Tuberculosis Quarantine: A Review of Legal Issues in Ohio and Other States

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The increase in tuberculosis cases in the United States in recent years has led to a major reconsideration of long-dormant public health strategies. Isolation of contagious persons, whether at home or in treatment facilities is one of the measures receiving renewed attention. Public health and legal authorities must reassess these measures from the point of view of their necessity, utility and constitutionality. The law currently in force in Ohio originated before expanded protection of civil liberties. If Ohio public health officials find it necessary to use existing quarantine procedures with tuberculosis patients they will be on shaky constitutional ground. As a consequence Ohio law will need to be modernized. This Note considers relevant federal and state law to inform a discussion of Ohio law.

I. TUBERCULOSIS AS A DISEASE

Tuberculosis was a principal cause of death worldwide through the World War II era. Tuberculosis (TB) is a bacterial infection which may occur in different parts of the body, but it is most common and most infectious in the lungs. It is possible to have TB in a latent and an active state. When the disease is latent, tuberculosis bacilli are present in the body but are held in check by the immune system. The bacteria do not cause symptoms and the infected


2Id. at 118.

person does not communicate TB to other people. A recent statement by the Office of Technology Assessment estimates that 10 to 15 million Americans have TB in this latent state.\(^4\) People with latent TB may develop active infections years after their first exposure.\(^5\)

To transmit TB, a person must be in an actively infectious state. During an episode of active infection TB bacilli in the lungs may be spread through the air by talking, coughing or sneezing. A microscopic mist of secretions containing the bacilli is injected into the air.\(^6\) The droplets may persist in the air for hours. They may be breathed in by anyone else breathing the same air.\(^7\)

Not everyone exposed to active TB will contract the disease. A number of factors influence the likelihood of infection. They include the efficiency of the ventilation system in changing the air, the degree of contagiousness of the infected person, closeness and frequency of contact with the infected person, and whether the exposed person has a healthy immune system.\(^8\) The seriousness of the illness will likewise vary with the person’s general state of health, whether they get prompt and continuous treatment, and whether they are infected with a drug-resistant strain of the bacteria.

In general, sitting in the same movie theater or on the same bus as someone with infectious TB will not be sufficient to cause most people to become infected. Sitting in the same office every day or sharing living quarters may well be sufficient to transmit infection.\(^9\)

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\(^4\)OTA Report Says TB on Rise, Climbing 20 Percent Since 1985, 1 HCPR (BNA) No. 32, at D-52 (October 18, 1993).

\(^5\)The recent case of School Bd. of Nassau County v. Arline concerned a teacher who had TB before she was employed in 1966 by the Nassau County (Florida) school system. 480 U.S. 273 (1987). From 1977 to 1979 she had three episodes of active TB and was dismissed from her job as a result. She sued under the Rehabilitation Act of 1973, \([\text{hereinafter Act}]\), alleging that she was a handicapped person under the meaning of the Act. \(\text{Id.} \) at 273. She also contended that she was "otherwise qualified" for her teaching job. The Supreme Court agreed with her that her infection was a qualifying handicap. They remanded the case to the district court for a determination of whether she was otherwise qualified and reasonable accommodations could be made to enable her to continue in her job. \(\text{Id.} \) at 288.

\(^6\)Gittler, \(\text{supra} \) note 1, at 109.

\(^7\)Id.

\(^8\)\(\text{Id.} \); see also Reilly, \(\text{supra} \) note 3, at 106.

\(^9\)Gittler, \(\text{supra} \) note 21, at 109. In one study about 7% of people who became ill in a year had contact with infectious persons. The rest experienced relapses of previous infections. Reilly, \(\text{supra} \) note 3, at 105.

When the author was working on this Note she had a chance conversation in a restaurant. One of the staff asked what the research was about. He volunteered the following story: a former employee at his regular office job had TB. A police officer visited the workplace. The officer advised the employee to be treated immediately in a hospital, or he would be involuntarily quarantined. A quarantine proceeding like the one threatened is currently legal in Ohio as in many other states. Ohio law will be examined in some detail, \(\text{infra} \) section IV.
Effective antibiotics against TB were developed in the 1950's.\textsuperscript{10} As a consequence the number of people in the United States who had the disease and the number of people who died of it dropped dramatically. In 1953, the rate of tuberculosis cases per 100,000 population was 53, with a death rate of 12.4/100,000. In 1974, the case rate had gone down to 14.2/100,000 and the death rate to 1.7/100,000.\textsuperscript{11} (See infra Table 1).

Table 1

<table>
<thead>
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<th>YEAR</th>
<th>NUMBER OF CASES</th>
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<tr>
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<td>Number</td>
<td>Rate</td>
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<tr>
<td>1974</td>
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</tr>
<tr>
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<td>22,201</td>
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<td>26,283</td>
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<tr>
<td>1992(*)</td>
<td>26,673</td>
<td>10.5</td>
</tr>
<tr>
<td>1993(*)</td>
<td>25,287</td>
<td>9.8</td>
</tr>
</tbody>
</table>

* Deaths and related statistics are considered provisional for these years because they are derived from a sample of death certificates.\textsuperscript{12}

The national TB case rate began to climb in the 1980's. Most years since 1985 have recorded an increase. Provisional statistics for 1993 record a decrease in the rate of TB infection, but an increase in the death rate.\textsuperscript{13}

Tuberculosis has re-emerged as a serious public health problem in recent years for a number of reasons. The disease is found more frequently in urban

\textsuperscript{10} Reilly, supra note 3, at 104.

\textsuperscript{11} Centers for Disease Control and Prevention (CDC), Reported Tuberculosis in the United States, 1993. October 1994 (Table 1, p. 3). [hereinafter CDC. Reported Tuberculosis].

\textsuperscript{12} Id. These figures are excerpted from the table.

\textsuperscript{13} Id. The decrease could mean either that people are getting less effective treatment or that the bacilli are becoming more resistant to available treatments, or both. However, statistics for June 1994 suggests that changes in the way numbers are reported may be the cause of the decline rather than actual changes in the number of people who are ill. Number of New Tuberculosis Cases Down For First Time Since 1986 CDC Says, 2 HCPR (BNA) No. 24, at D-43 (June 13, 1994); See also CDC. Reported Tuberculosis, supra note 11, at 34.
areas, among minority populations, immigrants and the homeless. These communities experience higher rates of TB as a consequence of crowded living conditions and substandard health care. Any increases in inner-city poverty or decreases in access to health care also contribute to rising TB rates. Crowded institutional settings have become likely sites for TB transmission. Serious outbreaks have occurred in prisons, homeless shelters, health care facilities and schools. Increased immigration from regions in which there is little TB testing and treatment (e.g. Southeast Asia) is another factor. People who are infected with the Human Immunodeficiency Virus (HIV) or who have Acquired Immune Deficiency Syndrome (AIDS) are extremely vulnerable to tuberculosis. The HIV-infected population is a locus of TB infection.

