

# The Global H1N1 Pandemic, Quarantine Law, and the Due Process Conflict

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## I. INTRODUCTION

On May 1, 2009, a twenty-five-year-old Mexican citizen boarded a crowded flight from Mexico City to Hong Kong. On May 2, 2009, the flight arrived at the Hong Kong International Airport where the passenger traveled by ground transportation to a local hotel. Within hours of arriving on the Chinese mainland, the passenger developed flu-like symptoms and sought medical attention at a nearby hospital. Chinese officials quickly determined that the man was infected with the H1N1 influenza strain, commonly referred to as “swine-flu.” The Chinese health officials immediately placed the patient into quarantine and instructed the police to locate and detain all persons who may have come into contact with the patient. Within hours, the government had placed 300 people at the Metropark Hotel, as well as dozens of passengers from the patient’s flight, under a mandatory quarantine restriction.<sup>1</sup>

Following China’s first confirmed swine-flu case, Mexican officials accused Chinese authorities of detaining dozens of “seemingly healthy” Mexicans in hospitals, escorting some from their hotels in the middle of the night.<sup>2</sup> As a result of the seven-to-ten-day mandatory quarantine, and increased tension between the two governments, Mexico chartered a private plane to transport the remaining Mexican citizens home.<sup>3</sup> However, China’s aggressive quarantine policies continued throughout the spring of 2009, as health officials boarded flights arriving from areas with H1N1 activity. Chinese quarantine officials detained many individuals who exhibited only minor flu-like symptoms. Michael Gomez, a twenty-nine-year-old from Alexandria, was “ordered to put on a mask and rushed by ambulance to a quarantine facility,” after Chinese health officials determined that he had a fever of 98.9 degrees Fahrenheit

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1. Jill Drew, *China Confirms First Swine Flu Case*, WASH. POST, May 2, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/02/AR2009050200098.html>.

2. Marc Lacey, *Even as Fears of Flu Ebb, Mexicans Feel Stigma*, N.Y. TIMES, May 4, 2009, at A1.

3. *Id.*

(only slightly above normal).<sup>4</sup> The Chinese swine-flu quarantine raised numerous legal issues which are complicated by tensions between international law, due process rights, and state sovereignty.

As demonstrated by the Chinese quarantine procedures discussed above, quarantine orders can have a global impact and are problematic as individuals are detained involuntarily in an effort to protect other members of society from a perceived health threat. Quarantine orders require courts to balance an individual's due process rights with the government's interest in protecting public health. However, courts have historically ignored the rights of individuals placed under quarantine and have interpreted quarantine laws as a broad and almost unrestricted grant of governmental authority to impose health regulations.<sup>5</sup> Due process rights can be further infringed if a quarantine order is extended for an unknown period of time. Moreover, the absence of an international or domestic quarantine standard has resulted in ineffective quarantine orders which fail to protect public health or due process rights.

While quarantine procedures are presently governed by international and domestic health laws, both regimes fail to provide adequate due process protections for individuals placed under a quarantine order. Quarantines are often ineffective due to a lack of communication and cooperation between local, federal, and international agencies. The World Health Organization (WHO) is the international body responsible for providing leadership during global health emergencies and has set health standards for member states to follow through the International Health Regulations (IHR).<sup>6</sup> However, the IHR are problematic as they conflict with other international agreements, and the WHO lacks a mechanism to enforce member compliance.<sup>7</sup>

The United States enforces quarantine orders through the Centers for Disease Control (CDC), yet quarantine law is also governed by state and

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4. Ariana Cha, *Caught in China's Aggressive Swine Flu Net*, WASH. POST, May 29, 2009, available at <http://www.washingtonpost.com/wpdyn/content/article/2009/05/28/AR2009052803919.html>.

5. See *Gibbons v. Ogden*, 22 U.S. 1, 113 (1824) (stating that the Commerce Clause gives the government the power to quarantine).

6. Arielle Silver, *Obstacles to Complying with the World Health Organization's 2005 International Health Regulations*, 26 WIS. INT'L L.J. 229, 231-32 (2008) (The WHO was established by the United Nations in 1948 and is composed of 193 member states, forming the World Health Assembly. The Assembly is responsible for making major policy decisions and approving regulations such as the IHR, which was adopted in May 2005 and became effective in June 2007).

7. *Id.*

local health codes, involving numerous governmental agencies.<sup>8</sup> The Obama Administration recently abandoned a plan to adopt amendments to the CDC Regulations, leaving federal quarantine law in need of substantial revisions to ensure the protection of procedural due process rights during future health emergencies.<sup>9</sup>

Accordingly, this comment argues that the CDC should develop a uniform due process standard to govern all quarantine procedures in the United States and then recommend that the standard be adopted by the WHO for incorporation into the IHR. Specifically, the standard should include: (1) a finding by a health professional that an individual poses a significant risk of spreading a contagious disease; (2) a quarantine order by a judicial authority or fact finder based on clear and convincing evidence that an individual poses a serious health risk; (3) an opportunity for a hearing and the right to appeal a quarantine order within one day to the court of issuance, or if such a court is unavailable, to the WHO for referral to an independent international court; (4) the right to speak with counsel and the opportunity to communicate with one's own government; (5) the right to be transferred to the custody of one's own government; (6) the right to refuse medical testing, treatment, or the disclosure of personal medical information; and (7) procedures to ensure that a quarantine order is implemented in the least restrictive and intrusive means available. Once the standard has been incorporated into the IHR, the WHO must have the authority to enforce the provisions under the agreement and impose sanctions on members who fail to comply. Further, quarantines should only be implemented on an individual basis since large-scale quarantines are ineffective and cannot be imposed without violating due process rights.

This Comment will first examine the 2009–2010 H1N1 pandemic as a case study and as a recent example of how quarantine orders can impact due process rights. Second, the Comment will discuss the legal foundations for due process rights and how those rights have been restricted by quarantine orders throughout history. Next, the Comment will examine the flaws in the newly revised IHR and how the WHO's role should be increased to allow for greater cooperation and compliance from member states. The Comment will then examine the current domestic quarantine

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8. Centers for Disease Control and Prevention, *Our History-Our Story* (Feb. 15, 2010), <http://cdc.gov/about/history/ourstory.htm> (The CDC is a federal agency founded in 1946 and is headquartered in Atlanta, Georgia. The CDC works with states and other partners to provide a system of health surveillance to monitor and prevent disease outbreaks in the United States).

9. Alison Young, *Obama Administration Scraps Quarantine Regulations*, USA TODAY, Apr. 1, 2010, available at [http://www.usatoday.com/news/washington/2010-04-01-quarantine\\_N.htm](http://www.usatoday.com/news/washington/2010-04-01-quarantine_N.htm).

procedures and the lack of adequate due process protections. Finally, this comment will discuss the realities of quarantine orders and how a uniform due process standard can better prepare the international community for a global health emergency.

## II. THE RISE OF THE GLOBAL H1N1 PANDEMIC

The emergence of the H1N1 virus reminded the international community that a pandemic can spread quickly around the world, presenting a major health crisis requiring global cooperation. The first official swine-flu case was reported by the Mexican government on March 18, 2009, and on April 24, 2009, the WHO issued a status report regarding the H1N1 virus, describing it as a previously unknown strain, exhibiting “influenza-like illness in the United States and Mexico.”<sup>10</sup> The report noted that while influenza “normally affects the very young and very old,” the majority of the new cases were occurring in “otherwise healthy young adults.”<sup>11</sup> The WHO expressed “high concern” over the outbreak “because of the geographical spread . . . plus the somewhat unusual age groups affected.”<sup>12</sup> At the time the report was published, the virus had already infected several-hundred people in Mexico City, and subsequently extended into the border states of California and Texas.<sup>13</sup> By the end of the summer, the virus had spread throughout the United States, crossing international borders, and causing the WHO to elevate the virus to “pandemic” status.<sup>14</sup> By the first week of October, the WHO reported almost 400,000 clinically confirmed cases of the virus and almost 5,000 deaths worldwide.<sup>15</sup>

On October 24, 2009, President Barack Obama issued a press release declaring that “the rapid increase in illness across the Nation may overburden health care resources and . . . the temporary waiver of certain standard Federal requirements may be warranted in order to enable U.S.

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10. Press Release, World Health Organization, *Influenza-like Illness in the United States and Mexico* (Apr. 24, 2009), [http://www.who.int/csr/don/2009\\_04\\_24/en/index.html](http://www.who.int/csr/don/2009_04_24/en/index.html) [hereinafter WHO].

11. *Id.*

12. *Id.* (The report expressed further concern that the virus had not been previously detected in pigs or humans and appeared to be resistant to antiviral drugs used to treat seasonal influenza).

13. *Id.*

14. Press Release, WHO, *Situation Update—Pandemic (H1N1) 2009—update 70* (Oct. 11, 2009), [http://www.who.int/csr/don/2009\\_10\\_16/en/index.html](http://www.who.int/csr/don/2009_10_16/en/index.html).

