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Problematic Application of Florida Administrative Law to Police Power Public Health Actions

*Richard P. McNelis**

There has always been government, however distant and predatory. But in the long ago ages of Europe, when paintings and statuary all bore the same stock face and the same blank expression, there was always Power. However they came into authority, rulers keenly followed the precepts of Power, which for them was both a tool and a purpose. The art of government was identical with the uses of Power.¹ Is it efficient to hunt down and punish one transgressor after another? Or is it prudent to make examples of offenders, to restrain and intimidate a coarse citizenry and its princes, and to thereby prevent bad acts from ever occurring? Is it legal to protect the rest of society from bad actors by segregating them? How about protecting society by making people stay home for a few days if they have possibly been exposed to dangerous disease? Where would a society get this authority? It derives from police power, which pre-dated the first organized colonies in North America, and existed before the first government here.

I. WHAT IS POLICE POWER?

What exactly is police power? Reading court decisions is confusing, and reading commentators is worse. Many express the values of their times, trading on their credentials as lawyers and experts. The common thread among all commentators, from Burgess to Professor Freund to Judge Epstein, is a theoretical approach to examinations of police power examination.² Burgess, for example, described police power as “the dark continent of our jurisprudence.”³ The theorists after him have given the term a

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1. NICOLÒ MACHIAVELLI, *THE PRINCE* ch. 9 (1515).

2. D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L REV. 471, 491–97 (2004).

3. *Id.* at 497.

theoretical rather than a legal meaning.⁴ Fortunately, there is a handy alternative to the confusions of the political theorists: In 1847, the U.S. Supreme Court defined the police powers of a state, saying they are neither “more [n]or less than the powers of government inherent in every sovereignty to the extent of its dominions,” and that whenever a state exercises those powers, it exercises “the power of sovereignty, the power to govern men and things within the limits of its dominion.”⁵ This legal definition is much easier for practitioners to follow than the definitions based on political theory.

Justice Taney’s definition binds us today. His sweeping definition includes a state’s adoption of a quarantine law, as well as laws to punish offenses, establish courts of justice, provide for the recordation of instruments, or regulate commerce within its borders. This simplifies things from the outset.

The nature of police power became a practical legal issue for the Florida Department of Health when, after Hurricane Katrina, the federal government shifted its focus slightly from bio-terror preparedness to pandemic influenza preparedness.⁶ In the bio-terror arena, Florida’s experience with anthrax indicated a clear bifurcation between the law enforcement aspect and the public health aspect of handling the AMI Building and the people who worked there.⁷ Although the health department immediately posted a health closure order on the facility—a form of state quarantine order—the facility was also closed to the health department as a crime scene under investigation. In essence, the law enforcement exercise of police power in the form of crime scene control delayed the health department exercise of police power in the form of health investigation and response. Both law enforcement and the health department were drawing from the same well of authority. Realistically, the health department was not injured because it was already fully engaged with the testing

4. *Id.* at 492.

5. *The License Cases*, 46 U.S. (5 How.) 504, 583 (1847).

6. Exec. Order No. 13,375, 70 Fed. Reg. 17,299 (Apr. 1, 2005).

7. The AMI Building, located in Boca Raton, Florida, was the site of a 2001 anthrax scare. *See generally* Susan Candiotti & Mark Potter, *Third Person Shows Exposure to Anthrax*, CNN.COM, Oct. 11, 2001, <http://archives.cnn.com/2001/HEALTH/10/10/anthrax/>.

and treatment of the workers, their families, and the casual contacts of both. No one wanted to contract anthrax, and those directly and tangentially exposed were fully cooperative with the health department's heroic response to public concerns. In other words, there were no legal challenges to the health department's actions.

Only a few years later, panflu planning, driven by requirements of the National Response Plan and the National Strategy for Pandemic Influenza,⁸ and awards of federal planning grant dollars, caused the Florida Department of Health to engage many sectors of society, especially non-governmental sectors, in an attempt to capitalize on our practical emergency response knowledge gained through hurricane seasons and leverage that knowledge to respond to a natural health calamity that theoretically put everyone at serious risk.⁹

II. MANDATORY QUARANTINE

The moment came when panflu planning tackled mandatory quarantine.¹⁰ In federal parlance, the term "quarantine" is now placed in the innocuous-sounding category of "non-pharmaceutical interventions."¹¹ Prior to formal planning efforts, the Florida Department of Health had politely declined offers from various quarters to help with quarantine planning. The Health Department's legal office took the position that a decision to quarantine was a medical decision: "let's see what the doctors say." Through that simple technique, the legal office bought two years time for formal panflu planning efforts. As it turned out, in contrast to prevailing views of extravagant quarantine processes, mandatory quarantine had only a minimal role in the public health doctors' ideas of how to effectively protect the maximum number

8. See generally HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA (2005), <http://www.whitehouse.gov/homeland/nspi.pdf>.

