CHAPTER 5

Individual Rights, Population Health, and Due Process

> Achieving a just balance between constitutionally protected rights and the powers and duties of the state to defend and advance the public's health poses an enduring problem for public health law.
>
> —Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint*

In the fall of 2001, as the nation struggled to come to terms with the terrible events of 9/11, and anthrax spread through the United States mail, the CDC commissioned the Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities to draft a model state law updating and clarifying emergency powers that states could use during a public health emergency. The subsequent publication of the Model State Emergency Health Powers Act (MSEHPA), which sought to give governors extraordinary powers and contained substantial provisions authorizing isolation, quarantine, and mandatory medical examinations and treatment, prompted a heated debate about the roles of government coercion and individual liberty in public health protection.[1]

Although fears of bioterrorism have since receded somewhat, the controversy generated by the MSEHPA has not. Indeed, as the years have progressed, new public health threats—SARS (severe acute respiratory syndrome), pandemic influenza, extensively drug-resistant tuberculosis—

have come to the fore. As they have done so, the debate about restrictive public health laws and civil liberties has continued. For example, during the SARS outbreak in 2003, the focus turned to the government's power to halt travel and impose wide-scale quarantines, as was done in parts of Asia and Canada.[2] Two years later, as the federal government planned its response to a possible influenza pandemic, President George W. Bush stated that he would consider using the military to enforce quarantines.[3] A few weeks later, CDC published proposed new quarantine regulations that would have expanded its power to detain individuals who were thought to have an infectious disease.[4]

By the spring of 2007, attention turned to drug-resistant tuberculosis when Atlanta attorney Andrew Speaker became the first American in more than forty years to be subject to a federal quarantine.[5] Speaker had been on his honeymoon in Europe when the CDC asked him to stay put after incorrectly diagnosing him with extensively drug-resistant tuberculosis (TB). Fearing isolation in a European hospital, Speaker evaded his inclusion on the no-fly list and border guards ordered to detain him by traveling to Prague and then to Montreal before driving into the United States. Once in New York, Speaker was detained and eventually flown to Denver for treatment. While he was there, Congress held hearings on the fiasco. The thrust of those hearings and the media coverage was clear: Speaker's actions demonstrated that public health protection requires tough laws.[6] In a dangerous age, when viruses can spread around the world in hours, many presumed that liberty must be exchanged for public health protection.

Is that in fact the case? If the protection and promotion of population health is a critical goal for the law, does that mean that individual rights must necessarily give way to tough public health measures? Does a population perspective compel a cramped view of individual liberty?

This chapter looks at those questions in the context of quarantine, one of the oldest and most coercive types of public health laws.[7] It first asks whether individual liberty and protection of population health are necessarily at odds. It then applies a population-based critique to due process law. This approach emphasizes the complementary relationship between individual liberty and population health and stresses the importance of using public health laws that broadly address population-based problems.

While validating the importance of public health protection, courts applying a population approach would look more critically than they now do at whether particular deprivations of individual liberty, such as quarantine, are actually an effective and least restrictive means of protecting the health of affected populations. This discussion paves the way for considering in later chapters the relationship between individual liberty and population health in other contexts.

Individual Rights and Public Health: Do They Clash?

Population-based legal theory postulates that law *ought* to protect and promote the health of populations. But at what cost to the interests and dignity of individuals or vulnerable populations?

In some sense, all enforceable laws limit the liberty of individuals. Some theorists, however, subscribe to what may be termed the conventional view, that there is an "inherent tension" between protecting the health of populations and the rights and interests of individuals.[8] This is the view reflected in the MSEHPA and other post-9/11 efforts to toughen public health laws.[9] It is also the view implicit in the remarks of Representative Bennie Thompson (D-MS), chair of the House Homeland Security Committee, when he asked in reaction to the case of Andrew Speaker, "When are we going to stop dodging bullets and start protecting Americans?"[10]

More deeply, the conventional view resonates with widely held liberal notions about individual autonomy, the role of individual choice in determining individual health, and the relationship of individuals to populations. If individuals are assumed to be the masters of their own health, and if populations are viewed as mere aggregations of individuals, then the health of populations can be seen as a function of individual choices. Hence, protecting population health appears to require the restriction of individual choices that pose dangers to others, such as Speaker's choice to fly across the Atlantic with TB. As Lawrence Gostin, the principal drafter of the MSEHPA has forcibly argued, classical liberal theory supports the restriction of individual behaviors that pose a significant risk to others.[11] According to Gostin, "infectious disease regulations targeted towards individuals who pose risks of tangible and immediate harm to others . . . are well within traditional liberal understandings of the legitimate role of the

state. Consequently, liberals would be expected to support liberty-limiting infectious disease control measures (e.g., vaccination, physical examination, treatment and quarantine) at least in high-risk circumstances."[12]

Yet, from a population perspective that is mindful of the interdependence of health and the social roots of individual preferences, the story seems more complex. First, in a world in which hundreds of thousands of people have drug-resistant forms of TB, and untold numbers travel with the disease every day, the focus on one man, Speaker, and the need to restrain him seems distracting if not strange.[13] Second, because individual choices are themselves partially constructed by the environment, including the legal environment, the emphasis on restricting, if not punishing, individual choices as if they were made in a vacuum, rather than seeking to change the environment in which individuals exercise and develop their choices, seems ill directed. Once we recognize the population basis of the problem and the potential strength of population-based interventions, the claim that public health protection requires the restriction of individual liberty becomes both theoretically and empirically problematic.

Nevertheless, history cautions that public health laws have often focused on and have frequently scapegoated particular individuals and vulnerable populations. The Nazis, after all, perpetrated some of their earliest atrocities in the name of promoting the health and vigor of their race.[14] In this country, a similar enthusiasm for eugenics led to the forced sterilization of Carrie Buck and thousands of other poor, young women.[15] Years later, in the infamous Tuskegee Study, the U.S. Public Health Service misled and failed to treat poor, mostly black, men with syphilis in an effort to learn more about that disease.[16]

These well-known abuses are not isolated cases. Throughout history, infectious epidemics have been frequently met with discrimination and gross denials of individual liberty. In the early twentieth century, for example, public health officials in San Francisco greeted the appearance of bubonic plague with racially based vaccination and quarantine programs, overlooking the rights, needs, and dignity of San Francisco's Chinese American residents.[17] During this same period, public health officials in Boston responded to an outbreak of smallpox by bringing guards to the railroad yards and forcibly vaccinating "Italians, negroes (sic) and other employees."[18]

The question raised by such examples is whether the conventional view is correct: does public health protection necessarily require limiting individual liberty? Or, does public health protection provide a pretext for the abridgment of individual rights and the mistreatment of minorities? In fact, the population perspective suggests that the conflict between individual liberty and population health is neither as inevitable nor as deep as the conventional view suggests. After all, as discussed in chapter 1, many of the most important public health efforts of the nineteenth century promoted public health by using law to provide clean water, safe homes, and wholesome foods.[19] Although these efforts necessarily relied to some degree on the coercive power of the state in that they depended ultimately on the government's ability to tax and regulate, the coercion of individuals was certainly not a central feature of these reforms. Rather, they used law to alter the environment faced by broad populations. The effective limitation of individual rights was trivial, at least compared with quarantine and like laws that severely restrict the movement and autonomy of individuals.