15. *Id.*

health care facilities to implement emergency operation plans, [as] the 2009 H1N1 influenza pandemic constitutes a national emergency.”<sup>16</sup> On December 28, 2009, the Administration reaffirmed the threat of the virus by declaring that “a public health emergency exists nationwide . . . that affects or has significant potential to affect national security.”<sup>17</sup> In mid-January 2010, the WHO confirmed that “intense pandemic activity continues [in] . . . North Africa, in Southern Asia, and . . . in parts of East and Southeast Europe.”<sup>18</sup> By August 2010, the virus had spread to more than 214 countries or overseas territories and caused a reported 18,449 deaths.<sup>19</sup>

The aggressive quarantine procedures implemented during the H1N1 outbreak highlight the need for a uniform quarantine standard. In response to the worldwide pandemic, many nations issued travel restrictions to Mexico and began to quarantine flights originating from North America. For instance, the Australian government implemented a policy that required airline pilots to monitor the health of passengers and report passengers who exhibited flu-like symptoms to the Australian Quarantine Inspection Service before landing.<sup>20</sup> Similarly, the Canadian government stationed quarantine officers at each of the nation’s airports receiving direct flights from Mexico to “assess any ill passengers [and] to provide advice and protection when treatment is needed.”<sup>21</sup> The most controversial international responses involved the implementation of mandatory isolation and quarantine procedures as illustrated by the Chinese actions involving Mexican citizens discussed above.<sup>22</sup>

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16. Press Release, Barack Obama, President of the United States of America, The White House, Office of the Press Sec’y, Declaration of a National Emergency with Respect to the 2009 H1N1 Influenza Pandemic (Oct. 24, 2009), <http://www2a.cdc.gov/php/docs/2009H1N1%20prc%20rel.pdf>.

17. Press Release, Kathleen Sebelius, Sec’y of Health and Human Servs., HHS, Renewal of Determination that a Public Health Emergency Exists (Dec. 28, 2009), <http://www.flu.gov/professional/federal/h1n1emergency123009.html>.

18. Press Release, Dr. Keiji Fukuda, Special Adviser to the Director-General on Pandemic Influenza, WHO, Transcript of virtual press conference with Dr. Keiji Fukuda (Jan. 14, 2010), [http://www.who.int/mediacentre/vpc/transcript\\_14\\_january\\_10\\_fukuda.pdf](http://www.who.int/mediacentre/vpc/transcript_14_january_10_fukuda.pdf).

19. Press Release, WHO, Situation Update—Pandemic (H1N1) 2009—update 112 (Aug. 6, 2010), [http://www.who.int/csr/don/2010\\_08\\_06/en/index.html](http://www.who.int/csr/don/2010_08_06/en/index.html).

20. Press Release, The Hon Nicola Roxon MP, Minister for Health and Ageing, Australia Strengthens Border Surveillance for Swine Flu (Apr. 27, 2009), [http://www.health.gov.au/internet/ministers/publishing.nsf/Content/1754980159FAAB4FCA2575A50019B052/\\$File/nr048.pdf](http://www.health.gov.au/internet/ministers/publishing.nsf/Content/1754980159FAAB4FCA2575A50019B052/$File/nr048.pdf).

21. Press Release, Public Health Agency of Canada, Government of Canada Provides further Update on Prevention Measures Being Taken Regarding H1N1 Flu Virus (Human swine flu) (Apr. 30, 2009), [http://www.phac-aspc.gc.ca/media/nr-rp/2009/2009\\_0430\\_h1n1-eng.php](http://www.phac-aspc.gc.ca/media/nr-rp/2009/2009_0430_h1n1-eng.php).

22. See Lacey, *supra* note 2.

Though H1N1 has entered a post-pandemic period—largely due to the widespread availability of the vaccine—the WHO expects the virus to take on the behavior of a “seasonal influenza virus and continue to circulate for some years to come” through localized outbreaks.<sup>23</sup> Moreover, the threat to due process rights has not subsided as international quarantine procedures remain broken. In response to the continuing pandemic, the WHO began a review process to assess the functioning of the IHR during the outbreak.<sup>24</sup> The Committee was tasked with reviewing the “experience gained in the global response, in order to inform the review of the functioning of the Regulations; to help assess and, where appropriate modify the ongoing response; and to strengthen the preparedness for future pandemics.”<sup>25</sup> The first meeting of the Committee took place on April 12, 2010 at the WHO headquarters in Geneva, where member states expressed concerns over the capacity to implement the IHR requirements, communication problems between member states and the WHO, equal access to vaccines, planning, alert, and response timing, and issues related to trade and travel.<sup>26</sup> The Review Committee should evaluate the lessons learned from the H1N1 quarantine procedures and propose amendments to the IHR that would provide for greater due process protections in the event of the next global pandemic.

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23. Virtual Press Release, World Health Organization, Director General’s Opening Statement at Virtual Press Conference, H1N1 in Post-Pandemic Period (Aug. 10, 2010), [http://www.who.int/mediacentre/news/statements/2010/h1n1\\_vpc\\_20100810/en/print.html](http://www.who.int/mediacentre/news/statements/2010/h1n1_vpc_20100810/en/print.html); Andrea Gerlin, *Fading H1N1 scare leaves vaccine surplus*, SEATTLE TIMES, Jan. 17, 2010, available at [http://seattletimes.nwsourc.com/html/nationworld/2010823058\\_fluvaccine\\_18.html](http://seattletimes.nwsourc.com/html/nationworld/2010823058_fluvaccine_18.html) (stating that governments worldwide are left with surpluses of H1N1 vaccine due to sagging demand).

24. WHO, *Report of the First Meeting of the Review Committee on the Functioning of the International Health Regulations (2005) in Relation to Pandemic (H1N1)*, ¶ 2 (Apr. 14, 2010), [http://www.who.int/ihr/r\\_c\\_meeting\\_report\\_1\\_en.pdf](http://www.who.int/ihr/r_c_meeting_report_1_en.pdf).

25. *Id.*

26. *Id.* ¶¶ 8, 14 (The Committee reconvened in late 2010 and in March 2011 with a goal of presenting a final report to the World Health Assembly by May 2011).

### III. THE LEGAL POWER TO QUARANTINE AND THE CONFLICT WITH DUE PROCESS RIGHTS

While the U.S. Constitution gives state officials the power to quarantine individuals to protect public health, this authority conflicts with other due process rights enumerated within the Constitution and the Bill of Rights. The Supreme Court has recognized the tension between quarantine orders and due process rights, but has concluded that the Commerce Clause gives the federal government broad authority to regulate health laws that relate to commerce.<sup>27</sup> Specifically, the Commerce Clause grants Congress the power “to regulate Commerce with foreign Nations, and among the several States.”<sup>28</sup> Courts have reasoned that the federal government has the power to monitor the spread of disease, as an outbreak can affect multiple jurisdictions by spreading across the nation through commerce and travel.<sup>29</sup> In addition, Article I, Section 8 of the Constitution grants the federal government the authority to provide for the common defense and general welfare.<sup>30</sup> Together, the provisions of Article I have been interpreted as a broad grant of authority for Congressional regulation of health laws and quarantine procedures.

Despite the scope of federal authority granted under Article I, the Tenth Amendment also gives the individual states a general police power to regulate local health laws, providing that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States.”<sup>31</sup> In *Gibbons v. Ogden*, the Court noted that although quarantine laws may affect commerce, they are by nature health laws, and thus under the authority of state and local government.<sup>32</sup> However, while individual states should have the ability to monitor local health concerns, there should be a national quarantine standard governed by the CDC to allow the agency to respond to serious health threats that have the potential to spread beyond a local community.

The broad power granted to federal and state authorities in regulating health laws can conflict with other constitutional guarantees, namely, due process protections under the Fourteenth Amendment. The Fourteenth Amendment states that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>33</sup> A quarantine

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27. *Gibbons v. Ogden*, 22 U.S. 1, 113 (1824).

28. U.S. CONST. art. I, § 8, cl. 3.

29. *Gibbons*, 22 U.S. at 113.

30. U.S. CONST. art. I, § 8, cl. 1.

31. U.S. CONST. amend. X.

32. *Gibbons*, 22 U.S. at 112–14.

33. U.S. CONST. amend. XIV, § 1.

order could conflict with the Due Process Clause if an individual is denied an opportunity for a pre-detention hearing or immediate post-detention hearing, or the opportunity to communicate with counsel, or the right to appeal such a judgment. Similarly, quarantine orders could be challenged through a writ of habeas corpus. Article I, Section 9 of the Constitution states that “the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it”<sup>34</sup> Although the government’s interest in public safety could warrant suspending the writ and detaining individuals who posed significant health threats under certain circumstances, the clause only allows for suspension in cases of “rebellion” and “invasion.”<sup>35</sup> The relationship between habeas corpus and quarantine law was discussed in *Greene v. Edwards*, where an individual was involuntarily detained after he was suspected of having communicable tuberculosis.<sup>36</sup> The court granted the petitioner’s writ, concluding that the order violated the due process guarantees of adequate notice and the right to counsel.<sup>37</sup>

Quarantine law in the United States has also been influenced by the Public Health Services Act (PHSA), which codified the federal government’s broad power to enforce quarantine orders.<sup>38</sup> The Act authorizes the Director of the CDC to make and enforce rules “to prevent the introduction, transmission, or spread of communicable disease from foreign countries into the States or possessions, or from one State or possession into any other State or possession.”<sup>39</sup> Specifically, Part 70 of the Act relates to interstate quarantine and authorizes “detention, isolation, quarantine, or conditional release of individuals, for the purpose of preventing the introduction, transmission, and spread of the communicable diseases.”<sup>40</sup> Further, Part 70 prohibits an individual who has a communicable disease from traveling “from one State or possession to another without a permit from the health officer of the State, possession, or locality of destination.”<sup>41</sup> The Act also requires common carriers engaged in interstate traffic to report a “suspected case

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34. U.S. CONST. art. I, § 9, cl. 2.

35. *Id.*

36. *Greene v. Edwards*, 263 S.E. 2d 661, 661–62 (W. Va. 1980).

37. *Id.*

38. *See* 42 U.S.C. § 264(a) (2002).

39. *Id.*

40. *Id.* § 264(d)(1).