9. See generally CTR. FOR DISEASE CONTROL, INTERIM PRE-PANDEMIC PLANNING GUIDANCE: COMMUNITY STRATEGY FOR PANDEMIC INFLUENZA MITIGATION IN THE UNITED STATES—EARLY, TARGETED, LAYERED USE OF NONPHARMACEUTICAL INTERVENTIONS (2007), http://www.pandemicflu.gov/plan/community/community_mitigation.pdf.

10. FLA. STAT. § 381.0011(6) (2007).

11. CTR. FOR DISEASE CONTROL, CDC INFLUENZA PANDEMIC OPLAN, Annex F (2008), <http://www.cdc.gov/flu/pandemic/OPLAN/Annex-F.pdf>.

of people who might be exposed to the pathogen.¹² Although the planning group published its first plan on the Internet, the Department still fielded many wild comments from observers; people demanded to know why the Department was going to shut down the Tri-Rail System in the West Palm Beach-to-Miami corridor (it was not; it said so in the Introduction to the plan—no closure of transport systems or highways) and why the Department was going to quarantine entire communities (it was not; same paragraph—no mass quarantines).¹³

The Department's legal office viewed quarantine authority as an exercise of police power, even admitting that there are administrative characteristics to the process of ordering quarantine, such as government forms. Florida's Administrative Procedures Act ("APA")¹⁴ describes forms as a species of "rule,"¹⁵ requiring that they undergo review by the legislature's Joint Administrative Procedures Committee, which has a forms committee.¹⁶ The Department did not do that. The Department maintains that proposed model quarantine forms are an administrative convenience for the internal use of the Department and county health departments, not a vehicle for regulating the public—at least not yet. If panflu manifests, the Department can adopt forms via emergency rule.¹⁷

The Florida Bar's Health Law Section published a lengthy chapter in its Health Law Handbook about the Department's general health authority including mandatory quarantine authority.¹⁸ That publication drew no comment, though there was vigorous discussion when the paper was presented at a meeting of the section. This author posted a White Paper on the Florida Law of Human Quarantine along with a companion FAQ for Florida

12. See FLA. DEP'T OF HEALTH, STATE OF FLORIDA EMERGENCY OPERATIONS PLAN, Pandemic Influenza Annex, app. 7 (2006), http://www.doh.state.fl.us/rw_Bulletins/flpanfluv104final.pdf (discussing quarantine in the context of medical response).

13. *Id.* at 1.

14. FLA. STAT. § 120.50-.81 (2007).

15. § 120.52(15).

16. § 120.545.

17. § 120.54(4).

18. Rodney Johnson & Richard McNelis, *Public Health—Legal Basics*, in THE FLORIDA BAR, FLORIDA PRACTITIONER'S HEALTH LAW HANDBOOK ch. 14 (2007).

judges, lawyers, and law enforcement on several Internet sites.¹⁹ There was little response to those documents although there was a steady stream of questions indicating that during a quarantine event the health department should provide for all the needs of the citizenry. There were blanket assumptions that health departments should compensate citizens for lost wages (unemployment benefits), food, medication, legal representation to challenge the health order, transportation, and alternate residence sites for family members when another member is quarantined. There was at least tacit acknowledgement that the Department's staff attorneys and county health department attorneys are ethically prohibited from simultaneously representing both the Department and a quarantined citizen,²⁰ although the participation of private counsel would be welcomed by the government's counsel and probably by any judicial officer hearing the challenge.

But when panflu became the danger of the moment, discussion quickly moved to the very authority of the Department to issue *ex parte* health orders. Closely related to that, there arose the issue of challenges to quarantine orders. But what would be the point of suspending quarantine orders on due process grounds? Is there a workable hearing system we could apply to a planeload of passengers, unfortunate enough to have shared a trip with a person seriously ill with a dangerous communicable disease, now waiting in an airport terminal concourse? Would review after the order issues be through an administrative action under APA procedures or a petition for writ of habeas corpus under the Florida Constitution?²¹ Ultimately, debate was framed by the Supreme Court of Florida during the compilation of its Pandemic Influenza Benchguide (the Bench Book).²² It is a common experience in the practice of law to read court assessments of important matters, but

19. The White Paper is now incorporated as appendix B of the Florida Pandemic Influenza Benchguide. FLA. COURT EDUC. COUNCIL, PANDEMIC INFLUENZA BENCHGUIDE: LEGAL ISSUES CONCERNING QUARANTINE AND ISOLATION, app. B (2007), http://www.flcourts.org/gen_public/courted/bin/pandemic_benchguide.pdf [hereinafter BENCHGUIDE]. See also Florida Quarantine and Isolation FAQ, <http://www2a.cdc.gov/phlp/docs/FAQ%20Quarantine%20FL%20judges%20Oct%2006.pdf> (last visited May 12, 2008).

20. See FLA. STAT. BAR R. 4-1.7(a)(1) (2007).

21. See FLA. CONST. art. I, § 13; FLA. STAT. § 120.57 (2007).

22. BENCHGUIDE, *supra* note 19.

there were some genuine surprises for the Department of Health in the Bench Book.

