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A HISTORY OF ABUSE AND LACK OF PROTECTION: THE NEED TO UPDATE CALIFORNIA'S QUARANTINE POWERS IN LIGHT OF THE H1N1 INFLUENZA OUTBREAK

*Arsen Kourinian**

The recent outbreaks of the H1N1 influenza, also known as the "swine flu," have raised concerns over whether California's broad quarantine regulations can be applied in an accurate, nondiscriminatory manner. One way to help ensure fair application of quarantine laws is to use procedural safeguards and to raise the standard of proof that is required before an individual can be quarantined. Another solution is for California to enact the Turning Point Model State Public Health Act—formulated by the Public Health Statute Modernization National Excellence Collaborative to address concerns raised by state quarantine powers—to help curb some of the worst abuses that have historically occurred in the quarantine context.

INTRODUCTION

The recent outbreak of the H1N1 influenza—the swine flu—has reawakened quarantine laws dating back to the nineteenth and early twentieth centuries.¹ While the spread of the H1N1 influenza is still in its early stages, individuals have already been subject to quarantine regulations.² The continuing spread of the H1N1 influenza has sparked concerns over whether California's quarantine

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1. See Michelle A. Daubert, *Pandemic Fears and Contemporary Quarantine: Protecting Liberty Through a Continuum of Due Process Rights*, 54 *BUFF. L. REV.* 1299, 1305–06 (2007).

2. See *infra* Part I.

regulations—or lack thereof—are sufficient to prevent potential discrimination and inaccurate application of quarantine restrictions.

This Note focuses on California's quarantine statutes and argues for the implementation of procedural mechanisms and a higher standard of proof before an individual is subject to quarantine. Part I of the Note discusses the H1N1 influenza and the potential problems that a widespread outbreak may cause. Part II examines the history of quarantine powers and their traditional applications. Part III focuses on the state's authority to develop quarantine laws and specifically on California's quarantine statutes. Part IV explores the potential for abuse of quarantine powers and explains why a higher standard of proof and adequate procedural mechanisms should be adopted in California. Part V discusses how the Turning Point Model State Public Health Act addresses these concerns and proposes that the Act should be enacted in California.

I. THE SPREAD OF THE H1N1 INFLUENZA

An influenza pandemic caused by a new virus has not affected human populations for decades.³ Since people have little or no immunity to an influenza pandemic, countries across the world are universally vulnerable to an influenza infection.⁴ The H1N1 influenza was first detected in April 2009.⁵ It is believed to have originated in Mexico, and its rapid proliferation has caused worldwide alarm as over seventy countries have confirmed H1N1 infections.⁶ The harmful effects of the H1N1 influenza have already reached the United States, where there are currently thousands of confirmed cases and numerous deaths.⁷ The H1N1 influenza is so severe that the World Health Organization categorized the H1N1 influenza at its highest threat level, Phase Six, certifying it as a full

3. Dr. Margaret Chan, Dir. Gen., World Health Organization, H1N1 Influenza Situation (May 4, 2009) (on file with author), available at http://www.who.int/dg/speeches/2009/influenza_a_h1n1_situation_20090504/en/index.html.

4. See generally Thomas H. Maugh II, *Swine Flu Could Hospitalize 2 Million in U.S. This Winter*, L.A. TIMES, Aug. 25, 2009, at A13 (discussing the potential health impact of the H1N1 influenza on Americans as compared to that of previous influenzas).

5. Seema Mehta, *Health and Education Officials Gird for Flu Season*, L.A. TIMES, Aug. 22, 2009, at A8.

6. See David Brown, *World Health Organization Calls Swine Flu Outbreak a Pandemic*, WASH. POST, June 12, 2009, at A03.

7. *Id.*

pandemic.⁸ Further concern about the H1N1 influenza was indicated by the President's Council of Advisors on Science and Technology.⁹ The council submitted an alarming report indicating that the H1N1 influenza could hospitalize close to two million Americans.¹⁰ The report also predicted that 20 to 40 percent of the American population could develop symptoms of the influenza, which could lead to thirty thousand to ninety thousand fatalities this winter alone.¹¹

Influenza pandemics are not to be taken lightly. Throughout the twentieth century, influenza pandemics brought devastating consequences.¹² During the 1918–1919 influenza pandemic, between 500,000 and 750,000 Americans lost their lives.¹³ The 1957 Asian flu epidemic also took a toll on the American public, with mortalities estimated at 70,000 in a population of 170 million.¹⁴

To control the spread of the H1N1 influenza, state authorities have already begun using their quarantine powers to confine individuals exposed to the virus. The first quarantine occurred on April 25, 2009, when a family in Texas was quarantined in their home after the son contracted the H1N1 influenza.¹⁵ On April 30, 2009, state authorities in Southern California also exercised their police powers and quarantined thirty marines on a military base after one service member was infected with the H1N1 influenza.¹⁶ As the exposure to the H1N1 influenza increases, concerns arise whether California has adequate procedures and safeguards before an individual is quarantined.¹⁷

8. Thomas H. Maugh II, *Health Agency Declares Flu Pandemic; Virus 'Now Unstoppable,' WHO Says, but Cautions Against Overreacting*, CHI. TRIB., June 12, 2009, at C19.

