New York Law Journal

Infectious Disease, Social Distancing, and the Law

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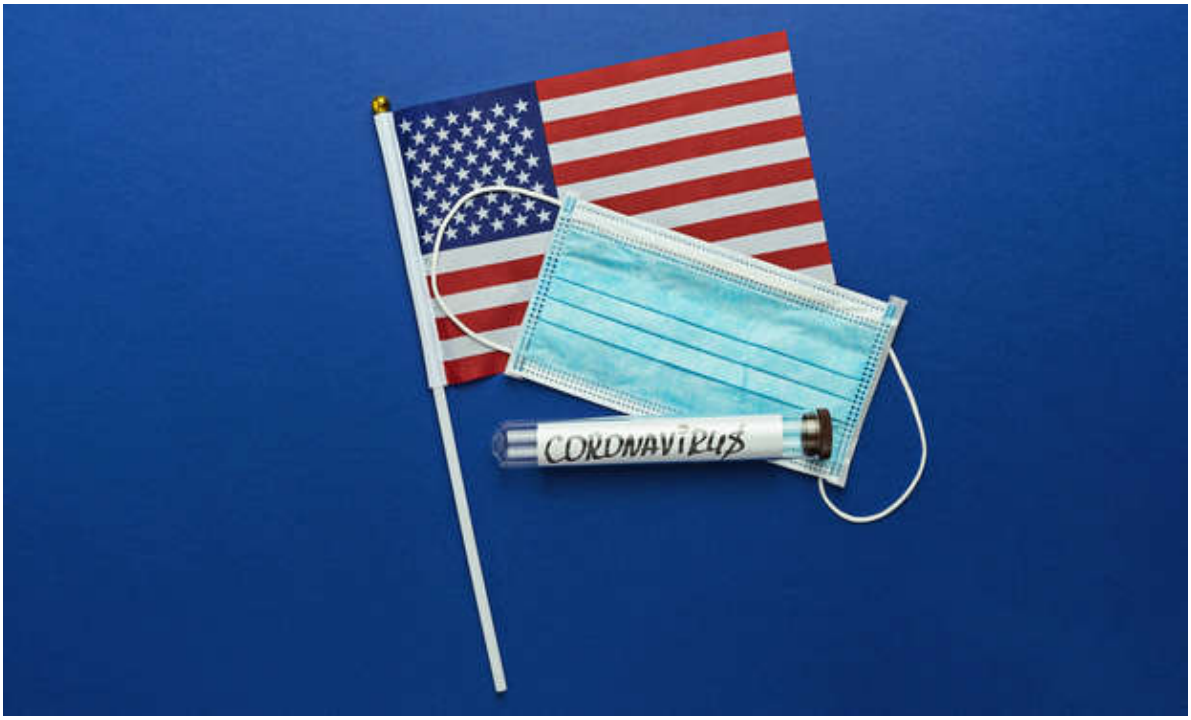
By **Andrew J. Luskin** | March 27, 2020



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"Social distancing" may be familiar parlance among epidemiologists, but the term is relatively novel to those of us who do not study infectious diseases. A new virus, previously unknown to human populations, has swept across the world, endangering entire populations. Governments around the globe have reacted with different measures designed to contain the spread of the SARS-CoV-2 virus and the COVID-19 disease.

As of the preparation of this article, New York state unfortunately holds the record of the most reported COVD-19 cases in the United States. In an effort to contain the virus, the legislature and the governor have put pen to paper, so to speak, to address the needs of the state's population, with the objective of "flattening the curve" to reduce the daily incidence of new cases. While not constituting a quarantine per se, the governor's actions nevertheless have imposed significant restrictions on New Yorkers, their livelihoods, and their freedom of movement. What legal standards apply to these restrictions, and do the restrictions go too far in the name of protecting the public from an unprecedented public health emergency?