Certainly in the late nineteenth and early twentieth centuries, public health practitioners increasingly turned their attention to the role that individuals played in the spread of disease. It was during this period that mandatory vaccination, contact tracing, and even isolation and quarantine were widely used. Still, even in this period, when public health officials felt most confident about using law in a paternalistic and often highly coercive manner, many advocates emphasized the importance of educating rather than coercing the public.[20]

By the time of the HIV epidemic in the 1980s and 1990s, public health officials in the United States and in many other nations concluded that they had to work with rather than against high-risk populations to have to have any success in stemming the epidemic.[21] Some scholars contend that the approach taken with respect to HIV was "exceptional"[22] and deviated from the historic public health approach, but the historical record, as we have seen, presents a more mixed picture.[23]

Advocates of environmental changes or voluntary approaches argue that they are both more respectful of autonomy and more apt to be effective than heavy-handed restrictions of liberty.[24] To explain that somewhat counterintuitive conclusion, opponents of coercive public health laws point to the important role that trust plays in promoting population health.

According to Patricia Illingworth, trust is a social good that facilitates reciprocity and social cooperation.[25] As such, trust may be essential for the successful implementation of policies that require individuals to act for the good of others or, as Thomas Glass and Monica Schoch-Spana have written, "the public will not take the pill if it does not trust the doctor."[26] Thus highly coercive or discriminatory policies that erode the trust of affected groups may actually undermine rather than promote population health. For example, when Milwaukee public health officials responded to an 1894 smallpox outbreak by forcibly moving immigrants and poor residents to a smallpox hospital, a riot ensued.[27] More recently, peasants and farmers rioted in China when health officials proposed quarantining asymptomatic individuals during the SARS outbreak.[28]

A related but more fundamental argument against the conventional view was articulated by Jonathan Mann, who was heavily influenced by his work with the HIV epidemic in Africa. Mann argued that respect for human rights, by which he meant the universal moral rights reflected in international law, helps promote, not undermine, the health of populations.[29] This is so for several reasons. First, some deprivations of human rights, such as genocide or torture, directly harm health. Second, sometimes the health of a population cannot be improved unless and until some human rights are secured. Mann noticed, for example, that campaigns to stop the spread of HIV in Africa were often ineffective when women lacked control over their sexual experiences. In the case of HIV, rights of sexual freedom and equality for women serve not as limits on but as foundations for population health.

Further support for Mann's observation comes in the work of social epidemiologists who have noted the intriguing association between equality and population health. Although it is well known that a society's health is correlated with its overall wealth, several studies have suggested that the distribution of wealth within a society, or the degree of inequality within it, also influences its health.[30] If this so-called relative-income hypothesis is correct, then, as Norman Daniels and colleagues have argued, "justice [may be] good for our health."[31] In other words, laws and policies that curtail discrimination and oppression may protect the health of different populations within a society. Conversely, highly coercive laws or those that reinforce an unequal distribution of resources may undermine population health.

Ultimately the question whether the conventional view is correct, and the protection of population health relies more on laws that starkly limit individual liberty or on respect for liberty and equality, is an empirical one that depends on multiple factors, including the nature of the health threat, whether the law is based on a sound scientific understanding of the epidemiology, and the existing relationship between a particular population and its government. Calls for voluntary quarantines may thus have been more effective when SARS struck Toronto than they would be in the United States because cooperation and social solidarity are more pronounced in Canada than in the United States.[32]

In any case, the argument that trust, cooperation, nondiscrimination, and respect for liberty may promote population health does not deny that conflicts sometimes exist between laws that promote a population's health and individual liberties. Rather, it reminds us that population health does not necessarily depend on pointing the strong arm of the state at particular individuals. Some conflicts between population health and individual liberty may be inevitable, but they are not the key to the relationship between population health and law.

Positive and Negative Rights

The discussion so far has presupposed specific understandings of the terms *liberty* and *rights*. Indeed, the dispute between those who hold and those who reject the conventional view derives largely from differing conceptions of liberty and rights. When proponents of the conventional view assume the inevitability of a clash between individual rights and population health, they rely on two assumptions about individual liberty and rights, both of which stand in sharp contrast to the tenets of the population perspective. First, proponents of the conventional view assume that liberty and rights are primarily negative, relating to individuals' desires to be left unrestrained. Second, proponents presuppose that individuals use their liberty and legal rights to make choices that are exogenous to social life.

These assumptions are closely connected to what C. B. Macpherson has coined *possessive individualism*, which holds that each individual is a "proprietor of his own person and capacities, owing nothing to society for them."[33] From this perspective, the autonomous choice that an individual

seeks to exercise is independent from both the environment and the populations of which the individual is a member. Moreover, because possessive individualism values autonomy so highly, it posits that individuals have a moral right or claim to exercise their autonomy, except under limited circumstances, such as when their actions harm another.[34] Interestingly, once such liberties are coined rights, it becomes easy to assume that they are or at least ought to be recognized as such by the law. Hence, even if a court has not found a right of an individual to defy a motorcycle helmet law or to ignore a compulsory vaccination law, civil libertarians can and do criticize such laws as infringing on individual rights.

The population perspective paints a very different picture. Rather than framing choices as exogenous to social life, and liberty as protecting an individual's interest in being left alone, the perspective emphasizes the role that populations play in influencing individual choices, opportunities, and risks. Hence, scholars that share many of the views of the population perspective, such as Jonathan Mann or Norman Daniels, are less apt than traditional liberals to envision rights as trumps against the state. They emphasize instead so-called positive rights, which provide individuals with what they need to realize their own preferences. As a result, when Mann and Daniels argue that rights are necessary or at least conducive to public health, they are not referring simply to the negative rights traditionally recognized by a liberal state, but also to theoretical positive rights, such as those to education or public health, that could enhance the opportunities available to individuals and improve the social determinants of health.[35]

A positive right to population health protection would differ from a traditional negative right not only because it would presuppose an action rather than restraint on the part of government but also because it would be less individualistic. Indeed, the recognition of a positive right to population health necessarily assumes that individuals cannot fulfill all of their goals, which presumably includes being healthy, without the assistance or support of others. In addition, the recognition of positive rights is based on the premise that individuals cannot satisfy their own preferences or choices wholly apart from the populations in which they exist. Thus, the claim for a right to promotion of population health sees individuals as interdependent and situated within populations.

The distinction between positive and negative rights helps explain the debate between adherents of the conventional view and their critics. It

also suggests that each side of the debate is in part correct. Holders of the conventional view rightly observe that laws that promote population health frequently invade or conflict with negative liberties, including those that have been recognized as rights by positive law in the Unites States. On the other hand, critics of the conventional view observe with equal veracity that such laws may, at times, support positive rights to population health.

This analysis suggests several points critical to a discussion of constitutional rights and population health. First, laws that are enacted in the name of public health can be viewed from a liberal, individualistic perspective as potential infringements on individual liberty. Yet, to the extent that such laws promote the health of populations (and of course, that a law is claimed to do so does not mean that it does so), they can also be seen as supporting the positive right to population health. Finally, that both statements are true helps explain why the relationship between individual rights and population health is both complex and problematic. In American domestic law, it typically falls to constitutional law, particularly under the due process clauses of the Fifth and Fourteenth Amendments, to mediate and resolve these tensions.

The Police Power and Due Process

Conflicts between individual interests and public health have always existed, but they have not always been understood as raising constitutional questions. In the antebellum period, the federal government enacted relatively few laws relating to public health. States, on the other hand, instituted a wide variety of measures aimed at protecting the public's health, from quarantines to laws regulating the practice of trades.[36] Occasionally, these laws were challenged in court as violating an individual's rights. Almost always these challenges were in state court based on state statutory or common law grounds. The U.S. Constitution was not implicated because it was not viewed as giving individuals many rights against their states.

