of how quarantines have been used to literally isolate those who were deemed unfit for the body politic. As one scholar of quarantine notes, these cases where courts have prevented or mitigated quarantines remind us of the “enduring significance about the capacity of courts to intervene in a public health crisis.”³³⁰ Nonetheless, these decisions largely have been forgotten as state and federal governments argue for broad-based quarantine powers.

One of the most infamous quarantines occurred in 1900 in San Francisco when a small number of cases of bubonic plague erupted in Chinatown. During the last half of the nineteenth century and well into the twentieth century, the Chinese on the West Coast had been the subject of significant racial hostility, which often manifested itself through discriminatory laws.³³¹ Much like Russian Jews in New York, health authorities, reformers, and journalists understood the Chinese in California as lacking appropriate homes and domestic arrangements.³³² Indeed, filth was understood as part of Chinese people’s very character, and as such, they were deemed a continual source of contagion and disease potentially afflicting whites in San Francisco.³³³ Both working class whites and city health officials in the late nineteenth century had repeatedly attempted to raze Chinatown. As a committee of the San Francisco Board of Health stated, the “Chinese cancer must be cut out of the heart of the city.”³³⁴ In fact, the federal government was so concerned that Chinese immigrants would bring contagious disease into the United States that in 1896 the Surgeon General ordered quarantine stations on the West Coast to disinfect the baggage of all Chinese entering the United States.³³⁵

330. McClain, *supra* note 91, at 448.

331. *Id.* at 451; *see also* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (holding misuse of licensing ordinance to prevent Chinese from operating laundries in San Francisco was unconstitutional); Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 643 (2005) (describing anti-Chinese legislation in late 1800s). The Chinese Exclusion Act of 1882 restricted the immigration of Chinese laborers into the United States. Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943). The Act was one of the first racially based federal immigration laws. *See* Abrams, *supra*, at 643.

332. For a discussion of San Francisco’s Chinatown, disordered family life, and disease, *see* NAYAN SHAH, *CONTAGIOUS DIVIDES: EPIDEMICS AND RACE IN SAN FRANCISCO’S CHINATOWN* 1-104 (2001).

333. *Id.* at 63-64.

334. I.S. KALLOCH ET AL., BOARD OF HEALTH COMMITTEE REPORT ON CONDITION OF CHINATOWN, *reprinted in* WORKINGMEN’S PARTY OF CAL., *CHINATOWN DECLARED A NUISANCE!* 4, 6 (1880), *available at* <http://www.druglibrary.org/schaffer/history/1870/wpc1.htm>.

335. Robert Barde, *Prelude to the Plague: Public Health and Politics at America’s Pacific Gateway, 1899*, 58 J. HIST. MED. 153, 157 (2003).

In March 1900, the body of a Chinese man was found in Chinatown; a physician quickly diagnosed the cause of death as bubonic plague and reported it to the Board of Health.³³⁶ That same evening San Francisco's Board of Health made the determination to quarantine all of Chinatown, allowing only Caucasians to leave the area and no one to enter.³³⁷ The death of a Chinese man from bubonic plague only seemed to confirm the belief that Chinatown was a place of danger from which contamination emanated.³³⁸

Unlike the quarantine of Russian Jews that occurred in New York where no one threatened legal suit on behalf of the quarantined immigrants, the Chinese Consul General, fearing a repeat of the destruction that had taken place in Honolulu, immediately threatened to file suit in federal court.³³⁹ This threat, along with uncertain laboratory results from the autopsy regarding the presence of bubonic plague, caused the quarantine to be quickly lifted.³⁴⁰ Within the month, however, additional potential cases of plague appeared.³⁴¹ At this point, the federal government through the Surgeon General formulated a plan to require the inoculation of all Chinese in San Francisco with an experimental vaccine.³⁴² Federal officials also informed railroad companies that they were not to transport Chinese out of the city unless the individual could produce a vaccination certificate and federal officials were stationed at crossings out of San Francisco and California to ensure compliance.³⁴³ Meanwhile, the Secretary of the Treasury authorized the Surgeon General "to forbid the sale or donation of transportation by common carrier to Asiatics or other races particularly liable" to bubonic plague.³⁴⁴

These orders produced considerable protest in the Chinese community.³⁴⁵ Taking immediate action, the Chinese Consolidated Benevolent Association filed suit on behalf of all Chinese in San Francisco against the San Francisco Board of Health and the federal quarantine officials.³⁴⁶ The plaintiffs claimed that the vaccine was toxic and experimental and that the actions of local and federal officials were "purely arbitrary, unreasonable, unwarranted, wrongful,

336. McClain, *supra* note 91, at 452.

337. *Id.*

338. *See id.* at 453 (noting that health officials had for many years described Chinatown "in the most garish terms, as the city's preeminent breeding spot for disease").

339. *Id.* at 456. The Chinese had a long history of filing suit to combat state and federal discriminatory legislation. For a discussion of some of this legal activity, see generally Christian G. Fritz, *A Nineteenth Century "Habeas Corpus Mill": The Chinese Before the Federal Courts in California*, 32 AM. J. LEGAL HIST. 347 (1988).

340. McClain, *supra* note 91, at 460.

341. *Id.* at 463-64.

342. *Id.* at 465.

343. *Id.* at 470-71.

344. *Id.* at 471.