41. *Id.*

of a communicable disease” and “notify the local health authority at the next port of call, station, or stop.”<sup>42</sup>

Part 71 of the Act relates to foreign arrivals and permits a federal quarantine official who has “reason to believe that any arriving person [who] is infected with or has been exposed to any of the communicable diseases” to “isolate, quarantine, or place the person under surveillance and may order disinfection or disinfestation [or] fumigation as he/she considers necessary to prevent the introduction, transmission or spread of the listed communicable diseases.”<sup>43</sup> In addition, Part 71 of the Act requires an individual who has been placed into isolation or quarantine to disclose personal information regarding his or her “health and his/her intended destination and report, in person or by telephone, to the local health officer . . . for medical examinations as may be required.”<sup>44</sup>

Taken together, Parts 70 and 71 grant the federal government unrestricted authority to quarantine individuals based on a mere suspicion that they have been exposed to a communicable disease. However, the Act fails to provide for due process protections to appeal such a quarantine order or the right to communicate with counsel. Furthermore, the Act does not specify what legal standard should be applied to a quarantine order or how long such an order can remain in effect. While the PHSA lacks adequate due process protections, the constitutional tension between public health laws and due process rights has been a reoccurring theme throughout the history of quarantine law.

#### IV. THE HISTORY OF QUARANTINE LAW

##### A. *Distinguishing Quarantine from Isolation*

As a threshold matter, it is important to distinguish a quarantine order from an isolation order. The CDC states that quarantine is “used to separate and restrict the movement of well persons who may have been exposed to a communicable disease to see if they become ill. These people may have been exposed to a disease and do not know it, or may have the disease but do not show symptoms.”<sup>45</sup> In contrast, the CDC states that isolation is “used to separate ill persons who have a communicable disease from those who are healthy.”<sup>46</sup> Historically, the

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42. 42 C.F.R. § 70.4 (2009).

43. *Id.* § 71.32.

44. *Id.* § 71.33.

45. Fact Sheet, CDC Quarantine and Migration Health, *Legal Authorities for Isolation and Quarantine* (Mar. 2009), <http://www.cdc.gov/quarantine/pdfs/legal-authorities-isolation-quarantine.pdf>.

46. *Id.*

terms have been used interchangeably, but it is important to understand that quarantine applies to healthy individuals who may have been exposed to a contagious disease, but not necessarily infected with a virus. Isolation is distinguishable as it is used to separate individuals who have contracted a specific disease.<sup>47</sup>

### *B. Early Quarantine Laws*

Quarantine procedures have been used to protect the public from health threats throughout history. Quarantine procedures were published in the *Book of Leviticus* to warn followers of the danger of “unclean” lepers who should be separated from society.<sup>48</sup> In response, the Catholic Church developed measures to exclude lepers from the general population, thereby creating an early written record of quarantine law.<sup>49</sup>

The use of the word “quarantine” can be traced to the Italian words for forty, “quaranta giorni,” referring to a forty day quarantine period implemented to protect the city of Venice from ships that may have been carrying the plague.<sup>50</sup> Throughout the Middle Ages, European cities such as Venice, Ragusa, and London passed quarantine laws that required ships arriving from areas infected with the plague to undergo a probationary term before entering a city’s port,<sup>51</sup> and England required ships to display a yellow flag with the letter “Q” to indicate that the vessel was under a mandatory quarantine order.<sup>52</sup> Like the early quarantine procedures found in Europe, the United States also developed quarantine laws to protect society from perceived health threats.

### *C. Quarantine Law in the United States*

The absence of a national quarantine standard or a consensus regarding when and how an individual should be quarantined has caused due process conflicts throughout the history of the United States. While

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47. *Id.*

48. See Joseph Topinka, *Yaw, Pitch, and Roll—Quarantine and Isolation at United States Airports*, 30 J. LEGAL MED. 51, 56 (2009) (The Book of Leviticus is the third book of the Hebrew Bible).

49. *Id.*

50. Kelly Culpepper, *Bioterrorism and the Legal Ramifications of Preventative and Containment Measures*, 12 QUINNIAC HEALTH L.J. 245, 261 (2008–2009).

51. Topinka, *supra* note 48, at 55–58.

52. *Id.* at 58 (stating the “Q” flag is still represented today on CDC Quarantine Officers’ uniforms and at official Quarantine Stations).

U.S. courts have affirmed the federal government's authority to quarantine individuals to promote the health and safety of the general population, quarantines have often been ineffective due to a lack of communication and collaboration between federal, state, and local jurisdictions.<sup>53</sup>

Early American quarantine laws were enacted to protect colonial settlers from infectious and deadly diseases in the New World. As settlers were faced with threats from smallpox and yellow fever, local governments implemented quarantine ordinances to guard communities from disease outbreaks.<sup>54</sup> The Massachusetts Bay Colony was the first American jurisdiction to pass a quarantine law in 1647 to protect the region from ships that could be carrying disease.<sup>55</sup> In response to a yellow fever epidemic, Congress enacted the first federal quarantine laws in 1796 and 1799, which authorized the federal government to assist state officials in enforcing local quarantine laws.<sup>56</sup>

Early judicial decisions interpreted quarantine law broadly, allowing states wide latitude to quarantine individuals for extended periods of time, even without adequate evidence of exposure to a contagious disease. In *Gibbons*, the Supreme Court affirmed Congress's authority to quarantine, noting that "the right of regulating foreign commerce, seems to be, the power of compelling vessels infected with any contagious disease . . . to perform their quarantine."<sup>57</sup> In one case, Mary Mallon, a healthy carrier of typhoid fever, was forced into isolation by the State of New York for twenty-six years until her death.<sup>58</sup> "Typhoid Mary," as she was coined, was never afforded a trial or charged with a crime.<sup>59</sup> Typhoid Mary's status as a lower-class Irish immigrant likely played a role in her involuntary isolation, a discriminatory theme that has continued to prejudice quarantine orders throughout history.<sup>60</sup>

Although early quarantine laws were interpreted broadly, by the beginning of the twentieth century, U.S. courts began to recognize that quarantine procedures could violate due process rights. In *Wong Wai v. Williamson*, a federal court struck down a quarantine order issued by the San Francisco Board of Health, which prohibited Chinese residents from

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53. *Gibbons v. Ogden*, 22 U.S. 1, 113 (1824).

54. Topinka, *supra* note 48, at 55–58.

55. *Id.* at 58.

56. *Id.*

57. *Gibbons*, 22 U.S. at 113.

58. Michelle Daubert, *Pandemic Fears and Contemporary Quarantine: Protecting Liberty Through a Continuum of Due Process Rights*, 54 BUFF. L. REV. 1299, 1311 (2007).

59. *Id.*

60. *Id.* (quarantine orders have been directed towards individuals in lower economic classes or minority groups. For instance, at the beginning of the twentieth century, San Francisco health officials issued quarantine orders only to the city's Chinese residents).

leaving the city without first being vaccinated for bubonic plague.<sup>61</sup> The court reasoned that the order violated due process rights because it targeted a specific class of individuals, “without regard to the previous condition, habits, exposure to disease, or residence of the individual.”<sup>62</sup> Several months later, in *Jew Ho v. Williamson*, the City of San Francisco adopted a similar ordinance that authorized the quarantine of several city blocks of the Chinese Quarter.<sup>63</sup> The court found that, although the order appeared to be neutral on its face, it was “unreasonable, unjust, and oppressive . . . discriminating in its character, and is contrary to the provisions of the fourteenth amendment.”<sup>64</sup> These cases demonstrate how quarantine laws and health concerns can be used as vehicles to discriminate against groups of people, highlighting the need for a uniform procedure to ensure that the due process rights of all groups are respected.

Although U.S. courts recognized that quarantine procedures could not be used to blatantly discriminate, the Supreme Court continued to affirm the broad governmental power to enforce quarantines for valid health concerns. For instance, in *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health*, the Court upheld a quarantine law prohibiting a French vessel from entering the Port of New Orleans under suspicion that the ship may have been carrying a contagious disease.<sup>65</sup> The Court reasoned that “state quarantine laws and state laws for the purpose of preventing, eradicating, or controlling the spread of contagious or infectious diseases, are not repugnant to the Constitution.”<sup>66</sup> Similarly, in *Jacobson v. Massachusetts*, the Court upheld a state law mandating compulsory inoculations during a smallpox outbreak.<sup>67</sup> These early cases exemplify the Court’s willingness to grant broad authority to state officials to protect public health, while still expressing concern for blatant violations of due process rights.

Though the Supreme Court recognized the U.S. government’s broad authority to quarantine individuals, the federal powers were not tested on

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61. *Wong Wai v. Williamson*, 103 F. 1, 7–10 (N.D. Cal. 1900).

62. *Id.* at 7.

63. *Jew Ho v. Williamson*, 103 F. 10, 11–12 (N.D. Cal. 1900).

64. *Id.* at 26.

65. *Compagnie Francaise de Navigation Vapeur v. Louisiana Bd. of Health*, 186, U.S. 380, 387 (1902).

66. *Id.*

67. *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1902).

a national scale until the 1918 outbreak of the Spanish influenza.<sup>68</sup> The test proved to be a failure, as the H5N1 Spanish flu strain killed approximately 675,000 Americans in a population of just over 100 million.<sup>69</sup> In an attempt to quell the spread of the virus, the Surgeon General issued a bulletin recommending that local public health boards “ban public gatherings and close churches, theatres, [and] saloons.”<sup>70</sup> Despite attempts to quarantine exposed individuals and limit public interaction, the Spanish flu spread rapidly throughout every region in the United States and reached distant countries around the world.<sup>71</sup> The federal government’s inability to stop the spread of the Spanish flu may be attributed to the lack of a national quarantine standard and the absence of cooperation between national, state, and local governments. These concerns continue to hinder the enforcement of quarantine procedures today and pose a significant threat to the protection of due process rights.