One of the earliest appellate cases to deal with the clash between individual liberty and a core public health law was heard by the Massachusetts Supreme Judicial Court. In *In re Vandine*, Justice Putnam upheld a Boston sanitary ordinance requiring individuals who collected house dirt and offal to be licensed.[37] Recognizing that "every regulation of trade is in some

sense a restraint upon it,"[38] Justice Putnam noted that "the great object of the city is to preserve the health of the inhabitants."[39] Because house dirt and offal were "sources of contagion and disease," the court agreed that the city could require a license. Moreover, the court suggested, there could be no right to disregard a law designed to protect public health.

The court's approach in *Vandine* was followed in the more famous *Commonwealth v. Alger*.[40] *Alger* challenged a Massachusetts statute that prohibited the erection of a wharf beyond certain harbor lines. In finding that the statute did not derogate the defendant's property rights, Chief Justice Shaw commented on the nature of the state's police power, noting that "rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient."[41] The chief justice then explained that when the police power was used to limit an individual's use of property, the state was not taking property, it was instead simply limiting a use that was noxious or injurious. Under the common law maxim, *sic utere tuo, ut alienum non laedas* (use your own property so as not to injure others), individuals had no right to harm others.[42]

It was only after the Civil War and the ratification of the Fourteenth Amendment that cases such as *Alger* or *Vandine* could be litigated under the federal constitution and clothed in the language of constitutional rights. Ratified in 1868 and enacted largely to ensure the constitutionality of the Civil Rights Act of 1866, the Fourteenth Amendment contained new and broad promises of individual rights that could be used to limit the police power of the states.[43] Most important, Section 1 echoed the Fifth Amendment's guarantee of due process of law by stating that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[44] With the enactment of the Fourteenth Amendment, individuals who felt that state police power laws infringed on their liberty could now assert that the Constitution gave them a legal right to trump the state.

The first set of Supreme Court cases making such Fourteenth Amendment claims resembled *Vandine* in numerous respects. In the so-called

Slaughter-House cases, the Court considered a challenge by a group of butchers to a Louisiana statute that regulated slaughtering in New Orleans and required, among other things, that all butchering occur on property operated by the Crescent City Livestock Company.[45] According to the butchers, the state had violated their privileges and immunities as citizens of Louisiana as well as their rights to due process and equal protection of the law by granting Crescent City a monopoly. Chief Justice Miller's majority opinion rejected all of these claims.

In the most famous part of the opinion, the Chief Justice provided a narrow construction to the Fourteenth Amendment's Privileges and Immunities Clause, finding that it applied only to federally granted privileges, not to privileges of state citizenship.[46] To some commentators, this interpretation eviscerated the amendment's capacity to redress the discrimination that freedmen faced in the former confederate states.[47] For our purposes, however, the more significant part of Chief Justice's Miller opinion is the brief introduction that focused on the nature of the police power and its relationship to the new constitutional amendment.

In his introduction, Chief Justice Miller noted that "from its very nature, [the police power is] incapable of any very exact definition or limitation."[48] Nevertheless, on that power "depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community."[49] Hence, the chief justice argued, a state's exercise of that power must be upheld by a court, "unless some restraint in the exercise of that power be found in the constitution of that State or in the amendments to the Constitution of the United States."[50]

Applying those principles to the Louisiana law before him, Chief Justice Miller had no doubt that the law was a proper exercise of the police power. He quoted the great New York jurist Chancellor Kent: "'Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all,' says Chancellor Kent, 'be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community.'"[51]

Miller then asserted that the regulation of butchering and the inspection of animals to be killed for meat are among the "most necessary" exercises

of the police power and that unless a challenger could show that the state had exercised its power in an impermissible way, the statute must be found constitutional.[52] That conclusion applied whether the challenge was under the Fourteenth Amendment's Privilege and Immunities Clause, its Due Process Clause, or its Equal Protection Clause. In all cases, a law that was within the boundaries of the police power because it sought to prevent harm to the community was constitutional.

Given that the case was decided when many still believed that the miasma from decaying animals caused disease and that New Orleans, in particular, suffered from horrific epidemics of yellow fever, Miller's conclusion was not surprising.[53] A few points, however, are worth emphasizing. First, the Court accepted that a challenge to a traditional state public health measure could be brought under the Fourteenth Amendment. By so deciding, the Court paved the way for further federal constitutional review of laws designed to protect public health. Yet the Court followed the reasoning of earlier common law cases such as *Commonwealth v. Alger* in presuming that constitutional rights could not trump the police power because the former ended where the latter began.

In two separate dissents, Justices Bradley and Field offered a very different analysis. Although they accepted Chief Justice Miller's conclusion that the Fourteenth Amendment did not preclude states from using the police power to protect public health, they questioned whether the Louisiana statute was a legitimate exercise of that power.

According to Justice Field, only two aspects of the Louisiana law qualified as a legitimate exercise of the police power: those requiring the landing and slaughtering of animals below the City of New Orleans and those requiring the inspection of the animals. The monopoly provisions, on the other hand, were not necessary for sanitation or health and therefore were not a bona fide exercise of the police power.[54] According to Justice Field, "under the pretence of prescribing a police regulation the State cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgement."[55] Most important, to Justice Field, the Fourteenth Amendment was designed to "give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes" and which include the right to pursue one's calling in conformity with legitimate police power regulations.[56] In other words, the Fourteenth

Amendment constitutionalized natural law rights and empowered courts to protect those rights against the state. This view implies that there may be times when the police power, or at least government actions undertaken in its name, will need to be limited to protect inalienable rights.

In his dissent, Justice Bradley advanced the same theme. To him, the Fourteenth Amendment codified certain individual rights created by natural law: "The right of personal security, the right of personal liberty, the right of private property. . . . These are the fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all."[57] Like Justice Field, Justice Bradley viewed these rights as pre-social, external limits on state power.

The contrast between Justice Miller's majority opinion and the dissenting opinions in *Slaughter-House* illustrates two very different approaches to how courts can apply the Fourteenth Amendment to state laws that purport to protect public health. Chief Justice Miller's approach was traditionalist, grounded in common law assumptions about the relationship of individual rights and the police power. This view incorporated existing notions about the police power into Fourteenth Amendment doctrine, assuming that if a law was reasonably aimed at protecting public health, it did not violate the Fourteenth Amendment. Perhaps more important, the traditional view accepted the importance of the police power and assumed that litigants who challenged an exercise of the police power had the burden of establishing that it was, as Justice Harlan suggested in *Jacobson v. Massachusetts*, "unreasonable, arbitrary and oppressive."[58]

As Lawrence Gostin suggests, this approach reflects the influence of social compact theory.[59] It views the police power as prior to liberty. Hence, reasonable exercises of the police power cannot limit liberty. Less obviously, although traditionalist judges did not speak of positive rights, their emphasis on the importance of the police power and their view of public health protection as a necessity, provides at least rhetorical support for asserting a positive duty on the part of the state to protect population health.[60]

In sharp contrast, the dissenting opinions in *Slaughter-House* were more protective of negative individual liberty and less supportive of government interventions aimed at promoting public health. This view achieved its

greatest influence during the previously discussed *Lochner* period,[61] though echoes of it remain in more recent cases.[62] For present purposes, several distinctions between the *Lochner*-era and traditional approaches are worth emphasizing. First, the *Lochner* approach was predicated on the existence of clear boundaries between the police power and individual liberty. Second, the *Lochner* approach accepted that individuals have pre-existing rights. Third, the doctrine assumed that those rights were not limited to those enumerated within the Constitution but instead encompassed a larger set of negative liberties derivable from natural law. Finally, the approach postulated that it was the responsibility of the judiciary to protect such rights from an overreaching state. As a result, the courts became border guards entrusted to keep the police power within its limited terrain.