Public health experts also attribute increases in TB to reduced government funding for health care. In the 1970's and 80's, "[f]unding was cut to zero . . . TB [is] a labor-intensive disease to treat[,] If . . . you remove the infrastructure . . . you will have a public health disaster." The infrastructure in question includes local health clinics, other forms of public health outreach and research facilities.

If it were possible to treat all infected persons with the medically indicated course of antibiotics, the problem would be less grave than it is. To become non-contagious, persons who are actively infected must take medication daily for about two weeks. In some cases, even while in a non-infectious state, those persons should continue to take medication for at least 6 months. Failure to do this makes the patient more likely to have a relapse into an actively infectious state, and to develop multi-drug resistant TB (MDR-TB).

Many of the people who have TB have little routine access to health care. They may lack health insurance but may not qualify for government sponsored programs. If they qualify for government assistance, they may have difficulty getting to clinics. Because of mental illness or drug and alcohol abuse some TB sufferers are not capable of taking medication on a regular basis for an extended period.

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15CDC. Reported Tuberculosis, supra note 11, at 4; see also Gittler, supra note 1, at 107.

161 HCPR (BNA) 32, supra note 4, at D-53.

171 HCPR (BNA) 39, supra note 14, at D-39. The same expert, Director of the National TB Center at University Hospital in Newark, N.J. also said "[t]his is the largest killer worldwide which is totally preventable . . . [W]e cannot let this genie out of the bottle again." Id. at D-45.

18Id.

19Id. at D-110-11; see also Reilly, supra note 3, at 107-08.
period of time. Side effects and drug reactions may discourage people from taking the medication.\textsuperscript{21}

As with any other bacterial infection antibiotic-resistant strains can develop when people take less than the indicated amount of their medication. Any time a patient relapses after failing to complete treatment, he or she is fighting bacilli which survived the previous round of antibiotics.

MDR-TB is a much greater burden on the health care system than non-resistant TB.\textsuperscript{22} It is more costly in lost productivity because it takes longer to treat. It is much more expensive to treat. It costs about $15,000 to treat someone with TB which responds to the most common antibiotics over a period of six months. Treatment for MDR-TB costs about $150,000, lasts as long as two years and the cure rate decreases from about 100\% to under 60\%. In MDR-TB outbreaks studied by the CDC from 1990-92, the death rate was 43\% - 89\%.\textsuperscript{23}

Drug-resistant TB may move into the mainstream through workplace exposure to TB carriers. A prison guard who had been exposed to MDR-TB on the job was unable to be cured and died of the disease.\textsuperscript{24} Hospital staffs and other health care workers are at risk, as are teachers in poor urban school systems and the staff of homeless shelters and other congregate living facilities.

\textbf{A. Contemporary Approaches to Controlling Tuberculosis}

Quarantine is the most drastic of a number of measures used to control infectious disease. Revival of quarantine was initially considered as a possible public health measure in reaction to the HIV/AIDS epidemic.\textsuperscript{25}

Quarantine is a much more plausible method for combating TB than AIDS for three reasons. TB is transmitted through the air, so restricting the movements of carriers would restrict the spread of contagion.\textsuperscript{26} Patients who follow appropriate treatment have an overwhelming likelihood of recovery, at least in cases of non-resistant infection. Patients who do not complete treatment contribute to the development and spread of MDR-TB.\textsuperscript{27} There are therefore medical and public policy reasons to ensure that people complete treatment.

\textsuperscript{21}Reilly, \textit{supra} note 3, at 109.

\textsuperscript{22}CDC. \textit{Tuberculosis Control Laws, supra} note 14, at 2.

\textsuperscript{23}Id. The outbreaks discussed in the study were in hospitals and corrections facilities.

\textsuperscript{24}HCPR (BNA) No. 39, \textit{supra} note 14, at D-39.

\textsuperscript{25}Wendy E. Parmet, \textit{AIDS and Quarantine: The Revival of an Archaic Doctrine}, 14 \textit{HOFSTRA L. REV.} 53, 54 (1985). As the public developed a better understanding of the manner in which HIV is transmitted, calls for the quarantining of AIDS patients diminished. A similar combination of legitimate concern, hysteria, prejudice and politics seems to have motivated some of the historical measures discussed at Part II \textit{infra}.

\textsuperscript{26}Gittler, \textit{supra} note 1, at 109.

\textsuperscript{27}1 HCPR (BNA) No. 39, \textit{supra} note 14, at D-39.
Quarantine may be an effective way to accomplish this. In *Controlling Resurgent Tuberculosis*, Gittler discusses compulsory TB control measures considered necessary for the health of the community and the individual. In *Combating the Tuberculosis Epidemic*, Reilly examines in detail two new initiatives in New York City designed to maximize completion of treatment. The measures under consideration include both voluntary and compulsory directly observed therapy (DOT) and quarantine. In DOT patients take their medication under direct supervision. Public health workers may go where the patients are (e.g. a shelter). Patients may be encouraged to come to a clinic. Car fare, food and other facilitators may be offered with DOT, particularly in neighborhoods with high poverty rates.

As an alternative to more drastic measures like quarantine a patient may be ordered to come in for DOT. Experts still believe, however, that quarantine is necessary in some cases. If patients demonstrate that they are unable or unwilling to be treated through DOT this could be the basis for a quarantine order.

The next section examines relevant law at the national and state level.

II. QUARANTINE LAW

A. Statutory Law

There are two principal sources of current legal thinking on quarantine for contagious diseases. The first originates in the law of quarantine itself. The second concerns civil commitment adjudication. Quarantine laws are limited to controlling infectious diseases. Civil commitment laws govern incarceration when people are a danger to themselves or others, are mentally ill and unable to care for themselves, or present a danger to others because they spread infectious disease.

Before antibiotics, quarantine was important in preventing the spread of infection. Since it was not possible to attack bacterial causes of disease directly, sources of disease had to be kept away from other people. According to a

28 CDC. *Tuberculosis Control Laws*, supra note 14, at 6-9.

29 See generally Gittler, supra note 1.

30 See generally Reilly, supra note 3.

31 Id.


33 Quarantine is used in more than one sense. It may mean the isolation of infected or exposed persons. It may also refer to the court-ordered removal of infected persons to treatment facilities (also called commitment). The following definition comes from In re Halko: "[T]he verb ‘quarantine’ means ‘to keep persons, when suspected of having contracted or been exposed to an infectious disease, out of a community, or to confine
recent study in the *Journal of the American Medical Association*, many state statutes which address the control of contagious diseases have been on the books since the turn of the century.\(^{34}\) The leading case on quarantine, *Jacobson v. Massachusetts* was decided in 1905.\(^{35}\) Even more recent statutes were enacted forty years ago. Only ten states have substantially changed their TB-related law within the last few years.\(^{36}\)

The public health powers in state statutes include: compulsory examination and treatment, emergency detention and quarantine. Quarantine may be defined as either in-home isolation or commitment to state facilities. These measures are accomplished through public health orders or court orders. Some states have civil and/or criminal penalties for failing to comply with a such an order.\(^{37}\) Other statutes do not spell out penalties.