#### *D. International Quarantines in the Twenty-First Century*

Recent quarantines have demonstrated the need for a uniform international quarantine system as disorganized global responses to disease outbreaks have been unsuccessful at stopping the spread of disease and have come at the expense of due process rights. In addition, mass quarantines are ineffective as they create panic and often are implemented over a large geographic region without considering individual due process rights. The emergence of Severe Acute Respiratory Syndrome (SARS) in Guangdong Province, China caused some nations to implement unprecedented mass quarantines.<sup>72</sup> In Taiwan, as many as 131,000 people were quarantined, and in Toronto, Canada, a city of about 3 million people, health officials quarantined approximately 30,000 individuals.<sup>73</sup> While the majority of Toronto’s residents cooperated with the quarantine restrictions and remained in their homes, the large-scale

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68. Jason Marisam, *Local Governance and Pandemics: Lessons From the 1918 Flu*, 85 U. DET. MERCY L. REV. 347, 358 (2008).

69. *Id.*

70. *Id.* at 360.

71. Jeffery K. Taubenberger & David M. Morens, *1918 Influenza: the Mother of All Pandemics*, 12 EMERGING INFECTIOUS DISEASES 15, 15 (2006).

72. Lesley Jacobs, *Rights and Quarantine During the SARS Global Health Crisis: Differentiated Legal Consciousness in Hong Kong, Shanghai, and Toronto*, 41 LAW & SOC’Y REV. 511, 512–14 (2007).

73. Mark A. Rothstein, *Job Security and Income Replacement for Individuals in Quarantine: The Need for Legislation*, 10 J. HEALTH CARE L. & POL’Y 239, 242 (2007); Jacobs, *supra* note 72, at 513.

Chinese quarantines proved to be ineffective.<sup>74</sup> For instance, in the spring of 2003, residents of a rural Chinese town “ransacked a school building” that was being used as a quarantine shelter.<sup>75</sup> Moreover, when Beijing officials announced a mandatory quarantine to stop the spread of the virus, nearly 250,000 residents fled the city, dispersed throughout the country, and likely enabled the spread of the disease.<sup>76</sup> The lessons from the SARS outbreak remind us that there is no uniform system in place or international plan of action to regulate or control large-scale quarantines. During the outbreak, countries exercised absolute authority to issue quarantine orders, largely ignoring due process rights. Moreover, even if due process rights were a concern, it is unlikely that a state would be able to provide adequate due process protections given the sheer number of individuals under quarantine restriction.

The absence of an international due process standard for quarantine orders or a consensus regarding when and how an individual should be quarantined was further highlighted in the well-publicized tuberculosis scare involving Atlanta attorney, Andrew Speaker.<sup>77</sup> In March 2007, Speaker was diagnosed with a dangerous and drug-resistant strain of tuberculosis by the Georgia Department of Public Health.<sup>78</sup> Despite a warning from Georgian health officials to refrain from traveling, Speaker traveled on a commercial airline from Atlanta, Georgia to Greece for his wedding and then to Italy for his honeymoon.<sup>79</sup> After locating Speaker in Italy, the CDC informed him that he could not return to the United States and should be quarantined immediately.<sup>80</sup> Ignoring the direction from the CDC, Speaker flew on a commercial airline from

74. Dearbhail McDonald & Meave Sheehan, *Breathe easy; Focus; Sars*, SUNDAY TIMES (UK), Apr. 27, 2003, at 13 (stating that “frightened migrant workers and students, fleeing both the risks of SARS and the official crackdown . . . flocked to stations and bus terminals seeking a way out—a classic method of spreading the infection nationwide”).

75. Wendy Mariner, George J. Annas & Wendy E. Parmet, *Symposium: Health Law Professors Conference Pandemic Preparedness: A Return to the Rule of Law*, 1 DREXEL L. REV. 341, 358 (2009).

76. *Id.*

77. Nicholas Riccardi, *Doctors Say Man has Less Severe Form of TB; American Traveler who Triggered International Health Scare Chides U.S. Officials for the Way his Case was Handled*, TORONTO STAR, July 4, 2007, at A02.

78. John Schwartz, *TB Case Sets off Global Rash of Finger-pointing U.S. Agency Failed to Share Data Promptly*, INT'L HERALD TRIB., June 4, 2007, at 1.

79. Muiris Houston, *At Times it's Better Not to Fly*, IRISH TIMES, June 12, 2007.

80. Rebecca Chen, *Closing the Gaps in the U.S. and International Quarantine Systems: Legal Implications of the 2007 Tuberculosis Scare*, 31 HOUS. J. INT'L L. 83, 87 (2008).

Italy to Prague and then to Montreal, where he rented a car and drove across the Canadian-U.S. border to New York.<sup>81</sup> Though Speaker did not transmit the virus to anyone he came into contact with, he traveled to four different countries, and risked causing a global outbreak.<sup>82</sup> The incident raises questions as to why the CDC was unable to prevent Speaker from traveling abroad and why the CDC and the WHO were unable to force Speaker into quarantine. The problem can be attributed to the WHO's failure to implement a uniform quarantine system that would allow member states to communicate with one another to enforce quarantines during a global health threat.

## V. THE INTERNATIONAL WORLD HEALTH REGIME AND ITS FLAWS

The World Health Organization was established by the United Nations in 1948 and is composed of 193 member states, forming the World Health Assembly (WHA).<sup>83</sup> The Assembly is responsible for making major policy decisions and approving regulations, such as the International Health Regulations, which were adopted in May 2005 and became effective in June 2007.<sup>84</sup> The purpose of the Regulations is to “prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks.”<sup>85</sup> Although the Regulations are legally binding on all 193 WHO member states, the organization's constitution lacks a provision providing for formal sanctions against non-compliant states.<sup>86</sup> Moreover, the IHR are flawed as they fail to provide adequate protections for due process rights through a universal quarantine standard.

### A. *Due Process Flaws in the 2005 International Health Regulations*

Although the WHO is comprised of almost the entire international community, the organization's role has been limited since its creation. The 1969 Regulations applied to only six infectious diseases: (1) cholera, (2) plague, (3) yellow fever, (4) smallpox, (5) relapsing fever, and

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81. *Id.* at 88.

82. Schwartz, *supra* note 78 (stating that each country pointed the finger at one another as Canada, Greece, and Italy claimed they had received no word of the presence of the patient in time to take action).

83. Silver, *supra* note 6, at 231.

84. *Id.* at 231–32.

85. WORLD HEALTH ORGANIZATION, INTERNATIONAL HEALTH REGULATIONS 1 (WHO Press 2nd ed. 2005) [hereinafter IHR].

86. Silver, *supra* note 6, at 233, 244.

(6) typhus.<sup>87</sup> The brevity of the list limited the WHO's power to act during new epidemics, and a self-reporting system required official notification from an affected country before the WHO could intervene.<sup>88</sup> However, the adoption of the 2005 Regulations (Regulations) granted the WHO greater authority to respond to global health threats. The Regulations provide for an expansive approach that has eliminated the list of diseases and authorized the WHO to act to combat "public health risks" and "public health emergencies of international concern."<sup>89</sup> Once it is determined that a public health emergency exists, the WHO can provide technical support to the affected state and "mobilize international assistance" to provide relief during and after an outbreak of disease.<sup>90</sup> In addition, the IHR allow the WHO to monitor the spread of infectious diseases more effectively by requiring member states to set-up internal focal points to comply with the Regulations and create contact points to communicate with the WHO directly.<sup>91</sup> The Regulations require member states to use a decision-tree to decide when they must notify the WHO of a potential global threat.<sup>92</sup> In this decision-tree method, when an outbreak occurs, a state must ask four questions: (1) "is the public health impact of the event serious," (2) "is the event unusual or unexpected," (3) "is there a significant risk of international spread," and (4) "is there a significant risk of international travel or trade restrictions?"<sup>93</sup> If a state party answers "yes" to any two of the four questions, the event is considered a public health emergency of international concern and must be reported to the WHO.<sup>94</sup> Furthermore, individuals and third parties may notify the WHO of potential outbreaks in a member state.<sup>95</sup> This information can be provided with or without the direction or consent of the member state.<sup>96</sup> Despite improvements to the WHO's authority to effectively combat contagious diseases, the Regulations do

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87. *Id.* at 232.

88. *Id.*

89. *Id.*; IHR, *supra* note 85 (this change will allow the organization to intervene in a wide-variety of situations that might pose a health risk to the international community).

90. IHR, *supra* note 85, at 15.

91. Kathleen J. Choi, *A Journey of a Thousand Leagues: From Quarantine to International Health Regulations and Beyond*, 29 U. PA. J. INT'L L. 989, 1017 (2008).

92. *Id.* at 1016.

93. IHR, *supra* note 85, at 12.

94. Choi, *supra* note 91, at 1016.

95. Silver, *supra* note 6, at 234 (explaining that Non-Governmental Organizations typically report a disease outbreak if a State has refused to inform the WHO).

96. *Id.*

not provide adequate due process protections for individuals placed under a quarantine order. Specifically, the Regulations fail to outline procedural due process rights, such as the right to a hearing or the right to communicate with counsel.