9. REPORT FROM PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY, REPORT TO THE PRESIDENT ON U.S. PREPARATIONS FOR 2009—H1N1 INFLUENZA, at vii (Aug. 7, 2009) (on file with author).

10. *Id.* at viii.

11. *Id.*

12. *See id.* at 7–11.

13. *Id.* at 8.

14. *Id.* at 9.

15. *See Texas Family Quarantined After Son Contracts Swine Flu* (CNN television broadcast Apr. 25, 2009) (on file with author), available at <http://www.cnn.com/2009/HEALTH/04/25/swine.flu.family/> (noting that authorities quarantined an entire family indefinitely to their family home).

16. Mike Lee, *Pandemic 'Imminent'; Calm Urged as Swine Flu Spreads to 9 Nations*, SAN DIEGO UNION-TRIB., Apr. 30, 2009, at A1.

17. *See Part IV.*

II. THE HISTORY OF QUARANTINE

Quarantine involves separating and restricting the movement of an individual exposed to a disease who may become contagious.¹⁸ For centuries, quarantine has proven to be an effective tool to control the spread of disease.¹⁹ In fact, quarantine laws date as far back as the Old Testament; the book of Leviticus expressed the idea of keeping unclean persons from the rest of the community.²⁰ During the Middle Ages, European communities used this biblical concept to prevent the rapid spread of the bubonic plague.²¹

Quarantine powers were exercised in colonial America as well.²² In 1647, the Massachusetts Bay Colony established the first quarantine regulations in the American colonies to control the spread of diseases carried by ships from the Caribbean.²³ Quarantine regulations also became particularly important in port cities such as Boston and New York, where people had contact with foreign goods.²⁴ Despite the success of quarantine laws in controlling the spread of diseases, these regulations came under attack during the first half of the 1800s because reformers found them inadequate and repressive.²⁵ However, these attacks were largely unsuccessful.²⁶

After the Civil War, the U.S. federal government expanded its quarantine powers to control the spread of the yellow fever virus in the southern states.²⁷ The broad quarantine powers enacted in 1866 resulted in armed men preventing passengers from disembarking trains and individuals being denied shelter if they were fleeing from a city infected with the disease.²⁸ From 1866 until the twentieth

18. See Daubert, *supra* note 1, at 1301–02.

19. See *id.* at 1301–03.

20. *Id.* at 1302.

21. *Id.*

22. Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53, 63 (2007).

23. *Id.*

24. See *id.* at 64.

25. *Id.*

26. See *id.* at 65.

27. *Id.*

28. *Id.*

century, federal authorities continued to enact broad quarantine regulations to control the spread of contagious diseases.²⁹

III. CALIFORNIA'S AUTHORITY TO QUARANTINE

Traditionally, the responsibility of preserving public health is vested in the hands of state and local governments.³⁰ *Gibbons v. Ogden*³¹ was one of the earliest cases to address a state's right to quarantine an individual. In *Gibbons*, the U.S. Supreme Court explained that states have the power to authorize quarantine under their police powers.³² After *Gibbons*, the Supreme Court case of *Jacobson v. Massachusetts*³³ broadened state quarantine powers by allowing states to mandate compulsory vaccination laws.³⁴ Justice Harlan explained that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."³⁵ However, to ensure that this right is not applied capriciously, the Court held that quarantine regulations must be "reasonable."³⁶

California Health and Safety Code sections 120177 to 120250 govern the quarantine of an individual in California.³⁷ Section 120175 grants health authorities extensive power to "take measures as may be necessary to prevent the spread of the disease or occurrence of additional cases."³⁸ Section 120195 empowers health

29. See generally *id.* at 64–67 (stating that Congress and the federal government continued to enact stricter quarantine laws).

30. *People ex rel. Barmore v. Robertson*, 134 N.E. 815, 817 (Ill. 1922).

31. 22 U.S. 1 (1824).

32. See *id.* at 203 ("[Inspection laws] form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description . . . are component parts of this mass.").

33. 197 U.S. 11 (1905).

34. *Id.* at 38.

35. *Id.* at 27.

36. *Id.* at 25 ("[T]he police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.").