345. SHAH, *supra* note 332, at 134-39.

346. *Id.* at 138-39. The Chinese Consolidated Benevolent Association was a confederation of six district associations formed to combat discrimination against the Chinese. *Id.* at 131. Its officers included Chinese who were members of the Chinese consular staff and major merchants. *Id.*

and oppressive.”³⁴⁷ They further claimed that these health orders violated personal liberty and the right to pursue a lawful business. In addition, the complaint alleged that the orders constituted a denial of equal protection as they were applied only to Chinese and Japanese.³⁴⁸

In *Wong Wai v. Williamson*,³⁴⁹ the court ruled in the plaintiffs’ favor and issued an injunction against city and federal officials on the ground that the rules violated the Fourteenth Amendment.³⁵⁰ The court concluded that the rules were unreasonable because there was no rational basis for requiring only the Chinese to be inoculated before leaving the city.³⁵¹ They were also racially discriminatory as they singled out Asians, although the government failed to demonstrate that Asians were more susceptible to bubonic plague than others.³⁵² Furthermore, as the court wrote:

[W]hen the municipal authority has neglected to provide suitable rules and regulations upon the subject, and the officers are left to adopt such methods as they may deem proper for the occasion, their acts are open to judicial review, and may be examined in every detail to determine whether individual rights have been respected.³⁵³

The court thus found the regulations to be arbitrary, discriminatory, and unrelated to preserving public health.³⁵⁴

This ruling did not end the matter, however. Texas health officials soon closed its border to goods and travelers from San Francisco.³⁵⁵ Further, one federal official wrote in his memoirs that the federal government delivered the following ultimatum to California: “You are a sovereign state . . . but if you do not take steps to control this vital danger, we will establish a quarantine entirely around you.”³⁵⁶ Likewise the California Board of Health began to put considerable pressure on San Francisco authorities to establish a quarantine of Chinatown.³⁵⁷ In response, city officials passed an ordinance specifically authorizing the Board of Health to quarantine persons, houses, places, and districts “when in its judgment it is deemed necessary to prevent the spreading of contagious or infectious diseases.”³⁵⁸ Quickly, the Board quarantined all of Chinatown.³⁵⁹

347. *Jew Ho v. Williamson*, 103 F. 10, 13 (N.D. Cal. 1900).

348. *Id.* at 14; McClain, *supra* note 91, at 476.

349. 103 F. 1 (N.D. Cal. 1900).

350. *Wong Wai*, 103 F. at 10.

351. *Id.* at 7.

352. *Id.*

353. *Id.* at 6.

354. *Id.* at 7-10.

355. McClain, *supra* note 91, at 483.

356. HEISER, *supra* note 77, at 97.

357. MARILYN CHASE, *THE BARBARY PLAGUE: THE BLACK DEATH IN VICTORIAN SAN FRANCISCO* 61-62 (2003).

358. *Jew Ho v. Williamson*, 103 F. 10, 12 (N.D. Cal. 1900).

359. *Id.*

Chinatown was once again sealed off with barbed wire and wooden fence posts while over a hundred policemen enforced the quarantine.³⁶⁰ Meanwhile, residents of Chinatown began to suffer from food shortages and implored city, state, and federal officials to provide provisions for those quarantined.³⁶¹ Instead, officials of all three levels of government contemplated the removal of Chinatown residents to (yet to be established) quarantine facilities and began discussing the burning of Chinatown, citing the success in Honolulu.³⁶² Quickly, lawyers filed a habeas petition on behalf of a quarantined Chinese man who did not live in Chinatown but who had become trapped while visiting friends. The habeas petition was granted.³⁶³ Within a week lawyers, once again representing a number of Chinese organizations, filed suit, with Jew Ho as the plaintiff.³⁶⁴ Ho claimed that the quarantine infringed on his personal liberty and his right to conduct business. The complaint alleged that the quarantine itself was discriminatory in that officials demarcated the quarantined area to specifically exclude whites.³⁶⁵ Furthermore, the plaintiff contended that the vast majority of Chinatown experienced no incidence of bubonic plague and the quarantine of 15,000 residents heightened the risk of exposure to disease rather than protecting their health.³⁶⁶ Finally, all levels of government had failed to provide for the needs of those quarantined. The city responded that all those who died of plague were Chinese living in Chinatown. Further, it claimed that Ho, and others by virtue of being Chinatown residents, potentially had been exposed to plague.³⁶⁷

The court took direct issue with the implementation of the quarantine, writing that the quarantine of such a large area exposed those quarantined to the possibility of disease rather than its prevention.³⁶⁸ It also found that while it might be reasonable to quarantine a particular house when an inhabitant was ill, it made no scientific sense to quarantine an entire community.³⁶⁹ Thus, the court held that the quarantine was not a reasonable regulation.³⁷⁰ It further concluded

360. CHASE, *supra* note 357, at 62.

361. *See id.* at 67 (explaining that as second quarantine lingered, hunger afflicted the Chinese more than the plague); McClain, *supra* note 91, at 487 (noting absence of steps to mitigate quarantine's effect of denying population income and food).

362. *See* MOHR, *supra* note 268, at 2 (noting Honolulu Fire Department burned buildings where plague victims had lived or worked); McClain, *supra* note 91, at 490-92 (explaining development of consensus to raze and rebuild district).

363. CHASE, *supra* note 357, at 69-70.

364. *Jew Ho*, 103 F. at 14. Jew Ho owned a grocery store in Chinatown, which was within the quarantine boundaries. *Id.* at 12. His Caucasian next door neighbors were not within the quarantine boundaries. CHASE, *supra* note 357, at 68.

365. *Jew Ho*, 103 F. at 13.

366. *See* CHASE, *supra* note 357, at 68 (arguing quarantine did not protect those subjected to it but rather heightened their risk by sealing them in an infected area).

367. *Jew Ho*, 103 F. at 14.

368. *Id.* at 21-22.

369. *Id.* at 22.

370. *Id.* at 23.

that the quarantine was racially discriminatory and violated the Fourteenth Amendment's Equal Protection Clause.³⁷¹

Jew Ho is often understood as having been decided on equal protection grounds alone.³⁷² It is crucial to recognize, however, that the court only reached the issue of discrimination after it determined that the quarantine was not designed to protect the health of all residents of San Francisco but rather put those in Chinatown at greater risk of contagion. *Jew Ho* can be interpreted as requiring a quarantine to *protect, not endanger*, a community by quarantining the smallest number of people necessary and ensuring their health. Furthermore, a particular group of people cannot be cleaved from the community on a wholesale basis. Where quarantine must be defined and actuated narrowly, "community" must be understood broadly. *Jew Ho* and *Wong Wai* continue to be two of the most important cases regarding the limitation of a state's power when imposing a widespread quarantine.