Some statutes define which diseases are contagious and therefore subject to quarantine regulations. Others authorize state health departments to decide which illnesses are contagious. Some empower public health authorities to make quarantine or isolation decisions without any direction as to illnesses or conditions.\(^{38}\)

Thirty-three states permit authorities to isolate people in their homes. In most cases there are no due process protections specified out in the law.\(^{39}\)

Forty-two states permit commitment to treatment facilities. Thirty-six states require a court order to commit someone to a facility. Several do not require a court order or a hearing.\(^{40}\) Generally court orders will be initiated by a petition from public health authorities requesting a hearing. Written notice to the person concerned is usually required, but the hearing may be held with or without the patient. Only thirteen states explicitly grant the right to be

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\(^{34}\) Costin, *supra* note 32, at 255.

\(^{35}\) 197 U.S. 11 (1905).

\(^{36}\) Costin, *supra* note 32, at 255.

\(^{37}\) *Id.* at 259. See generally CDC. *Tuberculosis Control Laws, supra* note 14; Annotation, *General Delegation of Power to Guard Against Spread of Contagious Disease*. 8 A.L.R. 836, 837-39 (1920) [hereinafter *General Delegation of Power*].

\(^{38}\) Standards range from specific (refusing to be treated, exposing others to disease) to general (public health threat). Costin, *supra* note 32, at 259. Until recently, courts upheld quarantine actions with minimal scrutiny even when the regulations or their implementation were arbitrary and overbroad. Reilly, *supra* note, 3.

The Annotation describes the state of these regulations in 1920. There is not a great deal of difference in content or procedure today. *General Delegation of Power, supra* note 37, at 837-38.

\(^{39}\) CDC. *Tuberculosis Control Laws, supra* note 14, at 7; *see also* Costin, *supra* note 32, at 259.

\(^{40}\) Costin, *supra* note 32, at 258.
represented by counsel in any part of the proceedings. Of these, eleven will provide counsel to indigent individuals.  

Release is accomplished when a determination is made that the person is no longer a threat to the public health, or no longer infectious. Some statutes specify criteria for release which may be vague ("no longer a danger to the public health") or specific (evidence in sputum tests that the person is no longer actively contagious). Ten states have no statutory time limits on the length of time a patient may be held without discharge or recommitment. In many states the only explicit due process protection afforded persons who are quarantined is the opportunity to petition the court for release.  

In section III, infra, the due process protections of civil commitment law will be considered as they might apply to quarantine proceedings.

B. Case Law

Quarantine is a very old public health measure. Historical references date back at least to the Old Testament. When people were thought (rightly or wrongly) to have a contagious condition, they were isolated from others by confining them to their houses or by compelling them to live outside the community.

Following English common law United States quarantine laws fall under the power of the state to protect public health and safety. In Gibbons v. Ogden, the United States Supreme Court alluded to the legitimacy of quarantine under the police power. The Court directly reviewed quarantine concepts in Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health. The law and its implementation were upheld as an appropriate exercise of police power. The suit arose when a geographic area of Louisiana was closed off to all new entrants because of the presence of infectious disease. The plaintiffs (a shipping company) regarded the action as a Commerce Clause violation, because it interfered with foreign commerce. The Court rejected the Commerce Clause argument, holding that the law was not repugnant to the Constitution.

41Id.

42Id. at 259.

43CDC. Tuberculosis Control Laws, supra note 14, at 7-8.

44Parmet, supra note 25, at 56. At least some statutes contained specific provisions for assistance to the quarantined. A 1797 Massachusetts law provided for nursing, "other assistance and necessaries." Id. at 59. Under current Ohio law the Board of Health is required to provide food, fuel and all other necessaries of life including medicine to those in quarantine. OHIO REV. CODE ANN. § 3707.14 (Anderson 1992).


46186 U.S. 380 (1902). (Upholding a quarantine law under which an area of the State of Louisiana was isolated against the introduction of new immigrants).

47Id. at 397. The Italian immigrants who arrived on the ship and would have settled in the quarantined area were not themselves infected. The object of the regulation was alleged to have been exclusion of immigrants for its own sake. For a more detailed
The dissent urged that the Court should have been addressing the particular implementation of the law rather than its constitutionality in general. The dissenters agreed however that "[t]he power of the several States... to establish quarantine regulations... is so well settled by repeated decisions of this court as to be no longer open to doubt."\textsuperscript{48}

Three years later the Court handed down the controlling opinion in quarantine law, \textit{Jacobson v. Massachusetts}. The \textit{Jacobson} case was about mandatory vaccination against smallpox, not quarantine. However, the Court specifically mentioned quarantine in its holding and the case is still good law.\textsuperscript{49}

\textit{Jacobson} also settled another controversy. There had been a number of challenges to the authority of state boards of health to develop and implement public health regulations, including quarantine. Plaintiffs in these suits contended that the creation of the regulations was an illegitimate delegation of legislative power to executive or administrative bodies. State supreme courts generally upheld the creation and activities of the boards, as long as their actions were reasonable and not arbitrary.\textsuperscript{50} The \textit{Jacobson} opinion affirmed that states could create bodies which would be given the authority to protect the public health through reasonable regulations.\textsuperscript{51}

Fourteenth Amendment due process challenges to communicable disease regulations were not well received by the courts. In one opinion the judge said "the Fourteenth Amendment to the Constitution... [h]as no application to this class of case", because the state could not be made powerless to act against a contagious disease.\textsuperscript{52} In \textit{Ex parte Company}, decided the same year, Ohio Supreme Court Justice Clark said,

\begin{quote}
[t]here is perhaps no provision of the federal constitution [sic] that is more overworked than the 14th amendment. Counsel generally are apparently unanimous in thinking that any judgment or finding as against the client denies such client the equal protection of the laws, or is without due process of law.\textsuperscript{53}
\end{quote}

In 1952 the Florida Supreme Court upheld a quarantine statute against a Fourteenth Amendment challenge in \textit{Moore v. Draper}. The petitioner's \textit{habeas corpus} request was denied, and would only be reconsidered if he could show he was cured.\textsuperscript{54}

\begin{flushright}
\textsuperscript{50} \textit{General Delegation of Power}, supra note 37, at 836.
\textsuperscript{51} 197 U.S. at 25. \textit{Ex parte Company}, 139 N.E. 204 (Ohio, 1922).
\textsuperscript{52} \textit{In re Caselli}, 204 P. 364 (1922).
\textsuperscript{53} 106 Ohio St. 50, 54 (1922). \textit{See infra} Part IV.
\textsuperscript{54} 57 So.2d 648 (Fla. 1952).
\end{flushright}
In *State v. Snow*, decided in 1959 the issue was whether the state had proceeded correctly under a relatively recent "Act to Require Isolation of Recalcitrant tuberculous [sic] Patients; Prescribing Methods and Procedures Therefor; and for other Purposes." The State of Arkansas had sought to have Snow committed to a TB sanatorium, alleging that he would not submit to treatment and was a danger to others. The trial court refused to issue the order on the grounds that the state had not met its burden of proof. It had not introduced some of the evidence required under the law, and other evidence introduced was out of date at the time of the trial in probate court. On appeal, the state supreme court affirmed the probate court decision because it could not find the decision contradicted by a preponderance of the evidence.