37. CAL. HEALTH & SAFETY CODE §§ 120175–120250 (West 2006 & Supp. 2009).

38. *Id.* § 120175 ("Each health officer knowing or having reason to believe that any case of the diseases made reportable by regulation of the department, or any other contagious, infectious or communicable disease exists, or has recently existed, within the territory under his or her jurisdiction, shall take measures as may be necessary to prevent the spread of the disease or occurrence of additional cases.").

authorities to “enforce all orders, rules, and regulations concerning quarantine or isolation prescribed or directed by the department.”³⁹

California’s quarantine laws came under attack in *In re Halko*,⁴⁰ in which the defendant was placed under quarantine after he was diagnosed with pulmonary tuberculosis.⁴¹ The defendant argued that California’s quarantine laws for tuberculosis were unconstitutional and that he was entitled to relief by habeas corpus.⁴² The court rejected this argument and held that “health authorities possess the power to place under quarantine restrictions persons whom they have reasonable cause to believe are afflicted with infectious or contagious diseases.”⁴³ The court concluded that because the health authorities had reasonable grounds to believe the defendant had tuberculosis, he was not entitled to habeas relief.⁴⁴ Based on *Halko*, health authorities merely need a reasonable belief to quarantine an individual.⁴⁵ With California adopting this reasonable belief standard—the same as that established in *Jacobson*—it is questionable whether this low threshold for quarantine laws adequately protects against potential discriminatory practices and inaccurate application of quarantine restrictions.

Along with requiring only a low standard of proof before an individual is quarantined, California also lacks a comprehensive procedural system for quarantine.⁴⁶ In California, quarantine authority is in the hands of local county authorities.⁴⁷ In Los Angeles

39. *Id.* § 120195.

40. 54 Cal. Rptr. 661 (Ct. App. 1966).

41. *Id.* at 662.

42. *Id.*

43. *Id.* at 664.

44. *Id.* at 664–65 (“There is nothing in this record to indicate the health officer issued any of the respective quarantine orders without probable cause or that petitioner does not at this time have an infectious and communicable disease which is dangerous to the public health.”).

45. *See id.* at 664 (“Persons who were confined in county hospitals or jails pursuant to quarantine orders issued by health officers under those statutes have been denied release on habeas corpus, where the evidence showed reasonable cause to believe that the person was infected. On the other hand, a person quarantined without reasonable grounds is entitled to relief by habeas corpus.” (internal citations omitted)).

46. A search of California health codes and local ordinances shows that California merely grants health authorities the power to quarantine but does not implement a system of overseeing the quarantine process. *See, e.g.*, L.A., CAL., MUN. CODE § 11.04.020 (2006); Daubert, *supra* note 1, at 1336–37; *see also* CAL. HEALTH & SAFETY CODE §§ 120175–250 (granting health authorities power to quarantine but not mentioning the necessary procedural requirements).

47. CAL. HEALTH & SAFETY CODE § 120215 (“Upon receiving information of the existence of contagious, infectious, or communicable disease for which the department may from time to

County, for example, extensive procedures exist to quarantine animals with rabies,⁴⁸ but only a vague standard governs procedures for human quarantine.⁴⁹ In fact, similar to California, many states have historically lacked comprehensive quarantine procedures and developed their quarantine regulations on an ad hoc, disease-by-disease basis.⁵⁰

IV. CALIFORNIA NEEDS TO IMPLEMENT PROCEDURAL MECHANISMS AND A HIGHER STANDARD OF PROOF TO PROTECT AGAINST POTENTIAL DISCRIMINATORY PRACTICES AND ERROR

The California standard of reasonable belief and the lack of comprehensive quarantine procedures could potentially lead to discrimination and inaccurate application of quarantine restrictions. Quarantine can be a useful tool to control the spread of the H1N1 influenza in California. However, unless procedural safeguards and a higher standard of proof are adopted, the spread of the H1N1 influenza could lead to a repetition of historical discriminatory practices.

A. *The Potential for Discrimination*

The history of quarantine is replete with discriminatory practices. During World War I, authorities quarantined thousands of prostitutes to prevent the spread of venereal diseases among soldiers.⁵¹ Under these quarantine laws, women were the primary

time declare the need for strict isolation or quarantine, each health officer shall . . . (b) [f]ollow *local rules and regulations*, and all general and special rules, regulations, and orders of the department, in carrying out the quarantine or isolation.” (emphasis added)).

48. See, e.g., L.A., CAL., MUN. CODE § 11.04.200–.290 (2009). Section 11.04.290 even provides a detailed procedural guideline for how the owner of a quarantined animal can appeal the confinement. *Id.* § 11.04.290.

49. *Id.* § 11.04.020(A) (“The director may remove any person affected or reasonably suspected of being affected with a contagious, infectious or communicable disease to a suitable place of isolation or quarantine when the director deems such action necessary to protect the patient and the public health.”); see also *id.* § 11.04.020(D) (“Return of such communicable disease patients from isolation in a hospital or other isolation facilities to community living shall be on authorization of the director.”).

50. See Rebecca B. Chen, Comment, *Closing the Gaps in the U.S. and International Quarantine Systems: Legal Implications of the 2007 Tuberculosis Scare*, 31 HOUS. J. INT’L L. 83, 93 (2008).

51. Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53, 66 (1985).

targets even though men could spread the disease as well.⁵² Since communities had little or no objection to the prevention of the spread of venereal diseases, the police used quarantine laws to hold women suspected of engaging in prostitution for periods of time even longer than those allowed pursuant to criminal sentences.⁵³ In fact, the widespread use of the quarantine laws against promiscuous women and prostitutes led to the stigma quarantined women in general faced.⁵⁴

Further, state authorities have abused quarantine powers by using an individual's national origin and economic status as a basis for quarantine.⁵⁵ In the early 1900s, an Irish immigrant named Mary Mallon was held against her will for a total of twenty-six years without a trial because she was suspected of spreading typhoid fever.⁵⁶ Scholars believe that she was targeted by health authorities because of her low-economic status and Irish ancestry.⁵⁷

In 1892, another example of the discriminatory application of quarantine powers against immigrants occurred during New York City's typhus outbreak. On February 11, 1892, a doctor in New York reported four cases of typhus in an area populated by newly arrived immigrants.⁵⁸ The initial four patients diagnosed with typhus were Russian Jewish passengers who had recently arrived in New York Harbor.⁵⁹ Once this discovery was made, the New York City Department of Health rounded up all newly arrived Russian Jewish immigrants and subjected them to quarantine, whether or not they showed signs of the illness.⁶⁰ Recently arrived Italian immigrants were quarantined as well because they had intermingled with the Russian Jewish passengers in New York.⁶¹ Eventually, health authorities began quarantining all Russian Jewish immigrants, whether or not they arrived on ships that were known to carry

52. *See id.* at 67.

53. *Id.* at 66.

54. *Id.* at 66–68.

55. *E.g.*, Daubert, *supra* note 1, at 1311.

56. *Id.*

57. *Id.*

58. Batlan, *supra* note 22, at 74.

59. *Id.*

60. *Id.* at 75.

61. *Id.*

typhus.⁶² A public health historian estimated that of the 1,200 immigrants who were quarantined, only 50 had typhus.⁶³

As a result of these massive quarantines, newspapers printed stories portraying the inhabitants of the Jewish quarters as sickly.⁶⁴ The newspapers described immigrant family dwellings as dirty, infested with disease, and uninhabitable. In reality, however, this was not the case.⁶⁵ Additionally, the newspapers dehumanized immigrants who were quarantined and portrayed them as individuals without any legal rights.⁶⁶

Even in California, the discriminatory nature of quarantine has been evident. In the case of *Wong Wai v. Williamson*,⁶⁷ a federal circuit court in California addressed the discriminatory practice of quarantine. On May 18, 1900, the San Francisco Board of Health quarantined about twenty-five thousand Chinese residents of San Francisco, precluding them from traveling outside the city unless they submitted to an inoculation.⁶⁸ The inoculation⁶⁹ in question, "Haffkine Prophylactic," was made out of living bubonic plague bacteria and was known to cause pain, distress, a sudden increase in temperature, and depression.⁷⁰ Since the Board of Health required only individuals of Chinese and other Asian descent to submit to this dangerous inoculation, the court struck down the quarantine as discriminatory.⁷¹

62. *Id.*

63. *See id.* at 79.

64. *Id.* at 76–77.

65. *Id.*

66. *Id.* at 76.

67. 103 F. 1 (N.D. Cal. 1900). It is important to note that this case was decided by a federal court and not under California's standard for quarantine regulations.

68. *Id.* at 3.

69. *Inoculation* is defined as "the act or process or an instance of *inoculating*; [especially] the introduction of a pathogen or antigen into a living organism to stimulate the production of antibodies." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 645 (11th ed. 2003).

70. *Wong Wai*, 103 F. at 3.

71. *Id.* at 9–10.

[The quarantine laws] are not based upon any established distinction in the conditions that are supposed to attend this plague, or the persons exposed to its contagion, but they are boldly directed against the Asiatic or Mongolian race as a class, without regard to the previous condition, habits, exposure to disease, or residence of the individual; and the only justification offered for this discrimination was a suggestion made by counsel for the defendants in the course of the argument, that this particular race is more liable to the plague than any other. No evidence has, however, been

Another form of quarantine that has been criticized for its potential discriminatory application has been HIV/AIDS quarantine.⁷² Since the public considers homosexuals to be a high-risk group for contracting this illness, there has been concern over the years that an HIV/AIDS quarantine could be used to promote prejudice against homosexuals rather than to protect society.⁷³

The discriminatory application of quarantine laws is not a thing of the past. With the spread of the H1N1 influenza in its initial stages, quarantine laws have already been applied in a prejudicial manner against Mexican nationals. On May 3, 2009, China quarantined Mexican nationals in their hotel rooms and other designated areas regardless of whether they had any symptoms of the H1N1 influenza.⁷⁴ As a result of China's arbitrary application of its quarantine powers, over fifty Mexican nationals were kept confined against their will.⁷⁵

The application of quarantine in China based on national origin has the potential to occur in the United States as well. Those who view our society as color-blind speak of race and racism as a vice of the past that was extinguished with the civil rights movement.⁷⁶ During times of national emergency and disaster, however, the role of race is hard to ignore in the United States. For example, after the terrorist attacks on September 11, 2001, law enforcement targeted Arab Americans and jailed them based on minuscule evidence.⁷⁷ Many Arab Americans worried that they would be viewed as enemies of the United States and their immigration statuses would be

offered to support this claim, and it is not known to be a fact. This explanation must therefore be dismissed as unsatisfactory.