*Kirk v. Wyman*³⁷³ is another fascinating quarantine case that implicated race, class, and gender in a quite different way.³⁷⁴ *Kirk* involved a white woman "of culture and refinement" who had contracted leprosy while serving as a missionary in Brazil.³⁷⁵ The city where Miss Kirk resided attempted to force her to move out of the city. When she refused to do so, the Board of Health quarantined her in a city hospital. The hospital was located near a garbage dump and had been used "for the purpose of incarcerating negroes having smallpox and other dangerous and infectious diseases."³⁷⁶ The Supreme Court of South Carolina wrote: "In passing upon such [quarantine] regulations and proceedings, the courts consider, first, whether interference with personal liberty or property was reasonably necessary to the public health, and second, if the means used and the extent of the interference were reasonably necessary for the accomplishment of the purpose."³⁷⁷ Here, the Court found that removing Kirk from her home was not necessary as she could be trusted to maintain home isolation.³⁷⁸ Further, the court ruled that due to Kirk's class, race, age, and "culture and refinement," the city was required to provide her with comfortable accommodations should she have to be quarantined outside her home.³⁷⁹ Accommodations previously used to house ill African Americans in a dilapidated building were inappropriate for a white middle-class woman.³⁸⁰

371. *Id.*

372. See, e.g., James G. Hodge, Jr., *Implementing Modern Public Health Goals Through Government: An Examination of New Federalism and Public Health Law*, 14 J. CONTEMP. HEALTH L. & POL'Y 93, 104 (1997) (arguing bubonic plague quarantine was pretext for harshly discriminatory treatment of Chinese population).

373. 65 S.E. 387 (S.C. 1909).

374. *Kirk*, 65 S.E. at 388.

375. *Id.* at 388, 390.

376. *Id.* at 388.

377. *Id.* at 390.

378. *Id.* at 391.

379. *Kirk*, 65 S.E. at 391.

380. *Id.*

Although this decision comes out of the segregated South and reflects the structural racism of that society, an important principle nonetheless flows from it. Quarantine facilities must provide some level of care and even comfort to those quarantined. Here, we might say that the court read in an affirmative duty of care and the requirement that people not be removed to quarantine facilities when less restrictive alternatives are available. Indeed, in this case home quarantine was appropriate since Miss Kirk's race and class made her respectable and trustworthy. On the other hand, *Kirk* also demonstrates how race and class can determine who will be trusted to maintain their own isolation and who must be removed by the state and placed in quarantine facilities.

As this section illustrates, when potentially deadly and contagious diseases occur, panic can ensue. Such panic is then often directed at some segment of society that is understood as deviant and such people are marked as potential sources of contagion with power to endanger and even destroy the health of the community. Quarantine literally serves to remove these sources of danger from the community, segregating and cutting them off from the broader population. It is within these configurations of fear, dread, and disgust that public health officers are viewed as potential saviors and science is held up as objective and apolitical. We have seen how repeatedly law is shunted aside for what is understood as a greater common good and how courts have ceded their authority to health officials. Yet, a study of the jurisprudence of quarantine also shows that a few courts understood that the power of the state to quarantine is not unlimited. A close reading of such cases suggests a duty of care in which concepts of community must be defined broadly to include those constructed as the potential source of danger. With this background, we can now turn to the Homeland Securities Council's Plan for a Pandemic and the CDC's proposed rules regarding quarantine.

V. BACK TO THE FUTURE AND LESSONS FROM THE PAST

A. *The 2006 National Strategy for a Pandemic and the CDC's Proposed Rules*

The possibility of a serious outbreak of a new and deadly influenza is extraordinarily real; some health experts argue that it is probable.³⁸¹ The Homeland Security Council's Plan and the CDC's Proposed Rules are the federal government's attempt to address how it would respond to a pandemic. Both the Plan and the Proposed Rules endorse the use of quarantines. Much like issues involving national security and potential terrorist threats, at the heart of the issue of quarantine is how much government intrusion should be permitted into the lives and even bodies of individuals in order to protect the health of the nation? Bluntly stated, how many healthy individuals are we willing to detain,

381. BARRY, *supra* note 14, at 449.

and for how long, in order to prevent those who have or carry a quarantinable disease from potentially infecting a larger number of people?³⁸²

The Plan contemplates the use of two types of quarantine, both of which, as we saw in previous sections, have been used in the past. The first is a geographic quarantine (*cordon sanitaire*). As the Plan sets forth, a “[g]eographic quarantine is the isolation, by force if necessary, of localities with documented disease transmission from localities still free of infection.”³⁸³ The *cordon sanitaire* was used in both the Honolulu and San Francisco Chinatown quarantines. This type of quarantine results in the closure of a delineated geographic area preventing people—whether or not actually exposed to a disease—from leaving or entering a specific locale.³⁸⁴ A *cordon sanitaire* causes tremendous dislocation, including the separation of family members, and could be extraordinarily difficult to maintain as it entails the lockdown of an entire community.

In contrast to the geographical quarantine, individuals, families, or specific groups of people may be quarantined. This appears to be the type of quarantine that most likely would be used in a pandemic in the United States. The Plan endorses this type of quarantine, stating that “the value of isolating patients with pandemic influenza and quarantining their contacts is clearly supported by recent modeling efforts.”³⁸⁵ The CDC also views quarantine as one of the most effective ways to prevent the spread of a dangerous communicable disease.³⁸⁶ As the Plan recognizes, any large-scale quarantine probably would entail the use of law enforcement personnel and the military to maintain its efficacy.³⁸⁷ For example, the Plan warns of potential civil disturbances and the need for states and the federal government to be prepared to use force to maintain “movement restrictions or quarantines.”³⁸⁸

Where the Plan and the CDC are clear on the potential need for quarantine, neither addresses the specifics of quarantine. For example, the Plan is nearly silent regarding how quarantines would be enforced, where those quarantined would be held, and what would happen to individuals who refused to be quarantined. Recognizing without solving these crucial issues, the Plan only states that “[d]ifficult issues such as rules on the use of force to enforce quarantine if necessary and what to do with those who refuse to be quarantined should be settled as much as possible in advance of any quarantine implementation.”³⁸⁹ As seen from past quarantines, however, it is these details

382. See Bruce Jennings, *On Authority and Justification in Public Health*, 55 FLA. L. REV. 1241, 1243-50 (2003) (arguing that more nuanced theory and vocabulary needs to be used when discussing balancing of individual liberty and public health).

