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## Balancing Interests and Risk of Error: What Quarantine Process Is Due after Ebolamania

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Jennifer Jolly-Ryan\*

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## I. INTRODUCTION

The risk of deadly infectious diseases with pandemic potential, including Zika, Ebola, Severe Acute Respiratory Syndrome (SARS), a resurgence of tuberculosis, and acts of biological terrorism, is increasing worldwide.<sup>1</sup> As the potential for the spread of disease and acts of bio-

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1. *History of Quarantine*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/quarantine/HistoryQuarantine.html> [<https://perma.unl.edu/YR65-2M7C>] (last updated July 31, 2014). The list of quarantinable diseases is contained in an Executive Order of the President and includes cholera, diphtheria, infectious tu-

logical terrorism grows, the potential for losing individual civil liberties also grows. The courts will struggle to strike a balance between public and private interests.

The possibility of involuntary quarantines of American citizens remains a controversial topic. During a presidential primary debate on February 6, 2016, one of the candidates, New Jersey Governor Chris Christie, said he would quarantine travelers coming home from the Olympics in Brazil to prevent the Zika virus outbreak from spreading in the United States.<sup>2</sup> The possibility of quarantining American citizens was in the news again, despite medical evidence that said quarantine may be an ineffective tool to fight the spread of the mosquito-borne Zika virus.<sup>3</sup>

The government historically uses two tools in response to a serious threat to public health from the threat of the spread of disease—isola-

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erculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers (including Ebola), and severe acute respiratory syndromes.

2. At the 2016 ABC News Republican debate, Martha Raddatz, one of the moderators, asked the following question:

Governor Christie, at the peak of the Ebola outbreak in west Africa, you ordered an American nurse who landed at Newark Airport be detained and quarantined. As fear spreads now of the Zika virus and with the Rio Olympics just months away, is there a scenario where you would quarantine people traveling back from Brazil to prevent the spread in the United States?

*Transcript of the Republican Presidential Debate*, N.Y. TIMES, Feb. 6, 2016, [https://www.nytimes.com/2016/02/07/us/politics/transcript-of-the-republican-presidential-debate-in-new-hampshire.html?\\_r=1](https://www.nytimes.com/2016/02/07/us/politics/transcript-of-the-republican-presidential-debate-in-new-hampshire.html?_r=1). Governor Christie responded:

You bet I would. And the fact is that because I took strong action to make sure that anyone who was showing symptoms—remember what happened with that nurse. She was showing symptoms and coming back from a place that had the [E]bola virus active and she had been treating patients. This was not just some—like, we picked up her just for the heck of it, alright?

- Id.* During the debate, candidate and medical doctor Ben Carson responded:

Do we quarantine people? If we have evidence that they are infected, and that there is evidence that that infection can spread by something that they're doing, yes. But, just willy-nilly going out and quarantining a bunch of people because they've been to Brazil, I don't believe that that's going to work. What we really need to be thinking about is how do we get this disease under control?

*Id.*

3. See Tim McDonnell, *Here's Why Chris Christie's Zika Quarantines Would Be Pointless*, MOTHER JONES, February 8, 2016, <http://www.motherjones.com/environment/2016/02/chris-christie-ben-carson-zika-quarantine> [<https://perma.unl.edu/HA4U-PR66>] (“Zika is rarely, if ever, spread from person to person, so quarantining infected people will do nothing to stem a Zika outbreak.” (quoting Laurie Garret, Council on Foreign Relations)); *id.* (“The vast majority of transmissions are from mosquito bites, and most of the country doesn't have the [Zika-carrying *Aedes aegypti*] mosquito in high concentrations . . . . So I don't think [a quarantine] is necessary or would be beneficial in any way.” (alteration in original) (quoting Dean Blumberg, University of California—Davis Children's Hospital)).

tion and quarantine.<sup>4</sup> Isolation is “the separation of persons who have a specific infectious illness from those who are healthy and the restrictions of their movement to stop the spread of that illness.”<sup>5</sup> Quarantine, the subject of this Article, is “the separation and restriction of movement of persons who, while not yet ill, have been exposed to an infectious agent and therefore may become infectious.”<sup>6</sup> The distinction between the two is that isolation confines one who is already infected with disease and ill, while quarantine confines one who is asymptomatic and healthy.<sup>7</sup> As a practical matter, whether a situation is called quarantine or isolation, the result is the same. There is a significant loss of individual liberty. But most important, there is likely a greater risk of error and possibly overreaction based on fear in the quarantine of a healthy, asymptomatic person. The focus of this Article is upon people who are asymptomatic, but who are nonetheless quarantined. Due Process concerns are the greatest in the context of quarantining asymptomatic individuals. Asymptomatic individuals are most at risk for unnecessary loss of their liberty and procedural due process violations. A symptomatic person who is affirmatively infected with a disease that will spread from person to person rightly prompts the severe governmental action of isolation. In those cases, individual liberty interests necessarily give way to protect the public in an emergency.<sup>8</sup>

On a continuum of due process rights for asymptomatic individuals, “legal, scientific, political, and social issues become more complicated. Procedural due process safeguards should increase . . . because the level of restraint on liberty increases” as the necessity for restraint on a person’s liberty becomes more questionable.<sup>9</sup>

This Article questions whether we are so focused on public safety that we lose sight of liberty in the context of some quarantines. On the one hand, government interest in public safety may indeed be so strong that it trumps individual rights in almost all cases of threatened communicable diseases or biological terrorism. Alternatively, political influence and public fear may be an equal or greater threat to civil liberties. Therefore, additional constitutional protections for people the government threatens with involuntary quarantine may be necessary.

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4. *History of Quarantine*, *supra* note 1.

5. See GEORGE ROSEN, A HISTORY OF PUBLIC HEALTH 64 (1958).

6. *Id.* at 65.

7. KATHLEEN S. SWENDIMAN & JENNIFER K. ELSEA, CONG. RES. SERV., FEDERAL AND STATE QUARANTINE AND ISOLATION AUTHORITY 1–2 (2007), [biotech.law.lsu.edu/cases/pp/RL33201.pdf](https://perma.unl.edu/8MME-WP7V) [https://perma.unl.edu/8MME-WP7V].

8. See Michelle A. Daubert, Comment, *Pandemic Fears and Contemporary Quarantine: Protecting Liberty Through a Continuum of Due Process Rights*, 54 BUFF. L. REV. 1299, 1318 (2007).

9. *Id.*

This Article analyzes whether the courts should shift the balance to protecting individual liberty interests when reviewing quarantine procedures and balancing individuals' civil liberties against the government's legitimate interest in protecting the public from the spread of serious communicable diseases. It questions whether the government's strong interest in eradicating discrimination should be added as an equal factor to the government's interest in protecting the public health when balancing private versus public interests under *Mathews v. Eldridge*.<sup>10</sup>

Part II explains the impetus for this Article—the recent case of a volunteer nurse with Doctors Without Borders/Médecins Sans Frontières (MSF).<sup>11</sup> The government quarantined her after she returned to the United States from treating Ebola-infected patients in Sierra Leon.<sup>12</sup>

Part III provides a history of quarantines, particularly focusing on their discriminatory past. Part IV summarizes the constitutional basis for the state and federal governments' power to quarantine. Part V discusses the constitutional limits of the government's quarantine power and the due process tests courts use to balance individual freedoms, considering the government's very strong interest in protecting public health. It compares civil quarantine law to criminal law, analyzes the risk of error in current quarantine procedures involving Ebola, and suggests additional government interests the courts should consider under the *Mathews v. Eldridge* test in considering the constitutionality of quarantine procedures.

The Article concludes that individuals facing quarantine have a significant liberty interest at stake. Unless quarantine procedures are clothed with significant safeguards, the risk of error in mistakenly quarantining a healthy individual, who poses no public health threat, is high. Finally, the government's interest in protecting the public from the spread of disease is compelling. However, the Article concludes that what little consideration the courts have given to the con-

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10. 424 U.S. 319 (1976).

11. Doctors Without Borders/Médecins Sans Frontières (MSF) delivers worldwide emergency medical aid to people affected by conflict, epidemics, disasters, or exclusion from healthcare. Press Release, Doctors Without Borders/Médecins Sans Frontières, MSF Awarded Nobel Peace Prize (Oct. 14, 1999), <http://www.doctorswithoutborders.org/news-stories/press-release/msf-awarded-nobel-peace-prize> [<https://perma.unl.edu/H46X-4VLY>]. The international medical relief organization was awarded the international Nobel Peace Prize on October 15, 1999, honoring the extraordinary work of the organization's national and international relief workers who provide medical assistance in more than eighty countries, over twenty of which are in conflict. *Id.*

12. Maggie Fox, *New Jersey Releases Nurse Quarantined for Suspected Ebola*, NBC NEWS (October 27, 2014), <http://www.nbcnews.com/storyline/ebola-virus-outbreak/new-jersey-releases-nurse-quarantined-suspected-ebola-n234661> [<https://perma.unl.edu/6BL3-CQKR>].

stitutionality of quarantine procedures under *Mathews v. Eldridge* is underinclusive. Quarantine cases call for additional procedural safeguards, given the government's history of using quarantine as a tool for discrimination. Additionally, the government has a compelling interest in eradicating and guarding against the discrimination that quarantine may cause, as inadvertent as it may be. The government also has an interest in encouraging medical-relief workers to fight the spread of disease. The government has an interest in avoiding quarantine procedures that might discourage medical-relief efforts and stymie medical-relief organizations' recruitment efforts, which benefit the United States.

## II. THE GOOD SAMARITAN NURSE'S RETURN HOME FROM SIERRA LEONE

The development of quarantine law and the controversial quarantining of American citizens remained dormant until a recent outbreak of the deadly Ebola virus on another continent.<sup>13</sup> The controversy surrounding quarantine erupted with a volunteer nurse's return home to the United States after treating Ebola patients as part of a medical relief effort.<sup>14</sup> On October 24, 2014, a Good Samaritan nurse with Doctors Without Borders, Kaci Hickox, returned to the United States after volunteering in Sierra Leone to fight the disease.<sup>15</sup> With her return, the fear of Ebola spread faster than the virus in West Africa.

Upon her arrival in the United States, the nurse presented no symptoms specific to Ebola.<sup>16</sup> However, through an entry point at Newark International Airport, health officials quarantined the volunteer nurse after learning she treated Ebola patients in Sierra Leone for a month.<sup>17</sup> A New Jersey statute empowered the Department of

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13. According to a CDC fact sheet:

Ebola was first discovered in 1976 near the Ebola River in what is now the Democratic Republic of the Congo. Since then, outbreaks have appeared sporadically in Africa.

The natural reservoir host of Ebola viruses remains unknown. However, on the basis of evidence and the nature of similar viruses, researchers believe that the virus is animal-borne and that bats are the most likely reservoir.

CTR. FOR DISEASE CONTROL & PREVENTION, EBOLA (EBOLA VIRUS DISEASE) (2015) [hereinafter EBOLA VIRUS DISEASE], <http://www.cdc.gov/vhf/ebola/pdf/ebola-fact-sheet.pdf> [<https://perma.unl.edu/PT8F-JS4E>].

14. See Fox, *supra* note 12.

15. See Abby Ohlheiser & Cecilia Kang, *Nurse Quarantined in New Jersey After Returning from Ebola Mission Is Released*, THE WASH. POST, October 27, 2014, <https://www.washingtonpost.com/news/post-nation/wp/2014/10/27/nurse-detained-under-new-jerseys-ebola-quarantine-to-be-released> [<https://perma.unl.edu/K46Y-FNJM>].