III. EXPRESS POWERS OF THE HEALTH DEPARTMENT

Florida's statutory quarantine scheme is a classic, old-fashioned, sweeping public health grant of broad power to respond to unspecified communicable diseases.²³ Enacted in 1991 and amended slightly nearly every year since, it gives the Department authority to tell people to go or not go to certain locations, or to destroy domestic animals.²⁴ The Department can order medical testing and medical treatment, including vaccination, as part of quarantine.²⁵ Isolation orders are a subset of quarantine orders.²⁶ Only the Department of Health can restrict travel or trade within the state for public health reasons; no other government agency can do so.²⁷

Consistent with the Florida legislature's probable understanding that Florida legislature that quarantine is a police power exercise, it did not require the official issuing the order to identify himself. There is no express legal requirement, for example, that the order bear a signature at all, such as required for a court order. The County Health Department Director (a medical doctor) or Administrator (a layperson) may issue quarantine orders directly, or through their delegates.²⁸ The rule actually reads "give public notice of quarantine," obliquely acknowledging that this is an exercise of state police power.²⁹ For that reason, the name of the official giving such notice is irrelevant because the state has ordered the quarantine. The health department has no law enforcement jurisdiction, but can enforce its orders simply by requesting assistance from other agencies of government. The statutory enforcement vehicle provides, "It shall be the duty of every state and county attorney, sheriff, police officer, and other appropriate city and county officials upon request to assist the

23. FLA. STAT. § 381.0011(6) (2007).

24. § 381.0011(6)(a)(2), (6).

25. *Id.*; FLA. ADMIN. CODE ANN. R. 64D-3.007(2) (2007).

26. R. 64D-3.007(2).

27. § 381.0011(6)(b).

28. R. 64D-3.005(1).

29. *Id.*

department or any of its agents in enforcing the state health laws and the rules.”³⁰ And “[a]ny person who violates any of the provisions of this chapter, any quarantine, or any rule adopted by the department under the provisions of this chapter is guilty of a misdemeanor of the second degree.”³¹ Violation of a quarantine order is a second degree misdemeanor with a maximum penalty of sixty days incarceration.³²

People today are accustomed to orders that have a fixed lifespan and are less comfortable with orders that remain in force until a problem is resolved or cured. Quarantine in theory could last a long time, as in situations where disease lingers in a community. “The quarantine shall remain in effect until the situation no longer represents a public health hazard as determined by the county health department director or administrator or their designated representative.”³³ Even where a health rule seems to require a termination date, it is only an option: “Quarantine orders shall be issued by the State Health Officer, or the county health department director or administrator, or their designee in writing; include an expiration date *or* specify condition(s) for ending of quarantine.”³⁴

IV. DIVINING THE INTENT OF THE LEGISLATURE

This is the kind of power that makes people uneasy if they think about it, but it did not slow our grandfathers, who grew up in the age before antibiotics, before people thought the war against infectious disease was won. Those people, in 1955, enacted a health statute still in effect that states, “The authority, action, and proceedings of the department in enforcing the rules adopted by it under the provisions of this chapter shall be regarded as judicial in nature and treated as *prima facie* just and legal.”³⁵ This language was puzzling to the Department until research brought to light a

30. § 381.0012(5).

31. § 381.0025(1).

32. §§ 381.0025(1), 775.082(4)(b).

33. R. 64D-3.037(3)-(4). *See, e.g.*, R. 64D-3.038(3).

34. R. 64D-3.038(1) (emphasis added).

35. § 381.0015.

1918 opinion of the Supreme Court of Washington.³⁶ The statute before the Washington court said,

In case of the question arising as to whether or not any person is affected or is sick with a dangerous, contagious or infectious disease . . . the opinion of the executive officer of the state board of health, or any member or physician he may appoint to examine such case, shall be final.³⁷

The ultimate question presented to the Washington Supreme Court was whether the legislature had the power to create a board of health and make its rulings final and conclusive, such as when called into question in a court of general jurisdiction. The court stated, "The power to detain one who is suspected of having a contagious disease rests in the police power, [which is] 'to the public what the law of necessity is to the individual.'"³⁸

Dealing primarily with challenges to the factual basis for health detention in a habeas corpus proceeding, the court declined to review the fact determinations of the board of health medical officers, saying that to do so "would make the exercise of the police power a judicial function."³⁹ The court asked if the record in the case was framed as a test for credit, with questions, answers, and credit for each question,

who would determine whether or not a particular answer had received a sufficient credit? Certainly not the jury, for they are not presumably competent to pass a proper judgment on such subjects. Not the judge, for his qualifications do not embrace, or at least require, an expert knowledge Expert witnesses could not be properly permitted to testify for the reason that the state has already designated and empowered experts to pass upon these questions presumably by reason of their recognized qualifications.⁴⁰

36. *State ex rel. McBride v. Superior Court for King County*, 174 P. 973 (Wash. 1918).

37. *Id.* at 975 (quoting WASH. REM. CODE § 5546).

38. *Id.* at 976 (quoting *State v. Mountain Timber Co.*, 135 P. 645, 648 (Wash. 1913)).

39. *Id.* at 978.

40. *Id.* at 979.