Id. at 7.

72. Parmet, *supra* note 51, at 71–75 (discussing the various forms of quarantine that could be used to control HIV/AIDS).

73. *Id.* at 84 (“[T]he association of AIDS with groups that are socially disfavored, such as drug addicts and homosexuals, suggests that there is a serious danger that quarantine will be used as a tool of prejudice.”).

74. Chris Buckley, *China Holds Mexicans over Flu Fears—Embassy*, REUTERS, May 3, 2009, <http://www.reuters.com/article/latestcrisis/iduspek8030>; see also Thomas H. Maugh II, *Flu Alert May be Raised*, L.A. TIMES, May 3, 2009, at A10.

75. *Id.* Mexican foreign minister Patricia Espinosa objected to China's actions, charging that “Mexican citizens showing no signs at all of being ill have been isolated under unacceptable conditions.” *Id.*

76. See Cheryl I. Harris, Review Essay, *Whitewashing Race: Scapegoating Culture*, 94 CAL. L. REV. 907, 908 (2006).

77. See Batlan, *supra* note 22, at 54.

jeopardized.⁷⁸ In fact, some Arab Americans have been subject to “political quarantine” in Guantanamo Bay for the “well-being” of the United States.⁷⁹

Another recent example of the role of race in national emergencies occurred in 2005, when Hurricane Katrina wreaked havoc in the Gulf of Mexico and dispossessed tens of thousands of Americans.⁸⁰ After Hurricane Katrina, the American public and many scholars could not overlook the role of race in the government’s response and the consequences that followed.⁸¹

As a result of the H1N1 influenza outbreak, racist commentary has been prevalent.⁸² On April 24, 2009, in his nationally syndicated show, Michael Savage blamed illegal immigrants for the spread of the H1N1 influenza and stirred anti-Mexican sentiment.⁸³ Savage even endorsed the idea of shutting down the U.S.-Mexican border as a response to the H1N1 influenza outbreak.⁸⁴ Michelle Malkin, a Fox News columnist, also contributed to the anti-immigrant dialogue.⁸⁵ She wrote in one of her blog posts, “9/11 didn’t convince the open-borders zealots to put down their race cards and confront reality. Maybe the threat of their sons or daughters contracting a deadly virus spread from south of the border to their Manhattan prep schools will.”⁸⁶

Without procedural safeguards and a higher standard of proof, California could be susceptible to discriminatory tendencies that continue to linger in our society today. If the H1N1 influenza spreads across America, minority communities will be the most harmed.⁸⁷

78. *Id.*

79. *See id.* at 54–55.

80. *See* Susannah Sirkin, *The Debacle of Hurricane Katrina: A Human Rights Response*, 30 FLETCHER F. WORLD AFF. 223, 223 (2006).

81. Harris, *supra* note 76, at 908–10.

82. *See* Teresa Puente, *Mexican Backlash Unwarranted*, CHI. TRIB., Apr. 30, 2009, at 7 (providing examples of racist commentaries made by media figures from prominent networks).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *See* Brietta R. Clark, *Hospital Flight from Minority Communities: How Our Existing Civil Rights Framework Fosters Racial Inequality in Healthcare*, 9 DEPAUL J. HEALTH CARE L. 1023, 1028–30 (2005). For decades, studies have shown that hospital closures are a nationwide problem in America. Social scientists have found a strong correlation between the locations of hospital closures and the high proportion of minority and low-socioeconomic-status individuals in these communities. *See id.* at 1028–30.

The protections available in the Turning Point Model State Public Health Act will help prevent devastating consequences to these communities and the discriminatory application of quarantine laws.⁸⁸

B. The Potential for Error and Harmful Consequences

The development of case law in the area of civil commitment addresses policy concerns similar to those raised by the quarantine powers. The adoption of a clear and convincing standard—the standard applied in civil commitment—before an individual is subject to quarantine will reduce the likelihood of an erroneous application of the quarantine authority.