The Governor's Executive Orders

Earlier this month, Gov. Andrew Cuomo issued a series of executive orders, starting with a declaration of statewide disaster emergency. Becoming increasingly encompassing and prophylactic, the executive orders collectively have directed the cancellation or postponement of social gatherings or events; closure of gyms, fitness, centers, movie theaters, and places of public amusement; and cessation of on-premises food and beverage service in bars and restaurants. On March 20, 2020, the governor announced his "New York State on PAUSE" order, touted on the state's website as a "10-Point Policy that Assures Uniform Safety for Everyone."

The New York state on PAUSE executive order mandates a 100% reduction of the in-person workforce of all non-essential businesses and not-for-profit entities. Any business that violates the governor's order shall be subject to a fine as prescribed in the Public Health Law §12. In a series of rapid-fire orders, the governor thus effectively shut down New York, with the exception of business and gatherings considered essential. What followed was not unexpected: Massive job layoffs and concern for widespread business failures as the economic realities of New York on PAUSE took hold. Did the governor act within his lawful powers? Some might think the question should be asked; others no doubt are just grateful that the governor acted as he did. The author does not seek to challenge the governor's leadership, but rather to commend it while examining evolving legal questions that will need to be addressed as we deal with infectious disease epidemics.

Executive Law §29-a

On March 2, 2020, the legislature overwhelmingly voted to amend New York Executive Law §29-a to give the governor extraordinary power to do virtually anything he deems necessary to contain the coronavirus. The governor must use his expanded powers "in the interest of the health or welfare of the public," and only to the extent "reasonably necessary to aid the disaster effort." L 2020, ch 23, §(2)(b). Executive orders so issued may not be effective for more than 30 days, but the governor may extend his orders for additional thirty-day periods "upon reconsideration of all of the relevant facts and circumstances." Id. §2(2)(a). The governor's broad new authority will expire on April 29, 2021 (see L 2020, ch 23, §4), and is subject to legislative override: The legislature may "terminate by concurrent resolution executive orders issued under this section at any time" (id. §2(4)).

The governor's executive orders are not without a rational basis. Harvard epidemiologist Marc Lipsitch tells us that according to the best epidemiological estimates, asymptomatic individuals are responsible for as much as 50% of all coronavirus transmissions. See Shaw, Jonathan, *COVID-19: An Emergency, and a long-Term Challenge* (https://harvardmagazine.com/2020/03/lipsitch-call-to-action), Harvard Magazine, March 20, 2020.

Against this worsening pandemic, the governor has quickly used his expanded powers under §29-a to issue his remedial executive orders. Prior to its recent amendment, the statute authorized the governor temporarily to suspend specific provisions of statutes, local laws, ordinances, orders, rules, and regulations of any agency during a state of disaster emergency. The statute, however, did not authorize the governor to order the cessation of business or public gatherings, prohibit people from attending their workplaces, or otherwise to halt the normal flow of life.

Is New York State Lawfully on PAUSE?

One might question the extent to which any government official can order social distancing, close businesses en masse, require the workforce not to attend to their livelihoods, prohibit gatherings, and perhaps even mandate home confinement. Even before its recent amendment, the governor's powers under §29-a were, and still are, subject to "the state constitution, the federal constitution and federal statutes and regulations." Executive Law §29-a(1). (The quoted language was not amended by L 2020 c 23.) That restriction did not change with the recent amendment.

The coronavirus challenges us, at least for the time being, with a new variation on an older theme. Social distancing and the likes of "New York State on PAUSE" appear to have no earlier iterations in our law

sufficiently analogous to be instructive here. But a case decided by a federal appeals court in California at the turn of the 20th century, and still cited today, does provide some guidance.

The Jew Ho Case

In May 1900, the city of San Francisco quarantined its Chinatown district after nine deaths, thought to be caused by bubonic plague, occurred during the "San Francisco Plague of 1900-1904," the first plague epidemic in the continental United States. The city empowered its board of health to quarantine persons, houses, places, and districts within the city and county, when, in its judgment, such action was necessary to prevent the spreading of contagious or infectious diseases. San Francisco's mayor approved the ordinance, which the next day resulted in a board of health finding that danger existed to the health of the San Francisco citizenry from the bubonic plague. The board imposed a quarantine on the city's Chinatown district, a measure followed promptly with another ordinance establishing quarantine regulations and directing the city's chief of police "to furnish such assistance as might necessary to establish and maintain this quarantine." *Jew Ho v. Williamson,* 103 F. 10, 12 (C.C.N.D. Cal. 1900). (The federal Circuit Court for the Districts of California was the predecessor of the U.S. Court of Appeals for the Ninth Circuit.)