In dicta the court stated that "adjudication as to commitment . . . of a tubercular person is, in some respects, similar to an inquest regarding insanity . . . neither . . . civil nor . . . criminal but rather . . . a special proceeding by the State in its character of *parens patriae*." It also said that the law must be strictly construed to protect individual rights.

*Parens patriae* is a concept which describes the obligation of the state to act as "parent of the country" in caring for those who cannot care for themselves. In this view, the infected person is incapacitated rather than a threat to the community. From an adjudication point of view, tuberculosis patients are thus similar to juveniles and the insane. This is the other side of the duty of the state to protect the rest of the community from infected individuals. It justifies similar limitations on individual rights, however.

*State v. Snow* demonstrates continuing support for the quarantine power while raising the parallel of the rights of the individual in insanity adjudications.

In the *Halko* case in 1966 the California Court of Appeals reached a different conclusion regarding individual rights in quarantine cases. Halko was confined to a hospital because of an active case of TB. After he left the institution without permission he was sentenced to jail for violating his quarantine order. He did not go to jail, but was instead quarantined for successive periods of six months in the security section of the same hospital. He petitioned for a writ of

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55 324 S.W.2d 532, 533 (Ark. 1959). The statute had been passed in 1955.

56 Id. at 534.

57 Although the court refused to uphold the quarantine order, it was concerned that Snow was in fact very ill and a willful danger to others. The majority encouraged "further proceedings" consistent with its opinion. The minority would have permitted the original order for the same reasons. Id. at 534, 537.

58 Id. "*Parens patriae*" is defined as parent of the country. *Barron's Law Dictionary* 341 (Barron's 1991). The *parens patriae* duty to safeguard the welfare of the people comes into play when people are unable to take care of themselves (for example because of mental incompetence).

59 324 S.W.2d 532.

60 *In re Halko*, 54 Cal. Rptr. 661 (Second App. Dist. 1966).
habeas corpus, asserting that the certificates of quarantine deprived him of his liberty. The court reviewed the relevant statutes and determined that health officers had all of the powers required to order and enforce quarantine orders. After a review of California case law on public health and quarantine, the court addressed the question of whether the public health authorities could restrict Halko's liberty, and found that they could. They held that when there are reasonable grounds to support the allegation of illness, personal liberty may be restrained. If someone continued to be infected, as Halko did, public health officers could continue to quarantine them. Halko may be distinguished from Snow by the statutory language. There was no provision in the California statute for a probate court review of quarantine determinations, and no specific statement of what evidence must be introduced to support quarantine orders.

The state of law was summarized by Parmet in her comprehensive 1985 survey of quarantine laws. "[W]ith the dramatic decline in the incidence of infectious disease . . . courts and legislatures have not been required to modernize the law of quarantine . . . [E]xisting precedent does not reflect significant contemporary developments in constitutional and public health law." One of the significant developments has been in the law governing civil commitment.

III. CIVIL COMMITMENT LAW

The power to isolate someone who has not committed a crime whether at home or in a hospital is a form of civil commitment. The procedure by which this is done may be administrative or judicial or both. At stake in these proceedings on one side are the right of the community to be protected, and the duty to care for people who may not be able to care for themselves. Both are aspects of parens patriae. Individuals have an obligation not to harm other members of the community by their actions. On the other side are the constitutionally protected liberties of individuals and their right to due process when they may be deprived of liberty. In recent years there has been a major alteration in the law governing involuntary incarceration in non-criminal cases. The community may not deprive individuals of liberty without

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61 Id. at 554.
62 Id. at 557-58.
63 Id. at 555-56, (discussing § 3285 of the CALIFORNIA HEALTH AND SAFETY CODE). Cf. Snow, 324 S.W.2d at 533-34.
64 Parmet, supra note 25, at 54-55.
65 Gostin, supra note 32, at 255; see generally Reilly, supra note 3 (examining due process requirements for involuntary detention, including balancing tests of individual liberty vs. the interest of the community); see also Parmet, supra note 25, at 78 (because of the increased emphasis on procedural protections, courts are likely to treat quarantine cases differently today); see also Deborah Jones Merritt, Communicable Disease and Constitutional Law: Controlling AIDS, 61 N.Y.U.L. REV. 739, 779 (1986) (confinement of individuals affects a fundamental right and might therefore be subject to strict scrutiny).
substantial reasons demonstrated through convincing evidence, as shown in
the following cases from various jurisdictions.

One aspect of these procedural rights is the right to be represented by
counsel. In In Re Gault the Supreme Court required counsel to be provided to
juveniles who were before the court. These were not criminal proceedings.
Because incarceration could be the result of the court action, counsel was
nonetheless required. Humphrey v. Cady addressed the curtailment of liberty
in involuntary hospitalization succeeding a prison sentence. Humphrey was
held under the Washington State Sex Crimes Act, which did not provide for
jury determination of renewed commitment. He had served his sentence and
was recommitted to prison. The Court remanded the case to the trial court for
an evidentiary hearing. It noted the similarity between the renewal of
commitment under civil law (which required a jury trial) and the commitment
in this case which did not. Some sort of due process protection was in order "to
justify such a massive curtailment of liberty."

O'Connor v. Donaldson limited commitment of alleged mentally persons who
were not a threat to the community. Their liberty interests were held to be
paramount. In Addington v. Texas, the Court held that civil commitment was
a significant deprivation of liberty and could not be imposed without due
process protection, specifically addressing the standard of proof to be used.
Addington was committed when a court held that he needed to be hospitalized
for his safety and the safety of others. The evidentiary standard applied by
the court was proof by a preponderance of the evidence. An appeals court reversed
Addington's commitment because the standard applied should have been
proof beyond a reasonable doubt. In noting that only one other state applied
a preponderance standard, the Supreme Court held that clear and convincing
evidence was the correct standard to be applied, in order to ensure due process
under the Fourteenth Amendment. It was already in use in the majority of
states. States might adopt higher standards if they wished to but it was not
necessary.

In Vitek v. Jones the Court said that even medical determinations like mental
illness assessments could not dispense with due process. If someone who was

67 Id.
68 405 U.S. 504, 509 (1972).
69 Id. at 509.
70 422 U.S. 563 (1975).
72 Id. at 422.
73 Id. at 432-33.
74 Id. at 431-32.
not a prisoner was subject to involuntary hospitalization, protected liberty interests would be unconstitutionally infringed without due process under the Fourteenth Amendment. The Court upheld the district court's requirements of notice, hearing, the right to present and examine evidence, the right to an independent decisionmaker and the right to counsel. Although four justices believed that counsel should be provided for prisoners who could not afford counsel, this was not the majority opinion. The court reasoned that the demand for assistance required qualified and independent assistance, but did not require the appointment of a licensed attorney. On this reasoning, the court might not affirm the provision of counsel for persons who are physically ill. On the other hand, if a court regarded both proceedings as an exercise of parens patriae, it might provide the same protections to the person with either disability.