16. *Id.*

17. See Fox, *supra* note 12.

Health to enforce a quarantine to protect the public health when deemed necessary.<sup>18</sup> Two days before the nurse's arrival home to the United States, New Jersey Governor Chris Christie announced Executive Order 164, which created a joint Ebola Response Team to protect the public in New Jersey from the arrival or spread of Ebola.<sup>19</sup> The nurse had departed Sierra Leone on the very day Governor Christie signed Executive Order 164 into law.<sup>20</sup> The nurse spent two days in Brussels, Belgium, between leaving Sierra Leone on October 22, 2014, and arriving at the New Jersey International Airport on October 24, 2014.<sup>21</sup> The nurse was not questioned, quarantined, or delayed by officials in Belgium in any way.<sup>22</sup>

The quarantine procedures created pursuant to New Jersey Executive Order 164 provided any person arriving in New Jersey on a flight originating from West Africa was subject to a twenty-one day mandatory quarantine if a noncontact fever check revealed an elevated temperature.<sup>23</sup> Additionally, any individual who treated an Ebola patient was subject to the mandatory quarantine regardless of the results of the noncontact fever check.<sup>24</sup>

Immigration and health officials questioned the returning nurse for several hours at the airport about where she traveled and who she had medically treated.<sup>25</sup> She informed the immigration officer she departed from Sierra Leone where she served as a volunteer nurse for Doctors Without Borders.<sup>26</sup> Upon hearing the nurse's response, immigration officers escorted her to the quarantine office.<sup>27</sup> Immigration and Centers for Disease Control and Prevention (CDC) officials took

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18. N.J. STAT. ANN. § 26:4-2 (West 2012).

19. Exec. Order No. 164, 46 N.J. Reg. 2217(b) (Nov. 17, 2014); see Press Release, State of N.J. Office of the Governor, Governor Christie Activates Ebola Preparedness Plan to Coordinate an Effective New Jersey Response (Oct. 22, 2014), <http://nj.gov/governor/news/news/552014/approved/20141022e.html>.

20. *Compare* Verified Complaint at 5, *Hickox v. Christie*, 205 F. Supp. 3d 579 (2016) (No. 15-764) ("Hickox . . . depart[ed] on October 22, 2014."), with Exec. Order No. 164, *supra* note 19 ("Issued: October 22, 2014.").

21. In her complaint, the nurse related that she worked for two years as an Epidemic Intelligence Service Fellow for the Center for Disease Control (CDC) and as a nurse manager and medical team leader for Médecins Sans Frontières (MSF) in Uganda, Nigeria, and Sudan, and a primary health case manager for MSF in Myanmar after graduating from John Hopkins. Verified Complaint, *supra* note 20, at 3–4. She spent two days at MSF in Brussels, before returning to the United States through the New Jersey point of entry. *Id.* at 9. She was not detained, isolated, or quarantined in Brussels. *Id.* at 8.

22. *Id.*

23. See Memorandum from Mary E. O'Dowd, Comm'r, Dep't of Health Chair, to Col. Rick Fuentes, Superintendent, State Police, et al. (Oct. 31, 2014), <http://www.nj.gov/health/news/2014/approved/20141031b.shtml>.

24. *Id.*

25. Verified Complaint, *supra* note 20, at 9.

26. *Id.*

27. *Id.* at 9–10.

her temperature with a forehead scanner.<sup>28</sup> Her initial temperature reading was ninety-eight degrees.<sup>29</sup>

Over the next two hours, officials held the nurse without telling her when or if she would be released.<sup>30</sup> Finally, sometime in the late afternoon, officials took a second scan from the nurse's forehead.<sup>31</sup> This time the reading was 101 degrees.<sup>32</sup> The nurse conveyed to the officials the only reason her body temperature was elevated was because she was upset over her confinement.<sup>33</sup> She relayed that as a trained nurse she was aware of her own symptoms and knew that her cheeks were flushed only because she was upset.<sup>34</sup>

After the elevated temperature reading, officials confined the nurse for another three hours before officials told her she must go to the local hospital.<sup>35</sup> Eight police cars with flashing lights escorted the nurse, who was traveling by ambulance, to the hospital.<sup>36</sup> The police delivered the nurse to a tent, which was made into a makeshift emergency room.<sup>37</sup> In the tent, a doctor took the nurse's temperature multiple times.<sup>38</sup> According to the nurse's complaint, the doctors confirmed that her temperature had indeed been elevated on the forehead scanner because of her flushed face and that her temperature was within normal a range.<sup>39</sup> Nevertheless, the nurse was held in an involuntary quarantine, even after her blood test for Ebola came back negative.<sup>40</sup>

Despite her previous pleas to talk with her lawyers, New Jersey officials allowed the nurse access to her lawyers for the first time on October 26, 2014.<sup>41</sup> She had already spent two nights quarantined at the hospital in a tent with no shower, no flushable toilet, and no TV or reading materials.<sup>42</sup> On October 27, 2014, New Jersey released the nurse from the hospital after she was fever free for a period of twenty-four hours at the hospital and completely symptom free since the time she left Sierra Leone five days earlier.<sup>43</sup> Although she was released

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28. *Id.*

29. *Id.* at 10.

30. *Id.* at 10–11.

31. *Id.* at 13.

32. *Id.* at 15.

33. *Id.* at 13–14.

34. *Id.*

35. *Id.* at 14.

36. *Id.*

37. *Id.*

38. *Id.* at 15–17.

39. *Id.* at 16.

40. *Id.* at 18–19.

41. *Id.* 25.

42. Elizabeth Cohen, Leslie Holland & Ralph Ellis, *Nurse Describes Ebola Quarantine Ordeal: "I Was in Shock. Now I'm Angry,"* CNN (Oct. 27, 2014), <http://www.cnn.com/2014/10/26/health/new-jersey-quarantined-nurse/index.html> [https://perma.unl.edu/3FRF-34GC].

43. Verified Complaint, *supra* note 20, at 26.



from the New Jersey hospital, three New Jersey medical technicians drove her to her home state of Maine, where she also faced quarantine through confinement to her own home and the loss of freedom to work, travel, or go out in public.<sup>44</sup>

The State of Maine promptly filed a Verified Petition for a Public Health Order, and on October 30, 2014, the court confined the nurse to her own home and severely restricted her liberty.<sup>45</sup> The court ordered the nurse to submit to direct active monitoring; coordinate all travel with public health authorities; refrain from using public transportation, going out in public, or going to work; and to maintain a three-foot distance from others.<sup>46</sup> The State sought to impose these restrictions for the full twenty-one day incubation period.<sup>47</sup> But on October 31, 2014, the court issued a superseding order, pending hearing, that was much less intrusive and restrictive.<sup>48</sup> The subsequent order required the nurse to continue with monitoring, coordinate her travel with public health authorities, and notify health authorities if any symptoms appeared.<sup>49</sup> Her home state allowed her to visit public places and return to work if she desired.<sup>50</sup>

The nurse and her boyfriend ultimately decided to leave their home in Fort Kent, Maine, once the direct active monitoring period

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44. See Josh Margolin & Meghan Keneally, *Ebola Nurse Kaci Hickox Will “Understand” Her Quarantine, New Jersey Governor Says*, ABC NEWS (Oct. 27, 2014), <http://abcnews.go.com/Health/ebola-nurse-kaci-hickox-understand-quarantine-jersey-governor/story?id=26479917> [https://perma.unl.edu/R8JR-JFNM].

45. See Verified Petition for Public Health Order, *Mayhew v. Hickox*, No. CV-14-36 (Me. Dist. Ct., Fort Kent, Oct. 30, 2014), [http://www.courts.maine.gov/news\\_reference/high\\_profile/hickox/verified\\_petition\\_for\\_public\\_health\\_order.pdf](http://www.courts.maine.gov/news_reference/high_profile/hickox/verified_petition_for_public_health_order.pdf) [https://perma.unl.edu/T56X-LHGF].

46. *Id.*; Temporary Order at 1–2, *Mayhew v. Hickox*, No. CV-14-36 (Me. Dist. Ct., Fort Kent, Oct. 30, 2014), [http://www.courts.maine.gov/news\\_reference/high\\_profile/hickox/temporary\\_order.pdf](http://www.courts.maine.gov/news_reference/high_profile/hickox/temporary_order.pdf) [https://perma.unl.edu/KB4X-8YV7]; see also Scott Dolan & David Hench, *Hickox Addresses Media After Judge Rejects Maine’s Bid to Restrict Her Movements*, PORTLAND PRESS HERALD, Nov. 1, 2014, <http://www.pressherald.com/2014/10/31/state-files-petition-to-force-nurse-to-follow-cdc-guidelines> [https://perma.unl.edu/LKY3-RFWR] (discussing the Temporary Order and Hickox’s response). Direct active monitoring is a procedure that requires a public-health worker to make a direct observation of the person at least once per day to determine if the person is displaying any symptoms of the disease. CTR. FOR DISEASE CONTROL & PREVENTION, MONITORING SYMPTOMS AND CONTROLLING MOVEMENT TO STOP THE SPREAD OF EBOLA (2014), <https://www.cdc.gov/media/releases/2014/fs1027-monitoring-symptoms-controlling-movement.pdf> [https://perma.unl.edu/NX6P-YF95].

47. Verified Petition for Public Health Order, *supra* note 45.

48. Order Pending Hearing at 18, *Mayhew v. Hickox*, No. CV-14-36 (Me. Dist. Ct., Fort Kent, Oct. 31, 2014), [http://www.courts.maine.gov/news\\_reference/high\\_profile/hickox/order\\_pending\\_hearing.pdf](http://www.courts.maine.gov/news_reference/high_profile/hickox/order_pending_hearing.pdf) [https://perma.unl.edu/KN4F-4EZ8].

49. *Id.*

50. *Id.*

expired on November 10, 2014.<sup>51</sup> Her boyfriend attended the University of Maine at Fort Kent as a nursing student during these events.<sup>52</sup> The boyfriend told reporters that university officials did nothing to communicate to other students that any harassment, threats, or demonstrations against the boyfriend would not be tolerated after the university received threats against him.<sup>53</sup> Disenchanted by the university's lack of support, the nurse's boyfriend withdrew from the university.<sup>54</sup> The nurse and her boyfriend moved to Yarmouth, Maine, where the nurse's boyfriend enrolled in another college.<sup>55</sup> The nurse became an in-demand speaker at educational institutions in Maine about the Ebola outbreak and about her quarantine.<sup>56</sup> In addition to public speaking, the nurse planned to continue her work as a medical-relief nurse in West Africa.<sup>57</sup>

Even though quarantine ended, the controversy did not. The nurse filed a legal challenge in a federal court in New Jersey asserting she was deprived of her civil rights.<sup>58</sup> Her complaint was filed against Governor Christie and officials of the New Jersey Department of Health, all in their individual capacities.<sup>59</sup> First, the nurse asserted the “[d]efendants, acting under color of state law, unreasonably caused [her] to be confined under quarantine . . . in violation of [her] right to be free of an unreasonable seizure under the Fourth Amendment . . . and to be free of a deprivation of liberty under the Fourteenth Amendment.”<sup>60</sup> Second, the nurse claimed the defendants violated her substantive due process rights by quarantining her without an adequate individualized assessment of the risks and “not using the least restrictive means available to protect the public health.”<sup>61</sup> Third, the nurse claimed defendants violated her procedural due process rights because she was not afforded “a prompt hearing for judicial review of [her] . . . quarantine where [she] could be represented by

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51. See Edward D. Murphy, *Kaci Hickox, Boyfriend Leaving Fort Kent After Ebola Quarantine Fight*, PORTLAND PRESS HERALD, Nov. 11, 2014, <http://www.pressherald.com/2014/11/07/kaci-hickox-boyfriend-leaving-maine-after-ebola-quarantine> [https://perma.unl.edu/X4LH-VTTN].