Since *Jacobson*, the U.S. Supreme Court has not addressed the issue of quarantine.⁸⁹ However, in *Addington v. Texas*,⁹⁰ the Supreme Court dealt with the standard of proof required for the civil commitment of a mentally ill person.⁹¹ In the Court's holding, Justice Burger outlined why state authorities need clear and convincing evidence before civilly committing an individual. First, although the Court acknowledged the state's legitimate interest in protecting the community,⁹² Burger explained that this interest does not validate confining individuals who "do not pose some danger to themselves or others."⁹³ Second, because a state has no interest in confining individuals who are not dangerous to society, the Court explained that the higher standard of proof—clear and convincing evidence—is necessary to prevent an inappropriate commitment.⁹⁴

The policy concerns addressed in *Addington* are also present when an individual is quarantined. Quarantine can last for a lengthy

88. See Part V (discussing how the safeguards in the Turning Point Model State Public Health Act will help curb the discriminatory application of quarantine laws).

89. See Daubert, *supra* note 1, at 1305–06.

90. 441 U.S. 418 (1979).

91. See *id.*

92. *Id.* at 430.

93. *Id.* at 426–27 ("Since the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is at least unclear to what extent, if any, the state's interests are furthered by using a preponderance standard in such commitment proceedings.").

94. *Id.* at 430 ("That practical considerations may limit a constitutionally based burden of proof is demonstrated by the reasonable-doubt standard, which is a compromise between what is possible to prove and what protects the rights of the individual. If the state was required to guarantee error-free convictions, it would be required to prove guilt beyond all doubt. However, '[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.'" (alteration in original)).

period of time, and the confined individual is released only when he or she no longer poses a danger to the community.⁹⁵ Similar to the reasoning in *Addington*, while a state has an interest in protecting society from an infectious disease, a state has no interest in confining individuals who pose no risk of infecting others.⁹⁶ A higher standard of proof is necessary to prevent the unnecessary confinement of individuals who are not a danger to the community.

The history of the discriminatory application of quarantine laws illustrates the potential for error when quarantine powers are exercised. As explained in *Addington*, increasing the burden of proof to clear and convincing evidence will “impress the factfinder with the importance of the decision and thereby perhaps . . . reduce the chances that inappropriate commitments will be ordered.”⁹⁷

Under California’s reasonable belief standard, the government is given broad authority to quarantine individuals without meeting a higher standard of proof.⁹⁸ By adopting the clear and convincing burden of proof, California can help protect its citizens from discriminatory and arbitrary applications of quarantine laws, as has happened in the past.

V. THE TURNING POINT MODEL STATE PUBLIC HEALTH ACT SHOULD BE ADOPTED IN CALIFORNIA

With the outbreak of the H1N1 influenza, the potential for abuse of quarantine powers in California is an impending concern. A majority of state laws are outdated and unfit to provide adequate safeguards for individual liberties.⁹⁹ In September 2003, the Turning Point Model State Public Health Act (the “Turning Point Act”) was formulated by the Public Health Statute Modernization National

95. *E.g.*, CAL. HEALTH & SAFETY CODE § 120235 (West 2006) (“No quarantine shall be raised until every exposed room, together with all personal property in the room, has been adequately treated, or, if necessary, destroyed, under the direction of the health officer; and *until all persons having been under strict isolation are considered noninfectious.*” (emphasis added)); Hilary A. Fallow, Comment, *Reforming Federal Quarantine Law in the Wake of Andrew Speaker: The “Tuberculosis Traveler,”* 25 J. CONTEMP. HEALTH L. & POL’Y 83, 86–87 (2008).

96. *See* 441 U.S. at 426.

97. *Id.* at 427.

98. *See* Daubert, *supra* note 1, at 1326–27.

99. *See* David P. Fidler et al., *Through the Quarantine Looking Glass: Drug-Resistant Tuberculosis and Public Health Governance, Law, and Ethics*, 35 J.L. MED. & ETHICS 616, 616 (2007).

Excellence Collaborative to address these concerns.¹⁰⁰ The Turning Point Act was written because of an Institute of Medicine (IOM) report that found state public health laws to be outdated and internally inconsistent.¹⁰¹ The IOM found that “revisions [are] necessary to (1) clearly delineate the basic authority and responsibility entrusted to public health entities and (2) support a set of modern disease control measures that address contemporary health problems and threats.”¹⁰² Unlike California’s quarantine laws, the Turning Point Act addresses the potential for abuse and discrimination inherent in quarantine powers.¹⁰³

Article II of the Turning Point Act grants states the ability to develop health laws to protect the public and also balances this power with the need to preserve individual rights.¹⁰⁴ Section 2-103(c) of the Turning Point Act lists specific liberties health officials are required to protect.¹⁰⁵ First, the Turning Point Act requires respect for the personal dignity of each individual.¹⁰⁶ Second, section 2-103(c)(2) mandates that all public health personnel protect the health information of each individual.¹⁰⁷ This provision is particularly important because of the stigma that can attach to an individual under quarantine.¹⁰⁸ Next, section 2-103(c)(3) requires public health systems to have adequate due process protections when safeguarding the community.¹⁰⁹ This provision is imperative because under

100. See PUB. HEALTH STATUTE MODERNIZATION NAT’L EXCELLENCE COLLABORATIVE, TURNING POINT MODEL STATE PUBLIC HEALTH ACT pmbl. (2003) (“[The Turning Point Act] is the result of a three-year effort by the Turning Point Public Health Statute Modernization Collaborative to develop a tool for state, local and tribal governments to use in improving their public health statutes and administrative rules.”).