Jew Ho, a person of Chinese ancestry who lived within the quarantined district and operated a grocery store, alleged that the quarantine unlawfully prevented him "from selling his goods, wares, and merchandise." Id. at 12. The complaint also alleged that while the quarantine was drawn in general terms and purported to impose the same restrictions, burdens, and limitations upon all persons within the quarantined district, in fact the restrictions were enforced only "against persons of the Chinese race and nationality." Id. at 13.

Jew Ho also alleged that no bubonic plague cases had been detected within the quarantined district; other diseases caused the nine deaths that spawned the quarantine; and the defendants had failed and neglected to quarantine the houses of the infected victims, or to quarantine those within the district who had been exposed to the plague and therefore likely to transmit the disease to others. Jew Ho further contended that the quarantine district was inappropriately large and populous, thereby increasing, rather than diminishing, the danger of contagion and epidemic. He further maintained that he had never contracted bubonic plague, been exposed to it, or been in any locality where the plague existed. Alleging a violation of equal protection and seeking an injunction, Jew Ho claimed that the quarantine was a purely arbitrary, unreasonable, unwarranted, wrongful, and oppressive interference with his personal liberty and the liberty of other Chinese residents, and illegally deprived him of the use of his property. The defendants countered that they acted lawfully, in accordance with the police powers of the state, and denied any selective enforcement of the quarantine.

The court concluded that the city's police powers were not without limitation, and the lack of any specific, relevant information about Jew Ho was a "difficulty or weakness that [was] inherent in the case." Id. at 15. The court observed that not "every statute enacted ostensibly for the promotion of [the public health] is to be accepted as a legitimate exertion of the police powers of the state." Id. at 17. Rather, there are "limits beyond which legislation cannot rightfully go." Id. Although statutes are entitled to the presumption of validity, "the courts must obey the constitution, rather than the lawmaking department of government," and constitutional adherence requires that courts, "upon their own responsibility, determine whether, in any particular case, these limits have been passed." Id.

Balancing the police power of the state with our well-entrenched system of checks and balances, the court wrote that the legislative branch cannot serve as the "exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue [his or her] business or profession." Id. at 19. In other words, "the personal liberty of the citizen and his rights of property cannot be invaded under the disguise of a police regulation." Id. The legislature thus may not, said the court, "arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." Id. at 20. However, when reviewing a state's use of its police power, the courts must exercise the "utmost caution" and countermand the legislature "only when it is clear that the ordinance or law so declared void passes entirely

beyond the limits which bound the police power, and infringes upon rights secured by the fundamental law." Id. at 19.

The court invalidated the Chinatown quarantine as not reasonable to accomplish the purposes sought, and because the quarantine was applied discriminatorily, only against persons of Chinese ancestry within the quarantine district. Notably, social distancing as we understand it by present circumstances was not a part of the quarantine regulations. Freedom of movement within the quarantined district was allowed, a fact that the court perceived as more likely to promote, rather than inhibit, the spread of an infectious disease.

Jew Ho provides a judicial analysis from the turn of the 20th century that might be instructive today. While the coronavirus has presented us with a new infectious disease, constitutional considerations still apply in the context of quarantine, isolation, and governmental responses to epidemics. More recent cases have challenged quarantine orders imposed upon travelers returning to the United States from Ebola-plagued West African nations in 2014, although those so quarantined tested negative for the disease upon their arrival. See *Hickox v. Christie*, 205 F. Supp. 3d 579 (D.N.J. 2016); *Liberian Cmty. Ass'n of Connecticut v. Malloy*, 2017 WL 4897048, at *3 (D. Ct. March 28, 2017) (not reported in the Federal Supplement). These cases resulted in dismissals of complaints alleging violations of constitutional and statutory rights, as federal courts in New Jersey and Connecticut found that public officials who ordered mandatory quarantines were cloaked with qualified immunity. The Hickox court noted that the federal Public Health Service Act (*see* 42 U.S.C. §264) empowers the federal government to quarantine persons entering the United States. Yet, as the court observed, the federal government historically has allowed the states to implement and execute their own quarantine laws, with little federal interference. See *Hickox*, 205 F. Supp.3d at 590. This practice is consistent with the Supreme Court's acknowledgement in 1905 that the states may use their general police powers to protect public health through quarantines and other measures. See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 S. Ct. 358 (1905).