*B. Quarantine Procedures Under the IHR are Flawed as They Fail to Provide for Procedural Due Process Rights*

While the Regulations address quarantine procedures and the proper treatment of individuals subjected to a quarantine order, the provisions do not provide an avenue to contest a quarantine order through an independent legal system. Article 21(a) of the WHO Constitution permits the WHA to adopt legally binding regulations concerning “sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease.”<sup>97</sup> In the event that a traveler refuses to consent to a medical examination, a vaccination, or to provide necessary documentation, the revised Regulations permit a member state to “establish health measures that prevent or control the spread of disease, including isolation [and] quarantine.”<sup>98</sup> Such measures may only be used if “there is evidence of an imminent public health risk.”<sup>99</sup> Additionally, Article 32 of the Regulations addresses the treatment of travelers and provides that:

State Parties shall treat travellers with respect for their dignity, human rights and fundamental freedoms and minimize any discomfort or distress associated with such measures, including by:

- (a) treating all travellers with courtesy and respect;
- (b) taking into consideration the gender, sociocultural, ethnic or religious concerns of travellers; and
- (c) providing or arranging for adequate food and water, appropriate accommodation and clothing, protection for baggage and other possessions, appropriate medical treatment, means of necessary communication if possible in a language that they can understand and other appropriate assistance for travellers who are quarantined [or] isolated.<sup>100</sup>

Although the articles reference “human rights” and list appropriate recommendations as to how travelers should be treated if quarantined or isolated, they fail to provide for adequate procedural due process protections.<sup>101</sup> For instance, the Regulations do not indicate how long an individual may be quarantined and what standard of proof regarding an

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97. Constitution of the World Health Organization, Principles of the Constitution, July 22, 1946, 14 U.N.T.S. 185.

98. IHR, *supra* note 85, at 24.

99. *Id.*

100. *Id.*

101. *Id.*

individual's exposure to a disease should be required before a quarantine order is issued. In addition, the Regulations do not provide avenues to appeal a quarantine order or provide rights to a hearing or the opportunity to communicate with counsel in the event a quarantine order is extended. Rather, the Regulations permit a member state to issue a quarantine order "in accordance with its national law and to the extent necessary to control such a risk."<sup>102</sup> This power is vague and grants nations broad discretion to quarantine individuals without concern for due process rights. In many instances, directing a member state to refer to its own quarantine law will likely protect due process rights as many states have included due process guarantees in their federal constitutions and statutes.<sup>103</sup> However, these constitutional guarantees can be abused or ignored, especially when there is a threat to public health.<sup>104</sup>

To illustrate this point, consider a scenario in which a member state quarantined several hundred foreign citizens for an extended period of time without evidence that the individuals were exposed to a contagious disease. Under the IHR, a state only needs to demonstrate that there is an imminent public health risk to keep a quarantine order in effect.<sup>105</sup> Moreover, even if a member state clearly exceeded appropriate quarantine authority by disrespecting due process rights, the WHO does not have the authority to discipline or sanction a member state for noncompliance.<sup>106</sup> In such an instance, a traveler subjected to quarantine in a foreign state would be forced to rely on his own government to protect his due process rights.<sup>107</sup>

### *C. The International Health Regulations Conflict with International Human Rights Agreements*

As noted above, the IHR do not adequately protect due process rights in regards to quarantine or isolation procedures. The IHR may also

102. *Id.*

103. *See* U.S. CONST. amend. XIV, § 1 (stating that no State shall "deprive any person of life, liberty, or property, without due process of law"); Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. XIX, 5 de Febrero de 1917 (Mex.) (mandating due process for criminal charges and prohibiting detention in excess of 72 hours without formal charges).

104. *See, e.g.*, *Jew Ho v. Williamson*, 103 F. 10, 11–12 (N.D. Cal. 1900).

105. IHR, *supra* note 85, at 24.

106. *Id.*; Silver, *supra* note 6, at 233, 244.

107. *See* Lacey, *supra* note 2 (stating that Mexico chartered a private plane to remove Mexican citizens from a Chinese quarantine and ensure their safe return home).

violate international human rights agreements, to which the majority of the WHO member states are signatories. The United Nations adopted the Universal Declaration of Human Rights (UDHR) in 1948 as a response to the humanitarian issues raised during World War II.<sup>108</sup> The UDHR does not have the legal force of a treaty per se, but the provisions “have been so often applied and accepted that they are widely considered to have attained the status of international law.”<sup>109</sup> Article 3 of the UDHR provides that “[e]veryone has the right to life, liberty and security of person,” while Article 9 protects against “arbitrary arrest, detention or exile.”<sup>110</sup> Article 10 provides that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his right and obligations and of any criminal charge against him.”<sup>111</sup> In addition, Article 13 states that “[e]veryone has the right to freedom of movement and residence within the borders of each state” and “[e]veryone has the right to leave any country, including his own, and to return to his country.”<sup>112</sup> These provisions have been regarded as absolute by the international community and appear to contradict articles in the IHR which allow for involuntary quarantines without safeguarding fundamental rights.

Under the IHR, a member state may quarantine any individual who poses a serious health risk.<sup>113</sup> The IHR does not provide for a time limit on a quarantine order and does not afford an individual an opportunity to a hearing.<sup>114</sup> The gaps in the IHR’s quarantine procedure directly conflict with Articles 9 and 10 of the UDHR, which provide for procedural due process rights.<sup>115</sup> Similarly, involuntary quarantine orders violate Article 13’s right to freedom of movement. While UDHR guarantees an individual the right to leave any country and return to his own country, the quarantine procedures under the IHR would likely prohibit a quarantined individual from returning to his nation-state or even communicating with his own government while under a quarantine order.<sup>116</sup>

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108. George J. Annas, *The Statue of Security: Human Rights and Post-9/11 Epidemics*, 38 J. HEALTH L. 319, 322 (2005).

109. Lawrence O. Gostin & Benjamin E. Berkman, *Pandemic Influenza: Ethics, Law, and the Public’s Health*, 59 ADMIN. L. REV. 121, 143 (2007).

110. Universal Declaration of Human Rights, G. A. Res. 217 (III) A, at 71, U.N. Doc. A/810 (III) (Dec. 12, 1948) [hereinafter UDHR].

111. *Id.* at art. 10.

112. *Id.* at art. 13.

113. IHR, *supra* note 85, at 24.

114. *Id.*

115. UDHR, *supra* note 110, at art. 9–10.

116. *Id.* at art. 13.

Other international agreements like the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) also provide for fundamental human rights.<sup>117</sup> However, in contrast to the UDHR, the ICCPR allows state parties to suspend civil and political rights in times of national crisis.<sup>118</sup> In addition, the UN Commission on Human Rights has published the Siracusa Principles on the Limitation and Derogation Provisions (Siracusa Principles) in the ICCPR, which are “widely recognized as a legal standard for measuring the validity of limitations on human rights.”<sup>119</sup> The Siracusa Principles state:

[E]ven when the state acts for a good reason, it must respect human dignity and freedom, requiring that state limitations must be in accordance with the law; based on a legitimate objective; strictly necessary in a democratic society; the least restrictive and intrusive means available; and not arbitrary, unreasonable, or discriminatory.<sup>120</sup>

Although the ICCPR and Siracusa Principles allow member states to suspend some rights in the event of a national crisis, states are required to utilize the least restrictive means available.<sup>121</sup> The threat of an infectious disease or global pandemic would qualify as national crisis to justify suspending rights through the use of quarantine or isolation procedures. However, the IHR fails to include adequate protections, such as the Siracusa Principles, that would limit the scope of governmental restriction and intrusion.

In contrast to the IHR, under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), individuals are provided with a forum in the European Court of Human Rights to bring a claim against a member state for violation of a right protected by the Convention.<sup>122</sup> In addition, Article 5 of the ECHR provides that “[e]veryone has the right to liberty and security,” and that no one shall be deprived of liberty in “the lawful detention of persons for

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117. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

118. Gostin & Berkman, *supra* note 109, at 145.

119. *Id.* at 146.

120. *Id.*

121. *Id.*

122. Chen, *supra* note 80, at 107.

the prevention of spreading infectious disease.”<sup>123</sup> This provision is stronger than the quarantine standard included in the IHR because it states that individuals cannot be deprived of liberty—due process rights—as a result of a quarantine order.

This stricter quarantine standard under the ECHR was analyzed in *Enhorn v. Sweden*, when the European Court of Human Rights ruled in favor of a homosexual man who was forced into isolation after he infected another individual with the HIV virus.<sup>124</sup> The court provided that when assessing the lawfulness of the detention of a person for an infectious disease, the court must consider “whether detention of the person infected is the last resort in order to prevent the spreading of the disease.”<sup>125</sup> By providing individuals with a forum to bring claims against member states, the ECHR can hold member states accountable for their actions and ensure compliance with the terms of the Convention. In contrast, the WHO does not sanction member states for noncompliance, and the Regulations fail to provide a system wherein a quarantined individual can bring a claim when his due process rights have been violated.<sup>126</sup>

*D. The WHO Should Have Independent Authority to Sanction Member States who Violate Due Process Rights Under the IHR*

The IHR should be amended to allow a party to bring a claim against a member state for violation of a right protected under the IHR. Without the authority to enforce the IHR, countries will not take the WHO seriously and will continue to ignore due process rights when issuing quarantine orders. Moreover, in certain circumstances, states may have an economic incentive to ignore IHR procedures to avoid the international stigma of a disease outbreak.<sup>127</sup> For instance, an argument has been made that China attempted to “cover up” its domestic SARS outbreak at the early and middle stages, violating its international duty to report infectious disease of international significance.<sup>128</sup> This commentator urged the international community to form a liability regime, under which affected nations might bring claims for economic damages against

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123. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5 §1(e) (2003).

124. *Enhorn v. Sweden*, 41 Eur. Ct. H.R. 30, 30 (2005).

125. *Id.* at 44.