This series of cases established that when someone is the subject of a hearing which will adjudge them incompetent or insane, they have a right to be represented by counsel. Vitek does not clearly afford the right to appointed counsel. According to a recent Annotation, in certain instances states do provide for appointed counsel. Persons being adjudicated mentally ill must be able to consult with counsel, and counsel should be able to cross-examine witnesses. The liberty interests of the individual must be balanced against the severity of the threat he/she is alleged to pose to society. Arguably, however, indigents may not have a Constitutional right to appointed counsel in competency hearings.

The proposition that people subject to involuntary commitment are entitled to the assistance of counsel receives additional support from a different line of cases. A recent review of individual rights in other administrative proceedings asserts that adjudicative procedures implicating fundamental rights may require counsel.

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76Id. at 498.
77Id. at 495.
78Id. at 497.
79445 U.S. at 497.
80Id.
81See generally id.
82Annotation, Right to Counsel in Insanity or Incompetency Adjudication Proceedings, 87 A.L.R. 2d 950, § 2 (1994) [hereinafter Right to Counsel]. This annotation reviews some Supreme Court cases but primarily covers state case law.
83Id. at § 3a, 3g.
84Annotation, Comment Note, Federal Constitution as Guaranteeing Assistance of Counsel at Administrative Proceedings—Federal Cases, 1 L.Ed. 2d 1865, 4 (1993). Fact-finding generally does not require judicial procedures, but determinations which affect an individual's legal rights would. Thus, a hearing which was held only to establish whether someone had TB in an active contagious state probably would not require presence of counsel. If the same hearing went on to consider whether the person
When public health authorities, as opposed to courts, make judgments which apply law to facts they are engaged in adjudication. State laws which permit quarantine decisions to be made by public health authorities rather than courts create adjudication procedures. It therefore appears that they are not exempt from due process requirements.

New thinking in civil commitment law was focused on a quarantine case for the first time Greene v. Edwards, a 1980 West Virginia case. Greene had been committed to a hospital under court order issued pursuant to the West Virginia Tuberculosis Control Act. A petition alleging that he had active communicable TB had been filed with a state circuit court, which scheduled a hearing. A copy of the petition and notice of the hearing were served on Greene. He was not however advised of his right to counsel. At the hearing an attorney was appointed for him but he was not given time to confer with the attorney. As a result of the hearing he was ordered to be committed to the hospital for treatment.

Greene filed for habeas corpus and alleged that his procedural due process rights were violated in three principal ways: first, he was not guaranteed the right to counsel; second, he was not given the right to confront witnesses, cross-examine them or present his own; and lastly, the standard of proof applied was not clear and convincing. In a per curiam opinion, the West Virginia Supreme Court agreed with him on all counts. The court began its analysis by recognizing the statutory purpose of preventing an actively infected person from becoming a danger to others, and then said "[a] like rationale underlies our statute governing the involuntary commitment of a mentally ill person."

The court considered State ex rel. Hawks v. Lazaro, an involuntary commitment case. In Hawks they had stressed state and federal constitutional guarantees against deprivation of life, liberty or property without due process of law. When someone is adjudged to be insane there is a partial deprivation of liberty, which calls for due process to be provided.

should be committed to a treatment facility right to counsel probably would be required. See generally, Hannah v. Larche, 363 U.S. 420 (1960).

Another case stated that "indispensable to a fair hearing are reasonable notice, the right to examine witnesses and to testify and to present witnesses and to be represented by counsel." Hyun v. Landon, 219 F2d 404, 406 (C.A. 9th, 1955) aff'd 350 U.S. 990; reh'g denied 351 U.S. 928 (1956). These cases primarily concern the deportation of aliens.

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85 263 S.E.2d 661 (W. Va. 1980).
86 Id. at 661-62, referencing W. VA. CODE § 265A-1 et seq.
87 263 S.E.2d at 662.
88 Id. at 663.
89 Id. at 662.
90 Id. at 663, citing State ex rel. Hawks v. Lazaro, 202 S.E.2d 109 (1974).
Because the quarantine and involuntary commitment laws had similar purposes and caused similar deprivations of liberty, the court held that the same due process protections were required in Greene's case. Since he had not been afforded these protections, a writ of *habeas corpus* was granted, in addition to the right to a new hearing. The procedures required were:

1. an adequate written notice detailing the grounds and underlying facts on which commitment is sought;
2. the right to counsel;
3. the right to be present, cross-examine, confront and 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 proceeding for purposes of appeal.

The court said this ruling would apply prospectively to similar cases.

Due process elements similar to those in *Greene* are now in place in many states. The 1993 revision of New York City's TB control procedures included the right to counsel, appointment of counsel for indigents and judicial review of commitment. Proof of the need for detention was to be shown by clear and convincing evidence. In 1994 Washington State required its board of health to adopt due process standards for public health officers to use in case of involuntary detention, testing, treatment or isolation of TB patients.

Public health authorities draw on civil commitment law in making recommendations for changes in TB law.

The Centers for Disease Control *Recommendations of the Advisory Council for the Elimination of Tuberculosis (ACET)* says:

> [a]s in commitment proceedings under state mental health laws, any law under which a person may be examined, isolated, detained, committed and/or treated for TB must meet due process and equal protection requirements under state and federal statutes and constitu-

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91263 S.E.2d at 663.

92 *Id.*

93 *Id.* at 663. Because the holding was a substantial departure from previous law the court determined that it would not hear other cases until they had gone through the new procedure. As in *Snow*, the order for Greene's discharge was delayed, presumably to give the state time to go through the proper procedures to re-commit him.


tions. Also, all patients who are subject to these legal proceedings should be represented by legal counsel.  

The next section examines Ohio law with respect to quarantine and civil commitment.

IV. OHIO QUARANTINE LAW

A. Ohio Revised Code

Relevant statutory law is found under the power of counties to establish hospitals and under the powers of the department of health and the board of health. Some still-current sections were in place before 1953 when the General Code became the Revised Code. Quarantine measures under Ohio law included isolating people in their own homes as well as removing them to public facilities. In 1949 the Attorney General considered whether "home quarantine", authorized under § 4429, General Code was an appropriate exercise of the police power. Medical authority at the time discouraged in-home care because it spread infection to others in the household and did not provide the most effective treatment. The Attorney General expressed concern about the "social and economic embarrassment" involved in placarding a home and isolating the whole family. Balancing the health benefit (or lack thereof, according to medical experts) against liberty interests and social stigma, he opined that "in view of control measures now available" home quarantine would be arbitrary and unreasonable under normal circumstances.

Contemporary society thinks removing people from their homes to treat their illness may be inhumane. When this opinion was written, the opposite may have been true, at least for illnesses requiring long-term care.