101. *Id.* at 2.

102. *Id.*

103. See *id.* at 18–60 (adopting a higher standard of proof and other procedural safeguards, and addressing the inherent abuse that exists in broad quarantine powers).

104. *Id.* § 2-101, at 18 (“It is the policy of this [State] that the health of the public be protected and promoted to the greatest extent possible through the public health system while respecting individual rights to dignity, health information privacy, nondiscrimination, due process, and other legally-protected interests.”).

105. *Id.* § 2-103(c), at 19.

106. *Id.* § 2-103(c)(1), at 19.

107. *Id.* § 2-103(c)(2), at 19 (“All persons within the public health system shall seek to accomplish the mission of public health while respecting individual rights including . . . (2) [p]rotection of health information privacy for each individual consistent with Article VII of this Act and any applicable federal, state, or local laws.”).

108. See Parmet, *supra* note 51, at 66.

109. TURNING POINT MODEL STATE PUBLIC HEALTH ACT § 2-103(c)(3), at 19.

quarantine laws, individuals are kept confined until they no longer pose a danger to society.¹¹⁰ The indefinite nature of quarantine mandates that an individual be given due process rights, which are necessary to avoid confinement for arbitrary reasons and excessive periods of time. The Irish immigrant Mary Mallon was kept confined for twenty-six years based on her country of origin and economic status.¹¹¹ If Mallon had been given adequate due process protections—notice and an opportunity to be heard—she would have had a forum and means to preserve her liberty.

Moreover, the Turning Point Act addresses one of the most harmful abuses of quarantine laws. Under section 2-103(c)(4), the Act imposes an obligation on persons in the public health system to avoid “explicit or implicit discrimination in an unlawful manner of individuals on the basis of their race, ethnicity, nationality, religious beliefs, sex, sexual orientation, or disability status.”¹¹² Quarantine laws have been historically used in a discriminatory manner.¹¹³ The need to address the discriminatory use of quarantine laws is essential to prevent such abuse from happening again.

Consistent with the goals of section 2-103(c)(3), Article V of the Turning Point Act lists the specific procedural due process requirements before an individual is quarantined.¹¹⁴ Quarantine restrictions are important in the wake of the H1N1 influenza.¹¹⁵ It is essential to keep those infected with the flu from spreading the H1N1 influenza through society.¹¹⁶ Article V provides the authority necessary for public health officials to combat contagious diseases such as influenza, while at the same time providing due process protections from inappropriate quarantine.¹¹⁷

110. See Fallow, *supra* note 95, at 87–88.

111. Daubert, *supra* note 1, at 1311.

112. TURNING POINT MODEL STATE PUBLIC HEALTH ACT § 2-103(c)(4), at 19.

113. See section IV.A.

114. TURNING POINT MODEL STATE PUBLIC HEALTH ACT § 5-108, at 33–35.

115. See generally Fallow, *supra* note 95, at 86–87 (proposing that quarantine and isolation laws be strengthened in the wake of the Andrew Speaker incident).

116. *Id.* (“When a person has become infected with a communicable disease and the transmission of the disease is possible, restriction of the individual’s movement and contact with others can effectively prevent transmission.”).

117. TURNING POINT MODEL STATE PUBLIC HEALTH ACT § 5, at 27–40.

Section 5-108(a) grants power to state public health systems to promulgate rules and regulations for quarantine.¹¹⁸ However, unlike the health codes in California, section 5-108(a) powers are not unrestricted and expansive. In addition, section 5-108(b) requires health authorities to regularly monitor the health status of quarantined individuals to ensure that they are released once they no longer pose a danger to society.¹¹⁹ With this standard, the Turning Point Act is consistent with *Addington*, in which the Court held that the state's interest in protecting the community does not allow it to quarantine individuals who "do not pose some danger to themselves or others."¹²⁰ With regular status reports on quarantined individuals, section 5-108(b) requires states to employ a strict procedural system to avoid the unnecessary application of quarantine laws.

Perhaps the most critical safeguard under Article V is the higher standard of proof required before an individual is quarantined. The Turning Point Act adopts the same standard as the Supreme Court adopted in *Addington*.¹²¹ Before an individual is quarantined, the state must prove by the higher clear and convincing evidence standard that the quarantine is "reasonably necessary to prevent or limit the transmission of a contagious or possibly contagious disease to others."¹²² Through the clear and convincing evidence standard, the Turning Point Act helps address the policy concerns raised in *Addington*.¹²³

Moreover, Article V also requires notice to the individual to be quarantined and an opportunity to be heard.¹²⁴ Before an individual

118. *Id.* § 5-108(a), at 33.