126. Silver, *supra* note 6, at 233, 244.

127. Joshua D. Reader, *The Case Against China: Establishing International Liability for China's Response to the 2002–2003 SARS Epidemic*, 19 COLUM. J. ASIAN L. 519, 522–25 (2006).

128. *Id.* at 522.

China.<sup>129</sup> However, in order for economic sanctions to be effective, the penalties for noncompliance would have to be greater than the benefits of active concealment.

In contrast, some have argued that the Regulations are not the proper forum to compel member states to protect due process rights when enforcing quarantine restrictions.<sup>130</sup> For example, one commentator argued that the Regulations “are not meant to symbolically handcuff states in the face of international health threats,” and that “the threat to the population’s welfare outweighs the lack of ‘compulsory due process protections, such as the right to challenge [quarantine] in court.’”<sup>131</sup> In addition, this commentator suggests that nations would be “unlikely to agree to give up sovereign rights of self-governance and domestic population control in making quarantine decisions.”<sup>132</sup> Moreover, “[e]ven if quarantine rules were merely an unenforceable gesture, such an act might gestate into binding international custom despite states’ objections.”<sup>133</sup>

This argument, however, ignores the fact that the Regulations reference the importance of protecting human rights when implementing isolation or quarantine procedures.<sup>134</sup> By deferring to absolute state power to enforce quarantine restrictions regardless of human rights, this argument fails to consider that the WHO is concerned with the health and safety of *all* people, even those in quarantine or isolation. Although this commentator was correct in assuming that states are unlikely to give up sovereign powers to quarantine health threats, member states must be guided by fundamental rights principles and should be held accountable for gross violations of those principles.

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129. *Id.* at 522–23, 563 (stating that economic sanctions would punish states for failing to comply with their international obligations and distribute wealth to make injured parties whole to the fullest extent possible. The amount of economic harm could be calculated by measuring how noncompliance led to fear of SARS infection in various countries, reducing consumer and travel demand and the confidence in the future of affected economies. In addition, economic harm could be calculated by examining the cost of disease prevention in retail, travel, and service industries).

130. Timothy J. Miano, *Understanding and Applying International Infectious Disease Law: U.N. Regulations During an H5N1 Avian Flu Epidemic*, 6 CHI.-KENT J. INT'L & COMP. L. 26, 41 (2006).

131. *Id.*

132. *Id.*

133. *Id.*

134. IHR, *supra* note 85, at 24 (suggesting that IHR require that quarantine procedures be implemented in consideration of the human rights of detained individuals).

While compliance with international health law and complete collaboration between member states are idealistic proposals, the international community has cooperated in other areas of international law to achieve a common purpose. For instance, international environmental law is similar to international health law in that both disciplines transgress across borders and have far reaching consequences for all nations. In one example, greenhouse gas emissions spread throughout the atmosphere much like a virus, which originates in one corner of the globe and impacts countries around the world. In recognition of the global complications of environmental threats, the international community has worked together to reduce air pollution. For example, the Kyoto Protocol was first adopted in 1997 and has been ratified by 187 nations.<sup>135</sup> The agreement aims at reducing the effects of global warming through the reduction of harmful greenhouse gas emissions.<sup>136</sup> Each member state is classified according to their industrial output and has agreed to reduce emissions by binding target deadlines.<sup>137</sup> Further, if the enforcement branch of the organization determines that a member has failed to meet their specified emissions standard, the member can be suspended from the emissions trading program and be required to decrease emissions by a greater percentage the following year.<sup>138</sup> While the Kyoto Protocol is only one example of the hundreds of international environmental regulations, it is a strong illustration of how the international community can work together to honor agreements that have far reaching consequences for all member states and a similar strategy should be adopted for quarantine law

Accordingly, the IHR should be amended to impose a global quarantine standard that respects the rights and concerns of all member states to ensure international support and compliance. At a minimum, the international standard should include the due process protections outlined in Part I above: (1) a finding by a health professional that an individual poses a significant risk of spreading a contagious disease; (2) a quarantine order by a judicial authority or fact finder based on clear and convincing evidence that an individual poses a serious health risk; (3) an opportunity for a hearing and the right to appeal a quarantine order within one day to the court of issuance or if such a court is unavailable, to the WHO for referral to an independent international

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135. United Nations Framework Convention on Climate Change, Kyoto Protocol, [http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php) (listing the member states; although the United States has not ratified the agreement).

136. Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 2(1)(a), Dec. 11, 1997.

137. *Id.* at art. 3.

138. *Id.*

court; (4) the right to speak with counsel and the opportunity to communicate with one's own government; (5) the right to be transferred to the custody of one's own government; (6) the right to refuse medical testing, treatment, or the disclosure of personal medical information; and (7) procedures to ensure that a quarantine order is implemented in the least restrictive and intrusive means available.

However, the provisions listed above should only be applied to individual quarantine orders as it is doubtful that a strict due process procedure would be effective in the event of a mass-quarantine.<sup>139</sup> As large-scale mandatory quarantines have historically proven to be ineffective and would likely fail at preventing the spread of disease in the modern era of mass transportation, large-scale mandatory quarantines should never be implemented.<sup>140</sup> If a large geographic area has been exposed to a contagious disease, a better approach would be to impose a voluntary quarantine by encouraging potentially exposed individuals to remain at home and discouraging the general population from gathering in large public areas. This was the approach most recently used to stop the spread of SARS in Toronto during the 2003 outbreak and the spread of swine-flu in Mexico City in the spring of 2009.<sup>141</sup>

#### VI. THE DOMESTIC HEALTH REGIME AND THE FLAWS IN THE PROPOSED CDC REGULATIONS

In addition to the flaws associated with the IHR discussed above, the 2005 Proposed CDC Regulations also lacked adequate due process protections.<sup>142</sup> The 2009 H1N1 outbreak raised new questions regarding the scope of the federal government's authority to respond to disease outbreaks and the legality of quarantine procedures implemented by federal, state, and local agencies. The CDC requested that the University of Louisville School of Medicine conduct a study on isolation and quarantine regulation and submit recommendations to adopt changes to

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139. See Mariner et al., *supra* note 75, at 358 (stating that large-scale quarantines were ineffective in China during the 2003 SARS outbreak).

140. *Id.*

141. See Rothstein, *supra* note 73, at 242; Jo Tuckman, *Swine Flu: Fear and Disbelief Stalk Mexico City's Eerily Empty Streets*, THE GUARDIAN, Apr. 27, 2009, at P4 (stating that Mexico City closed schools and cancelled sporting events, concerts, and church services to stop the spread of the virus).

142. Control of Communicable Diseases, 42 C.F.R. 70, 71, available at [http://www.access.gpo.gov/nara/cfr/waisidx\\_03/42cfrv1\\_03.html](http://www.access.gpo.gov/nara/cfr/waisidx_03/42cfrv1_03.html) [hereinafter CDC Proposed Regulations].

Parts 70 and 71 of the Act.<sup>143</sup> However, in early 2010, the U.S. Department of Health and Human Services (HHS) withdrew the proposed amendments to the Regulations after concluding that further revisions were necessary.<sup>144</sup> HHS and the CDC are currently in the process of drafting new revisions to the Regulations which will incorporate lessons learned since 2005.<sup>145</sup> For the purposes of this comment, the flaws in the 2005 Proposed Regulations (Proposed Regulations) will be examined with a view towards any forthcoming revisions.

#### A. *The 2005 Proposed CDC Regulations*

The Louisville Report concluded that quarantine and isolation procedures should be amended, and “[t]here must be adequate evidence to justify the conclusion that the individual represents a threat.”<sup>146</sup> The Report addressed due process concerns stating that:

The requested order must be specific and time-limited, and there must be an opportunity to be heard by a neutral fact-finder and eventually a judge. It is probably constitutional for a hearing to follow detention in the case of isolation of a probable infected person, provided the hearing is held promptly after detention and the detainee has the right to representation and appeal to a court.<sup>147</sup>

The Report also indicated that the fact finder should apply greater scrutiny to quarantine orders and update outdated definitions.<sup>148</sup>

While the Proposed Regulations would have provided greater due process protections than current quarantine laws, the Proposed Regulations were flawed because they did not go far enough to protect due process rights. In general, the Proposed Regulations would have expanded the CDC’s power, while also providing for increased due process protections.<sup>149</sup> The new Proposed Regulations would have given the CDC more flexibility to issue quarantine orders by defining “ill person” to include persons with symptoms commonly associated with diseases requiring quarantine.<sup>150</sup> The Proposed Regulations also would have provided increased direction to common carriers, by requiring airlines and other carriers to: (1) screen passengers at borders; (2) report cases of illness or death; (3) distribute health notices to crew and passengers; (4) collect and transmit personal passenger information; (5) order physical

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143. Topinka, *supra* note 48, at 64.

144. Young, *supra* note 9.

145. *Id.*

146. Topinka, *supra* note 48, at 64.

147. *Id.*

148. *Id.*

149. *Id.* at 64–65.

150. CDC Proposed Regulations, *supra* note 142, at 71,899.

examinations; and (6) require passengers to disclose information about contacts, travel itinerary, and medical history.<sup>151</sup> However, such personal medical information and testing should not be required unless an order is issued by a judge who is aware of such a significant threat to the public based on clear and convincing evidence.