383. PLAN, *supra* note 10, at 108.

384. *Id.*

385. *Id.* at 109.

386. Control of Communicable Diseases, 70 Fed. Reg. 71,892, 71,892 (proposed Nov. 30, 2005) (to be codified at 42 C.F.R. pts. 70, 71).

387. PLAN, *supra* note 10, at 153-54.

388. *Id.* at 153.

389. *Id.* at 156.

such as the conditions of quarantine and what force the state may use to remove people that prove most difficult. Answers to such questions are crucial to have in place before the necessity of quarantine arises.

In addition, the Plan addresses how a pandemic would affect the movement of people across various borders and boundaries. An important element of the Plan entails early and continual surveillance of travelers in the event of a domestic or foreign outbreak of a pandemic flu.³⁹⁰ This could result in the implementation of entry and exit visas, predeparture screening, arrival screening, and a reduction in the number of entry points into the country.³⁹¹ The Proposed Rules go further and require every airline passenger traveling interstate or internationally to provide contact information, including e-mails, telephone numbers, itineraries, and the names of the parties with whom they are traveling.³⁹² Thus, the traveling public can expect additional government surveillance and movement restrictions in the event of a serious outbreak of avian flu.

Even with the imposition of such federal restrictions, the Plan states that in the event of a pandemic, the federal government's response, under the direction of the Department of Homeland Security, will be limited, with much of the burden falling on local and state government. The Plan repeatedly iterates that the federal government in a pandemic will not be able to mobilize and provide relief to the same extent as it does following a natural disaster such as a hurricane. Given the federal government's response to Hurricane Katrina, this is potentially ominous.³⁹³ As enunciated by the Plan, the federal government views its principal role as facilitating communication, coordinating federal and state responses, working with other countries and nongovernmental organizations, providing advice, supporting medical research, and maintaining federal quarantines. According to the Plan, much of the response to a pandemic will have to come from municipalities, states, individuals, philanthropic organizations, and the medical and business communities.³⁹⁴ Thus, the federal government views itself only as a partner in a local/state and private partnership. This obviously could lead to significant jurisdictional clashes, inefficiencies, and result in a variety of important state, local, and individual needs going unaddressed.

The history of quarantine recounted in this Article demonstrates that confusion, rivalries, and inefficiencies are created by overlapping and multiple

390. *Id.* at 48.

391. *Id.*

392. Control of Communicable Diseases, 70 Fed. Reg. at 71,899. Generally, the travel industry has been opposed to the proposed rules. See the comments of the American Society of Travel Agents, the Association of Asia Pacific Airlines, the International Air Transport Association, and the International Council of Cruise Lines, all of which are available at <http://www.cdc.gov/ncidod/dq/nprm/viewcomments.htm>.

393. See, e.g., PLAN, *supra* note 10, at 2, 3. ("[T]he impact of a severe pandemic may be more comparable to that of war or a widespread economic crisis than a hurricane, earthquake, or act of terrorism.").

394. *Id.* at 1-3.

jurisdictions regarding control over quarantines. As demonstrated in 1892, different jurisdictions may legitimately have different interests. Yet, it was individuals trapped between these conflicting jurisdictions that suffered most. To once again open this jurisdictional Pandora's box is to create the conditions for the same types of conflicts between local, state, and federal governments that marked nineteenth- and twentieth-century quarantines. As seen during Hurricane Katrina, municipal and state governments may not have adequate resources to respond to a pandemic, and the federal government must be willing to take a lead in both providing care and aid to those ill as well as ensuring that critical resources and basic infrastructures are not disrupted. Jurisdictional conflicts as well as vacuums must be addressed well in advance of an emergency.

In addition to the Plan, the Proposed Rules provide the CDC with extraordinary powers in connection with quarantine and, more broadly, regulation regarding communicable diseases. Striking, however, is that the Plan, which clearly contemplates quarantines, makes few references to the Proposed Rules, which would govern quarantine. Likewise, the Proposed Rules indicate a central role for the federal government in a pandemic, one that the Plan disclaims.³⁹⁵ Pursuant to the Public Health Service Act, the Secretary of Health and Human Services has the authority "to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases" from foreign countries and from one state into another state.³⁹⁶ The statute authorizes a variety of public health measures, including destruction of articles determined to be sources of communicable disease, and the apprehension and detention of people (i.e., quarantine and isolation) to prevent the spread of specific diseases, as identified by executive order.³⁹⁷ The Secretary of HHS has delegated these duties regarding quarantine to the director of the CDC.³⁹⁸ Together, such statutes, rules, and regulations provide the basis for quarantining and inspecting those entering the country and those moving in interstate travel.³⁹⁹ The Proposed Rules greatly enhance such powers.

395. *Id.*

396. 42 U.S.C. § 264(a) (2000).

397. 42 U.S.C. § 264(a)-(b). Currently these diseases are:

(a) Cholera; Diphtheria; infectious Tuberculosis; Plague; Smallpox; Yellow Fever; and Viral Hemorrhagic Fevers (Lassa, Marburg, Ebola, Crimean-Congo, South American, and others not yet isolated or named).

(b) Severe Acute Respiratory Syndrome (SARS)

. . . .

(c) Influenza caused by novel or reemergent influenza viruses that are causing, or have the potential to cause, a pandemic.

Exec. Order No. 13,295, 68 Fed. Reg. 17,255 (Apr. 9, 2003), *as amended by* Exec. Order No. 13,375, 70 Fed. Reg. 17,299 (Apr. 5, 2005).