Both the traditional and *Lochner* approaches were subject to sharp attack by the legal realists and were ultimately rejected during the New Deal. In the wake of Roosevelt's court-packing plan, the Supreme Court adopted a third, still influential approach that relied far less on either traditional conceptions of the police power or natural rights. This approach granted public health protection a far lesser role on the constitutional stage.[63]

The New Deal approach is well illustrated by the Supreme Court's analysis in *Williamson v. Lee Optical*, which affirmed a state law prohibiting opticians from fitting prescription lenses without a prescription.[64] The state argued that its law was designed to protect the health of eyeglass users and thus was within the state's police power. Under a traditional approach, the Court would likely have affirmed the state law simply because it was a traditional and reasonable exercise of the police power. In contrast, under the *Lochner* approach, the Court would have been far more skeptical of the state's assertion of authority and more protective of the right of an optician to practice his or her profession. Nevertheless, because the regulation concerned health, the Court may have still concluded that the state regulation fell on the police power side of the police power–individual rights boundary. Under either approach, that the state law targeted health would have been critical to the case's outcome.

Not so under the New Deal approach. Reacting to the *Lochner*-era Court's willingness to place strict boundaries on the police power in order to protect so-called fundamental rights, the *Williamson* Court went to the opposite extreme, granting even greater deference to the state than the traditionalists did. According to Justice Douglas, "the Oklahoma law may

exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement."[65] As long as there was "an evil at hand for correction, and it might be thought that the particular legislative measure was a rational way to correct it," the state law would be upheld.[66]

The New Deal Court thus differed from the earlier approaches in several critical ways. First, in contrast to *Lochner*, the Court did not see its role as protecting individual rights against the police power. Nor did it put the burden on the state to defend its regulation. Rather, in *Williamson,* the Court held that as long as the state had a rational basis, the legislation would be upheld.

Although the deference the New Deal Court gave to the state bears some resemblance to that accorded by the traditional approach, there are subtle but important differences. Under the traditional approach two questions were critical: did the state purport to pursue a legitimate police power goal, such as the promotion or protection of public health, and if so, did it do so in a reasonable manner?[67] In asking the latter question, the Court did not second-guess the legislature. For example, in *Jacobson v. Massachusetts,* the Court made clear that it would not strike down a statute simply because an alternative public health theory could be presented that questioned the appropriateness of the state's vaccine law.[68] In contrast, after the New Deal, the Court no longer paid much attention to whether the state sought a traditional police power objective. Nor did the Court demand that the statute constitute a reasonable effort to achieve the state's goal. Rather, the Court applied the more lenient rationality standard, under which the statute was found constitutional as long as there was a hypothetical justification for it. Empirical evidence was not essential.

Thus the New Deal Court was far more deferential to state legislatures than earlier courts had been. At the same time, the New Deal approach was also less mindful of the importance of public health to constitutional decision making. After the New Deal, the actual or even potential efficacy or relationship of the state's law to population health was no longer essential or even relevant to the law's constitutionality. At the same time, the language in traditionalist opinions that could be read as endorsing the importance of population health was gone. In effect, all affirmative state goals were treated as the same—merely as outcomes of legislative determinations. Missing was any appreciation of the importance of population

health protection to the development of or justification for the police power. Missing also was an understanding of the role that populations play in framing individual interests and liberties as well as epidemiology's value in helping courts review state infringements on liberty.

Contemporary Due Process Law

The New Deal jurisprudence left major questions unanswered: were there any limits to the police power? If the courts would no longer assume a clear boundary between appropriate, that is, traditional, exercises of the police power and the realm of individual liberty, was there any room left for judicial protection of rights under the due process clause?

Almost immediately it became clear that the answers to both questions were yes. Despite the majoritarianism of the New Deal jurisprudence, the Court did not abandon the due process clause or cease to protect individual rights. Rather, it focused its protection on some favored rights and continued to neglect the importance of population health.

One influential approach to deciding what rights should be protected was offered in *United States v. Carolene Products Co.*, a 1938 case involving a federal rather than state law.[69] In its decision, the Supreme Court rejected a Fifth Amendment due process challenge to a federal statute regulating so-called filled milk. In so doing, Justice Stone inserted his famous footnote 4 that set forth criteria for determining when courts should provide a "narrower scope for operation of the presumption of constitutionality," in other words, for deciding when courts should protect individual rights.[70] Less deference, he suggested, might be appropriate when the legislation "appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments," when the legislation "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or when it is directed at particular racial, religious, or "discrete and insular minorities."[71]

Significantly, the framework that Justice Stone proposed offered no role for an assessment of the nature of the state's goal or its efficacy. Rather, the level of judicial review would depend solely on the nature of the individual or group interest that was infringed upon. To be sure, by suggesting that enhanced judicial review was appropriate when a law was directed at

vulnerable groups, Justice Stone seemed to recognize, as a judge using population-based legal analysis would, that laws can target particular groups. However, what Justice Stone did not see, and what the Court has too often failed to appreciate in the following decades, is that laws that are not aimed at different groups may still have important disparate impacts on different populations. Moreover, populations consist not only of specified and discrete groups, but also varied and overlapping groups.

In the years since *Carolene Products* and the New Deal, the Court largely adopted Justice Stone's footnote 4 suggestion and incorporated most but not all of the rights enumerated in the Bill of Rights into the Due Process Clause of the Fourteenth Amendment.[72] Likewise, under its equal protection analysis, the Court came to apply strict scrutiny to laws that were directed at racial or ethnic minorities.[73] Moreover, as is well known, the Court decided in the 1970s to provide so-called intermediate scrutiny to laws that discriminate on the basis of gender.[74]

More controversial has been the Supreme Court's determination that the due process clause protects other so-called fundamental rights, including the right to privacy.[75] The debate over the Court's fundamental rights jurisprudence has been heated. Some justices and scholars, known often as originalists, have argued that the set of fundamental rights should be limited to those rights recognized by the Framers of the Fourteenth Amendment. Others have argued that the Constitution's text is purposefully open-ended and that it is necessarily the job of courts to look to the broader principles set forth in the Constitution and in the nation's legal heritage, and perhaps even in international legal principles, to determine what rights are fundamental. In the background of these debates are deep cultural and social divisions within society as well as the long-standing controversy about the role of courts in a democratic polity.

For our purposes, these heated debates are less important than that in most cases the key question becomes the nature of the individual claim—does it warrant recognition as a constitutionally protected right—rather than the aim or impact of the state's action on population health. Thus frequently the determination of whether a right is deemed fundamental is effectively dispositive of a case regardless of the law's merits.[76]

For example, in *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach,* the D.C. Court of Appeals considered the claim that a dying individual has a constitutional right under the Due Process Clause

to use investigational drugs that have yet to be licensed by the Food and Drug Administration.[77] The court's majority found against the claimants on theory that there was "no fundamental right . . . of access to experimental drugs for the terminally ill."[78] In reaching this decision, the court looked to the "nation's history, legal traditions, and practices" and emphasized that American governments have historically regulated drugs to ensure safety to individual users.[79] In addition and in full accordance with the post–New Deal approach to the due process clause, the court noted that "the democratic branches are better suited to decide the proper balance between the uncertain risks and benefits of medical technology, and are entitled to deference in doing so."[80] In contrast, the dissent argued that the nation's legal history established a fundamental and personal right of dying individuals to use experimental drugs.[81]

What neither the majority nor the dissent explored was the decision's ramifications for drug safety and thereby the health of different populations. Nor did any of the judges ask whether the FDA's regulatory scheme served to enhance the positive liberty of individuals who require and use prescription drugs. Thus the court never asked whether the law added to or diminished liberty. Rather, the discussion was limited to whether the negative, individual right that the plaintiff to sought to have recognized was fundamental.