119. *Id.* at 5-108(b), at 33.

120. *Addington v. Texas*, 441 U.S. 418, 426 (1979).

121. Compare TURNING POINT MODEL STATE PUBLIC HEALTH ACT § 5-108(e)(4), at 34–35, with *Addington*, 441 U.S. at 431–32.

122. TURNING POINT MODEL STATE PUBLIC HEALTH ACT § 5-108(e)(4), at 34–35.

123. See 441 U.S. at 431–32.

124. TURNING POINT MODEL STATE PUBLIC HEALTH ACT §§ 5-108(e)(2)–(3), at 34.

(2) Notice. Notice to the individuals or groups of individuals identified in the petition shall be accomplished in accordance with existing rules of civil procedure. (3) Hearing. A hearing must be held on any petition filed pursuant to this subsection within [forty-eight hours] of filing of the petition. In extraordinary circumstances and for good cause shown the state or local public health agency may apply to continue the hearing date on a petition filed pursuant to this Section for up to [five (5)] days. The court may grant the continuance in its discretion giving due regard to the rights of the affected

is quarantined, health authorities must first submit a written petition to the court.¹²⁵ After the written petition, notice must be sent to the individual identified in the petition.¹²⁶ The beneficial aspect of this procedural requirement is the short time span involved in the entire process. Once the written petition is filed, a hearing must be held within forty-eight hours.¹²⁷ If there are extraordinary circumstances and the state has good cause, then this short two-day time span may be extended.¹²⁸ Even then, the state will not be given a continuance of more than five days.¹²⁹

As a result of the requirements in Article V, the entire quarantine process is expedited, and the state will minimize the loss of liberty individuals will suffer as a result of the quarantine. Additionally, Article V will help prevent individuals from being quarantined for an indefinite period of time because they will have an opportunity to dispute the quarantine.¹³⁰

Lastly, Article V allows health authorities to take quick action during situations in which “delay in imposing the isolation or quarantine would significantly jeopardize the agency’s ability to prevent or limit the transmission of a contagious or possibly contagious disease to others.”¹³¹ Section 5-108(d) permits the state to temporarily quarantine an individual through a written directive.¹³² With the written directive, the state will have ten days to file the petition for quarantine.¹³³ This alternative avenue will allow state authorities to take quick action to protect the public, while still preserving the procedural rights of the quarantined individual.

The Turning Point Act balances the protection of individual liberties and the state’s authority to prevent the spread of communicable diseases. With safeguards against discrimination and

individuals, the protection of the public’s health, the severity of the need for quarantine or isolation, and other evidence.

Id.

125. *Id.* § 5-108(e), at 34.

126. *Id.* § 5-108(e)(2), at 34.

127. *Id.* § 5-108(e)(3), at 34.

128. *Id.*

129. *Id.*

130. *See id.*

131. *Id.* § 5-108(d), at 33–34.

132. *Id.*

133. *Id.* § 5-108(d)(3), at 34.

indefinite quarantine, and with the opportunity for a hearing and notice, individual liberties will receive adequate safeguards. Additionally, with exceptions available for temporary quarantine and emergency situations, the Turning Point Act gives state authorities the flexibility to take quick action when necessary for public health and safety.

In fact, the beneficial aspects of the Turning Point Act have been widely recognized in the United States. Since the Turning Point Act's release in September 16, 2003, thirty-three states have introduced features of the Act through 133 bills or resolutions, of which 48 have passed.¹³⁴

CONCLUSION

We are currently facing a global pandemic as a result of the H1N1 influenza outbreak. With California only miles away from the H1N1 influenza epicenter, implementing the procedural mechanisms and higher standard of proof in the Turning Point Act is imperative. The history of quarantine should serve as an example of the abuses that may come with the H1N1 influenza outbreak. As Niccolo Machiavelli stated, "Whoever wishes to foresee the future must consult the past; for human events ever resemble those of preceding times."¹³⁵ The safeguards necessary to prevent a repeat of past abuses of quarantine powers are addressed in the Turning Point Act. If California adopts the Turning Point Act, it will strike the proper balance between the government's need to protect public safety and individual rights. Not only does the Turning Point Act ensure that individuals will be protected against arbitrary applications of quarantine powers, but it also provides avenues for quick government response to an influenza outbreak. California's actions in dealing with the H1N1 influenza will determine how pandemics are handled in the future. If California fails to heed the warnings of the past, we are destined to replicate past misfortunes.

134. LEGISLATIVE UPDATE, THE TURNING POINT MODEL STATE PUBLIC HEALTH ACT STATE LEGISLATIVE UPDATE TABLE (2007), <http://www.publichealthlaw.net/Resources/ResourcesPDFs/MSPHA%20LegisTrack.pdf>.

135. Famous Opinions on the Importance of the Study of History, http://www.bukisa.com/articles/62068_famous-opinions-on-the-importance-of-the-study-of-history (Apr. 12, 2009).