52. *Id.*

53. *Id.*

54. *Id.*

55. See Paul H. Mills, *The Pre and Post Quarantine Life of Kaci Hickox and Ted Wilbur*, DAILY BULLDOG (Jan. 25, 2015), <http://www.dailybulldog.com/db/features/the-pre-and-post-quarantine-life-of-kaci-hickox-and-ted-wilbur> [https://perma.unl.edu/5FVM-46BX].

56. *Id.*

57. *Id.*

58. See Joseph Ax, *Ebola-Quarantined U.S. Nurse to Sue in Test of States' Policies*, REUTERS (Oct. 27, 2014), <http://www.reuters.com/article/us-health-ebola-usa-nurse-idUSKBN01F0VT20141027> [https://perma.unl.edu/U4WP-K4UT].

59. Verified Complaint, *supra* note 20, at 2–5.

60. *Id.* at 28.

61. *Id.* at 29.

counsel and could present opposing evidence and argument and could cross examine witnesses.”<sup>62</sup> The nurse’s fourth and fifth claims for relief asserted false imprisonment and invasion of privacy.<sup>63</sup>

To many people, the nurse’s case became a symbol of deprivation of due process. She became a spokeswoman for people concerned that the government’s treatment of returning volunteers would dissuade other healthcare workers from traveling to Africa to fight the Ebola outbreak at its source.<sup>64</sup> To others, the nurse became a villain and a traitor to her profession the harder she fought for her alleged constitutional rights. One blogger captured the public animus against the nurse when he wrote:

This nurse’s behavior exposes a lack of concern for political realities, even those with which she disagrees. [The nurse] wishes the public were more empirical. She believes that Americans and their elected representatives are reacting irrationally and she is a victim of their hysteria. Even if she has a point, by ignoring the will of the public she is behaving in a manner so self-obsessed and juvenile that it reflects poorly on her and the selfless members of her profession who devote their time and energies to containing the Ebola outbreak in Africa.<sup>65</sup>

In the public’s eye, there were repercussions for healthcare and medical-relief workers who challenged procedures leading to their quarantines. Despite how instructive the nurse’s case will be to future officials and individuals dealing with quarantine decisions, the resolution to the legal issues presented by the Good Samaritan nurse in New Jersey remain unclear.<sup>66</sup>

The Ebola epidemic will not be the last threat of a spread of deadly disease. The fear of Ebola’s spread will not be the last fear that infects public sentiment. The nurse will not be the last individual who faces a loss of liberty through quarantine. But future health officials, volunteer healthcare workers, and the courts have little legal guidance stemming from the nurse’s experience. It remains unclear what legal process is due to volunteer healthcare workers and medical-relief workers, traveling from abroad, who face forced quarantine. Moreover, the extent to which there is any discriminatory impact resulting from quarantines is yet to be closely examined.

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62. *Id.* at 30.

63. *Id.* at 31–32.

64. See Cohen et al., *supra* note 42.

65. Noah Rothman, *Ebola Nurse Kaci Hickox Violates Quarantine, Dares You to Do Something About It*, HOT AIR (Oct. 30, 2014), <http://hotair.com/archives/2014/10/30/ebola-nurse-kaci-hickox-violates-quarantine-dares-you-to-do-something-about-it> [https://perma.unl.edu/ZCC6-JVT7].

66. See Rick Hampson, *Fighting Ebola on the Home Front: Confusion Reigns Supreme*, USA TODAY, Oct. 28, 2014, <https://www.usatoday.com/story/news/nation/2014/10/27/ebola-christie-cuomo-quinn-pentagon/18022791> [https://perma.unl.edu/N99Y-BPNH].

## III. HISTORICAL BACKGROUND OF QUARANTINES

To combat the threats to public health, the government has a history of isolating and quarantining individuals from the public. The use of isolation and quarantines is as ancient as the Old Testament. The Book of Leviticus provides detailed quarantine instructions for priests when confronted with a person exhibiting various skin conditions, such as boils or white spots.<sup>67</sup> The affected person was quarantined for a period of seven days, at which time the priest would either declare the mark a simple burn or freckle, or label the person infected with leprosy.<sup>68</sup> Once the person was determined to have leprosy, the Book of Leviticus unmercifully dictates that for “[a]ll the days wherein the plague shall be in him he shall be defiled; his is unclean; he shall dwell alone . . . .”<sup>69</sup>

Isolation and quarantines were also invoked in the times of the Black Death.<sup>70</sup> Once it became apparent in the mid-1300s that medicine was useless against the plague, some city-states restricted access with armed guards and created makeshift camps for persons suspected of having the plague.<sup>71</sup> Later, cities and seaports created dedicated buildings, usually separated by geographic barriers, where persons suspected of having the plague were confined.<sup>72</sup>

In the late 1800s, outbreaks of yellow fever and cholera, brought by passenger ships arriving to the United States from Europe, prompted Congress to pass federal quarantine legislation.<sup>73</sup> This legislation allowed the federal government to set up quarantine stations to prevent the introduction and spread of communicable diseases to or within the United States.<sup>74</sup>

However, some quarantines were used as a platform to discriminate against immigrants.<sup>75</sup> In 1892 four cases of typhoid fever were diagnosed among Russian–Jewish immigrants.<sup>76</sup> The Russian–Jewish immigrants lived in a tenement house in New York City and had all recently arrived to the United States on the same vessel, the ship *Massila*.<sup>77</sup> Under New York City’s broad and quite arguably overin-

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67. Leviticus 13:4–46 (King James).

68. *Id.* at 13:4–5.

69. *Id.* at 13:46.

70. See Daubert, *supra* note 8, at 1302–04.

71. See Eugene Tognotti, *Lessons from the History of Quarantine, from Plague to Influenza A*, 19 EMERGING INFECTIOUS DISEASES 254, 254–55 (2013).

72. *Id.* at 255.

73. *History of Quarantine, supra* note 1.

74. See Tognotti, *supra* note 71, at 255.

75. HOWARD MARKEL, QUARANTINE: EAST EUROPEAN JEWISH IMMIGRANTS AND THE NEW YORK CITY EPIDEMICS OF 1892, at 2 (1997).

76. *Id.*

77. KAREN WEATHERSBEE, QUARANTINE: ITS USE AND LIMITATIONS 6 (2008) (citing MARKEL, *supra* note 75, at 46, 50), <http://www.americanbar.org/content/dam/aba/>

clusive health regulations, “every single Russian Jew passenger” was ordered to be quarantined.<sup>78</sup> Twelve hundred people were quarantined, even though 1100 of the Russian Jews quarantined reportedly were perfectly healthy.<sup>79</sup>

One of the most well-known and historic quarantine cases is that of an Irish immigrant, Mary Mallon. Mallon was the infamous “Typhoid Mary.”<sup>80</sup> She worked as a cook in New York City around the turn of the twentieth century.<sup>81</sup> Although perfectly healthy, Mallon was a known carrier of the very contagious typhoid fever.<sup>82</sup> She was twice isolated against her will for a total of twenty-six years without a trial even though she violated no law.<sup>83</sup> Many people believe that public prejudice against her as an Irish immigrant and a defiant woman of lower economic status played a major role in her extended isolation without a trial.<sup>84</sup>

In the 1900s, the City of San Francisco’s public health regulations required all Chinese residents to be vaccinated against the bubonic plague.<sup>85</sup> In *Wong Wai v. Williamson*, a California court considered whether quarantining Chinese and Asian residents to the city limits violated substantive due process.<sup>86</sup> These residents were prevented from traveling outside of the city limits unless they received a vaccine for bubonic plague.<sup>87</sup> Many Chinese and Asian residents of San Francisco declined to be vaccinated because the vaccination had serious potential side effects.<sup>88</sup> The vaccination requirement did not apply to any other races or ethnicities in San Francisco.<sup>89</sup> Rather, it was premised on the scientifically unfounded idea that “Asiatic” races were more susceptible to contracting the bubonic plague.<sup>90</sup> The city further attempted to justify the quarantine of a large number of Asian San Francisco residents under authority of the Quarantine Act of 1890, which gave the State power to enact measures to prevent the spread of disease.<sup>91</sup> The court held the regulation violated substantive due pro-

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migrated/adminlaw/awardsprogram/08GSwinneressay.authcheckdam.pdf [https://perma.unl.edu/8HQN-Y49G].

78. MARKEL, *supra* note 75, at 50.

79. *Id.* at 59.

80. *See* Daubert, *supra* note 8, at 1311.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. WEATHERSBEE, *supra* note 77, at 66.

86. *Wong Wai v. Williamson*, 103 F. 1, 3 (C.C.N.D. Cal. 1900).

87. *Id.*

88. *Id.* at 7–8.

89. *Id.* at 7.

90. *Id.*

91. *Id.* at 8.

cess because it was patently discriminatory on its face.<sup>92</sup> The court noted the quarantine regulations were specifically “directed against the Asiatic race exclusively, and by name.”<sup>93</sup> Chinese residents of San Francisco were “denied the privilege of traveling from one place to another, except upon conditions not enforced against any other class of people.”<sup>94</sup> The regulation classified a group purely on race and not on any scientific factors related to an actual risk of exposure or infection to the disease.<sup>95</sup>

In a companion case to *Wong Wai*, the court examined San Francisco health officials’ decision to quarantine a twelve-block area composed of primarily Chinese residents.<sup>96</sup> In *Jew Ho v. Williamson*, a California court found the quarantine of Chinese and Asian immigrants violated equal protection under the U.S. Constitution.<sup>97</sup> The quarantined area had fixed boundaries that were drawn to exclude the residences of non-Asians, while houses owned by Asians on the same street were included.<sup>98</sup> The police allowed non-Asians to enter and exit the quarantined area.<sup>99</sup> Moreover, non-Asian residents were allowed to have their physicians visit their homes for purposes of medical diagnosis and treatment.<sup>100</sup> However, Asian residents were not allowed to have physicians from outside the quarantine area visit them.<sup>101</sup> The court held the quarantine and regulations were clearly discriminatory in nature and a violation of the Fourteenth Amendment of the U.S. Constitution.<sup>102</sup>

Although U.S. courts recognized quarantine procedures could not be used to blatantly discriminate against American citizens, the Supreme Court continued to affirm the broad governmental power to enforce quarantines for valid health concerns. Federal quarantine powers were tested on a national scale in the 1918 outbreak of Spanish influenza (Spanish Flu). During the 1918 Spanish Flu outbreak, it is estimated the Spanish Flu killed 675,000 Americans in a period of only ten months.<sup>103</sup> As World War I ended, thousands of soldiers came home from Europe, bringing the Spanish Flu virus with them.<sup>104</sup> The Spanish Flu occurred in three different waves: the first beginning in

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92. *Id.* at 9.

93. *Id.*; see MARKEL, *supra* note 75.

94. *Wong Wai*, 103 F. at 9.

95. *Id.*

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

97. *Id.* at 23.

98. *Id.*

99. *Id.*

100. *Id.* at 13.

101. *Id.*

102. *Id.* at 24.

103. Kristen DiGirolamo, Comment, *Legal Preparedness for Pandemic Influenza: Is Virginia Ready?*, 13 RICH. J.L. & PUB. INT. 385, 388 (2010).