Even when courts do not emphasize the fundamental nature of the individual right at issue, they still tend to focus on the individual nature of the claim and harm. For example, in *Lawrence v. Texas*, which struck down laws criminalizing sodomy between consenting adults, Justice Kennedy wrote, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions."[82] Thus although Justice Kennedy did not focus on the fundamental nature of the right at hand, he still emphasized the importance of individual autonomy, rather than the impact of the state's law on an already stigmatized population.[83] In contrast, in dissent Justice Scalia challenged the constitutional worthiness of the individual claim.[84] Arguing that neither history nor precedent supported finding a fundamental right of adults to engage in sodomy, Justice Scalia argued that the law was constitutional merely to express the disdain of the majority of people in Texas for same-sex sodomy. Justice Scalia did not care, however, if the state law failed to

provide any empirically verifiable benefit to any population, nor did he care if laws against sodomy harmed a population. Rather, he would have upheld the law simply because the individual claim was not a historically recognized, fundamental right.[85]

Only occasionally in recent decades have the Supreme Court justices suggested that the relationship between autonomy and state action might be deeper and more complex than is usually portrayed. For example, in *Washington v. Glucksberg*, the majority upheld a state's ban on physician-assisted suicide by concluding that there was no historical or legal basis for finding that an individual had a fundamental right to assistance in committing suicide.[86] In a concurring opinion, however, Justice Souter suggested that the question before the Court could not be resolved simply on the basis of the historical pedigree of the individual's claim: "Just as results in substantive due process cases are tied to the selections of statements of the competing interests, the acceptability of the results is a function of the good reasons for the selections made. It is here that the value of common-law method becomes apparent, for the usual thinking of the common law is suspicious of the all-or-nothing analysis that tends to produce legal petrifaction instead of an evolving boundary between the domains of old principles. Common law method tends to pay respect instead to detail."[87]

Following that advice, Justice Souter looked closely at the rationales for the state's law. Finding that the law helped protect vulnerable patients from involuntary euthanasia, he concluded that the law should be upheld. But he suggested that his conclusion was not necessarily a final one. Because he saw the analysis as depending on facts and contexts that could change, he concluded that the answer as to whether the law was constitutional could change. In effect, the empirical world mattered.

Although distinct doctrinally, Justice Souter's approach in *Glucksberg* has much in common with an earlier line of Supreme Court cases that includes *O'Connor v. Donaldson*,[88] which held that illness alone does not justify commitment, and *Addington v. Texas*,[89] which held that a person cannot be civilly committed unless the state proves by clear and convincing evidence that the individual is dangerous to him- or herself or others. In these cases, which lie at the intersection between substantive and so-called procedural due process, the state unquestionably infringed on an individual's negative liberty. Yet, without ever deciding whether the liberty at issue was fundamental, the Court placed limits on when and how

the state may civilly commit someone. In so doing, the Court effectively recognized that the state's goal matters. Likewise, by stressing in *Addington* the importance of procedural protections to determine whether a particular commitment would meet a state's goal, the Court implicitly accepted that the state's evidence matters. Still, as shall be suggested, these cases fall far short of applying a population approach that looks deeply at the nature of the impact of the state's laws on varying populations.

In many ways, however, the civil commitment cases are an anomaly; they do not represent the core of substantive due process law. The cases that do, such as *Glucksberg*, emphasize the nature of the right of an individual as an individual rather than the relationship between the individual and the multiple populations in which his or her health and well-being is determined. As a result, the question whether a state's law actually promotes or even undermines the health of populations is rarely central to a court's analysis. This means that states have less need to attend to empirical evidence and consider whether a law is actually well suited to the goals its advocates claim. Lawmakers can take credit for protecting public health by enacting laws, such as those that criminalize sexual activity for individuals who are HIV positive or ban partial birth abortions, without having to demonstrate that the laws actually serve their intended purpose.[90] Grandstanding suffices.

In addition, to the extent that judicial doctrines express and inculcate public values, the majoritarianism of the post–New Deal doctrine imparts a problematic message: the improvement of the health of populations is neither a serious nor an important public value. In contrast to earlier cases such as *Slaughter-House*, *Jacobson*, and even *Lochner*, courts today do not treat the advancement of population health as either a central goal of law or a critical factor in constitutional cases. As a result, there is little in contemporary opinions from which to conclude that the Constitution creates any duties, even only moral duties, on the part of states to promote population health.[91]

The result is a doctrine that all too often fails to consider the diversity of populations as well as the negative and positive aspects of liberty. In contemporary due process cases, courts generally defer to the state or focus on an abstract and arid determination of the "fundamentalness" of the individual right. Lost in the fray is the critical recognition that an individual interest does not and cannot stand totally apart from the interests

of the varied populations to which the individual belongs. Lost also is a meaningful assessment of the nature and impact of the state's action on the relevant populations.

A Population-Based Due Process

To see how a population-based legal approach would alter the analysis of cases arising under the Due Process Clause, consider the constitutional status of quarantine. Although public health practitioners distinguish quarantine from the isolation of people who are ill, legal discussions have generally applied the term *quarantine* to any restriction of an individual's movement or contact with others to prevent the spread of an infectious disease. Hence quarantine undeniably limits an individual's negative liberty in the name of public health.

Historically courts have been quick to assume that states have the power to impose a quarantine to prevent the spread of a disease. Indeed, during the traditionalist period, when the scope of the police power was equated with efforts to protect public health, courts were emphatic about the state's power to quarantine. For example, in 1876, the Supreme Court of Maine rejected a constitutional challenge to the removal of a sick child from its mother to a smallpox hospital: "It is unquestionable, that the legislature can confer police powers upon public officers, for the protection of the public health. The maxim *salus populi suprema lex* is the law of all courts and countries. The individual right sinks in the necessity to provide for the public good."[92]

During the mid-twentieth century, after the development of antibiotics and vaccines that proved effective against many infectious diseases, quarantine was less often needed or used. During this period, the post–New Deal approach to the Due Process Clause made the once simple identification of quarantine with the police power an inadequate answer to the question whether quarantine was constitutional.[93]

Surprisingly, under contemporary doctrine, the constitutionality of quarantine remains elusive. On the one hand, quarantine limits a long-recognized, thus likely to be found fundamental, aspect of individual liberty—freedom of movement. On the other hand, the practice of quarantine is well established in the law and no court has questioned that it may be

used under some circumstances. Perhaps for this reason, courts have wisely resisted the temptation to apply the all-or-nothing approach suggested by mainstream substantive due process analysis. Instead, following the lead of the West Virginia Supreme Court of Appeals,[94] modern courts have looked to the civil commitment cases and have focused on two factors: whether the state has afforded the individual with adequate procedural protections and, less often, whether the state has shown that quarantine is the least restrictive alternative.[95]

Although commentators have focused much of their discussion of quarantine on its applicability in a massive public health emergency, such as the type that the MSEHPA was designed to address, much of the case law arises from an epidemic of multidrug-resistant tuberculosis in the early 1990s. At the time, many public health officials attributed the outbreak to the confluence of the HIV epidemic (people who are HIV positive are much more likely to develop active tuberculosis if they are infected), homelessness, the rise of immigration from TB-endemic regions, and the erosion of tuberculosis control programs in earlier years. Worried that some individuals would fail to adhere to the long course of TB treatment and develop and spread multidrug-resistant TB, which is both difficult and costly to treat, officials in many states ordered the quarantine of so-called noncompliant patients.[96]

City of Newark v. J.S. exemplifies how courts handled such cases.[97] J. S. was a homeless African American man who was HIV positive and infectious with tuberculosis. There was evidence that he had previously tried to leave the hospital against medical advice. He had also failed to comply with either infection-control guidelines or his prescribed treatment. In multiple ways he was the type of patient whom public health officials tend to see as creating a menace.