In 1951, § 4429-1 of the Ohio General Code provided the department of health with the power to "at once . . . cause [someone with a communicable disease] to be separated from susceptible persons in such places and under such circumstances as will prevent the . . . conveyance of the infectious agents . . . and shall enforce such restrictive measures as may be prescribed by the state department of health."
Ohio law has several provisions which govern quarantine generally. Under § 3701 of the Ohio Revised Code, the department of health has the authority to "declare and enforce" or "modify, relax and abolish" quarantines. It may make other rules for preventing communicable disease.\(^{102}\) The chapter also provides that individuals shall not knowingly fail to prevent transmission of their illness to others. Those who care for sick individuals, and those who "have charge of a public conveyance or place of public accommodation" shall not recklessly or negligently fail to protect others; or fail to inform health authorities of the presence of contagion.\(^{103}\) Criminal penalties are available under quarantine law, but they do not appear to have been much used. The statutes and cases do express the obligations of infected persons and others to avoid the spread of infection.

Ohio quarantine regulations are very sweeping in the power granted to boards of health. They are also sweeping in their potential effect on people's lives. Most of the provisions below were effective when the code was revised in 1953, and were carried over from similar provisions in the General Code. Quarantine regulations are covered under § 3707. Key provisions include the following:

§ 3707.06 - Physicians or other persons "called to attend" persons with contagious diseases are required to report to the health commissioner "the name, age, sex, and color [sic] of the patient."\(^{104}\)

§ 3707.07 - In case of a complaint or reasonable belief that there is infectious disease at a particular place, the board of health shall have it inspected, and may either send the sick person to a facility, or quarantine the location, including any people exposed to the disease.\(^{105}\)

§ 3707.08 - Where there is infectious disease, the board shall isolate infected persons and those exposed, and have the location placarded. Anyone isolated or quarantined must have written permission to leave locations to which they are restricted.\(^{106}\)

§ 3707.14 - When people are quarantined the board of health is obligated to provide food, fuel and other necessities, at public expense if necessary.\(^{107}\)

§ 3707.16, .20 - Quarantined persons may not attend school, places of worship or other public gatherings. They may not be sent to any institution


\(^{103}\)Ohio Rev. Code Ann. § 3701.81 (Anderson 1993). Although this sounds like personal responsibility provisions under AIDS laws, it was in effect in 1974, before the AIDS epidemic.

\(^{104}\)Ohio Rev. Code Ann. § 3707.06 (Anderson 1993). The language is antique, but the effective date is April 9, 1981. The original version appears to go back to the General Code (before 1953).


such as a jail, children's home, or institution for the blind or mentally ill without notice of their illness or exposure.\textsuperscript{108}

Significant changes were made in 1955, with the passage of Amended House Bill 127, "The Recalcitrant Tuberculosis Law" enacted to protect society and based upon the legal principle that liberty implies absence from arbitrary restraint, not immunity from reasonable regulations imposed in the interest of society".\textsuperscript{109} This legislation was considered to be a significant advance, "protective rather than punitive."\textsuperscript{110} It put in place the specific mechanisms for implementing § 339.40, infra, evidentiary requirements, and mechanisms for release. There is no mention of the right to counsel, however.

Key provisions of Chapter 339 include the following:

§ 339.40 - when proper presentation of facts has been made, the board of health is authorized to order the removal of persons with TB who are a menace to public health and cannot be treated at home. If someone is suspected of having TB on the basis of medical evidence, that person may be compelled to be examined regularly until certified as "free from tuberculosis in a communicable stage."\textsuperscript{111}

§ 339.51 - evidence of communicable TB consists of laboratory reports of sputum or other body fluid which are positive for the presence of TB bacilli, or chest X-rays which show active TB. A sputum test showing bacteria means the person is considered to have active TB for three months or until three successive tests show no bacilli.\textsuperscript{112}

§ 339.52-60 a board of health may request an order from the probate court to remove someone to a tuberculosis facility. The board must file an application with the court alleging that the person is suffering from TB, is a menace to public health, and has either "refused to enter or has absented himself from a tuberculosis hospital against medical advice."\textsuperscript{113} After an application has been filed, a hearing is scheduled. The person named in the application must receive a summons no less than three days before the hearing. The judge examines any witness from the board of health and any others. The hearing may be conducted without the person summoned, if he or she does not appear.

If the judge determines the allegations of the application are true, "the . . . court shall enter a commitment order committing the person to a facility."\textsuperscript{114} When someone is committed, she or he remains hospitalized until discharged. After ninety days a patient may apply to the same probate court to be


\textsuperscript{109} Vincent E. De Felice & Dr. Ralph E. Dwork, \textit{Hospitalization of Tuberculosis Patients}, 16 \textit{Ohio St. L.J.} 492, 495 (1956).

\textsuperscript{110} \textit{Id.} at 493.


discharged. The discharge is requested on the grounds that the patient no longer has communicable TB, and thus is not a menace to public health. The court holds a hearing within seven days. If it determines that the patient is not infectious, the discharge will be ordered, but not otherwise. Patients may also be released when an appropriate public health official certifies they are no longer a menace to the community.

There is no other mechanism for requesting release under this section, but see the discussion of section 3707, infra.115

B. Ohio Case Law

Relevant Ohio case law deals with the powers of the board of health to make and enforce regulations. Cases of actual quarantine involved smallpox or venereal disease (VD) rather than tuberculosis.116 An early important case was Ex parte Company.117 Company concerned requests for habeas corpus filed by two women who had been arrested for prostitution. Neither was convicted. One was discharged by the court and the other was found not guilty. While they were in custody they had been found to have VD. When their cases were resolved they were quarantined for the disease and applied for habeas corpus to be released from quarantine.118 They asserted that the quarantine, examination and detention provisions of the Sanitary Code violated the Fourteenth Amendment of the U. S. Constitution and section 5. Article 1 of the Ohio Constitution; that the provisions violated Ohio law; and that the legislature was not permitted to delegate its power to make laws to other bodies.119

The court readily disposed of the Constitutional claims on the grounds that legislative power to enact "reasonable and proper restraints" for the public

115Habeas corpus has been used in some states to request release from quarantine (see e.g. Greene, 263 S.E 2d 663). It is not clear whether it could be used in Ohio. "An unjustly confined person may have the benefit of the writ of habeas corpus" according to one source. 53 O.JUR. 3D Quarantine § 44 (1993). But see 53 O.JUR. 3D Venereal Disease § 46 (1993), stating that "a diseased person detained or restrained is not entitled to be released on a writ of habeas corpus."

It is difficult to see why two persons with contagious diseases should be treated differently under the same general quarantine rules. This would suggest that the quarantine of an alleged TB sufferer may be unjust but the quarantine of alleged prostitute is not. In fact the case law on quarantine in Ohio is about prostitution, not TB. It seems likely that this distinction would not be sustained under today's equal protection standards. It also seems likely that the question would be resolved in favor of habeas corpus protection in the absence of other statutory provisions, as in Greene, see supra notes 85-93 and accompanying text.

116To the best of the author's knowledge there are no Ohio cases arising out of the quarantining of an individual for TB. No cases are referenced or discussed in the relevant sections of Ohio Jurisprudence. See 53 O.JUR.3D Health and Sanitation § 44 (discussing quarantine).