104. *Id.*

the spring of 1918, the second in the fall of 1918, and the third in the spring of 1919.<sup>105</sup> During the Spanish Flu outbreak, “because of the political climate created by World War I,” public officials attempted to subdue the public’s fears.<sup>106</sup> Reportedly, public officials routinely lied about the seriousness of the Spanish Flu virus and tried to placate the fearful public through quarantine procedures.<sup>107</sup> Public-health departments distributed gauze masks for people to wear in public, forbade stores from holding public sales, and limited funerals to fifteen minutes in length.<sup>108</sup> Some towns required people to sign a certificate verifying they were healthy as a prerequisite to entering a public building.<sup>109</sup> Railroads were instructed to deny transport to passengers who did not present a certificate of health.<sup>110</sup> Some state boards of health placed the entire state under quarantine, closing all places of amusement, churches, schools, and such places of business where crowds could congregate.<sup>111</sup> Public gatherings of any sort were forbidden; children were to remain at home and were not permitted to play on the public streets.<sup>112</sup> Despite attempts to quarantine exposed individuals and limit public interaction with others, the Spanish Flu spread rapidly.<sup>113</sup> Historians propose the federal government’s inability to stop the spread of the Spanish Flu “may be attributed to the lack of a national quarantine standard.”<sup>114</sup> These concerns continue to hinder the enforcement of quarantine procedures today and pose a significant threat to the protection of due process rights.<sup>115</sup>

The history of quarantine is also intertwined with gender. During both world wars, the U.S. military involuntarily quarantined thousands of women prostitutes to prevent the spread of venereal disease among American troops.<sup>116</sup> The federal government passed the Chamberlain–Khan Act in 1918, which allocated funds to the states to assist them in identifying, quarantining, and treating persons infected with venereal disease to protect the military.<sup>117</sup> States created laws

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105. *Id.* at 388–89.

106. *Id.* at 389.

107. *Id.*

108. MOLLY BILLINGS, *THE INFLUENZA PANDEMIC OF 1918* (2005), <https://virus.stanford.edu/uda> [<https://perma.unl.edu/PX4T-G27L>].

109. *Id.*

110. *Id.*

111. Gene E. Hamaker, *Influenza, 1918*, *BUFFALO TALES*, Apr. 1984, [http://www.bchs.us/BTales\\_198404.htm](http://www.bchs.us/BTales_198404.htm) [<https://perma.unl.edu/HR63-83TW>].

112. *Id.*

113. Gregory P. Campbell, *The Global H1N1 Pandemic, Quarantine Law, and the Due Process Conflict*, 12 *SAN DIEGO INT’L. L.J.* 497, 510 (2011).

114. *Id.*

115. *Id.* at 511.

116. Daubert, *supra* note 8, at 1310.

117. Scott W. Stern, *The Long American Plan: The U.S. Government’s Campaign Against Venereal Disease and Its Carriers*, 38 *HARV. J.L. & GENDER* 373, 385 (2015).

that allowed for the detention and mandatory testing and treatment of women “reasonably suspected” of having a venereal disease.<sup>118</sup> Women were quarantined and subjected to mandatory testing for any offense that was tangentially related to promiscuity.<sup>119</sup>

During World War II, the government created “rapid treatment centers,” complete with barbed wire, electrified fences, and locked gates, for the treatment and detention of women infected with venereal disease.<sup>120</sup> Women were often held in jails for days waiting to be transported to the treatment centers or to even be tested by a health official.<sup>121</sup> Overall, “[t]housands of women and girls suspected of engaging in promiscuous sexual activities with soldiers were committed to institutions; no similar efforts were made to quarantine men.”<sup>122</sup>

These examples illustrate the importance of procedural due process limits on quarantine measures.<sup>123</sup> Quarantine history is intertwined with the history of immigrants, minorities, and women in the United States, as well as a history of public fear often placated by the government’s imposition of quarantines.

#### IV. STATE AND FEDERAL QUARANTINE POWERS

There is sparse legal precedent on the constitutional scope of quarantines and isolation. Despite the government’s historic use of quarantines, the courts have not given much attention to modern developments in procedural due process law affecting involuntary quarantine.<sup>124</sup> Yet, the government’s power to quarantine is deeply vested in both the state and federal government.

The State’s quarantine power stems from its strong police power to protect the public under the Tenth Amendment.<sup>125</sup> Although it has not been tested in court, the federal government’s authority to enact quarantine is presumed to arise from the Commerce Clause. The Commerce Clause grants Congress the power to regulate people who engage in interstate travel and who enter the United States from other

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118. *Id.* at 386.

119. *Id.* at 388.

120. *Id.* at 414.

121. *Id.*

122. Daubert, *supra* note 8, at 1310.

123. *Id.* at 1311.

124. See Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755, 781 (2004) (“During World War II, approximately 120,000 Japanese were interned in camps on the basis of military orders.”); see also Campbell, *supra* note 113, at 509–10 (“Though the Supreme Court recognized the U.S. government’s broad authority to quarantine individuals, the federal powers were not tested on a national scale until the 1918 outbreak of the Spanish influenza. . . . [T]he H5N1 Spanish flu strain killed approximately 675,000 Americans in a population of just over 100 million.”).

125. See U.S. CONST. amend. X.



countries.<sup>126</sup> However, the Due Process Clause places limits on the government's power to subject its citizens to involuntary quarantines.<sup>127</sup>

### A. The States' Broad Police Powers and Quarantines

Without question, the individual states are strong defenders against the spread of disease. The Constitution necessarily affords them great latitude.<sup>128</sup> When the health and safety of the people are threatened, the State has the right to make necessary laws to protect the citizens.<sup>129</sup> The primary authority for quarantine and isolation exists at the state level as an exercise of the state's broad police power under the Tenth Amendment.<sup>130</sup>

The Tenth Amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>131</sup> In 1824 the U.S. Supreme Court in *Gibbons v. Ogden* established states have substantial quarantine power under their police powers to protect the public's health and welfare.<sup>132</sup> Chief Justice Marshall described the State's police power as "that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: . . . [i]nspection laws, quarantine laws, health law of every description . . ." <sup>133</sup> Therefore, in circumstances where a contagious disease could spread, the state has the right to take necessary precautions to protect the public.<sup>134</sup>

The courts have paid great deference to the states in their decisions to quarantine or isolate contagious individuals. In *People ex rel. Barmore v. Robertson*, the Illinois Supreme Court explained the state's broad police power to protect the public health:<sup>135</sup>

Among all the objects sought to be secured by governmental laws none is more important than the preservation of public health. The duty to preserve the public health finds ample support in the police power, which is inherent in the state, and which the state cannot surrender. . . . The constitutional guaranties that no person shall be deprived of life, liberty, or property without due process of law, and that no state shall deny to any person within its jurisdiction

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126. U.S. CONST. art. I, § 8, cl. 3.

127. See U.S. CONST. amend. V; *id.* amend. XIV.

128. See U.S. CONST. amend. X.

129. See *id.*

130. See *id.*; *Gibbons v. Ogden*, 22 U.S. 1, 20–21 (1824).

131. U.S. CONST. amend. X.

132. *Gibbons*, 22 U.S. at 20–21.

133. *Id.* at 203.

134. *Id.*

135. *Ex rel. Barmore v. Robertson*, 134 N.E. 815, 817 (Ill. 1922).

equal protection of the laws, were not intended to limit the subjects upon which the police power of a state may lawfully be asserted . . . .<sup>136</sup>

Accordingly, great deference was paid to the City of Chicago Board of Health's decision to quarantine a typhoid fever carrier.<sup>137</sup> By order, the Chicago Board of Health quarantined a young woman resident of a Chicago boarding house.<sup>138</sup> The Chicago Board of Health placed a sign on the young woman's boarding house that warned others that she was a carrier of the disease.<sup>139</sup> The young woman applied for a writ of habeas corpus, maintaining she had been "unlawfully restrained of her liberty at her home."<sup>140</sup> In denying habeas corpus relief, the court held the government interest in protecting the public from the spread of typhoid fever trumped any individual liberty interest the woman possessed.<sup>141</sup> The court crystalized the amount of deference paid to health officials' decisions to quarantine an individual by stating:

The necessity of delegating to an administrative body the power to determine what is a contagious and infectious disease and giving the body authority to take necessary steps to restrict and suppress such disease is apparent to every one who has followed recent events. . . . There is probably not a Legislature in the country that would have named the deadly Spanish influenza as a contagious and infectious disease prior to the epidemic of that disease that took a greater toll of lives throughout the country than any other epidemic known in this country. In emergencies of this character it is indispensable to the preservation of public health that some administrative body should be clothed with authority to make adequate rules which have the force of law, and to put these rules and regulations into effect promptly.<sup>142</sup>

The great deference courts pay to health officials in exercising their judgment in preventing the spread of disease was extended further in the case of a woman who was isolated even though she was asymptomatic and likely had never been exposed to anyone carrying the disease.<sup>143</sup> In *United States v. Shinnick*, the petitioner brought suit to gain the release of her mother, Ellen Siegel.<sup>144</sup> Siegel was a female passenger who entered the United States after traveling from Sweden.<sup>145</sup> She was placed in isolation for fourteen days in a hospital in Staten Island, New York, when she could not prove that she was vaccinated after arriving in the United States from a smallpox-in-

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136. *Id.* (citations omitted); see also *People ex rel. Baker v. Strautz*, 54 N.E.2d 441 (Ill. 1944) ("It has almost universally been held in this country that constitutional guaranties must yield to the enforcement of the statutes and ordinances designed to promote the public health as a part of the police powers of the State.").

137. *Barmore*, 134 N.E. at 817.

138. *Id.* at 816.

139. *Id.*

140. *Id.*

141. *Id.* at 820-21.

142. *Id.* at 819.

143. *United States v. Shinnick*, 219 F. Supp. 789, 790 (E.D.N.Y. 1963).

144. *Id.*

145. *Id.*

fectured area in Stockholm, Sweden.<sup>146</sup> The court held the quarantine and isolation of Siegel was permissible even though there was no evidence that she was ever exposed to the disease.<sup>147</sup> The Court held that as long as the government's decision to quarantine the woman was made in good faith, it was constitutional.<sup>148</sup> Here, the opportunity for exposure to smallpox existed during the four days the woman spent in Stockholm.<sup>149</sup> The *Shinnick* case demonstrates the courts' deference to health officials' quarantine decisions will increase as the severity of the harm that the government seeks to prevent increases.<sup>150</sup> The court in *Shinnick* held an individual could be deprived of liberty without any showing of an illness if the illness has deadly effects.<sup>151</sup> Pursuant to strong police power, most states have broad power to respond to a health crisis through their own statutes governing quarantine.<sup>152</sup>

### **B. The Federal Government's Commerce Power and Quarantines**

In addition to the states' strong police power under the Tenth Amendment, the Commerce Clause gives the federal government broad authority to respond to a public-health crisis. The Commerce Clause refers to Article I, Section 8, Clause 3 of the U.S. Constitution, which gives Congress the power "[t]o regulate commerce with foreign nations, and among the several states."<sup>153</sup> Although quarantines traditionally have been imposed via the states' power, the Commerce Clause presumably empowers the federal government to impose quarantine conditions on people traveling between states and on people entering and leaving the United States. The Necessary and Proper Clause presumably empowers the federal government to execute quarantines through laws and executive orders.

The Public Health Service Act of 1944, pursuant to the powers of the Commerce Clause, gives the U.S. Public Health Service "responsibility for preventing the introduction, transmission, and spread of communicable diseases from foreign countries to the United States."<sup>154</sup> Section 361 of the Act empowers the U.S. Secretary of Health and Human Services to take measures to contain the transmission of communicable diseases from foreign countries into the

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146. *Id.*

147. *Id.* at 791.

148. *Id.*

149. *Id.* at 790.

150. *See id.*

151. *Id.*

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

153. U.S. CONST. art. I, § 8, cl. 3.

154. *History of Quarantine*, *supra* note 1.