The court ultimately held that the legislature had the power in public health matters to make a medically-determined fact final and binding on the public and the courts.⁴¹ The court wrote that a statute providing “that the finding of the health officers shall be final is a sufficient evidence of legislative intent to leave the whole matter to the health officers without restraint on the part of the courts.”⁴²

In light of the Washington explanation, it seems the 1955 Florida legislature intended that medical judgments should be made by the doctors of the health department, and not by courts. The statute, then, is consistent with the health department’s current approach, viewing the decision to quarantine as a medical decision. And it further appears that the Florida legislature intended such a medical decision to possess at least *prima facie* validity. The statute stops short of saying that the medical decision is actually judicial.

There is a companion statute dating from the same Florida legislative session, from the same bill, apparently with a similar rationale, which provides, “The rules adopted by the department under the provisions of this chapter shall, as to matters of public health, supersede all rules enacted by other state departments, boards or commissions, or ordinances and regulations enacted by municipalities,” with some exceptions.⁴³ This statutory language seems to be an affirmation of the trust the legislature has in the medical practitioners it employs, and that all agencies of government should defer to that expertise. Both of these statutes pre-date Florida’s general quarantine authority statute by many years.

V. EMERGENCY MANAGEMENT

Consequently, it may be unsurprising that there is no role in the statutory scheme for the courts in the designation, preparation, text, service, or enforcement of health department quarantine orders. This is consistent with the legislature’s structure of emergency

41. *Id.*

42. *Id.* at 978 (citing with approval *State ex rel. City of Aberdeen v. Superior Court of Chehalis County*, 87 P. 818 (1906)).

43. FLA. STAT. § 381.0014 (2007).

management generally.⁴⁴ As to mandatory quarantines, the function of the Florida courts is review following governmental action; there is no participatory role. Florida's governor has authority to issue executive orders with a renewable sixty-day lifespan, proclamations, and rules, and to amend or rescind them.⁴⁵ The governor's orders have "the force and effect of law."⁴⁶ Those orders typically correspond to requirements of the federal Stafford Act.⁴⁷ The governor can suspend any statute or state program that impedes response to an emergency.⁴⁸ The Florida governor in respect to his chapter 252 powers is subject to Florida's Administrative Procedures Act⁴⁹ (the Florida legislature has exempted only itself and the Florida courts from that Act),⁵⁰ but no one suggests that during an emergency the governor's orders should be reviewed by the administrative courts.

VI. NATURE OF ORDERS

Pivotal to the entire business of orders is the individualized nature of the order and service on a person. The governor's executive and supplemental orders of emergency are issued to the entire state of Florida, not to any individual person. Quarantine orders, by contrast, are purposely crafted to inform an identified person exactly how to follow health department directions. But the governor's orders are immediately enforceable by law enforcement officers. Indeed, the emergency management statute says, "The law enforcement authorities of the state and the political subdivisions thereof shall enforce" those emergency orders and rules issued under chapter 252.⁵¹ Violation of such orders and rules is, once again, a second degree misdemeanor.⁵² Standard provisions of emergency orders allow the governor to control ingress and egress of an emergency area and the movement of

44. See generally §§ 252.31-946.

45. § 252.36(1)(b).

46. *Id.*

47. Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), Pub. L. No. 100-707 (1988).

48. § 252.36(5)(a).

49. § 120.52(1)(a).

50. § 120.50.

51. § 252.47.

52. § 252.50.

persons and occupancy of premises therein. The governor may also control the conduct of civilians and the movement of pedestrian and vehicular traffic.⁵³ These controls are restrictions of citizens' liberty, yet the governor is under no duty in promulgation of his emergency orders to advise citizens of their legal rights to challenge these measures, nor to assure them he has taken steps to ensure their due process rights and access to justice. On the contrary, the emergency management statute states that those measures shall be liberally construed so as to effect their purposes.⁵⁴ In actual practice, Florida's governor delegates sweeping authority to the Director of the Division of Emergency Management and other persons "as he may deem prudent."⁵⁵

VII. CURFEW AND RABIES CONTROL

Although it is a common thing for people to express questions, reservations, and objections about quarantine, evidently all people intrinsically understand curfew. Interestingly, there is scarcely a mention of curfew in the Florida statutes, yet the parallels with quarantine are obvious. Both are obvious liberty restrictions, often requiring persons to remain at home or at least off the public streets; both often involve area closures and prohibit public assembly; both are associated with emergency situations, and invoked locally. The specific legal elements are "substantial defiance of, or resistance to, a lawful exercise of public authority" *and* reasonable belief in a danger of general public disorder.⁵⁶ On those elements, a sheriff or local official may declare a state of emergency within the jurisdiction. If the situation qualifies as a "riotous assembly," officials "shall in the name of the state command all the persons so assembled immediately and peaceably to disperse."⁵⁷ Whenever such a declaration issues, the official may establish curfew.⁵⁸ Florida citizens commonly encounter curfew in storm and hurricane ravaged areas, and other emergency

53. § 252.36(5)(g), (k).

54. § 252.52.

55. § 252.36(1)(a).

56. § 870.043.

57. § 870.04.