In an interesting and lengthy opinion written after the commitment order had been issued, the New Jersey Superior Court analyzed J. S.'s rights under the Due Process Clause as well as the Americans with Disabilities Act (ADA).[98] In many ways the opinion took a population perspective. First, the court recognized both the legitimacy and importance of the state's goal of preventing the spread of an infectious disease, noting that isolation and quarantine are archetypical exercises of the police power.[99] Thus, in contradiction to the mainline of due process doctrine, the court

did not focus on a determination of whether the state was violating a fundamental liberty. Perhaps more interestingly, and again in contrast to many due process cases, the court emphasized the importance of the public health evidence, noting in its discussion of the ADA claim that though "opinions of public health officials must be respected, their decisions must be based upon the latest knowledge of epidemiology, virology, bacteriology, and public health."[100] The court thus made clear that the scientific evidence mattered. The legal outcome did not depend simply on the legal categories given to the state's power or the individual's claim.

Most important, in deciding that both the Due Process Clause and the ADA permitted the state to quarantine J. S. only if that was the least restrictive alternative, the court noted the complex and complementary relationship between the promotion of population health and the advancement of liberty: "Good public health practice considers human rights so there is no conflict. Since coercion is a difficult and expensive means to enforce behaviors, voluntary compliance is the public health goal. Compliance is more likely when authorities demonstrate sensitivity to human rights."[101] To ensure such sensitivity, the court held that J. S. was entitled to the procedural guarantees generally provided to people who were committed due to mental illness. In addition, the court clarified that J. S. could not be medicated against his will and could be detained only until he had three negative sputum tests in a row. Once he was no longer infectious, he had to be released.

By seeking a middle ground that attempted to reconcile individual rights with public health protection, and by recognizing that the former may advance the latter, the court's opinion in *J.S.* provides a starting point for a viable population-based approach to the relationship between individual liberty and protection of population health. But it is only a starting point.

In contrast to the New Jersey court in *J.S.*, and indeed to almost all courts that have considered quarantine cases in recent years,[102] a population-based analysis would look more skeptically at the state's claim that it was seeking to protect the public's health, questioning the assumption that the state was acting on behalf of and in furtherance of the interests of the public, as if there were a single population facing a single, unified risk. In fact, there were different populations that faced very different risks and J. S. was a member of many of the populations most at risk. Thus the

question should not have been whether detaining J. S. protected the public, but rather whether it was the least restrictive way of helping those populations at the greatest risk of TB. From a population perspective, this question is critical not only because it keeps courts mindful of the dangers of invidious discrimination (a very real danger in the case of detaining noncompliant TB patients),[103] but also because it also reminds courts that conflicts that are perceived to pit the rights of lone individuals against the public are seldom that simple. More often, as was true in *J.S.* and in most litigated quarantine cases, different communities have different interests, values, and risks. Thus when a state claims that a law is enacted to protect the public's health, caution is in order.

This caution does not mean that courts adopting a public health perspective should disregard the presumption of constitutionality granted to acts of the legislature. In a democratic system the laws enacted by legislative bodies must be taken prima facie as the actions of the public even if they really are merely the actions of the majority or the political winners. Legislation always has winners and losers. This reality is the strongest justification for the highly deferential form of review exemplified by *Williamson v. Lee Optical*.

Nevertheless, though a recognition that there are multiple populations differentially situated with respect to any exercise of the police power should not legitimize the judiciary's casual disregard of the democratic process, it should lead courts to ask if the population whose liberty is denied receives a benefit, or an increase in their positive liberty from the deprivation. In the case of J. S., the relevant question is whether the communities at high risk for TB are the ones who would benefit from his isolation. Another question is whether those who might be isolated would receive benefits, such as medical care for all their health needs, while they were isolated. Or is one population seeking to externalize the costs of reducing its risks by disregarding the interests of another, more vulnerable population? In effect, is a population at relatively low risk of contracting TB seeking to further lower its risk by imposing the high cost of detention on others who are already at greater risk?[104] If so, the reconciliation between rights and public health that the *J.S.* court lauded might not be so simple. Indeed, unless there were a significant overlap between the population benefited and that harmed, neither a social compact nor Rawlsian perspective could support the deprivation of liberty, because an individual

behind a veil of ignorance would not limit his or her autonomy for the good of a group to which he or she does not belong.[105]

Implicit in this discussion is the critical premise that liberty must be understood in both its negative and positive components and that both are appropriately part of a due process analysis. In other words, if we accept that protection of population health is not only a positive good but, as Justice Harlan pointed out in *Jacobson,* a critical rationale for the empowerment of the state, and that it is the role of the courts to review denials of liberty under the Due Process Clause, then a court should be obliged to consider whether or to what extent the challenged state action has deprived an individual of both negative and positive liberty. This suggests that deprivations of negative liberty can, in a sense, be offset by increases in positive liberty. Conversely, as suggested, if the state deprives an individual or population of negative liberty to protect the health or safety of other populations, there can be no positive liberty gained to justify the deprivation of negative liberty.

This discussion points to another way in which a population-based approach would part company from the analysis offered by the *J.S.* court. In *J.S.*, the court assumed that isolation was the least restrictive alternative because J. S. was infected with active TB and was homeless. (Indeed, the court suggested that a different outcome might have been in order had J. S. had a home to go to.) By so doing, the court applied the least restrictive alternative test narrowly, taking J. S.'s social environment as a given, ignoring what the state could or should do to change that environment.

But from a population perspective, this approach is unduly restricted. It locates the source of risk in the actions or choices of a single, noncompliant individual, such as J. S., but ignores the social factors that make it difficult for populations to adhere to their medication regime. It also fails to ask whether the detention of one individual would in fact help or harm the health of others. For example, if both HIV status and homelessness were significant risk factors for TB, a truly less restrictive and more effective policy might provide housing for homeless HIV patients. Such a policy, by reaching a broader population, and working with rather than against those who are at risk for TB, might lead to a greater reduction in the prevalence of TB than would the detention of a few people like J. S. At the least, a court could and should find that the absence of such truly less restrictive

policies raises serious questions about whether the detention of any particular individual such as J. S. is in fact well suited to reducing the threat to the population's health.

Hence, from a population perspective, the question that must be asked is not whether there is a less restrictive way to reduce the risk posed by any one individual, but whether any feasible intervention is less restrictive of negative liberty and more supportive of positive liberty. To answer that question courts would have to consider the broad social factors that may affect both the risk posed by the individual and the efficacy of the state's chosen approach to protect public health. For example, in *Best v. St. Vincent's Hospital,* a federal magistrate suggested that directly observed therapy (DOT), a policy that requires TB patients to take their medication under observation, was a less restrictive way of reducing the risk of TB than was quarantine.[106] Although the court did not explicitly demand that DOT be made available before the state could quarantine an individual who was infected with TB, the court's opinion supports the inference that the imposition of a quarantine in the absence of less restrictive population approaches such as DOT would be constitutionally problematic.