398. Interstate Quarantine, 42 C.F.R. § 70.2 (2006).

399. 42 C.F.R. pt. 70.

The Proposed Rules allow for the screening of people “at airports and other locations” to detect “ill persons.”⁴⁰⁰ Screening may occur through “visual inspection, electronic temperature monitors, and other methods determined appropriate by the [d]irector” of the CDC.⁴⁰¹ The phrase, “and other methods,” makes unclear the extent to which any inspection may include physical contact and bodily intrusion. For example, could urine, blood, or stool samples be required?⁴⁰² Furthermore, the regulations do not articulate what would occur if an individual refused to submit to such inspection. Importantly, such monitoring and surveillance is not limited to those engaged in airline, domestic, and foreign travel or the ill, but rather includes any person within the United States and imposes no time or geographical restrictions. Such screening is not limited to quarantinable diseases, but rather encompasses any illness, and the Proposed Rules do not set forth a standard for screening, such as a reasonable suspicion that an individual is ill. Certainly screening may have the capacity to detect those who may have some symptom of a potentially communicable disease. Nonetheless, much like the ways in which immigrant and Chinese bodies were inspected in the San Francisco and Honolulu Chinatown quarantines and the 1892 New York quarantines, screening also potentially puts all of us under surveillance and adds yet another feature to the realization of the panoptical state.

The Proposed Rules’ most troubling new power involves “provisional quarantine.” Provisional quarantine allows the CDC to detain individuals, without a hearing, for up to three *business* days.⁴⁰³ For those quarantined over a long weekend, three days easily could be stretched to five days. A slightly different jurisdictional standard for provisional quarantine applies to those individuals already within the United States as compared to people arriving from foreign countries. For persons arriving into the United States, whether U.S. citizens or non-U.S. citizens, the director of the CDC may provisionally quarantine those whom he “reasonably believes to be infected with or exposed to a quarantinable disease.”⁴⁰⁴ For those already in the United States, the director may provisionally quarantine individuals or groups that he “reasonably believes to be in the qualifying stage of a quarantinable disease and . . . [m]oving or about to move from one State to another . . . or . . . a probable source of

400. Control of Communicable Diseases, 70 Fed. Reg. 71,892, 71,902 (proposed Nov. 30, 2005) (to be codified at 42 C.F.R. pts. 70, 71).

401. *Id.*

402. Courts have upheld urine testing in a variety of contexts. *See, e.g.*, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 836-37 (2002) (upholding school drug testing policy that falls into “special needs” exception to Fourth Amendment’s prohibition against unreasonable searches); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656-57 (1995) (holding that drug testing of student athletes is valid because state’s interest outweighs student’s Fourth Amendment rights); Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 629-33 (1989) (maintaining that drug testing railway employees is done in interest of public safety).

403. Control of Communicable Diseases, 70 Fed. Reg. at 71,932-33.

404. *Id.* at 71,942.

infection to persons who will be moving from one State to another.”⁴⁰⁵ The Proposed Rules do not define what constitutes “a qualifying stage of a quarantinable disease.” Furthermore, much like the issues that arose regarding turn of the century quarantines, the Proposed Rules do not set forth a standard regarding what constitutes *exposure* to a quarantinable disease. Has exposure resulted if a person is in a part of a city where an outbreak (or perhaps even an isolated case) of a quarantinable disease has occurred, or is the appropriate geographical area a city, a country, a region, a continent? In other words, how close must a person be to the person with a quarantinable disease to be considered exposed?

The CDC contemplates that while provisionally quarantined, the detained person will be required to undergo a variety of diagnostic tests.⁴⁰⁶ After three business days, if quarantine continues, the individual or groups of individuals quarantined must receive a written notice of quarantine.⁴⁰⁷ Again, the Proposed Rules do not address what would occur if a person refused diagnostic tests. One might reasonably surmise, however, that she or he would be held in quarantine until the incubation period for the disease had passed.

Following written notice of quarantine, and unlike the way in which many of the quarantines that occurred in the past were conducted, the quarantined person would have the right to request an administrative hearing.⁴⁰⁸ Such hearing would be limited to the question of whether evidence existed that the person had been exposed to a quarantinable disease.⁴⁰⁹ Again, the rules are silent regarding what this precisely might mean and the breadth of what might constitute exposure. Further, the hearing officer has the ability to consolidate cases “when the number of persons or other factors renders individual participation impracticable or when factual issues affecting the group are typical of those affecting the individual.”⁴¹⁰ Thus, a quarantined person is not guaranteed an individualized assessment of whether they have been exposed to a quarantinable disease. Moreover, although the quarantined individual has the right to a “representative,” the provision is silent regarding the appointment of counsel or how counsel might be selected and retained in the event of a group hearing.⁴¹¹ The Proposed Rules provide that the hearing would be in front of a hearing officer designated by the Director of the CDC and would occur within one day of the request.⁴¹² The hearing officer’s determination then would be

405. *Id.* at 71,932-33.

406. *Id.* at 71,896.

407. *Id.* at 71,933, 71,942.

408. Control of Communicable Diseases, 70 Fed. Reg. at 71,934, 71,943.

409. *Id.* at 71,905-06, 71,943.

410. *Id.* at 71,892, 71,906.

411. See New Eng. Coal. for Law & Pub. Health, Comments on the Interstate & Foreign Quarantine Regulations Proposed Rulemaking 5 (Feb. 3, 2006), available at http://www.cdc.gov/ncidod/dq/nprm/comments/2006Feb3_NECLPH.pdf [hereinafter New Eng. Coal. Comments] (arguing procedural protections are constitutionally defective in failing to provide for appointed counsel when individual cannot afford private representation).