58. § 870.045(1).

settings. Violation of curfew is a first degree misdemeanor, punishable by maximum of one year incarceration.⁵⁹

As in the case of the governor's emergency orders, the local emergency orders are public notice orders not served on individual persons, yet fully and immediately enforceable. There are no reported cases of judicial review of emergency curfew orders, nor any judicial opinions requiring officials to advise the public of due process rights or the procedures to challenge the curfew.

People also seem to accept governmental action in the form of rabies control, whether that action is aimed at pets, domestic animals, or wild animals. Being informed of a bite or exposure to a rabid animal, a Florida CHD Director or Administrator is required to capture, confine, or seize suspected rabid animals and isolate and quarantine or humanely euthanize them.⁶⁰ When information indicates epizootic⁶¹ rabies, the health officer is required to declare an area-wide quarantine⁶² to protect public health and bring an end to the outbreak. The health department procedures for controlling rabies outbreaks are set out in a guidebook, adopted by rule,⁶³ entitled Rabies Prevention and Control in Florida.⁶⁴ Most Florida counties have adopted animal control ordinances⁶⁵ and work closely with the health department in rabies actions, which often include hearings before administrative boards composed of county animal control employees to determine whether animals should be euthanized, observed (quarantined) in a veterinary clinical setting, or handled otherwise. Those procedures have never been brought within the domain of Florida's APA, although they determine property rights of the citizens. Animals, of course, are chattels and themselves

59. §§ 870.048; 775.082.

60. FLA. ADMIN. CODE ANN. R. 64D-3.013(2)(c) (2007).

61. "Affecting a large number of animals at the same time within a particular region or geographic area. Used of a disease." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2005), <http://www.ask.com/reference/dictionary/ahdict/46068/epizootic>.

62. R. 64D-3.013(2)(d).

63. R. 64D-3.013(2)(c).

64. FLA. DEP'T OF HEALTH, DIV. OF ENVTL HEALTH, RABIES PREVENTION AND CONTROL IN FLORIDA (2007), <http://www.doh.state.fl.us/environment/community/arboviral/Zoonoses/Rabiesguide2007.pdf>.

65. See, e.g., Leon County Animal Control Division, Animal Control Chapter 4 Ordinance, Ordinance No. 05-02 (2005), http://www.leoncountyfl.gov/Animal/pdfs/Animal_Control_Ordinance2.pdf.

possess no due process rights under our legal system. Their owners do, and areas closed under a rabies quarantine order of the health department are closed to humans and animals alike.

VIII. LIBERTY RESTRICTION BY QUARANTINE

The least controversial thing in all the discussions about mandatory quarantine was the idea that it is another liberty restriction, inviting constitutional issues of freedom of movement, right of free association, possibly impinging freedom of religion, almost surely restricting freedom of assembly, and so forth. The health department had powerful support for the notion of habeas corpus review in a decision of the Supreme Court of Florida, *Varholy v. Sweat*.⁶⁶ In 1943 in the Jacksonville, Florida area, Pauline Varholy was confined to the county jail under a health department order, awaiting transfer to a health department hospital.⁶⁷ She petitioned the trial court of Duval County for a writ of habeas corpus, and, together with the sheriff, health officials appeared in court and testified to facts indicating Ms. Varholy had venereal disease and that the health department had a curative plan.⁶⁸ The trial court denied the petition for writ, and Ms. Varholy appealed directly to the Supreme Court of Florida, protesting detention and excessive bail.⁶⁹ The Supreme Court wrote:

Generally speaking, rules and regulations necessary to protect the public health are legislative questions, and appropriate methods intended and calculated to accomplish these ends will not be disturbed by the courts. All reasonable presumptions should be indulged in favor of the validity of the action of the legislature and the duly constituted health authorities. But the constitutional guarantees of personal liberty and private property cannot be unreasonably and arbitrarily invaded. The courts have the right to inquire into any alleged unconstitutional exercise or abuse of the police powers of the legislature, or

66. 15 So. 2d 267 (Fla. 1943).

67. *Id.* at 268.

68. *Id.*

69. *Id.* at 269.

of the health authorities in the enactment of statutes or regulations, or the abuse or misuse by the Boards of Health or their officers and agents of such authority as may be lawfully vested in them by such statutes or regulations.

However, the preservation of the public health is one of the prime duties resting upon the sovereign power of the State. The health of the people has long been recognized as one of the greatest social and economic blessings. The enactment and enforcement of necessary and appropriate health laws and regulations is a legitimate exercise of the police power which is inherent in the State and which it cannot surrender. The Federal government also possesses similar powers with respect to subjects within its jurisdiction. The constitutional guarantees of life, liberty and property, of which a person cannot be deprived without due process of law, do not limit the exercise of the police power of the State to preserve the public health so long as that power is reasonably and fairly exercised and not abused. The legislative authority in this legitimate field of the police power, like as in other fields, is fenced about by constitutional limitations, and it cannot properly be exercised beyond such reasonable interferences as are really of action of individuals as are really necessary to preserve and protect the public health. It has been said that the test, when such regulations are called in question, is whether they have some actual and reasonable relation to the maintenance and promotion of the public health and welfare, and whether such is in fact the end sought to be attained. Not only must every reasonable presumption be indulged in favor of the validity of legislative action in this important field, but also in favor of the validity of the regulations and actions of the health authorities.⁷⁰