United States and between states.<sup>155</sup> The authority to develop procedures to quarantine individuals was transferred to the CDC in 1967.<sup>156</sup>

There are “U.S. Quarantine Stations . . . located at 20 ports of entry and land-border crossings where international travelers arrive.”<sup>157</sup> However, the CDC’s work covers more than 300 ports of entry.<sup>158</sup> Those ports of entry use the CDC’s public health practices as “part of a comprehensive Quarantine System that serves to limit the introduction of infectious diseases into the United States and to prevent their spread.”<sup>159</sup> Moreover, because the spread of disease would likely not be confined by state boundaries, the federal government, through the CDC, is a major player in the fight to prevent the spread of disease. The CDC promulgates federal rules to help control a disease’s spread.<sup>160</sup> The Model State Emergency Health Powers Act serves as a guideline to the states, although it has not been enacted by all states.<sup>161</sup>

## V. PROCEDURAL DUE PROCESS LIMITS ON QUARANTINE POWERS

Although the state and federal governments have broad power to act in the public’s interest when the United States is faced with the spread of contagious disease, such situations create an inherent conflict between individual and public rights. Government-imposed, mandatory quarantine substantially interferes with a person’s right to freedom of movement, which is protected by the Constitution.<sup>162</sup> Therefore, the Due Process Clauses of the Fifth and Fourteenth

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155. *Legal Authorities for Isolation and Quarantine*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html> [https://perma.unl.edu/9ATU-WP7Y] (last updated October 8, 2014).

156. *Id.*

157. *Quarantine Stations*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/quarantine/quarantinestations.html> [https://perma.unl.edu/44DH-7RVY] (last updated Jan. 15, 2014).

158. *Protecting America’s Health at U.S. Ports of Entry*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncezid/dgmg/quarantine-fact-sheet.html> [https://perma.unl.edu/LP2V-PKDQ] (last updated Dec. 23, 2016).

159. *Quarantine Stations*, *supra* note 157.

160. CDC Interstate Quarantine, 42 C.F.R. §§ 70.1–.18 (2017); CDC Foreign Quarantine, 42 C.F.R. §§ 71.1–.63 (2017).

161. *The Model State Emergency Health Powers Act (MSEHPA)*, CTRS. FOR L. & PUB.’S HEALTH, <http://www.publichealthlaw.net/ModelLaws/MSEHPA.php> [https://perma.unl.edu/YX4G-HQAK] (last updated Jan. 27, 2010).

162. John T. Clarkson, *Phase Six Pandemic: A Call to Re-evaluate Federal Quarantine Authority Before the Next Catastrophic Outbreak*, 44 GA. L. REV. 803, 832 (2010).

Amendments place limits on the government's power to impose involuntary quarantines.<sup>163</sup>

The Fourteenth Amendment prohibits the state from depriving a citizen of "life, liberty, or property, without due process of law."<sup>164</sup> The Due Process Clause has two basic goals founded in correctness and justice. The first is to produce more accurate results through fair procedures.<sup>165</sup> The second is to make people feel the government and its justice system have treated people fairly.<sup>166</sup> The Due Process Clause of the Fourteenth Amendment mandates the government provide an individual certain procedural due process before he or she is deprived of his or her liberty.<sup>167</sup> Those procedures may include the right to counsel, the right to a pre-deprivation hearing, the right to have a neutral decision maker, the right to present evidence, or an elevated burden of proof by the government.<sup>168</sup>

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163. Daubert, *supra* note 8, at 1310. ("Within the context of public health interventions, basic elements of substantive due process include: (1) a demonstrated public health necessity; (2) an effective intervention with a demonstrable means–end connection; (3) proportionality—the intervention is neither too narrowly or broadly tailored; and (4) it is the least restrictive in terms of infringing on individual rights while accomplishing its purpose, and does not inflict unnecessary harm."); *see also* Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.").
164. U.S. CONST. amend. XIV.
165. Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process." (citing Carey v. Phipus, 435 U.S. 247, 259–262, 266–67 (1978))).
166. *Id.* ("The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done' . . ." (first citing Mathews v. Eldridge, 424 U.S. 319, 344 (1976); and then quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring))).
167. John V. Orth, *Taking from A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 CONST. COMMENT. 337, 337–38 (1997) ("Before a person can be deprived of life, liberty, or property, certain procedures must be observed, procedures designed to ensure fairness.").
168. Vitek v. Jones, 445 U.S. 480, 494–95 (1980) ("The State was required to observe the following minimum procedures before transferring a prisoner to a mental hospital: . . . '[w]ritten notice to the prisoner that a transfer to a mental hospital is being considered; . . . [a] hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given; . . . [a]n opportunity at the hearing to present testimony of witnesses by the defense and to confront and

The traditional test to determine what process is due to a person who faces quarantine or any predetermination deprivation of government benefits is the *Mathews v. Eldridge* balancing test.<sup>169</sup> The *Mathews v. Eldridge* balancing test determines whether an individual received due process under the Constitution.<sup>170</sup>

Under *Mathews*, the court balances three factors. First, the court will weigh the private interest that will be affected by the official action.<sup>171</sup> Second, the court will weigh the risk of an erroneous deprivation of such interest through the procedures used.<sup>172</sup> Finally, the court will weigh “the Government’s interest, including the function involved.”<sup>173</sup> The *Mathews* test helps the court determine the adequacy of pre-deprivation process.

Both goals of accuracy and fairness, promoted by the three *Mathews* factors, are crucial when a person faces a loss of liberty through the government’s quarantine power and possible stigmatization. The U.S. Supreme Court declared being free from physical detention by one’s own government is “the most elemental of liberty interests.”<sup>174</sup>

Yet, a loss of liberty may result under the current *Mathews* balancing test if the courts’ focus is placed too heavily upon the government’s interest in quarantining individuals to prevent the spread of disease to the exclusion of other government interests. The *Mathews* test will always pit the gravity of the government’s interest in protecting public health against the individual’s private interest in liberty and freedom. A narrow view of government interests under the *Mathews* test will almost always favor the government’s action in quarantining an individual when the public at large is faced with a potential health crisis.<sup>175</sup> As a result, the procedural due process rights of a person facing

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cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination; . . . [a]n independent decision maker; . . . [a] written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate; . . . [a]vailability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and . . . [e]ffective and timely notice of all the foregoing rights.” (quoting *Miller v. Vitek*, 437 F. Supp. 569, 575 (D. Neb. 1977)).

169. *Mathews*, 424 U.S. at 335.

170. *Carfora v. City of New York*, 705 F. Supp. 1007, 1010 (S.D.N.Y. 1989) (“But the amount of process due depends on a balancing of the strength of the individual’s interests against the countervailing state interests.” (citing *Mathews*, 424 U.S. at 335)).

171. *Mathews*, 424 U.S. at 335.

172. *Id.*

173. *Id.*

174. *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004). The national security risk did not outweigh the liberty interest at stake under the *Mathews* test, so the detainee was entitled to notice and hearing before a neutral decision maker. *Id.* at 532–33.

175. See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 *YALE L.J.* 455, 473 (1986) (“By their very

quarantine will always be in grave doubt under the *Mathews* balancing test unless the Court opens the lens and takes a broader view of government interests. The U.S. Supreme Court held the government also has a compelling interest in eradicating discrimination.<sup>176</sup> In some quarantine cases, the government's compelling interest to eradicate discrimination may counterbalance the government's interests in protecting the public health. The first two prongs of the *Mathews* test focus on the individual's interest, while the third prong focuses on the government's contrary interest in protecting public health, thereby reducing the individual's liberty. But a broader view of the government's interest recognizes that, while eradicating discrimination is a government interest, the heart of the interest is an individual interest—protecting individuals from the consequences of discrimination.

#### A. Weighing Individual Liberty Interests Quarantines Infringe

The first factor the Court weighs under the *Mathews* test is the individual's private interest at stake.<sup>177</sup> When a person is screened at the airport and potentially quarantined, strong liberty interests are implicated because he will potentially be deprived of his freedom of movement. He may be confined in a hospital, his home, or a makeshift emergency room tent. He may be unable to go to work, go out to eat, visit libraries and other public places, or visit friends or family.

An individual's liberty interest is so engrained in the U.S. Constitution that it may even outweigh the government's strong interest in national security. For example, the U.S. Supreme Court weighed the conflict between the government's strong interest in national security and an individual's most elemental interest in his liberty in *Hamdi v. Rumsfeld*.<sup>178</sup> The government classified Hamdi, an American citizen, as an "enemy combatant" and detained him for allegedly taking up arms with the Taliban.<sup>179</sup> Hamdi's father filed a habeas petition on

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nature, procedural safeguards impose administrative costs and burdens on the government that would not otherwise exist. At the same time, the benefits of such safeguards are not always immediately recognizable. Often it is not clear that the ultimate outcome in a particular case will be more just or efficient when specific procedures are employed than when they are not. In an important sense, then, the benefits of procedural due process—at least when measured from a purely efficiency standpoint—are prophylactic in nature. An efficiency-oriented balancing test, therefore, weighs an inevitable and immediately recognizable administrative cost against a largely prophylactic interest in the use of specific procedural protections. Thus, it is likely that the Court's balancing test, lacking any minimum floor of procedural protection, will generally find in favor of the governmental interest.”)

176. *Bob Jones Univ. v. United States*, 461 U.S. 574, 598 (1982).

177. *Mathews*, 424 U.S. at 321.

178. *Rumsfeld*, 542 U.S. at 535.

179. *Id.* at 507.

his behalf under 28 U.S.C. § 2241 alleging the government held his son in violation of the Fifth and Fourteenth Amendments.<sup>180</sup> Despite the risk to national security, under the Due Process Clause even a citizen charged and detained as an enemy combatant is entitled to notice and a hearing before a neutral decision maker to challenge his enemy-combatant status.<sup>181</sup> He is also entitled to receive notice of the factual basis for his classification and a fair opportunity to rebut the government's factual assertions before a neutral decision maker.<sup>182</sup>

The effect of quarantine is it detains and commits an individual to the custody of the government although no crime has been committed. The government may not intend for a quarantine to be punitive, but quarantine is nonetheless punitive. Quarantined individuals exhibit a high prevalence of psychological distress.<sup>183</sup> Even short durations of quarantine can cause posttraumatic stress disorder (PTSD) and depression.<sup>184</sup> Like a prisoner, a quarantined individual is not free to engage in daily activities or leave a place.<sup>185</sup>

The U.S. Supreme Court held civil commitment cases “for any purpose constitute[] a significant deprivation of liberty that requires due process protection.”<sup>186</sup> The Supreme Court held in *Addington v. Texas* that because the liberty interest at stake in a civil commitment proceeding is so great, due process requires a clear and convincing burden of proof.<sup>187</sup> Moreover, the Supreme Court made clear that due process requires certain procedural safeguards.<sup>188</sup> For example, due process in juvenile delinquency commitment proceedings, which are civil actions, requires notice and a hearing, the right to be represented by

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180. *Id.*

181. *Id.*

182. *Id.*

183. See, e.g., Laura Hawryluck et al., *SARS Control and Psychological Effects of Quarantine, Toronto, Canada*, 10 CANADIAN J. PSYCHIATRY 1206, 1209–11 (2004); Emma Robertson et al., *The Psychosocial Effects of Being Quarantined Following Exposure to SARS: A Qualitative Study of Toronto Health Care Workers*, 49 CANADIAN J. PSYCHIATRY 403, 404–06 (2004).

184. Studies show 28.9% of quarantined individuals experience symptoms of posttraumatic stress disorder (PTSD) and 31.2% exhibit signs of depression. Hawryluck et al., *supra* note 183, at 1206. “Longer durations of quarantine have been associated with an increased prevalence of PTSD symptoms.” *Id.* After serving others and risking their own health, the last thing they want to face is stigma and prejudice in their homeland because of their sacrifices. See Robertson et al., *supra* note 183, at 404–05.