117106 Ohio St. 50 (1922).

118Id. at 51. The other case which forms part of this decision is Ex parte Irvin.

119Id. at 54.
good "is no longer open to question". It noted that the Fourteenth Amendment did not extend the Bill of Rights to the States. The statute provided that anyone charged with a prostitution offense should be held if they were found to be infected with a venereal disease. The court found that the law was adequately supported by another statute which provided for the quarantine of any persons infected with venereal disease, incarcerated or not.

Lastly the court determined that the legislature had given administrative authority to boards of health to create rules and regulations. Such grants of authority had been upheld in a number of other states. Only one case with distinguishable facts held otherwise. The court dismissed the petitions and remanded the petitioners to the health commissioner.

Turner v. Toledo noted in dicta that the legislature has the power to protect the public health, and the board of health has the power to quarantine persons who were infected with or exposed to contagious disease (in this case smallpox).

State ex rel. Sippel et al. concerned tuberculosis hospitals funded under the taxation powers of counties. The plaintiffs alleged inter alia that the legislature did not have the right to enact TB laws. The Darke County Common Pleas Court relied on the legislative power to pass laws for the protection of the public. "[It] is the judge of the mischief and the remedy for tuberculosis."

McGowen v. Schaeffer concerned plumbing, but addressed the powers of the legislature and boards of health. Plaintiffs contended there was no statutory power which would permit licensing. The court stated that boards of health and municipalities had the right to enforce public health regulations. They held that the statutory "may" meant "shall" pass such rules and regulations as they deem necessary for . . . the health and welfare of the public." The power granted to boards of health was not a delegation of legislative power, and would only be limited by the courts if it was abused. In conclusion the court

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120 Id. at 55.
121 106 Ohio St. at 56.
122 Id. at 61.
123 8 Ohio Cir. Dec. 196, 199 (1898). The plaintiff's saloon was quarantined. The court would not award him damages for the closure because the law did not provide for that. It did hold that he had a valid contract with the city for payment of necessities during the quarantine period.
124 11 Ohio N.P. 555 (1911).
125 Id. at 557. The court nonetheless held the District Tuberculosis Act of 1909 unconstitutional. The hospital funding and management scheme under the law made the appointed hospital trustees superior to the county commissioners who appointed them.
126 111 N.E.2d 615 (C.P., Summit County, 1953). The suit was brought by a plumber who objected to county licensing requirements and fees.
127 Id. at 618.
said "[t]he implied powers of a board of health should be given construction in the broadest sense, and police powers exercised by the board should be liberally construed . . . because . . . boards are the sentinels guarding the people from . . . diseases which might well develop into an epidemic."128

A quarantine-related question was at issue in Ex parte Mabel Mason.129 Mason was a prostitute who had been quarantined. She argued that she could not be held without proof beyond a reasonable doubt that she had VD. The court held the quarantine procedure was analogous to commitment of juveniles. As a result it did not call for trial by jury and proof beyond a reasonable doubt was therefore not necessary.130 In this opinion the court addressed only the criminal law standard of proof. Neither the plaintiff nor the court appear to have considered due process issues in their arguments.

Quarantines rarely seem to have been overturned. One such case based on procedural grounds was In re Mossie Jarrell.131 For unknown reasons Jarrell was arrested by Cincinnati city police and put in the workhouse, where she was examined by a doctor who reported that she had a venereal disease. She was then quarantined and filed a habeas corpus petition for release. The court granted it, because the proper procedures had not been followed in confining her. The examination was made pursuant to an illegal arrest. The quarantine order was issued not by the health commissioner as required by the regulations but by a clerk in his office. The health commissioner had not made the necessary finding that Jarrell had VD. For these reasons the court held the quarantine void and granted the habeas corpus petition.132 The court did not address any general due process concerns with quarantine orders.

Ex parte Kilbane demonstrated that correctly executed quarantine orders were still acceptable. The Kilbane case was factually very similar to Company, and was decided on the Company precedent. The court held that Kilbane was not "unlawfully restrained and deprived of her liberty."133

Thus in Ohio as in the rest of the country the legislature has the power to create boards of health, which themselves have the power to create and execute a wide variety of public health regulations. What distinguishes Ohio law in this area is the fact that it has not been modernized.

V. Ohio Civil Commitment Law

Case law will be considered first because most of the cases precede changes made in Ohio civil commitment law in 1989.

128Id. at 625. The court went on to say that boards must not take actions which were dictatorial, oppressive or confiscatory.

12922 Ohio N.P. 21 (1919).

130See Landis, supra note 94 on standards of proof in civil commitment.

13128 Ohio N.P. 473 (1930).

132Id. at 480.

13367 N.E.2d 22, 23 (1945).
In the *Fisher* case inmates of a mental institution filed *habeas corpus* writs alleging denial of due process under the Fourteenth Amendment. They could not afford counsel and had not been provided with counsel at their commitment hearings. The court, relying on *Gault*, *supra* stated that there is a right to counsel in cases of civil commitment for mental illness. The proceedings in both types of cases are non-adversarial and may result in incarceration. The court was also concerned that civil commitment hearings could use hearsay evidence which would not be admitted in criminal cases. There was also not a good enough written record to be used in case of appeal.

Because of the seriousness of the rights and liberty interests involved the court held that due process required assistance of counsel. Anyone subject to such a proceeding had to be advised of their rights and have counsel appointed if they could not afford it. The right to counsel might not be waived if the person was not competent to understand the meaning of the action.

The *Slabaugh* case concerned a man who was committed without having an opportunity to consult with counsel of his own choosing. The court had appointed counsel for him in his absence, and refused to grant him a continuance to obtain the counsel he wanted. The Appeals Court held that this was an abuse of discretion and remanded the case. They did not however accept the plaintiff's argument that the statute was unconstitutionally vague as to what constituted grounds for commitment.

Under the Ohio Revised Code there are specific provisions to be followed in involuntary commitment cases. *In re Miller* considered both the emergency and non-emergency procedures. Miller was arrested and hospitalized under an emergency commitment order. The court found that he had not been given his due process rights under the law. He was not told he had a right to a phone call to a lawyer or physician, the right to counsel and independent psychiatric evaluation, and a hearing. Because the case was reversed on these grounds, the court did not address the appellant's arguments about the constitutionality of the statute.