412. Control of Communicable Diseases, 70 Fed. Reg. at 71,934, 71,943.

accepted or rejected by the Director and would constitute an administrative determination.⁴¹³ Of course, it is difficult to believe that the director would overrule his own decision to impose the quarantine in the first place. A quarantined individual also would have the right to file a petition for habeas corpus in federal court.⁴¹⁴

Thus, the rules contemplate a number of periods during which individuals and groups can be stopped, searched, seized, and detained without a warrant or even probable cause that an individual is ill or has been exposed to a quarantinable disease.⁴¹⁵ The federal government justifies such warrantless stops, searches, and detentions by referring to cases that arise in the context of international border crossings.⁴¹⁶ In these cases courts have ruled that individuals crossing international borders have a reduced expectation of privacy.⁴¹⁷ Yet, pursuant to the commentary accompanying the Proposed Rules, this reduced expectation of privacy when crossing international borders will be imported into the domestic and interstate context. It must be remembered that the CDC's broad screening and quarantine authority will reach not only those entering the country but also those crossing interstate borders and even those in contact with people who might cross interstate borders.

In support of its position, the commentary to the Proposed Rules analogizes provisional quarantine to cases involving the detention of alimentary canal drug smugglers at the nation's borders.⁴¹⁸ Courts have held that in these situations a warrantless detention based on reasonable suspicion rather than probable cause can continue until the drugs are expelled.⁴¹⁹ We might query why the federal government chooses to analogize potentially ill people to suspected drug smugglers. To do so already stigmatizes them as less than innocent and as engaged in willful and dangerous conduct rather than people who deserve empathy, sympathy, and care. Indeed, much like the case of Mary Mallon and the immigrants caught in turn of the century quarantines, the government is

413. *Id.* at 71,943.

414. The due process rights that the regulations provide may very well not meet constitutional standards. *See* New Eng. Coal. Comments, *supra* note 411, at 5.

415. Courts have long recognized a distinction between reasonable suspicion and the higher standard of probable cause. In *Alabama v. White*, the Court wrote:

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable.

496 U.S. 325, 330 (1990); *accord* *Hudson v. Michigan*, 126 S. Ct. 2159, 2182 (2006) (stating that reasonable suspicion is a less demanding standard than probable cause).

416. Control of Communicable Diseases, 70 Fed. Reg. at 71,894-95.

417. *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004); *United States v. McDonald*, 100 F.3d 1320, 1324-25 (7th Cir. 1996); *United States v. Berisha*, 925 F.2d 791, 795 (5th Cir. 1991).

418. Control of Communicable Diseases, 70 Fed. Reg. at 71,895.

419. *See, e.g., United States v. Montoya de Hernandez*, 473 U.S. 531, 544 (1985) (declaring detention pending bowel movement acceptable where customs officials had reasonable suspicion traveler had swallowed drugs in order to smuggle).

already constructing the potentially ill as deviant and standing outside the community of law abiding citizens.

Substantively, the commentary uses these drug smuggling cases to justify employing a reasonable suspicion standard for provisional quarantine. As the CDC writes, the standard for provisional quarantine "is likely to be premised on the need to investigate based on reasonable suspicion of exposure or infection."⁴²⁰ We must ask whether this standard is too low. Would it allow for the detention of too many healthy people and, as in the case of past quarantines, invest public health officers with an overabundance of discretion?⁴²¹

The federal government argues for the necessity of this standard and the three-day provisional quarantine period on the basis that the CDC would not have enough evidence to present at a hearing to support quarantine before the expiration of three business days.⁴²² As the government writes: "[D]uring this initial three business day period, there may be very little for a hearing officer to review in terms of factual and scientific evidence of exposure or infection."⁴²³ Although this might in fact be the case, such an argument is troubling for it verges on a legal tautology—provisional quarantine without a hearing is permitted because the government would be unable to produce evidence justifying such detention at a hearing. The question remains: Are we willing as a society to cede so much authority to the determination of a health officer when the CDC admits that before the three-day period there simply might not be enough evidence to support even a reasonable suspicion of exposure? Indeed, in the past, vesting such unchecked authority in health officers has allowed some of the worst societal prejudices, understood as based in science, to come to the fore and to be expressed through official acts.

Although the Proposed Rules do provide some procedural due process rights, one has to question whether even these are sustainable in the event of a widespread outbreak of a quarantinable disease. The Plan honestly discloses that the federal government's resources will be taxed severely if a pandemic occurs.⁴²⁴ Would laboratory results be available within three days? Would sufficient hearing officers be on hand? A scenario is imaginable in which the three-day provisional quarantine is stretched to a much longer time period. Like the Honolulu Chinatown quarantine, even sophisticated state law officials may be willing to sacrifice due process rights of large groups of individuals when they believe that the health of the larger community is at serious risk. The question looms: Would a federal court release detainees from quarantine if the director of the CDC believed that such detainees were potentially contagious?

The rules do not specify how long an individual may be quarantined nor do they provide for postconfinement administrative hearings should a quarantined individual demand release. Yet, one leading report on potential quarantines

420. Control of Communicable Diseases, 70 Fed. Reg. at 71,896.

421. On the distinction between probable cause and reasonable suspicion, see *supra* note 415.

422. Control of Communicable Diseases, 70 Fed. Reg. at 71,895-96.

423. *Id.* at 71,896.

424. PLAN, *supra* note 10, at 2-3.

states: "Quarantine will not be over quickly. The period during which confined persons could develop disease might be days or weeks, depending on the specific infectious agent. Development of illness among detainees could prolong the confinement of those remaining healthy."⁴²⁵ Indeed, this was the precise situation that occurred in the Chinatown and 1892 epidemics.