185. Cf. Robertson et al., *supra* note 183, at 404.

186. *Addington v. Texas*, 441 U.S. 418, 425–33 (1979) (considering what standard of proof is required by the Fourteenth Amendment of the Constitution in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital).

187. *Id.*

188. *Id.*



counsel, a privilege against self-incrimination, and a commitment order based on sworn testimony subject to cross-examination.<sup>189</sup>

Although the U.S. Supreme Court has not addressed the permissible scope of quarantines and what process is due, some lower courts do afford certain procedural safeguards prior to quarantine because of the potential loss of individual liberty.<sup>190</sup> Some lower courts analogize quarantines to involuntary confinement of mentally ill patients and adopt similar procedural due process protections.<sup>191</sup> In the West Virginia civil commitment case *Greene v. Edwards*, a petition filed against Mr. Greene alleged he suffered from active communicable tuberculosis.<sup>192</sup> The court held a hearing in the matter and, upon learning Mr. Greene was not represented, appointed an attorney for him after the hearing commenced.<sup>193</sup> However, the court denied Mr. Greene a recess so that he and his attorney could consult privately.<sup>194</sup> The court proceeded to take evidence and committed Mr. Greene.<sup>195</sup>

The West Virginia Supreme Court in *Greene* reasoned that because “involuntary commitment for having communicable tuberculosis impinges on the right to ‘liberty, full and complete liberty’ no less than involuntary commitment for being mentally ill,” the state must provide the same procedural due process protections in both situations.<sup>196</sup> Specifically:

[P]ersons . . . must be afforded: (1) an adequate written notice detailing the grounds and underlying facts on which commitment is sought; (2) the right to counsel and, if indigent, the right to appointed counsel; (3) the right to be present, to cross-examine, to confront and to present witnesses; (4) the standard of proof to be by clear, cogent and convincing evidence; and (5) the right to a verbatim transcript of the proceedings for purposes of appeal.<sup>197</sup>

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189. *See In re Gault*, 387 U.S. 1, 30 (1967).

190. *See City of Newark v. J.S.*, 652 A.2d 265, 278 (N.J. Super. Ct. Law Div. 1993); *Greene v. Edwards*, 263 S.E.2d 661, 663 (W. Va. 1980).

191. *Greene*, 263 S.E.2d at 663. The West Virginia Tuberculosis Control Act at that time stated:

If [the Department of Health] shall find that any such person’s physical condition is a health menace to others, the department of health shall petition the circuit court of the county in which such person resides, or the judge thereof in vacation, alleging that such person is afflicted with communicable tuberculosis and that such person’s physical condition is a health menace to others, and requesting an order of the court committing such person to one of the state tuberculosis institutions.

*Id.* at 662; *see also City of Newark v. J.S.*, 652 A.2d at 278 (invoking New Jersey procedures for civil commitments of the mentally ill as procedural safeguards for quarantine).

192. *Greene*, 263 S.E.2d at 662.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 663.

197. *Id.*

Parolees in revocation hearings are afforded more procedural due process rights than a person facing quarantine, even though the former has been convicted of a crime. In *Morrissey v. Brewer*, the U.S. Supreme Court held the revocation of parole and confinement of a convicted criminal violates due process in the absence of a prior revocation hearing.<sup>198</sup> The court considered how the parolee was free to be gainfully employed, be with family and friends, and live a life free of confinement.<sup>199</sup> Termination of a parolee's liberty interests inflicts a grievous loss on the parolee.<sup>200</sup>

Prisoners convicted of a crime are also afforded more procedural rights than a person in quarantine. A quarantined person is subject to medical treatment or tests as a condition for release from quarantine. For example, the nurse quarantined in New Jersey and Maine was subjected to blood tests and physical examination before she was released.<sup>201</sup> Medical or other research involving prisoners, unlike the forced quarantine of a person, requires full informed consent by the prisoner, and the government must provide a review procedure to make certain that prisoners are not coerced into medical testing.<sup>202</sup> The same procedural safeguards are not afforded to one who is quarantined and is subject to medical treatment or tests as a condition for release from quarantine.

The procedural due process afforded to the nurse was in stark contrast to the rights of those charged with a crime. The nurse returning home to the United States after treating Ebola patients in Sierra Leone was detained at the airport and confined to a tent at a New Jersey hospital without any notice, hearing, or access to counsel.<sup>203</sup>

Liberty interests are so important in criminal cases that probable cause hearings must be afforded to criminal defendants within forty-eight hours of arrest.<sup>204</sup> In *Gerstein v. Pugh*, the U.S. Supreme Court held detaining prisoners for a substantial amount of time without a hearing, based solely on the decision of a prosecutor, violated the prisoner's constitutional right to due process.<sup>205</sup> The Court ruled that "[w]hatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest."<sup>206</sup>

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198. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1977).

199. *Id.*

200. *Id.*

201. Ohlheiser & Kang, *supra* note 15.

202. See 45 C.F.R. §§ 302.0-.85 (2017).

203. Ohlheiser & Kang, *supra* note 15.

204. See *Gerstein v. Pugh*, 420 U.S. 103 (1975).

205. *Id.* at 117.

206. *Id.* at 125-26.

The existence of probable cause in a criminal case depends on whether “at the moment the warrantless arrest was made, . . . the facts and circumstances within [the arresting officers’] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense.”<sup>207</sup> Probable cause is “a reasonable ground for suspicion, supported by circumstances sufficiently strong to warrant an impartial and reasonably cautious person in the belief that plaintiff is guilty of the offense with which plaintiff is charged.”<sup>208</sup>

Like a police officer’s initial decision to arrest a person for a criminal violation, health officials make decisions whether to detain, question, and quarantine people entering the United States through airports. There is no right to a prompt review of the decision.<sup>209</sup> However, a police officer’s decision to detain or arrest in the field is subject to a court’s prompt probable cause review.<sup>210</sup> Similar constitutional safeguards should apply in quarantine situations. Citizens who have not committed crimes should have as many constitutional protections as those charged with crimes. Procedural safeguards like those afforded to people charged with crimes and prisoners could better protect an individual’s liberty interests.

But sources for many of the constitutional protections in criminal law often do not apply to administrative quarantine proceedings. For example, unlike in criminal proceedings, the Fourth Amendment is not central in administrative quarantine proceedings.<sup>211</sup> Fourth Amendment warrant requirements do not apply to public health searches unless directed at finding evidence for criminal prosecutions.<sup>212</sup> Finding evidence for criminal prosecutions is not the goal of health officials in questioning or screening travelers at airports or in deciding whether to quarantine them. Moreover, the exclusionary rule does not apply in quasi-criminal or civil cases, such as quarantine proceedings. The exclusionary rule does not apply in civil deportation hearings,<sup>213</sup> grand jury proceedings,<sup>214</sup> civil tax proceedings,<sup>215</sup> or pa-

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207. *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

208. 17 AM. JUR. PLEADING & PRAC. FORMS, MALICIOUS PROSECUTION § 102 (2017).

209. *Cf. Legal Authorities for Isolation and Quarantine*, *supra* note 155.

210. *See Gerstein v. Pugh*, 420 U.S. 103, 125 (1975) (“[A] State . . . must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.”).

211. *See Edward P. Richards, Dangerous People, Unsafe Conditions*, 30 J. LEGAL MED. 27 (2009).

212. *Frank v. Maryland*, 359 U.S. 360 (1959), *overruled in part by Camara v. Mun. Court of S.F.*, 387 U.S. 523 (1967) (expressing concern about the potential for warrantless public-health searches’ use for harassment or discrimination purposes).

213. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

role revocation hearings,<sup>216</sup> even though some of these administrative proceedings may result in an individual's loss of liberty. Border searches, prison searches, as well as searches at airports and entrances to government buildings are all free of the warrant and probable cause requirements.<sup>217</sup>

Moreover, the court has carved out warrant-and-probable cause exceptions when the government has a special need to act without them. Special needs cases involve searches conducted for important non-law enforcement purposes in contexts where adherence to the warrant-and-probable cause requirement would be impracticable.<sup>218</sup> For example, the court has upheld highway checkpoints designed to enable police to question citizens about a recent crime, programs to subject students participating in extracurricular activities to random drug testing, and a warrantless search of a probationer's residence.<sup>219</sup>

The exclusionary rule protects a person's liberty interests in criminal trials and plays a special role in law enforcement and the evidence-gathering process. The exclusionary rule prohibits the introduction of evidence during a criminal trial if it is the product of an unconstitutional search and seizure conducted by the police.<sup>220</sup> The exclusionary rule plays the important role of deterring police misconduct by precluding evidence at trial that a police officer illegally obtained.<sup>221</sup> In comparison, there is no police misconduct to deter in an administrative process like quarantine. Rather, administrative authority to develop procedures, screen, monitor, and quarantine rests with federal and state health officials.<sup>222</sup> Moreover, greater procedural protection is afforded in criminal cases versus administrative proceedings, such as quarantine proceedings, because risks and stigma are allegedly higher in criminal proceedings, intent and *mens rea* are not at issue in administrative law, and public health cases are limited by time or intrusiveness. In administrative proceedings, the court dis-

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214. *United States v. Calandra*, 414 U.S. 338 (1974).

215. *United States v. Janis*, 428 U.S. 433 (1976).

216. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357 (1998).

217. *United States v. Kincade*, 379 F.3d 813, 822 (9th Cir. 2004).

218. *Id.* at 823.

219. *Id.*

220. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961) ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.")

221. *See Miranda v. Arizona*, 384 U.S. 439 (1966) (excluding evidence gained in violation of defendant's Sixth Amendment right to counsel); *Mapp*, 367 U.S. 643 (detering improperly elicited self-incriminatory statements gathered in violation of the Fifth Amendment).

222. *See History of Quarantine*, *supra* note 1; *see also State Quarantine and Isolation Statutes*, NAT'L CONF. ST. LEGISLATORS (Oct. 29, 2014), <http://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx> [<https://perma.unl.edu/62YW-DDTH>] (discussing the CDC's authority for quarantine and isolation).

penses with many of the protections traditionally afforded in criminal trials to protect liberty. Even when an administrative hearing is provided, the hearing is much less formal than a criminal trial, and the rules of evidence are greatly relaxed.<sup>223</sup> The traditionally flexible, non-adversarial nature of administrative proceedings would be jeopardized by application of the exclusionary rule. The constitutional protections seen in criminal cases do not neatly fit the quarantine situation.

But an individual's procedural due process rights and liberty interests could be better safeguarded in quarantine cases if a probable cause hearing was held within forty-eight hours, as required in criminal cases. If persons who are detained at the airport are adequately informed about the process and treated fairly, many of the individual concerns about quarantine procedures could be alleviated. If detainees knew what to expect, knew they could consult with counsel, and knew that they could address their concerns before a neutral party, the risk of error, which the *Mathews* test seeks to reduce, would greatly diminish.<sup>224</sup> Moreover, the anxiety felt by the detainee would be greatly reduced.

The neutral party presiding over the quarantine probable cause hearing could be a CDC official, a local (state) health department official, or a court- or agency-appointed hearing officer. The hearing officer should be someone familiar with communicable diseases and should look at the totality of the circumstances.

If quarantine is implemented, a response plan drafted in advance that establishes the rights of citizens under quarantine would best preserve civil liberties, rather than an ad hoc response created in the charged political climate.<sup>225</sup> For example, a person who has been quarantined in Canada has the right to an immediate appeal of his detention decision.<sup>226</sup> A detained individual must immediately be informed of the reason for detention and the right to appeal to the Deputy Minister of Health or any person the Deputy Minister designates.<sup>227</sup> If the person is to be held more than forty-eight hours, the individual has the right to an attorney and a hearing regarding the detention.<sup>228</sup> For anyone held longer than forty-eight hours, the Minister of Health must confirm the detention, inform the individual, and inform a "judge of the superior court of the province in which the

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223. See 5 U.S.C. § 556(d) (1990).

224. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

225. Eleanor E. Mayer, Comment, *Prepare for the Worst: Protecting Civil Liberties in the Modern Age of Bioterrorism*, 11 U. PA. J. CONST. L. 1051, 1076 (2009).

226. Erin M. Page, *Balancing Individual Rights and Public Health Safety During Quarantine: The U.S. and Canada*, 38 CASE W. RES. J. INT'L L. 517, 535 (2007).

227. *Id.*

228. *Id.*

person is detained.”<sup>229</sup> Canada explicitly provides for an expedited judicial review of the quarantine detention.<sup>230</sup> Judges must hear such cases within one day of receiving notice and must “make an order revoking, varying or confirming the order for detention.”<sup>231</sup> This judicial review attempts to balance the individual’s right against being held and the public health safety of the nation.<sup>232</sup>

In sum, an individual’s elemental liberty interest should be given greater weight in the *Mathews* procedural due process balancing test when applied to quarantine cases. Under traditional due process analysis, the gravity of the spread of disease will almost always outweigh the individual’s interest in freedom of movement.<sup>233</sup> But unlike the pre-termination of Social Security benefits in *Mathews* that could be remedied through back pay of benefits later if the initial decision was incorrect, the government cannot ring the liberty bell once liberty is lost. Under the *Mathews* test, an individual’s liberty interest should be just as weighty in quarantine cases as it is in other civil commitment proceedings or criminal detention proceedings.

## B. Weighing the Risk of Error in Quarantine Procedures

The second factor of the *Mathews* test weighs the risk of error through the procedures used and probable value, if any, of additional or substitute procedural safeguards.<sup>234</sup> As the risk of error increases, so does the need for greater procedural safeguards. If there is little risk of error, additional procedural safeguards are unwarranted. The petitioner in *Mathews*, Eldridge, challenged the constitutional validity of the administrative procedures established by the Secretary of Health, Education, and Welfare to determine his continued entitlement to Social Security Disability (SSD) benefits.<sup>235</sup> Eldridge had collected SSD benefits for nearly four years when the Social Security Administration notified him that his benefits would terminate.<sup>236</sup> He was not afforded the opportunity for a pre-termination of benefit hearing.<sup>237</sup> In determining what process was due, the U.S. Supreme Court held due process does not require a hearing prior to termination of SSD benefits.<sup>238</sup>

The *Mathews* balancing test works well in Social Security benefits cases and other cases involving government entitlements because the

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229. *Id.* at 536.

230. *Id.*

231. *Id.*

232. *Id.*

233. *See Ex rel. Barmore v. Robertson*, 134 N.E. 815, 817 (Ill. 1922).

234. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

235. *Id.* at 324–25.

236. *Id.* at 323–24.

237. *See id.* at 324.

238. *Id.*

test focuses on the fiscal administrative burdens that additional or substitute pre-termination procedural requirements might entail.<sup>239</sup> Significantly, the *Mathews* test recognizes that any wrongs regarding a Social Security recipient's benefits may be righted through post-termination procedures.<sup>240</sup> If an initial mistake is made about benefits, the government has the opportunity to correct its error. The government may compensate the individual deprived of benefits through back pay of benefits after a hearing.<sup>241</sup> The interests of both the government facing administrative costs and an individual facing a deprivation of financial benefits are inherently quantifiable and correctible.

But the liberty interests and loss of freedom at stake in quarantining individuals are not neatly comparable to fiscal burdens such as those at issue in *Mathews*. Arguably, the loss of freedom is not correctible once an individual is deprived of his liberties, even if the individual later prevails in a lawsuit and receives substantial monetary damages.<sup>242</sup> Unlike the pre-termination of Social Security benefits in *Mathews*, which could be remedied through back pay of benefits if the initial decision was incorrect, the government cannot give back a person's liberty once the government takes it away.

Airport entry screenings for Ebola during the latest outbreak in West Africa were controversial and heavily politicized.<sup>243</sup> They represented the first time fever monitoring was used nationally to detect and detain persons arriving to the United States with an infectious disease.<sup>244</sup> Republicans implied the Democrats in power were unable to keep citizens safe because of allegedly weak Ebola screening procedures.<sup>245</sup> Republicans proposed widespread travel bans to placate a fearful public.<sup>246</sup> Democrats, on the other hand, blamed Republicans for slashing the CDC budget, asserting budget cuts rendered the CDC ineffective in preventing the spread of Ebola.<sup>247</sup>

Some criticized the Ebola airport screening procedures as "wasteful, specious, and harmful to the public's health."<sup>248</sup> First, airport screening procedures at ports of entry to the United States were criti-

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239. *Id.*

240. *Id.*

241. *See id.* at 340–42.

242. Although it could be argued that the rare individuals who are exonerated after spending years in prison are "corrected" through compensation, it can also be argued that money is not the same as liberty.

243. *See* James G. Hodge, *Legal Myths of Ebola Preparedness and Response*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 355, 369–70 (2015); Fox, *supra* note 12.

244. *See* Hodge, *supra* note 243, at 369–70.

245. *Cf. id.* at 360.

246. *Id.* at 360 n.34.

247. *Cf. id.* at 359 & n.30.

248. *Id.* at 370.

cized as wasteful because no Ebola patient had ever been identified through airport screening practices at a port of entry.<sup>249</sup> Second, airport screening procedures at a U.S. port of entry were criticized as specious because they failed to materially improve border security against Ebola because they are prone to false positives and evasion.<sup>250</sup> Finally, airport screening procedures at a U.S. port of entry were criticized for their “potential to harm the public’s health by driving [Ebola] cases underground or across borders in ways that cannot be detected.”<sup>251</sup>

The CDC acknowledged the early symptom of fever was not very reliable in detecting Ebola in a person because fever is nonspecific to Ebola.<sup>252</sup> Ebola shares common early symptoms with other viruses like the common flu.<sup>253</sup> According to the CDC, Ebola is detected in blood only after onset of symptoms, most notably fever, which accompanies the rise of the virus circulating within the patient’s body.<sup>254</sup> It may take up to three days after symptoms start for the virus to reach detectable levels.<sup>255</sup> Moreover, although the Ebola virus is contagious, the influenza virus is much more contagious because it is airborne.<sup>256</sup> Ebola, to the contrary, is spread through direct contact with the body fluids such as blood, sweat, vomit, and feces of a symptomatic person.<sup>257</sup> With somewhat of a consensus on the ineffectiveness of thermometers and fever detection, more reliable methods and procedures are necessary for detecting symptoms of diseases like Ebola before depriving a person of his or her liberty through quarantine.

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249. *Id.*

250. *Id.*

251. *Id.*

252. EBOLA VIRUS DISEASE, *supra* note 13.

253. *Id.*

254. *Id.*

255. *Id.* Laboratory tests used in diagnosis include: antigen-capture enzyme-linked immunosorbent assay (ELISA) testing, IgM ELISA, polymerase chain reaction (PCR), virus isolation, IgM and IgG antibodies, and immunohistochemistry testing. *Diagnosis*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vhf/ebola/diagnosis/index.html> [<https://perma.unl.edu/MST4-BNW9>] (last updated Apr. 25, 2015). It appears the same tests are used at different stages of infestation. *See id.*

256. CTR. FOR DISEASE CONTROL & PREVENTION, IS IT FLU OR EBOLA? (2015), <https://www.cdc.gov/vhf/ebola/pdf/is-it-flu-or-ebola.pdf> [<https://perma.unl.edu/RB6S-GGQX>].

257. *Id.* Ebola can also be spread through exposure to objects that are contaminated with the virus, such as needles. *See id.* The maximum incubation period for the Ebola virus is twenty-one days with symptoms most commonly appearing within eight to ten days of exposure. *Id.*



### C. Weighing Government Interests, Adding Eradication of Discrimination

The third and final factor under the *Mathews* balancing test weighs the government interest and gives “substantial weight . . . to the good-faith judgments” of officials charged with government administration.<sup>258</sup> Under this final prong of the *Mathews* balancing test, the court may also consider the administrative costs of providing additional procedures to safeguard the individual’s constitutional rights.<sup>259</sup> However, if additional procedures and safeguards will achieve the Due Process Clause’s goal of making people feel that the government and its justice system have treated people fairly, then the court will not factor in administrative costs.<sup>260</sup>

The courts’ task of balancing is most difficult when two competing interests are strong, as is the case between an individual’s interest in his own freedom of movement and the government’s interest in protecting the public from the spread of disease. However, the Supreme Court has long held the government’s use of quarantines is constitutional.<sup>261</sup>

In a landmark 1902 case upholding a mandatory vaccination law under which resisters were imprisoned, the U.S. Supreme Court declared quarantines constitutional.<sup>262</sup> In *Jacobson v. Massachusetts*, the board of health in Cambridge, Massachusetts, adopted a regulation requiring inhabitants to be vaccinated or revaccinated against smallpox.<sup>263</sup> Jacobson refused to comply with the vaccination requirement.<sup>264</sup> Jacobson insisted his liberty was invaded when the state subjected him to fine or imprisonment when he refused to submit to vaccination.<sup>265</sup> He asserted that “a compulsory vaccination law is un-

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258. *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976).

259. *Id.* at 347.

260. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (“The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, ‘generating the feeling, so important to a popular government, that justice has been done’ . . .” (first citing *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976); and then quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring))).

261. David P. Fidler et al., *Emerging and Reemerging Infectious Diseases: Challenges for International, National, and State Law*, 31 INT’L LAW. 773, 795 (1997) (“The leading case in quarantine law occurred in 1902 when the U.S. Supreme Court upheld a Louisiana public health resolution prohibiting the entry of any person in any city or town in quarantine, regardless of whether the person was healthy or infected with disease.” (citing *Compagnie Francaise De Navigation A. Vapeur v. State Bd. Of Health*, 186 U.S. 380 (1902))).

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

263. *Id.* at 12.

264. *Id.* at 13.

265. *Id.* at 26.

reasonable, arbitrary, and oppressive . . . and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person.”<sup>266</sup> In rejecting Jacobson’s constitutional challenge, the Court held that to vest the state agency with authority over such matters was not an unusual, unreasonable, or arbitrary requirement.<sup>267</sup> “[O]f paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”<sup>268</sup> Therefore, the pertinent question becomes what process is due to an individual facing quarantine, so that the loss of individual liberty is not unusual, unreasonable, or arbitrary.

Under the *Mathews* balancing test, the government’s interest in preventing a potential health crisis is most weighty. The courts largely conclude that for any court to replace its own judgment for the judgment of public health officials in regard to the prevention of a disease outbreak would be most dangerous.<sup>269</sup>

In reconciling the conflict between government interests and private interests, the government interest to protect public health has been paramount.<sup>270</sup> However, another important government interest historically associated with quarantines has been neglected in the analysis under the *Mathews* balancing test—the government’s “fundamental, overriding interest in eradicating racial discrimination.”<sup>271</sup> Serious consideration of this compelling government interest may shift the balance to protecting individual rights.

Congress repeatedly reiterated the government’s fundamental interest in eradicating discrimination when it enacted many civil rights acts such as Title VII,<sup>272</sup> the Americans with Disabilities Act (ADA),<sup>273</sup> and the Age Discrimination in Employment Act (ADEA).<sup>274</sup> A *Mathews* analysis that also weighs the government’s compelling interest in eradicating discrimination should consider that quarantines are historically intertwined with discrimination. In addition, the recent Ebola threat demonstrates that discrimination associated with

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266. *Id.*

267. *Id.* at 27.