While the Proposed Regulations would have provided greater due process protections than what is afforded by the current law, the procedures were still inadequate because they allowed for prolonged detention through a process known as “provisional quarantine.”<sup>152</sup> The revisions would have required quarantine orders to “be signed by the Director of the CDC, provide sufficient notice to the person of the actions that the government proposes to take, and describe how to contest the decision, such as through a hearing.”<sup>153</sup> Despite the introduction of due process protections, the Proposed Regulations also included a loophole contained in a procedure defined as “provisional quarantine orders.”<sup>154</sup> These special orders would have allowed the CDC to detain an individual for up to three business days.<sup>155</sup> After the three day waiting period, an individual would have been released or served with a regular quarantine order.<sup>156</sup> Provisional quarantine orders are absolute and may not be contested until an official quarantine order has been issued by the Director of the CDC.<sup>157</sup> The CDC has justified the use of provisional quarantines by arguing that time is needed to determine whether or not a quarantined individual is infected with a communicable disease.<sup>158</sup> However, the provisional quarantine procedure is problematic as it would have allowed for extended detention without affording individuals an opportunity to contest a quarantine order through a judicial process.

Another example of the Proposed Regulations’ inadequacy is that an individual placed under a provisional quarantine order on a Saturday could be held for up to five days without an opportunity to appeal the order to an independent fact-finder. This time frame could be extended further if the quarantine order was issued during a holiday week. Under this scenario, such quarantine orders would be anything but provisional.

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151. *Id.* at 71,897–901.

152. *Id.* at 71,902–06.

153. Topinka, *supra* note 48, at 64–65.

154. CDC Proposed Regulations, *supra* note 142, at 71,902–04.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

In addition, provisional quarantine orders do not include sufficient notice or a legal standard to determine when such an order should be issued. Thus, the Proposed Regulations would have allowed the CDC to quarantine a person for almost a week based on a mere suspicion or “reasonable belief” that an individual may have come into contact with a communicable disease.<sup>159</sup> This reasonable belief standard is overbroad and could be expanded to include any medical symptom.

The Proposed Regulations have also been criticized by other members of the legal community for its failure to provide adequate due process protections. For example, Professor Felice Batlan argued that the Proposed Regulations are “silent regarding how quarantines would be enforced, where those quarantined would be held, and what would happen to individuals who refused to be quarantined . . . [or] what would occur if a person refused diagnostic tests.”<sup>160</sup> Professor Batlan also criticized a provision of the Proposed Regulations which would permit the hearing officer 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.”<sup>161</sup> This provision would eliminate any requirement that each quarantined individual be granted a separate administrative hearing to evaluate the individual threat posed.<sup>162</sup> In addition, Professor Batlan argued that while the Proposed Regulations provide for an administrative hearing to contest a quarantine order, the hearing is presided over by an officer designated by the Director of the CDC.<sup>163</sup> The officer’s determination is then subject to acceptance or rejection by the Director of the CDC, thus removing any guarantee of independent review by a neutral fact-finder.<sup>164</sup>

The Proposed Regulations have also been strongly criticized by civil rights groups, such as the American Civil Liberties Union (ACLU), who have argued that “mass quarantines of healthy people who may have been exposed to a pathogen have never worked to control a pandemic [and] . . . have all too often been premised on discrimination against classes of people (like immigrants or Asians) who are seen as ‘diseased’ and dangerous.”<sup>165</sup> The ACLU attacked the Proposed Regulations’

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159. CDC Proposed Regulations, *supra* note 142, at 71,902–04.

160. Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53, 111, 115 (2007).

161. *Id.* at 115.

162. *Id.*

163. *Id.* at 115–16.

164. *Id.* (stating that “[i]t is difficult to believe that the director would overrule his own decision to impose the quarantine in the first place”).

165. E-mail from Barry Steinhardt, Director, Technology & Liberty Program, American Civil Liberties Union, to Centers for Disease Control and Prevention Division of Global

provisional quarantine orders as “just involuntary detention for up to three business days—without probable cause, a warrant, or a hearing.”<sup>166</sup> Despite the due process concerns from such groups and the need for substantial revisions to the Public Health Services Act, the current versions of Parts 70 and 71 of the Act remain in effect.<sup>167</sup> As the HHS and CDC work to develop a new proposal to implement changes to the Regulations, they should consider the due process implications of a provisional quarantine procedure.

*B. State and Local Quarantine Regulations Fail to Provide for Due Process Rights*

State and local quarantine laws in the United States contain similar due process flaws when compared to international and federal quarantine procedures. In 2001, the Centers for Law and the Public’s Health at Georgetown and Johns Hopkins Universities drafted the Model State Emergency Health Powers Act (MSEHPA) to provide recommendations to state legislatures to revise outdated quarantine laws.<sup>168</sup> A majority of the States and the District of Columbia have revised public health laws to include provisions from or closely related to the guidelines set forth under the MSEHPA.<sup>169</sup> Although the MSEHPA provides for due process protections for quarantined individuals, the provisions are overbroad and fail to protect constitutional guarantees under all circumstances.

While the MSEHPA affords individuals detained under a quarantine order greater protections than the Proposed Regulations, the recommendations are inadequate because they allow for up to five days of detention without an opportunity for a hearing.<sup>170</sup> The MSEHPA provides that an individual may be quarantined under a written order from a health official specifying the individual’s identity, the premises to be quarantined, and the suspected communicable disease.<sup>171</sup> The

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Migration and Quarantine (Mar. 1, 2006), available at [https://www.aclu.org/images/asset\\_upload\\_file960\\_25244.pdf](https://www.aclu.org/images/asset_upload_file960_25244.pdf).

166. *Id.*

167. Topinka, *supra* note 48, at 64–65.

168. See Timothy Zick, *Constitutional Displacement*, 86 WASH. U. L. REV. 515, 585 (2009).

169. Topinka, *supra* note 48, at 68.

170. *Id.*

171. MODEL STATE EMERGENCY HEALTH POWERS ACT art. VI, § 605(a), (b) (Draft for Discussion 2001), <http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf> [hereinafter MSEHPA].

quarantined individual must receive notice of the order within twenty-four hours, and a hearing must be held for every petition within five days.<sup>172</sup> After ten days, local health officials may move for a court order to extend the time period, although the order cannot exceed thirty days.<sup>173</sup> In addition, the MSEHPA recommends that trial courts consider petitions under a “preponderance of evidence” standard and uphold quarantine orders if they are proven reasonably necessary to limit the spread of a communicable disease.<sup>174</sup> The court of review must provide the quarantined individual with access and communication to counsel and the quarantine must be implemented by the “least restrictive means necessary.”<sup>175</sup> Furthermore, quarantined individuals must be kept separate from isolated individuals and the quarantine facility must include adequate shelter, medical care, food, clothing, and means of communication.<sup>176</sup> Like the Proposed Regulations, the MSEHPA also allows quarantine proceedings to be consolidated where there are a large number of individuals involved who share common questions of law and fact under similar circumstances.<sup>177</sup>

The MSEHPA provides greater due process protections in comparison to the Proposed Regulations because the MSEHPA outlines a stricter standard of review to be considered by an independent judicial authority.<sup>178</sup> The MSEHPA’s preponderance of the evidence standard requires greater scrutiny than the reasonable belief standard contained in the Proposed Regulations.<sup>179</sup> Moreover, the MSEHPA states that quarantine petitions should be reviewed by an impartial fact-finder, rather than a CDC official.<sup>180</sup> The MSEHPA also provides increased protections for individuals placed into quarantine or isolation by requiring that orders be implemented in the least restrictive means necessary and in accordance with enumerated provisions.<sup>181</sup>

Although MSEHPA affords quarantined individuals greater due process protections than the Proposed Regulations, the recommendations are inadequate as they allow for quarantine for up to five days without an opportunity for a hearing.<sup>182</sup> Furthermore, this time period can be

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172. *Id.* § 605(b).

173. *Id.* § 605(b)–(c).

174. *Id.*

175. *Id.* § 604(b), (e).

176. *Id.* § 604(b).

177. *Id.* § 605(e).

178. *Id.* § 605(b).

179. *Id.*; CDC Proposed Regulations, *supra* note 142, at 71,902–04.

180. MSEHPA, *supra* note 171, at § 605(a)–(b); CDC Proposed Regulations, *supra* note 142, at 71902–04.

181. MSEHPA, *supra* note 171, at § 604(b).

182. *Id.* § 605(b).

extended for up to ten days under “extraordinary circumstances” at the discretion of the court.<sup>183</sup> This provision is problematic as it allows a court to define broad terms, like extraordinary circumstances, subjectively to keep a quarantine order in place. Moreover, a court may extend a quarantine order for up to thirty days or longer if the public health authority requests a continuance.<sup>184</sup> By failing to provide immediate access to a hearing or the ability to contest a quarantine order in a timely manner, the MSEHPA conflicts with due process protections under the Fourteenth Amendment and should be revised to limit the duration of a provisional order.

The MSEHPA also conflicts with constitutional due process guarantees as it allows individual claims to be consolidated, thus eliminating the opportunity for an individual hearing.<sup>185</sup> This provision is troublesome in that the health threat posed by an individual is determined not based on the individual’s personal medical circumstances, but solely on an individual’s membership in a specified group. Quarantine orders should always be reviewed under a subjective standard that considers the personal circumstances of each individual. A separate analysis is needed for each individual as exposure to disease affects each person differently. For instance, if an entire cruise ship were placed under quarantine, the MSEHPA would allow health authorities to hold a single hearing to determine the rights of thousands of passengers who would be prohibited from asserting individual defenses, such as proof of immunization against the suspected communicable disease.

In a separate attempt to formulate a model act, a collaborative group of state representatives, national organizations, and government agencies released the Turning Point Model State Public Health Act (Turning Point Act) in the fall of 2003.<sup>186</sup> Like the MSEHPA, the Turning Point Act was created to set guidelines or recommendations for state legislatures in

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183. *Id.*

184. *Id.*

185. *Id.* § 605(e).