Unlike the sections of the Ohio Revised Code which concern tuberculosis and quarantine, the Code is very specific about due process protections for

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135 387 U.S. 1.
136 *id.*
137 *id.* at 82.
140 *id.* at 501.
142 *id.* at 399.
people who may be involuntarily hospitalized for mental illness. Some of the relevant sections are:

§ 5122.05 - A person who is involuntarily detained must be immediately provided with a written statement of his or her rights. These rights include "a reasonable number" of phone calls to an attorney and/or licensed mental health professionals; the right to counsel and independent evaluation of his or her mental state. Both counsel and independent mental health experts will be provided to the indigent.\(^\text{143}\)

§ 5122.11 - Judicial hospitalization is initiated when an affidavit is presented to the court alleging that a person is mentally ill subject to hospitalization by court order. One or more types of evidence (reliable information, direct knowledge, or written certification) should accompany the affidavit. Temporary detention is permitted, if the court determines there is probable cause to believe the individual is mentally ill and subject to hospitalization by court order.\(^\text{144}\)

§ 5122.13 - The court refers the affidavit for investigation to appropriate authorities, and receives a written report from them. The report is not permitted to be submitted in evidence but a copy must be provided to the respondent’s counsel.\(^\text{145}\)

§ 5122.141 - This provision specifies in great detail the timing of the required hearing. If the hearing is not held within the required period of time the respondent must be discharged and the records expunged.\(^\text{146}\)

§ 5122.15 - A full hearing must be held, at which the respondent must be represented by counsel. The court will hear "only reliable, competent and material evidence." An adversary process is required. Proof must be by "clear and convincing evidence."\(^\text{147}\)

Both statutory and case law in Ohio are consistent with a national consensus about involuntary civil commitment for mental illness.

According to Judge Donnelly of the Cuyahoga County Court of Common Pleas Probate Division, quarantine cases have been so rare in the last thirty years that the question of due process protections has not arisen. While the right to counsel is not contained in the quarantine or tuberculosis laws, he believes that all respondents in probate cases automatically have a right to counsel. In his court anyone appearing in a quarantine case would be told of their right to counsel. Counsel would also be provided to indigents as in other types of cases.

\(^\text{143}\)Ohio Rev. Code Ann. § 5122.01 et seq. (Baldwin 1994).

\(^\text{144}\)See id. § 5122.11.

\(^\text{145}\)See id. § 5122.13.

\(^\text{146}\)See id. § 5122.141.

He concludes that counsel is necessary by analogy to the commitment procedures in mental illness. It is also necessary to satisfy Constitutional due process requirements.\(^{148}\)

Other judges might have different opinions, given that the right to counsel and related due process protections are not currently part of quarantine law. The author believes that it would be preferable for Ohio law in this area to reflect the principles incorporated in civil commitment law.

**VI. CONCLUSION**

Ohio has a low rate of tuberculosis infection in comparison to the rest of the nation.\(^{149}\) The number of cases has remained fairly steady at 300 - 400 cases per year since 1987.\(^{150}\) Cases are concentrated in large metropolitan counties and poor minority neighborhoods. On the northeast side of Cleveland the incidence of infection is as high as 12.7/100,000, well above the national average.\(^{151}\) Increases in factors known to promote tuberculosis infection, such as increases in immigration from affected areas of the world, increases in AIDS and decreases in access to health care may influence continued growth in the Ohio case rate. More cases of TB may lead to calls for quarantine or DOT to prevent the spread of the disease. Ohio policymakers should consider addressing the civil liberties questions raised by our current laws before a need arises.

This Note has demonstrated that quarantine laws and regulations may be selectively used in the service of societal concerns beyond the public health. The *Compagnie Francaise* case illustrates one theme which is still current.\(^{152}\) The subjects in *Compagnie* were immigrants.\(^{153}\) Nativist prejudice against them was linked to rational concern about infection. Immigrants were routinely quarantined for public health reasons when they arrived in the United States. They are still a large segment of the TB-infected population today.\(^{154}\) Now as

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\(^{148}\) Telephone interview with Judge Donnelly, Cuyahoga County Court of Common Pleas Probate Division (Mar. 3, 1995).

\(^{149}\) CDC. *Reported Tuberculosis*, supra note 11, at 4.

\(^{150}\) Telephone interview with staff member, *Ohio Department of Health* (Feb. 13, 1995).

\(^{151}\) Telephone interview with Mr. Leo Russo, *Metro Health Medical Center* (Feb. 15, 1995). He compiles the Cuyahoga County statistics. It is his opinion that local TB numbers have increased because there are more cases and more cases are reported.

\(^{152}\) 186 U.S. 380.

\(^{153}\) *Id.* at 386. "The evil which the statute of 1898 was to remedy" included landing of emigrants from Italy to the danger of the people of Louisiana. The state wanted to avoid a repeat of an epidemic of the year before.

then they may be vulnerable to a generalized fear and to anti-immigrant prejudice.\textsuperscript{155}

Prostitutes but not their customers were targets of quarantine actions during the 1920s.\textsuperscript{156} Legitimate public health concerns were focused on only one of the parties who might spread disease. One prostitute might infect many men who would carry infection home, but it was also easier to target a stigmatized group.

The contemporary impetus to quarantine arose first as a reaction to the AIDS epidemic. Some of the fervor behind AIDS quarantine proposals came from people who disapproved of homosexual activity. HIV infection was at the time primarily a "gay disease." The illness could have become an excuse to target gay men for isolation without regard to whether this was a necessary or effective public health measure.\textsuperscript{157}

Civil liberties protections for TB-infected individuals do not just protect them from variations in judicial philosophy. They may also protect them from being "railroaded" by an anxious public. In discussing new TB treatment measures, Reilly notes the concern that they may be used "in a discriminatory manner to isolate HIV carriers, persons with AIDS, and the homeless."\textsuperscript{158}

Status-based programs (applying to all patients with active TB, for example) were recommended by one agency precisely to avoid stigmatizing "the most socially marginalized." In New York, the majority of TB patients are poor, Hispanic and African-American. Treatment measures targeting these groups run a risk of being or seeming discriminatory, particularly if they are coercive.\textsuperscript{159}

Beyond its specific role in regulating conduct the law codifies public opinion.\textsuperscript{160} Due process protections are necessary to remind us of our rights and our duties, and they balance a social equation. The right to deprive people of their liberty for sound public health reasons is established beyond question. As some of the cases have also noted, individuals must be prepared to give up

\begin{itemize}
  \item California Proposition 187 if implemented will deny even emergency care to illegal aliens. It has the potential to create a population of untested and untreated TB carriers who will nonetheless to able to spread the illness to other citizens.
  \item Parmet, \textit{supra} note 25, at 66. \textit{See also} \textit{Ex parte Kilbane}, 67 N.E. 22 (Ohio 1945); \textit{Ex parte Company}, 139 N.E. 204 (Ohio 1922). Both upheld as valid exercises of police power the quarantine of women arrested for prostitution after examination revealed they had a venereal disease.
  \item In Kansas all but one case upholding quarantine of VD patients concerned women. \textit{General Delegation of Power}, \textit{supra} note 37.
  \item Parmet, \textit{supra} note 25, at 54.
  \item \textit{See generally} Reilly, \textit{supra} note 3.
  \item \textit{Id.}
  \item Illustrations of this principle may be seen in a number of arenas. Legislators frequently argue that particular laws send a message to the community. Recent examples include death penalty laws, proposed denial of welfare payments to teenage mothers, and the assault weapons ban.
\end{itemize}
some of their freedom to live in a community. This includes an obligation not to expose others to disease. The right of the community to enforce those individual obligations must be complemented by due process when it calls for the sacrifice of individual freedom.

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