The take-away from these federal court decisions is that "an individual 'although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will ... until it be ascertained by inspection ... that the danger of the spread of the disease among the community at large has disappeared.'" *Liberian Cmty. Ass'n of Connecticut*, 2017 WL 4897048 at *11 (quoting *Jacobson*, 197 U.S. at 29, 25 S. Ct. at 362).

New York's Quarantine Law

New York Public Health Law §2100 authorizes local boards of health to isolate "cases of communicable disease in a hospital or elsewhere when necessary for protection of the public health." Interestingly, the statute speaks of "isolation," but not "quarantine." The former usually involves separating sick people with a contagious disease from those who are not sick. The latter involves separation and restriction of movement of people who were exposed to a contagious disease to see if they become ill. See CDC website, at https://www.cdc.gov/quarantine/index.html (last visited March 22, 2020). New York's public health regulations, however, address both isolation and quarantine. "Isolation" is "the separation from other persons, in such places, under such conditions, and for such time, as will prevent transmission of the infectious agent, of persons known to be ill or suspected of being infected." 10 N.Y.C.R.R. §2.25(d). "Quarantine of premises" prohibits entrance into or exit from premises where a case of communicable disease exists of any person other than medical attendants and other authorized persons. See 10 N.Y.C.R.R. §2.25(e). "Personal quarantine" means "restricting household contacts and/or incidental contacts to premises designated by the health officer." 10 N.Y.C.R.R. §2.25(f). The regulations prescribe various duties of physicians and public health officials in dealing with cases of communicable disease. The regulations, however, do not on their face empower public health officials to act merely for prophylactic protection, in the absence of sufficient indicia.

Quarantine challenges are not unknown to New York courts. In 1917, the Court of Appeals decided *Crayton v. Larabee*, 220 N.Y. 493 (1917), involving an allegedly unlawful fourteen-day quarantine of Mary Crayton, a resident of Syracuse, N.Y., after her next-door neighbor contracted smallpox. A Syracuse city ordinance, more

flexible and expansive than the state quarantine statute, similar to the one presently in effect, authorized the city's health officer to order quarantine in instances not specified in the statute, *if deemed necessary*. This allowed for the lawful quarantine of Crayton, although there was no evidence that she had been exposed to her neighbor, and she showed no signs of smallpox. In vacating a jury verdict for Crayton and ordering a new trial due to jury instruction error, the Court of Appeals held that the city ordinance was lawful and valid and protected the health officer's reasonable judgments in pursuit of the public health. The court observed that "[f]or a mere error of judgment the officer cannot be held liable." 220 N.Y. at 503.

Conclusion

Coronavirus presents a new challenge insofar as it is highly contagious, deadly in a percentage of cases, and difficult to manage. The governor has issued far-reaching executive orders that address a dire public health emergency, while simultaneously halting a substantial portion of the New York economy. Business failures and job losses have become urgent problems in their own right. The public so far has been generally appreciative of the governor's actions and indulgent of the restrictions they now face. But at some point, as the economic realities of this pandemic unfold, individual or collective challenges to the rigorous exercise of executive authority might arise. Today's appreciation of swift executive action might become tomorrow's lament and second-guessing. For the time being, though, we should hope that our collective efforts, sound judgment, and effective leadership will see us through this stressful time.

Andrew J. Luskin *is a partner at McLaughlin & Stern in Long Island, and an adjunct professor of law at the Maurice A. Deane School of Law at Hofstra University.*