The *Varholy* opinion teaches several important lessons, all germane today: quarantine already has passed constitutional muster with the Supreme Court of Florida; the quarantine power is a legitimate exercise of the police power of the state; habeas corpus is the proper remedy to challenge it; the trial court is the

70. *Id.* at 269-70.

right place to bring the challenge; constitutional rights to liberty are not absolute and may have to bend to the police power in public health matters; the proper constitutional test is a rational relationship; the courts generally will not entertain challenges to the discretion of public health officers; and, as the court later stated, because quarantine is not a criminal matter, bail is not available.⁷¹

Subsequent to the *Varholy* opinion, the Florida Supreme Court approved a Florida statute that allowed compulsory confinement of people with tuberculosis, and opined,

The health of the people is unquestionably an economic asset and social blessing, and the science of public health is therefore of great importance. . . . That the preservation of the public health is one of the duties devolving upon the state as a sovereign power will not be questioned. Among all the objects sought to be secured by governmental laws none is more important than the preservation of public health. . . . The constitutional guaranties that no person shall be deprived of life, liberty, or property without due process of law, and that no state shall deny to any person within its jurisdiction the equal protection of the laws, were not intended to limit the subjects upon which the police power of a state may lawfully be asserted in this any more than in any other connection.⁷²

IX. LEGISLATIVE OVERRIDE

In 1943, the Florida Supreme Court declared in *Varholy* that “the courts have the right to inquire into any alleged unconstitutional exercise or abuse of the police powers of the legislature or of the health authorities,”⁷³ and in 1952 said the constitutional guarantees of due process and equal protection were not intended to limit the subjects of state police power actions.⁷⁴ Shortly thereafter, the 1955 Florida legislature adopted a statute providing that the authority, action, and proceedings of the health

71. *Id.* at 270.

72. *Moore v. Draper*, 57 So. 2d 648, 649 (Fla. 1952).

73. 15 So. 2d at 269.

74. *Moore*, 57 So. 2d at 649.

department “shall be regarded as judicial in nature and treated as prima facie just and legal.”⁷⁵ That statute may have been (and may be) a legislative override of the court’s power to review health department actions.

In the setting of administrative law, the Florida courts respected a 1999 legislative override regarding the scope of executive branch agency rulemaking authority. Until 1998, the legislative restriction on administrative agency rulemaking powers was codified at section 120.52(8) of the Florida Statutes, which stated:

An agency may adopt only rules that implement, interpret, or make specific the *particular* powers and duties granted by the enabling statute: No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the *particular* powers and duties conferred by the same statute.⁷⁶

The appellate court in *St. Johns River Water Management District v. Consolidated Tomoka Land Co.* ruled that the “class of powers and duties” of agencies formed the legal basis to support rule criteria adopted by the St. Johns River Water Management District.⁷⁷ The *Consolidated Tomoka* decision was flatly rejected by the legislature in its next session, which amended section 120.52(8) to bar the “class of powers and duties” standard set out by the court. The amended language stated:

An agency may adopt only rules that implement or interpret the *specific* powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the

75. FLA. STAT. § 381.0015 (2007).

76. FLA. STAT. § 120.52(8) (1998 Supp.) (emphasis added).

77. 717 So. 2d 72 (Fla. 1st Dist. Ct. App. 1998).

enabling legislation and is not arbitrary and capricious *or is within the agency's class of powers and duties*, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than *implementing or interpreting the specific powers and duties conferred by the same statute*.⁷⁸

Shortly thereafter, the same court in *Southwest Florida Water Management District v. Save the Manatee Club, Inc.* accepted the legislature's statutory mandate and read section 120.52(8) narrowly, stating that rulemaking is a function "within the exclusive authority of the legislature."⁷⁹ Nor have subsequent courts disturbed this override by the Florida legislature.

The 1999 Florida legislature offered no explanation for its change of wording in the amending legislation, and the members publicly denied any attempt to overrule a court, but their actions appear not to support those denials. In light of the foregoing, we may conclude—at least in Florida—that legislative override of the judiciary is a reality we must include in our assessment of the meaning of statutes, even when no legislative intent is expressed in the enacting legislation.

X. DEFERENCE TO AGENCY EXPERTISE

In any event, the scope of judicial review of agency decisions remains a difficult and pivotal policy choice. Professor Edward Richards has observed, "If the courts review all agency decisions *de novo*, rehearing expert witnesses and substituting their decisions for those of the agencies, the government loses the value of agency expertise and flexibility."⁸⁰ The business of setting the proper standard for judicial review is controversial because judicial deference to agency decisions "prevents opponents of public

78. FLA. STAT. § 120.52(8) (1999) (emphasis added).

79. 773 So. 2d 594, 598(Fla. 1st Dist. Ct. App. 2000).