In addition to federal quarantine, states still retain the ability to impose their own quarantines. Numerous states have recently revised their quarantine laws.⁴²⁶ A number of them have adopted in some form the Model State Emergency Health Powers Act ("Emergency Act") or the Model State Public Health Act ("Turning Point Act").⁴²⁷ Both provide wide discretion for a state's executive to declare a public health emergency and initiate the quarantine of individuals. Under these model acts, an individual can be quarantined for ten days without a hearing.⁴²⁸ If quarantine continues beyond ten days, it must be authorized by a court order.⁴²⁹ In the Emergency Act, the standard for a court granting such an order is a showing "by a preponderance of the evidence [that] isolation or quarantine is . . . reasonably necessary to prevent or limit the transmission of a contagious or possibly contagious disease to others."⁴³⁰ In the Turning Point Act, the standard is "clear and convincing evidence" that quarantine is "reasonably necessary."⁴³¹ Although the model acts provide a number of procedural and substantive protections to a quarantined individual, such as the right to counsel, they—like the Proposed Rules—provide state officials with inordinate latitude.⁴³² Yet not all states have adopted the Model

425. Barbera et al., *supra* note 22, at 2714.

426. The Turning Point Model State Public Health Act: State Legislative Update Table, <http://www.publichealthlaw.net/Resources/ResourcesPDFs/MSPHA%20LegisTrack.pdf> (last visited May 20, 2007); see also Lorena Matei, *Quarantine Revision and the Model State Emergency Health Powers Act: "Laws for the Common Good,"* 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 433, 445 (2002) (noting that after 9/11, CDC released MSEHPA to assist states in enacting bioterror response statutes).

427. See sources cited *supra* note 426 for extent to which states have embraced the Model Acts. For the text of the initial model act, see MODEL STATE EMERGENCY HEALTH POWERS ACT (Discussion Draft 2001), available at <http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf> [hereinafter EMERGENCY ACT]. See also Matei, *supra* note 426, at 435 (explaining purpose of model act). The majority of the Model State Emergency Health Powers Act was informed by and later integrated into the Turning Point National Collaborative on Public Health Statute Modernization's Turning Point Model State Public Health Act. For the text of the later model, see TURNING POINT MODEL STATE PUBLIC HEALTH ACT (2003), available at <http://www.turningpointprogram.org/toolkit/pdf/MSPHAFinal.pdf> [hereinafter TURNING POINT ACT]. See also JAMES G. HODGE, JR. & LAWRENCE O. GOSTIN, THE MODEL STATE EMERGENCY HEALTH POWERS ACT – A BRIEF COMMENTARY 3 (2002), available at <http://www.publichealthlaw.net/MSEHPA/Center%20MSEHPA%20Commentary.pdf> (providing brief history of the development of the model acts).

428. EMERGENCY ACT, *supra* note 427, § 605(a)(4); TURNING POINT ACT, *supra* note 427, § 5-108(d)(3).

429. EMERGENCY ACT, *supra* note 427, § 605(a)(4); TURNING POINT ACT, *supra* note 427, § 5-108(d)(3).

430. EMERGENCY ACT, *supra* note 427, § 605(b)(5).

431. TURNING POINT ACT, *supra* note 427, § 5-108(e)(4).

432. EMERGENCY ACT, *supra* note 427, § 605(e)(1); TURNING POINT ACT, *supra* note 427, § 5-108(f)(4).

Acts and many have adopted some but not all provisions. As one scholar of public health and law writes: "Throughout the fifty states, there is a significant variation of quarantine and isolation laws and many of them predate the advent of modern epidemiology principles."⁴³³ Further, how federal, state, and local officials would coordinate quarantines is addressed neither in the Plan, the Proposed Rules, nor state law.

Given the variation in due process rights in connection with quarantine, which may be afforded under federal and state law, one can foresee the possibility of considerable conflict. For example, a person could be released from federal provisional quarantine after three days only to find him or herself in a state quarantine for a ten day prehearing detention period. In a separate scenario, one might be freed from state quarantine on the ground that there is not a preponderance of the evidence to demonstrate that one has been exposed to a quarantinable disease. Yet, the federal government may then quarantine the individual on the lower standard of reasonable suspicion that he or she has been exposed to a quarantinable disease. Further, the federal government and the states may employ different definitions of what constitutes exposure. As illustrated in this Article, the jurisprudence on quarantine has never fully developed or been able to consistently articulate what legally constitutes exposure. Thus, what contact might be adequate to constitute exposure under the Proposed Rules may not constitute sufficient contact under state law or vice versa.

B. Looking to the Future

The Proposed Rules and Plan are important steps in protecting the health of the nation from a serious epidemic. They are, however, inadequate and potentially dangerous. Much like the war on terrorism, they put tremendous power in the hands of the government and provide too much discretion to government officials. In the process, the individual potentially becomes an object of the panoptical state while the state refuses to recognize a duty to care for all of its citizens, not in the abstract but as individuals with needs. As demonstrated by this Article, history informs us that even with the best intentions in what are perceived as health emergencies, which readily translate into national emergencies, government power can be over used and abused.⁴³⁴

History also cautions that we cannot depend on the courts to impute adequate due process and substantive rights into federal or state quarantine law. In the past and continuing well into the present, courts too often have deferred to the authority of health officials. Rather than provide such significant discretion to government, at a minimum, there must be a clear legal standard for quarantine to be imposed. I would suggest a probable cause standard in that there would have to be probable cause that a person either has a quarantinable

433. Cetron, *supra* note 22, at 83.

434. See *City of Newark v. J.S.*, 652 A.2d 265, 271 (N.J. Super. Ct. Law Div. 1993) ("The potential abuse [of government power] is of special concern when the other interest involved is confinement of a human being who has committed no crime except to be sick.").

disease or actually has been exposed to a quarantinable disease. With probable cause, a person may be detained for only that amount of time necessary for diagnostic test results to be obtained.⁴³⁵ Three days, not three business days, appears reasonable. It is certainly not irrational to expect government employees to work weekends and holidays during a national crisis. After such time, a quarantined person should be afforded an individualized hearing, with the right to have counsel present and appointed. The determination of the hearing officer then should be based on clear and convincing evidence that a person has been exposed to a quarantinable disease. For example, a New York City health regulation related to the forced hospitalization of tuberculosis patients who have failed to obtain and continue medical treatment requires that the health commissioner "prove the particularized circumstances constituting the necessity for such detention by clear and convincing evidence."⁴³⁶ Standards such as these are entirely absent from the Proposed Rules.