186. Turning Point Model State Public Health Act, 3 (proposed Sep. 16, 2003), available at [http://www.turningpointprogram.org/Pages/pdfs/statute\\_mod/MSPHAfinal.pdf](http://www.turningpointprogram.org/Pages/pdfs/statute_mod/MSPHAfinal.pdf) [hereinafter Turning Point Act].

enacting local health laws.<sup>187</sup> By March, 2007, thirty-three states had adopted features or provisions of the Act.<sup>188</sup>

While the Turning Point Act provides greater due process protections for quarantined individuals when compared to the MSEHPA, the due process guarantees are similarly problematic because it authorizes detention for more than five days in the case of “extraordinary circumstances.”<sup>189</sup> The Turning Point Act adopts a comparable provisional quarantine period, but requires that hearings be held within forty-eight hours of the filing of a petition and up to five days in extraordinary circumstances and for good cause at the discretion of the court.<sup>190</sup> In addition, the Turning Point Act includes a stricter evidentiary burden during quarantine proceedings, requiring that “[t]he court shall grant the petition . . . by clear and convincing evidence.”<sup>191</sup> This is in contrast to the burden of proof required by the MSEHPA, which requires only a preponderance of the evidence in order to uphold a quarantine restriction.<sup>192</sup> However, the Turning Point Act’s due process guarantees are inadequate because they authorize detention for more than five days in extraordinary circumstances.<sup>193</sup> The vagueness of the provision leaves the provisional quarantine period open to an indeterminable length of time based on a court’s interpretation of what constitutes extraordinary circumstances or “good cause.”<sup>194</sup>

While the Proposed Regulations require substantial revisions, the MSEHPA and Turning Point Act should also be amended to reflect the changes to the Regulations to prevent confusion and conflict. Since disease can spread quickly throughout interstate commerce, a national due process standard is critical. Without a clear and uniform due process standard, state quarantine directives issued by local officials could conflict with quarantine orders issued by the Director of the CDC. Accordingly, the CDC should either: (1) adjust the provisions of the MSEHPA and Turning Point Act to coincide with federal guidelines, or (2) eliminate the MSEHPA and Turning Point Act altogether and require

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187. *Id.* (stating that “[t]he Act presents a broad mission for state and local public health agencies to be carried out in collaboration with various public and private entities within the public health system”).

188. George P. Smith, II, *Re-shaping the Common Good in Times of Public Health Emergencies: Validating Medical Triage*, 18 ANNALS HEALTH L. 1, 30 (2009).

189. Turning Point Act, *supra* note 186, at 34, § 5-108[e](3).

190. Daubert, *supra* note 58, at 1341; Turning Point Act, *supra* note 186, at 34, § 5-108[e](3).

191. Daubert, *supra* note 58, at 1341; Turning Point Act, *supra* note 186, at 34–35, § 5-108[e](4).

192. MSEHPA, *supra* note 171, § 605(b)(5).

193. Turning Point Act, *supra* note 186, at 34, § 5-108[e](3).

194. *Id.*

all state officials to apply the provisions under the Regulations. Some may argue that such a requirement would violate state sovereignty and impose federal regulation over local police powers that have traditionally been delegated to the states. However, this argument ignores the implications of a far-reaching disease outbreak which can traverse interstate borders within hours, crossing numerous jurisdictions. To prevent confusion and inefficiency in the application of quarantine procedures, a clear federal standard should be created.

*C. The Realities of Quarantine Law and the Implications  
of Mass-Quarantines*

The federal government's failure to implement national quarantine guidelines has produced conflicts between federal and state agencies, which have ultimately come at the expense of individuals placed under quarantine supervision. As the health laws of most states are outdated and lack procedural safeguards to protect due process rights, the national quarantine system remains broken and subject to chaos in the event of a national health emergency. The problems of the current system were exemplified in the recent case *Best v. Bellevue Hospital*, where a patient brought an action against a hospital after he was detained without notice after being diagnosed with active tuberculosis.<sup>195</sup> After the patient refused to complete a tuberculosis drug regimen, the local health department issued a quarantine order, which the patient appealed.<sup>196</sup> The courts reviewed whether the patient was dangerous to himself or the community, and whether he was afforded adequate notice and a hearing during the detention.<sup>197</sup> While trying to decipher New York's health law in conjunction with federal law and conflicts of authority, the case resulted in four hearings and more than seven administrative, state, and federal judicial orders over the course of two years.<sup>198</sup> Ultimately, the federal court declared that the New York Health Department must comply with due process guarantees, including the right to notice, counsel, a hearing, and an assessment of an individual's danger to self or

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195. *Best v. Bellevue Hosp.*, 115 F. App'x. 459 (2d Cir. 2003).

196. *Id.*

197. *Id.*

198. Ernest B. Abbott, *Law, Federalism, the Constitution, and Control of Pandemic Flu*, 9 ASIAN-PAC. L. & POL'Y J. 185, 198 (2008), available at [http://www.hawaii.edu/aplpj/articles/APLPJ\\_09.2\\_abbott.pdf](http://www.hawaii.edu/aplpj/articles/APLPJ_09.2_abbott.pdf).

others.<sup>199</sup> The case exemplifies the complexities, conflicts, and confusion over the current quarantine system, which can place quarantined individuals into an administrative sea of inefficiency as hearings are continued and court orders appealed. Accordingly, a uniform quarantine system is needed to guide local officials in times of health emergencies.

If the current quarantine system fails in the case of a single individual, it is doubtful that due process rights would be protected in the event of a mass quarantine. In the event of quarantine orders being issued to thousands of individuals in the same geographic area, a limited court system could not handle the influx of requested hearings or court orders. In such an event, the local health department and court system would be overburdened and lack the necessary resources to adequately protect due process rights. Individuals placed under quarantine order could be quarantined for weeks or even months while awaiting an individual hearing.

Mr. Ernest B. Abbott, Principal of the Federal Emergency Management Agency (FEMA) Law Associates, PLLC which specializes in legal and regulatory issues raised by major disasters and emergencies, argued that the answer is clear: “in the event of a mass incident, requirements for individual hearings will likely be relaxed.”<sup>200</sup> Alternatively, a state could hold a single hearing to determine the rights of all individuals affected by the mass quarantine order, but this solution would ignore the specificity of quarantine procedures that attempt to isolate patients based on their *individual* exposure to a disease and the threat that each person poses to others in the community.

The implication of a mass quarantine order was also illustrated during the 2003 SARS outbreak when Beijing officials announced a mandatory quarantine to stop the spread of the virus.<sup>201</sup> The announcement caused wide-spread panic as nearly 250,000 residents fled the city, dispersed throughout the country, and likely enabled the spread of the disease.<sup>202</sup> These incidents suggest that large-scale quarantines are ineffective because they complicate the protection of due process rights and can result in chaos if the population reacts negatively to the quarantine order. Accordingly, mass-quarantines should never be implemented and health officials should impose voluntary quarantines to stop the spread of disease amongst a large population.

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199. *Id.*

200. *Id.* at 185, 199.

201. Mariner et al., *supra* note 75, at 358.

202. *Id.*

## VII. CONCLUSION

The wide dispersal of the H1N1 vaccine in the winter of 2009 weakened the spread of the virus in North America and Europe, and in August 2010, the WHO announced the virus has entered a post-pandemic stage, consisting of only localized outbreaks.<sup>203</sup> However, H1N1 remains unpredictable and it is likely that the virus will continue to cause disease in younger age groups at least in the immediate post-pandemic period.<sup>204</sup> The pandemic has reminded the international community that the world is not immune from the threat of global disease outbreaks. As current international and domestic quarantine laws fail to provide adequate due process protections, substantial revisions are needed.

As the risk of a worldwide pandemic continues to pose a serious health threat, quarantine laws must be amended to reach a balance between due process rights and global health concerns. The current administration should propose new CDC Regulations to afford greater due process guarantees to those placed under a quarantine order. Quarantine orders should be issued by an independent judicial authority and only upon clear and convincing evidence from a qualified health professional that the individual poses an immediate and substantial risk to the community. The quarantined person must have the right to a hearing within twenty-four hours of the court order and access to information regarding evidence of exposure and the right to communicate with counsel. The Proposed Regulations provisional quarantine standard should be rejected and replaced with a strict standard that allows for immediate release following a hearing. In addition, health authorities must take every step necessary to protect the privacy, medical information, and human rights of those placed under a quarantine restriction. The new CDC Regulations should be codified and should represent a national standard for states to adopt and refer to in the event of a health emergency. These modifications will have the effect of creating a clear national standard to avoid confusion during a national emergency.

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203. Virtual Press Release, World Health Organization, Director General's Opening Statement at Virtual Press Conference, H1N1 in Post-Pandemic Period (Aug. 10, 2010), [http://www.who.int/mediacentre/news/statements/2010/h1n1\\_vpc\\_20100810/en/print.html](http://www.who.int/mediacentre/news/statements/2010/h1n1_vpc_20100810/en/print.html).

204. *Id.*

After the CDC Regulations have been amended to incorporate these fundamental due process rights, the United States should recommend to the United Nations and the WHO the adoption of these new provisions into the IHR. An international quarantine standard based on global cooperation would increase communication between member states and enable the WHO to respond more efficiently to worldwide pandemics and global health threats. Such a standard would have been useful to address the due process issues raised during the Chinese swine-flu quarantine discussed in the introduction to this comment. Had an international standard been in place, the Mexican government may have felt more comfortable deferring to the authority of the Chinese quarantine officers.

The WHO must have authority to enforce the provisions of the IHR through an international court and impose economic sanctions on member states who violate international health law. Although the international community may be reluctant to relinquish state powers during a health crisis, collaboration is possible, provided that the IHR is amended to reflect the needs of all member states and the international community as a whole.