80. Edward P. Richards, *Public Health Law as Administrative Law: Example Lessons*, 10 J. HEALTH CARE L. & POL'Y 61, 68 (2007).

actions from being able to contest these actions.”⁸¹ So what is the correct form of judicial review? Most commentators agree that the seminal public health case is *Jacobson v. Massachusetts*, a mandatory smallpox vaccination case from 1904.⁸² With language that some describe as “sweeping,” the U.S. Supreme Court pronounced that the price of civilized society was the surrender of some individual autonomy, that Jacobson was not entitled to rely on the protection provided by vaccination of his neighbors (no free ride on “herd immunity”), and that Jacobson could not challenge the legislative policy decision with evidence of risks inherent in the vaccine—no collateral attack on the legislative decision.⁸³ In a later decision, the U.S. Supreme Court restated its deference standard, stating, “The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretence. Within the field where men of reason may reasonably differ, the legislature must have its way.”⁸⁴

XI. IMPLICIT EXTINCTION OF POLICE POWER?

While developing its Bench Book, the Florida Supreme Court’s legal advisor took the position that enactment of Florida’s Administrative Procedures Act subjected all existing executive branch powers to administrative status, reviewable by the central panel of professional administrative law judges of the Division of Administrative Hearings (DOAH).⁸⁵ In other words, the APA extinguished the police power. Presumably, this position was based on Florida Statutes section 120.50 (exempting the legislature and courts from the APA). No other legal authority was cited in support of the court’s position. The court stated,

If an agency order were entered with no right to a hearing, either before or after the rendition of the order, it would be subject to summary reversal on appeal. The appellate court would not even have to reach the constitutional issue.

81. *Id.* at 69.

82. 197 U.S. 11 (1905).

83. *Id.*

84. *Williams v. Mayor of Baltimore*, 289 U.S. 36 (1933).

85. *See State of Florida, Division of Administrative Hearings*, <http://www.doah.state.fl.us/internet/> (last visited May 7, 2008).

Pursuant to section 120.68(7), Florida Statutes, “the court shall remand a case to the agency for further proceedings . . . or set aside agency action . . . when it finds that:

(a) There has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts; or

(b) The agency’s action depends on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing conducted pursuant to ss. 120.569 and 120.57.”⁸⁶

Where a state agency engaged in licensing finds an immediate serious danger to the public health, safety, or welfare, it may order the emergency suspension, restriction, or limitation of a license, but only if the agency files a companion administrative complaint that will give the respondent licensee an opportunity for a hearing.⁸⁷ But that post-deprivation hearing provision exists under the APA only in a licensing setting. The court quoted,

If an agency head finds that an immediate danger to the public health, safety, or welfare requires an immediate final order, it shall recite with particularity the facts underlying such finding in the final order, which shall be appealable or enjoined from the date rendered.⁸⁸

The court also observed,

Taken at face value, this provision makes no provision for any administrative hearing before or after an “immediate final order” and it would thus make any such order vulnerable to reversal on appeal, as mentioned above. Needless to say, it could have a strongly adverse effect on the executive branch’s efforts to control a pandemic if the appellate courts summarily vacated the executive branch’s quarantine orders. The remedies suggested in this subdivision are not perfect procedural vehicles, and they have not been extensively tested on appeal, but they could

86. BENCHGUIDE, *supra* note 19, at 40 (emphasis omitted).

87. FLA. STAT. § 120.60(6) (2007).

88. BENCHGUIDE, *supra* note 19, at 40 (quoting § 120.569(2)(n)).

serve to provide sufficient procedural due process to allow the system to function during a pandemic.⁸⁹

Even if the Florida legislature intended to abandon its police power authority over public health matters, that abandonment would have to be express in law. Yet there is no supporting statement of legislative intention anywhere in Florida's Administrative Procedures Act, revisited many times since its enactment in 1974. It is preposterous to assume that the power defined by Justice Taney could be implicitly extinguished, if that were even possible, as an unintended consequence of the enactment of the APA. Exercise of sovereign authority cannot be so casually cast aside.

XII. DIFFICULT PROBLEMS SURROUNDING ADMINISTRATIVE COURT REVIEW

Review of quarantine orders through administrative law proceedings fails for several reasons. First, quarantined petitioners do not have standing to litigate in administrative courts because they cannot meet the "substantial interests" prong of the standing test.⁹⁰ They cannot show an injury resulting from the violation of a right that the proceeding is designed to protect. Second, quarantine controls behavior in order to slow or stop the spread of disease, is designed to protect the health of the general public rather than protect the individual, and is not an action similar to the health department's regulatory jurisdiction over licensing and discipline of license holders. Quarantine declarations, predicated on objective scientific criteria, are not agency actions designed to protect an individual's liberty or property interests, but instead are crafted to protect the public health. Moreover, because quarantine time periods appear to last only days, there likely will be insufficient time for hearing disputed material facts before the quarantine expires or is modified. Third, neither health department personnel sitting as hearing officers, nor the Department administrative law

89. *Id.* at 40-41.