Furthermore, any federal quarantine rules should require that in the case of a necessary quarantine the least restrictive manner of isolation or quarantine be employed. The Model State Public Health Act and the Model State Emergency Health Powers Act contain such a requirement.⁴³⁷ This least restrictive standard has been required by courts in civil commitment proceedings and more recently has been included in state laws that allow for the detention of individuals with serious infectious diseases who refuse to complete a prescribed course of medication.⁴³⁸ Employing this least restrictive standard might entail quarantines in which people are confined to their homes whenever possible rather than removed from their homes to quarantine facilities.⁴³⁹ Yet, with home confinement, we must be particularly vigilant about not succumbing to deep-seated prejudices regarding who possess the requisite responsibility to be trusted to abide by home quarantines. Furthermore, we must recognize that in a society with a multitude of living arrangements, where the poor often live in complex blended families in close quarters, even home quarantines could be devastating. If home quarantines become necessary, we should be able to look to the state to have a system in place to deliver food, medication, home health care, and if a

435. See James J. Misrahi, Gene W. Matthews & Richard E. Hoffman, *Legal Authorities for Interventions During Public Health Emergencies*, in *LAW IN PUBLIC HEALTH PRACTICE* 195, 205 (Richard A. Goodman et al. eds., 2003) (noting that law recognizes emergency situations in which individuals may be detained without notice or hearing).

436. N.Y. CITY HEALTH CODE § 11.47(d)(5)(e) (2006); see also *City of Newark*, 652 A.2d at 271 (reading in clear and convincing standard to tuberculosis confinement proceeding); *Greene v. Edwards*, 263 S.E.2d 661, 663 (W. Va. 1980) (same).

437. EMERGENCY ACT, *supra* note 427, § 604(b)(1); TURNING POINT ACT, *supra* note 427, § 5-108(b)(1).

438. Ball & Barnes, *supra* note 326, at 54.

439. Cf. *Best v. St. Vincents Hosp.*, No. 03 CV.0365 RMB JCF, 2003 WL 21518829, at *7-8 (S.D.N.Y. July 2, 2003) (emphasizing that, although protection of public health is a substantial government interest, due process requires use of least restrictive means).

breadwinner cannot work, supplementary income.⁴⁴⁰ In addition, in order to make home quarantine less of a hardship, employers should be prohibited by law from terminating quarantined employees.⁴⁴¹ In other words, the state and federal government should provide people with the resources necessary to make home quarantine feasible.

Any new rules regarding quarantine must also place an affirmative duty on the state to provide an adequate standard of care for those who are quarantined outside of the home. In the case of the New York 1892 quarantines as well as the San Francisco Chinatown quarantine, those quarantined often suffered due to a lack of adequate housing, food, medical care, sanitary conditions, and the failure to separate those who were ill from those who were not ill. Delineating a specific standard of care can provide guidance to officials when setting up quarantines, as well as establishing a basis for potential lawsuits should the government fail to meet such a standard.⁴⁴² Indeed, this Article has argued for a state that provides and cares for its citizens rather than a system designed primarily to monitor and regulate individuals.

VI. CONCLUSION

As discussed in this Article, the Plan and the Proposed Rules create significant gaps in terms of defining crucial concepts such as when “exposure” occurs. In other important areas, they are simply vague or silent regarding the substantive details of quarantine. Furthermore, the Plan and the Proposed Rules provide the federal government with inordinate power and discretion. Unfortunately, history demonstrates that such power often has been misused and that courts have been extraordinarily reluctant to substitute their judgments for those of the supposedly objective, scientific, and neutral determinations of public health officials. Should the time arise, however, when quarantines become necessary, courts must draw on the thin reeds of jurisprudence discussed in this Article that place limits on quarantines. Although scant, there is precedent that quarantines must not be arbitrary or discriminatory. They must also be reasonable and designed to protect the general health of the entire community, broadly and inclusively defined. Finally, the conditions of quarantine must include a reasonable standard of comfort and care for those detained with the least restrictive manner of quarantine employed.

440. In the 1916 Polio epidemic, the town of Oyster Bay’s Citizen’s Committee distributed “replacement wages” to those who could not work due to being quarantined. Risse, *supra* note 323, at 34.

441. See *At Will Workers Quarantined Due to Exposure to Virus May Be Protected from Wrongful Discharge*, 75 U.S. LAW WEEK 2097, 2103 (2006) (noting tort law may provide limited protection for workers benefited by the legislation proposed here).

442. Following Hurricane Katrina, a number of class action suits were brought against FEMA due to its failure to provide emergency aid as required by the Stafford Act. *E.g.*, *McWaters v. FEMA*, 408 F. Supp. 2d 221, 225-26 (E.D. La. 2006) (alleging violations of both relief statutes and constitutional rights); *Ass’n of Cmty. Orgs. for Reform Now v. FEMA*, No. 06-CV-1521-RJL, 2006 WL 3424993, at *1 (D.D.C. Nov. 29, 2006) (alleging FEMA denied hurricane evacuees due process).

As we have seen in past epidemics or threatened outbreaks of deadly disease, a general panic develops as people often legitimately become fearful for their own well-being. At such moments, associations between contagion and disease with race, class, and those people who live on the margins of society solidify. Such people and groups take on a literal and metaphorical power to contaminate and infect the national body, composed of "true" Americans whose health is imperiled by a dangerous outsider. It is at times like these that public health officials often are looked to as potential saviors. They also, however, come under intense pressure to stop an outbreak or potential outbreak of deadly disease by invoking the most stringent means possible, especially when the greatest hardship will befall the most socially marginalized, even detested, groups.

Due to such intense emotions and potential for draconian practices, detailed laws, rules, and procedures involving quarantine must be determined fully in advance and shared with the public. When a threatened emergency is well under way, we have seen how legal niceties and even far more important legal necessities are shunted aside, especially when the laws are at best vague, as in the case of the 1892 New York cholera epidemic. In order to prevent such scenarios, we must have robust public discussions, before an outbreak of communicable disease occurs, regarding what civil liberties we are willing to sacrifice and what obligations government has to its citizens, not only to protect an abstract notion of the welfare of society or general health of the nation, but also to each of us as individuals.