268. *Id.*

269. See *Ex rel. Barmore v. Robertson*, 134 N.E. 815, 817 (Ill. 1922); *Gibbons v. Ogden*, 22 U.S. 1, 20–21 (1824); *United States v. Shinnick*, 219 F. Supp. 789, 791 (E.D.N.Y. 1963).

270. See *Barmore*, 134 N.E. at 817; *Gibbons*, 22 U.S. at 20–21; *Shinnick*, 219 F. Supp. at 791.

271. *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1982).

272. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to e-17).

273. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. ch. 126).

274. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. ch. 14).

quarantines is not simply a matter of history, but a matter of modern life.

The Ebola controversy caused a backlash, a type of second-hand discrimination against people simply because of the color of their skin. Moreover, there was a backlash against those who traveled to and from continents occupied by people of color.<sup>275</sup> At times, it did not matter whether a country was in fact an Ebola-infected country.<sup>276</sup> If its people were of the same race as those of an Ebola-infected country, in the public's eye they were diseased by association.<sup>277</sup>

During the height of the most recent Ebola outbreak, American children of African descent were reportedly chided and bullied by classmates chanting "Ebola babies" simply because of the color of their skin.<sup>278</sup> In October 2014, two African children were beaten by their classmates at a Bronx school.<sup>279</sup> The boys were assaulted in the gym and the lunch yard.<sup>280</sup> Amid the punching and kicking, the attackers chanted "Ebola, Ebola, get out of here" and "Go back home to Africa."<sup>281</sup> The boys' father brought his children to America from Senegal so they could get a good education.<sup>282</sup> The CDC stated Senegal had previous cases of Ebola, but no new cases had been reported for several months.<sup>283</sup>

The media also reported applicants from Africa were denied admission to a Texas school because the admissions committee feared they carried Ebola.<sup>284</sup> Two applicants from Nigeria were sent rejection letters from Navarro College.<sup>285</sup> The two-year community college stated

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275. See Allison Ross, *Teacher Leaves Catholic School Amid Ebola Fears*, COURIER-J., Nov. 4, 2014, <http://www.courier-journal.com/story/news/education/2014/11/03/louisville-catholic-teacher-resigns-amidst-ebola-fears/18417299> [https://perma.unl.edu/TH9W-FRAF]; Ray Sanchez, *Connecticut Girl Barred from School Amid Ebola Fears; Family Sues*, CNN (Oct. 29, 2014), <http://www.cnn.com/2014/10/29/us/connecticut-school-ebola-lawsuit> [https://perma.unl.edu/88TX-CZVD].

276. See Ross, *supra* note 275.

277. Ben Chapman et al., *Bronx Bullies Chanting About "Ebola" Beat Senegalese Boys, 13 and 11*, N.Y. DAILY NEWS, Oct. 28, 2014, <http://www.nydailynews.com/new-york/bronx/bronx-bullies-beat-senegalese-boys-ebola-article-1.1989033> [https://perma.unl.edu/UZ9N-AWZX]; Elizabeth Hagan, "My Name Is Not Ebola": African Children Bullied at School, N.Y. POST, Oct. 27, 2014, <http://nypost.com/2014/10/27/my-name-is-not-ebola-african-children-bullied-at-school> [https://perma.unl.edu/R2RW-RL9S].

278. Chapman et al., *supra* note 277.

279. Hagan, *supra* note 277.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Did a Texas College Deny Men Admittance Because of Ebola?*, CBS DALL./FORT WORTH (Oct. 14, 2014), <http://dfw.cbslocal.com/2014/10/14/did-a-texas-college-deny-men-admittance-because-of-ebola> [https://perma.unl.edu/J4AG-YYQQ].

285. *Id.*

in the letters they were not accepting international students from countries with confirmed Ebola cases.<sup>286</sup>

A third-grader in Connecticut was reportedly banned from school for twenty-one days when she returned from a trip to Lagos, Nigeria.<sup>287</sup> The child had not been diagnosed with Ebola and had not exhibited symptoms.<sup>288</sup> The city also refused her father's offer to test himself and his daughter for Ebola.<sup>289</sup> The family filed a lawsuit, which stated a local health official said the decision to "quarantine" his daughter at home was "due to the rumors, panic and climate at Meadowside Elementary School."<sup>290</sup> The attorney for the child's family further said the decision came after complaints from parents of her classmates.<sup>291</sup>

A teacher in Louisville, Kentucky, was reportedly suspended because parents at the school feared she carried Ebola after she visited Kenya on a mission trip.<sup>292</sup> The teacher had traveled with her husband to Migori, Kenya, for their fourth medical mission with the non-profit organization Kenya Relief.<sup>293</sup> The nearest case of Ebola was more than three thousand miles from where the couple stayed during their medical missions.<sup>294</sup> Upon returning home to the United States, the private Catholic school where she taught asked the teacher to take a precautionary leave of twenty-one days and to secure a doctor's note about her health prior to returning to work.<sup>295</sup> The school communicated with parents about the teacher's absence from her classroom and the facts regarding her mission trip.<sup>296</sup> Many parents raised concerns about the teacher exposing their children to the Ebola virus even though the Ebola-infected area was thousands of miles away from where the teacher served in the mission.<sup>297</sup> Some of the school's parents distributed media articles naming Kenya as a "high risk"

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286. Dan Mangan, *Texas College Rejects Nigerian Applicants, Cites Ebola Cases*, NBC NEWS (Oct. 15, 2014), <http://www.nbcnews.com/storyline/ebola-virus-outbreak/texas-college-rejects-nigerian-applicants-cites-ebola-cases-n226291> [https://perma.unl.edu/9B7Z-7ZQT].

287. Sanchez, *supra* note 275.

288. *Id.*

289. *Id.*

290. *Id.* (quoting a local health official).

291. *Id.*

292. Ross, *supra* note 275.

293. Antoinette Konz, *Former St. Margaret Mary Teacher: "Resignation Had Nothing to Do with Kenya or Ebola"*, WDRB (Nov. 5, 2014), <http://www.wdrb.com/story/27285185/former-st-margaret-mary-teacher-resignation-had-nothing-to-do-with-kenya-or-ebola> [https://perma.unl.edu/5CZJ-RYMJ].

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

country and approached the local media about their fears.<sup>298</sup> The teacher ultimately resigned from her teaching position.<sup>299</sup>

The U.S. government has a strong interest in eradicating discrimination, as evidenced by the multiple laws that the legislature has passed for this purpose.<sup>300</sup> Title VII of the Civil Rights Act of 1964 outlawed employment discrimination on the basis of race, color, religion, sex, or national origin.<sup>301</sup> Congress enacted Title VII in response to the growing civil rights movement of the early 1960s.<sup>302</sup> Title VII's main purpose was to create the Equal Employment Opportunity Commission (EEOC) to provide oversight for the newly enacted employment rights designed to help eradicate discrimination.<sup>303</sup> The Age Discrimination in Employment Act of 1967 (ADEA) outlawed employment discrimination against anyone at least forty years of age.<sup>304</sup> The legislature's purpose in enacting the ADEA was to promote employment of older workers, end arbitrary age discrimination, and help both employers and workers address the problems that occur with an aging workforce.<sup>305</sup>

More recently, the government showed its strong interest in eradicating discrimination against people with disabilities. The ADA outlawed discrimination on the basis of actual or perceived disabilities.<sup>306</sup> The intent of the ADA was reiterated and the provisions strengthened in a 2008 amendment in response to a series of Supreme Court cases that limited the protections of the original Act.<sup>307</sup> The Legislature emphasized the ADA was intended to provide a clear national mandate to end discrimination on the basis of disability and required courts to construe the definition of disability in favor of broad coverage.<sup>308</sup>

A healthcare worker who provides medical relief to other countries and returns to the United States with an infectious disease may be a sympathetic candidate for application of the ADA. First, under the ADA, an individual with either "a physical or mental impairment that

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298. *Id.*

299. *Id.*

300. *See supra* notes 272–74 and accompanying text.

301. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to e-17).

302. *Delivering on a Dream: The House and the Civil Rights Act of 1964*, HIST. ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Exhibitions-and-Publications/Civil-Rights/1964-Essay> (last visited April 4, 2017).

303. *Id.*

304. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. ch. 14).

305. *Id.*

306. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. ch. 126).

307. *Id.*

308. *Id.*

substantially limits” some “major life activity” or a record of such impairment is considered disabled.<sup>309</sup> The term “major life activity” includes the operation of any major bodily function, which creates a broad range of potential disabilities.<sup>310</sup> Second, the EEOC includes contagious diseases such as HIV on the list of covered disabilities.<sup>311</sup> Therefore, it seems probable that while infected, a healthcare worker would be considered disabled under the ADA.<sup>312</sup>

Even a healthy healthcare worker who returns to the United States could be considered as having a disability as defined by the ADA. The ADA provides protection for individuals who are “regarded as having such an impairment” whether or not an actual impairment exists.<sup>313</sup> It does not matter if the perceived impairment would limit a major life activity—it is enough that the individual has been subjected to the public perception that he or she is impaired to qualify as a disability.<sup>314</sup> The recent history of public perception about Ebola shows many people believed the disease was easily spread from person to person, and at times, people perceived a person was a carrier of the virus simply because he or she had visited African countries.<sup>315</sup>

However, the perceived-impairment provision does not apply to impairments that are transitory—lasting or expected to last six months or less—and minor.<sup>316</sup> In the case of a returning healthcare worker who is not infected, but who may be perceived as being infected, the question will be whether the disease is both transitory and minor. A disease like Ebola is transitory—in that it either resolves or the patient dies within six months—but it certainly is not minor.<sup>317</sup> Therefore, a healthcare worker perceived to be infected may qualify as disabled under the ADA for the duration of that perception.

When faced with deciding whether procedures to quarantine are constitutional, the courts’ procedural due process analysis and *Mathews* balancing of interests have exclusively focused on the government’s strong and legitimate interests in protecting the public’s

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309. 42 U.S.C. § 12102 (2012).

310. *Id.*

311. *Disability Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/types/disability.cfm> [<https://perma.unl.edu/23T5-NHB9>].

312. *Baker v. Roman Catholic Archdiocese of San Diego*, 197 F. Supp. 3d 1210 (S.D. Cal. 2016) (holding a teacher who had a concussion that prevented her from working for ten days had a cognizable disability under the ADA for that time period).

313. 42 U.S.C. § 12102.

314. *Id.*

315. *See supra* notes 287–99 and accompanying text.

316. 42 U.S.C. § 12102.

317. *Ebola Virus Disease (EVD) Information for Clinicians in U.S. Healthcare Settings*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/vhf/ebola/healthcare-us/preparing/clinicians.html> [<https://perma.unl.edu/H692-B2AZ>] (last updated May 24, 2016).

health. However, if the state's interest in eradicating discrimination is an equal player in the balance, the balancing may well shift to provide the same constitutional procedural rights afforded to those who face civil commitment or criminal prosecution. The government's overriding interest in eradicating discrimination could shift the balance to provide stronger procedural safeguards before quarantining asymptomatic individuals and depriving them of their freedom of movement.

## VI. CONCLUSION

The government's power to step in and quarantine individuals who may threaten the public with the spread of serious disease is necessary in today's society. The world has become smaller with international travel, and deadly germs do not respect geographic boundaries. The potential for pandemics and epidemics calls for effective screening and quarantine procedures. But as the potential for the spread of disease grows, the potential for loss of liberty grows as well. The Constitution requires adequate protection for individual rights. The government has a compelling interest in eradicating discrimination, which is historically and currently intertwined with quarantines. The government also has an interest in encouraging health workers to travel to other countries to fight the spread of many diseases at their source. Those strong government interests may shift the *Mathews v. Eldridge* balance to protecting individual liberty interests in quarantine screening procedures.