90. *See* *Agrico Chemical Co. v. Dep't of Env'tl. Regulation*, 406 So. 2d 478 (Fla. 2d Dist. Ct. App. 1981).

judges, possess jurisdiction to rule on constitutional issues⁹¹ or to entertain extraordinary writs. Therefore they have no authority to grant liberty to a detained person regardless of the facts.⁹² Fourth, the health department has exclusive statutory authority among executive branch agencies to modify or lift its quarantine orders.⁹³

Even if the Department ultimately was forced to defend its quarantine orders in the administrative courts, the timelines for those proceedings would work against speedy resolution. Upon receipt of a request for hearing, the Department is statutorily entitled to consider for fifteen days before referring the case to the Department panel of administrative law judges.⁹⁴ Likewise the Administrative Procedures Act itself requires a minimum of fourteen days following a notice of hearing before the hearing may take place.⁹⁵ Assuming an adverse outcome, the Department may take fifteen days from receipt of the Proposed Recommended Order to file its exceptions (objections).⁹⁶ Once those objections are ruled on, the agency head may take up to ninety days from the date of hearing to issue a Final Order.⁹⁷ Those time periods, to which the health department is entitled, total 119 days to litigate an objection to quarantine. Assuming a bad public health result and zero motion practice, the Department will probably have an additional 180 days to act on the appellate case. And the latest CDC guidance does not support involuntary personal quarantine, so perhaps the whole thing will prove moot.

91. See *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*, 361 So. 2d 695, 699 (Fla. 1978) (citing *Dep't of Revenue v. Young Am. Builders*, 330 So. 2d 864 (Fla. 1st Dist. Ct. App. 1976)). See also *Shinholster v. Graham*, 527 F. Supp. 1318, 1322 (N.D. Fla. 1981).

92. *But see* Florida Baker Act, FLA. STAT. § 394.451–4789 (2007) (regarding mental health commitments). Under the Baker Act, the patient litigates through habeas while the institution litigates through an administrative path. The patient may question the cause and legality of detention (“placement”) via habeas corpus at any time. § 394.459(8)(a). After initial placement, the institution may petition in administrative court for continued commitment on a factual basis. § 394.467(7)(b). The DOAH administrative law judge may recognize those facts and order continued commitment for up to six months. § 394.467(7)(d).

93. § 381.0011(6)(a).

94. § 120.569(2)(a).

95. § 120.569(2)(b).

96. § 120.57(1)(k).

97. § 120.569(2)(f).

XIII. SOCIAL DISTANCING ORDERS

No discussion of quarantine orders is complete without mention of that other variety of non-pharmaceutical intervention: the social distancing order. Because social distancing—keeping your distance—exhorts the general public to avoid close contact with no punishment expressed for violation, and because the orders are not compulsory, but advisory only, the current health department thinking assumes the orders are not enforceable at all, unless perhaps asserted by the governor or local officials in response to emergency declarations. The health department views social distancing orders as exercises of authority under its public health advisory power.⁹⁸

XIV. SUMMARY

It has become something of a legal fad in Florida to insist upon identification of specific statutory authority in order to support executive agency action. This notion probably is traceable to the Florida experience with scope of agency authority and legislative override, as described above. The influential language is in the Florida APA definition of “invalid exercise of delegated legislative authority”⁹⁹ and cautions agencies that their rulemaking authority is limited to “the specific powers and duties granted by the enabling statute.”¹⁰⁰ A U.S. Supreme Court opinion is often cited in support of the same limitation.¹⁰¹ But the insistence on specific statutory authority, while prudent and consoling, does not represent the scope of power possessed by state governments—it leaves out the police power. The FDA could not expand its jurisdictional reach over the tobacco industry precisely because, as a federal government agency, it was a government of limited powers and

98. § 381.00315(1)(a).

99. § 120.52(8).

100. § 120.52(8)(f).

101. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 123 (2000) (“No matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. Courts must take care not to extend a statute’s scope beyond the point where Congress indicated it would stop.” (citation omitted)).

could not go further than Congress and the federal courts would allow.¹⁰² Even so, the state governments have sweeping power, only occasionally written down at all, to protect public health and safety. It is the same power that allows a fire chief to order people to leave their homes because a chlorine gas cloud is coming their way. That power cannot be found in the Florida Statutes, yet it exists. We all know it.

Enforceable public health orders stand in the police power of government, power that is synonymous with sovereignty itself. The U.S. Supreme Court long ago defined quarantine as an express example of state police power, equal in standing with the adoption of criminal codes, creation of court systems, creation of systems of public records for transactions in lands, and commercial regulation—in essence, the very “power to govern men.”¹⁰³ It is not a mere administrative process. The fact that a legislature creates a judiciary of limited jurisdiction to review regulatory decisions does not vitiate the police power assigned to health departments. Police power has not breathed its last under such petty slights, because every agency of government with emergency responsibilities has an independent duty to compel behavior in the public interest. That is the essence of good government, which will always be worth having—to serve the public interest.

102. *Id.*

103. The License Cases, 46 U.S. (5 How.) 504, 583 (1847) (Taney, C.J., majority opinion).