Thus a court can and should inquire about the existence of broader, population-based alternatives before quickly affirming the imposition of a highly coercive measure on any particular individual. Although such an examination may well lead courts to the outer boundaries of their own institutional competence, raising questions that the New Deal Court sought to avoid about public health policies and the allocation of state tax dollars,[107] courts can and, from a population perspective, should nevertheless do what courts have always done: consider the appropriateness of any individual confinement. In so doing they would not establish or demand any particular alternative population-based program, but they would require states to recognize and address the broader nature of a problem before shifting the burden of prevention to any particular vulnerable person. Thus a mandatory quarantine for pandemic influenza or a bioterrorism event may be more constitutionally defensible if the government has put in place other less restrictive policies, such as stockpiling vaccines and providing income supports for people who stay at home, than if the government responds merely by confining some individual or group that has been exposed to the pathogen.

Finally, to ensure the reciprocity and trust that support population health, a population-based approach to quarantine or any due process case would put a premium on three related attributes: accountability, transparency, and participation. Although population health protection sometimes requires governments to limit negative liberty, courts under a population approach would look to see if the populations affected are treated as participants and stakeholders in interventions that affect their health and liberty. This would necessitate that restraints on liberty be transparent and justifiable to the populations most affected.

Judicial review, by providing a forum to contest police power actions, offers one important forum for such dialog and accountability. But courts can and should encourage the establishment of better and richer forums. For example, instead of interpreting the Due Process Clause as demanding only individual hearings when constitutionally recognized rights are abridged, courts applying a population-based perspective might find that coercive public health policies developed in the open and with the participation of affected communities are entitled to greater deference than those formulated less transparently and inclusively.[108]

In addition, under a population-based approach, the court's examination of the nature and impact of the state law on populations would consider empirical evidence on the nature of the state's goal and the potential efficacy of its approach to the populations at issue. In effect, the stringency or bite of review would depend on multiple factors, including the importance and nature of the state interest, the strength of the individual and group interest, and the extent to which the state offers a positive benefit to the individual or group that alleges harm. Thus judicial review would not be tiered, but would instead, as Justice Souter suggested in *Glucksberg,* be applied along a continuum. The most deferential form of review would be applied when the state has the most critical interests and the individual the most trivial. Alternatively, courts would apply the most the stringent review when the state interest is the least apt to benefit the affected population and the individual interests are substantial. Although the recognition of this spectrum would defy easy predictability, there is no reason to assume that this approach would be more indeterminate than the current doctrine's query as to whether the rights claimed are fundamental.

Moreover, in time, a population-based analysis would lead to the development of a body of law that could help to define the necessary and proper

goals for states. This enterprise would necessarily be normative and presuppose that promotion of population health is an appropriate, indeed critical, goal for a political entity. But it would also be empirical and would appreciate that not all laws purporting to protect population health are in fact well designed to do so.

Finally, the population approach would reframe the debate about public health and individual rights. Rather than emphasizing, as the conventional view does, the many conflicts between individuals and public health, it would stress the ways in which individual and population interests coincide. By recognizing that law can provide a forum for debate, discussion, and dialog on how the well-being of diverse and often disagreeing populations can be advanced, while providing judicial review to ensure that actions taken in the name of population health have some possibility of achieving that goal, a population-based approach to due process law may help promote policies that are both more effective and less restrictive of individual rights than those emphasized since 9/11.

Notes

1. The Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities, *The Model State Emergency Health Powers Act* (Dec. 21, 2001), http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf (last visited Oct. 10, 2008). In support of the Model Act, see Lawrence O. Gostin et al., *The Model State Emergency Health Powers Act: Planning for and Response to Bioterrorism and Naturally Occurring Infectious Diseases*, 288 JAMA 622, 622 (2002). For an example of criticism of the act, see George J. Annas, *Bioterrorism, Public Health, and Civil Liberties*, 346 N. Eng. J. Med. 1337 (2002).

2. For a discussion of the SARS outbreak and the issues it raised in the United States, see Mark Rothstein, *SARS, Public Health, and Global Governance: Are Traditional Public Health Strategies Consistent with Contemporary American Values?*, 77 Temp. L. Rev. 175 *passim* (2004).

3. David Brown, *Military's Role in Flu Pandemic: "Troops Might Be Used to Effect a Quarantine," Bush Says*, Washington Post, Oct. 5, 2005, at A-05.

4. 70 Fed. Reg. 71, 892, 71, 903 78192 at § 70.16 (Nov. 30, 2005).

5. *See* Wendy E. Parmet, *Perspective: Legal Power and Legal Rights: Isolation and Quarantine in the Case of Drug-Resistant Tuberculosis*, 357 N. Eng. J. Med. 433, 433 (2007).

6. *Id.*

7. For a fuller discussion of quarantine, see Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53, 55–71 (1985).

8. James Colgrove and Ronald Bayer, *Manifold Restraints: Liberty, Public Health and the Legacy of Jacobson v. Massachusetts*, 95 AM. J. PUB. H. 571, 575 (2005).

9. Lawrence O. Gostin, *The Model State Public Health Powers Emergency Act: Public Health and Civil Liberties in a Time of Terrorism*, 13 HEALTH MATRIX 3, 13 (2003).

10. Parmet, *supra* note 5, at 433.

11. Lawrence O. Gostin, *When Terrorism Threatens Health: How Far Are Limitations on Personal and Economic Liberties Justified?*, 55 FLA. L. REV. 1105, 1147 (2003).

12. *Id.* at 1148 (citation omitted).

13. For a discussion of the drug-resistant TB problem, *see* WHO/IUATLD Global Project on Anti-Tuberculosis Drug Resistance Surveillance, *Anti-Tuberculosis Drug Resistance in the World,* Report No. 4 (2008), http://www.who.int/tb/publications/2008/drs_report4_26feb08.pdf (last visited Oct. 10, 2008).

14. Matthew Lippman, *War Crimes Prosecutions of Nazi Health Professionals and the Contemporary Protection of Human Rights*, 21 T. MARSHALL L. REV. 11, 14–21 (1995).

15. WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 3–25 (1995).

16. U.S. Public Health Service, U.S. Dep't of Health, Education and Welfare, *Final Report of the Tuskegee Syphilis Study Ad Hoc Advisory Committee* (1973).

17. NAYAN SHAH, CONTAGIOUS DIVIDES: EPIDEMICS AND RACE IN SAN FRANCISCO'S CHINATOWN 120–57 (2001).

18. *Workmen Vaccinated,* BOSTON HERALD, Mar. 16, 1902, at 10.

19. *See* chapter 1, *supra*.

20. Keith Tones, *Health Promotion, Health Education and the Public Health,* in 1 OXFORD TEXTBOOK OF PUBLIC HEALTH (R. Detels et al. eds., 4th ed. 2002). *See also* George Dock, *Compulsory Vaccination, Antivaccination, and Organized Vaccination*, 133 A.J. MED. SCIENCES 218 (1907).

21. Scott Burris, *Public Health, 'AIDS Exceptionalism' and the Law*, 27 J. MARSHALL L. REV. 251, 259–61 (1994).

22. Ronald Bayer, *Public Health Policy and the AIDS Epidemic: An End to AIDS Exceptionalism?*, 324 N. ENG. J. MED. 1500, 1501 (1991).

23. Burris, *supra*, note 21, at 254–58.

24. George J. Annas, *Puppy Love: Bioterrorism, Civil Rights, and Public Health*, 55 FLA. L. REV. 1171, 1179 (2003).

25. PATRICIA ILLINGWORTH, TRUSTING MEDICINE: THE MORAL COSTS OF MANAGED CARE 94 (2005).

26. Thomas A. Glass & Monica Schoch-Spana, *Bioterrorism and the People: How to Vaccinate a City against Panic*, 34 CLINICAL INFECTIOUS DISEASES 217, 221 (2002) (emphasis omitted).

27. Judith W. Leavitt, *Public Resistance or Cooperation? A Tale of Smallpox in Two Cities*, 1 BIOSECURITY AND BIOTERRORISM 185, 185 (2003).

28. Lesley A. Jacobs, *Rights and Quarantine during the SARS Global Health Crisis: Differentiated Legal Consciousness in Hong Kong, Shanghai and Toronto*, 41 LAW & SOC'Y REV. 511, 529 (2007).

29. Jonathan M. Mann, *Medicine and Public Health, Ethics and Human Rights*, 27 HASTINGS CTR. REP. 6, 6–14 (1997). For a further discussion of human rights, see chapter 10, *infra.*

30. NORMAN DANIELS, BRUCE KENNEDY AND ICHIRO KWACHI, IS INEQUALITY BAD FOR OUR HEALTH? 3–33 (2000).

31. *Id.*

32. Rothstein, *supra note* 2, at 182–92.

33. C. B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 3 (1962).

34. JOHN STUART MILL, ON LIBERTY 13 (Currin V. Shields ed., 1956).

35. For further discussion of the role of positive rights in population health, see chapter 6, *infra.* The argument here is related but not identical to that developed in chapter 1 as to why promoting population health is a positive social good.

36. William J. Novak, *Governance, Police, and American Liberal Mythology*, *in* PUBLIC HEALTH LAW AND ETHICS: A READER 186, 187 (Lawrence O. Gostin ed., 2002).

37. 23 Mass. 187 (1828).

38. *Id*. at 190–91.

39. *Id*. at 192.

40. 61 Mass. (7 Cush.) 53 (1851).

41. *Id*. at 85.

42. *Id*. at 86.

43. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 246–48 (4th ed. 2000).

44. U.S. CONS'T Amend. V.

45. 83 U.S. (16 Wall.) 36 (1873).

46. *Id*. at 74.

47. *See, e.g.*, David Currie, *The Constitution in the Supreme Court: Limitations on State Power, 1865–1873*, 51 U. CHI. L. REV. 329, 348 (1984).

48. 83 U.S. at 62.

49. *Id*.

50. *Id*. at 66.

51. *Id*. at 62 (quoting JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW, at 340).

52. *Id*. at 63.

53. Wendy E. Parmet, *From Slaughter-House to Lochner: The Rise and Fall of the Constitutionalization of Public Health*, 40 AMER. J.L. HIST. 476, 481–86 (1996).

54. 83 U.S. at 87 (Field, J., dissenting).

55. *Id*.

56. *Id*. at 105

57. *Id*. at 112, 116 (Bradley, J., dissenting).

58. 197 U.S. 11, 26 (1905).

59. *See* Lawrence O. Gostin, Public Health Law: Power, Duty, Restraint 123 (2d ed. 2008) (discussing Jacobson v. Massachusetts).

60. *See* 197 U.S. at 27.

61. Lochner v. New York, 198 U.S. 45 (1905); *see* chapter 2, *supra.*

62. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

63. *See* chapter 2, *supra.*

64. 348 U.S. 483 (1955).

65. *Id.* at 487.

66. *Id.* at 488.

67. Jacobson v. Massachusetts, 197 U.S. at 25.

68. *Id.* at 30.

69. United States v. Carolene Products Co., 304 U.S. 144 (1938). For a discussion of the importance of *Carolene Products,* see John Hart Ely, Democracy and Distrust 75 (1980).

70. 304 U.S. at 152–53 n.4.

71. *Id.*

72. Lawrence H. Tribe, American Constitutional Law 772 (2d ed. 1988).

73. Korematsu v. United States, 323 U.S. 214 (1944).

74. Craig v. Boren, 429 U.S. 190 (1976).

75. Planned Parenthood v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973).

76. *E.g.*, Washington v. Glucksburg, 521 U.S. 702 (1997). This is not always so. In *Gonzales v. Carhart*, 550 U.S. __, 127 S.Ct. 1610 (2007), the Supreme Court upheld the Partial-Birth Abortion Act without denying that a right to an abortion was fundamental. The Court reached its decision in part based on the view that the Act did not in fact infringe upon the protected right. Interestingly, the Court also stated that courts should defer to legislative determinations in the face of medical uncertainty. *See id*. at 1636.

77. 495 F.3d 695 (D.C. Cir. 2007) (en banc).

78. *Id.* at 697.

79. *Id.* at 703–10 (quoting Washington v. Glucksberg 521 U.S. 702, 710 (1997)). The court also rejected the contention that the common law defenses of self-defense and necessity evidenced a fundamental right to take experimental drugs in the face of death.

80. *Id.* at 713. Interestingly, the court cited *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905) for that proposition.

81. 495 F.3d. at 714, 714–22 (Rogers, J., dissenting).

82. 539 U.S. 558, 562 (2003).

83. Although Justice Kennedy spoke of stigma, his concern was clearly placed on the stigma that private individuals suffered as a result of the criminalization of their private behavior. The focus remained on the individual nature of the harm. *See id*. at 575.

84. *Id. at* 586, 594–99 (Scalia, J., dissenting).
85. *Id. at* 594–99.
86. Washington v. Glucksberg, 521 U.S. 702 (1997).
87. *Id.* at 752, 770 (Souter, J., concurring).
88. 422 U.S. 563 (1975).
89. 441 U.S. 418 (1979).
90. *See* Gonzales v. Carhart, 550 U.S. 124 (2007).
91. *See* chapter 6, *infra.*
92. Haverty v. Bass, 66 Me. 71, 73–74 (1876).
93. Parmet, *supra* note 6, at 75–77.
94. Greene v. Edwards, 263 S.E.2d 661 (W. Va. 1980).
95. Although there is strong reason to believe that the Constitution permits the quarantining of individuals only when it is the least restrictive alternative, there is no authoritative appellate court opinion so holding and many of the quarantine cases rely on state statutory grounds. For a fuller discussion of quarantine law, see Michelle A. Daubert, *Pandemic Fears and Contemporary Quarantine: Protecting Liberty Through a Continum of Due Process Rights*, 54 BUFF. L. REV. 1299 *passim* (2007).
96. Karen H. Rothenberg and Elizabeth C. Lovoy, *Something Old, Something New: The Challenge of Tuberculosis in the Age of AIDS*, 42 BUFF. L. REV. 715, 730–31 (1994).
97. 652 A.2d 265, 267–68 (N.J. Super. Ct. Law Div. 1993).
98. 42 U.S.C. §§ 12101–213.
99. 652 A.2d at 271.
100. *Id.* at 274.
101. *Id.* at 276.
102. *E.g.*, City of New York v. Antoinette R., 630 N.Y.S.2d 1008 (N.Y. Sup. Ct. 1995); City of New York v. Doe, 614 N.Y.S.2d 8 (N.Y. App. Div. 1994).
103. Daniel Markovits, *Expert Testimony: Bridging Bioethics and Evidence Law: Quarantines and Distributive Justice*, 33 J.L. MED. & ETHICS 323, 323 (2005).
104. For a fuller discussion of the distributive impact of quarantine, see *id.*
105. JOHN RAWLS, A THEORY OF JUSTICE, 136–42 (1971).
106. 2003 U.S. Dist. Lexis 11354 (S.D.N.Y. 2003).
107. For a fuller discussion of the institutional competence issues raised by this discussion, see chapter 6, *infra.*
108. This suggestion reflects traditional understandings that legislation enacted by a democratically accountable body is entitled to greater deference than administratively promulgated regulations, whereas administrative regulations that have been subject to a publicly open process, and hence are quasi-legislative, are entitled to greater deference than informal, interpretative regulations that have not been subject to public input.