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Public Health Law as Administrative Law: Example Lessons

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PUBLIC HEALTH LAW AS ADMINISTRATIVE LAW: EXAMPLE LESSONS

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The greatest change in legal practice over the past fifty years has been the shift from primarily private law between private parties, to public law. Public law can include the regulation of private parties, litigants (both governmental and private) challenging government policy, or the operation of agencies themselves. The jurisprudential core of public law is administrative law, which describes the relationship between the courts, government agencies, and regulated parties. Government agencies were as critical to the civil rights revolution as they have been to environmental law and, for better and worse, the development of the modern health care system. It is ironic that few law schools require all students to take a course in administrative law, and that at many schools a student may graduate with few or no public law courses on his or her transcript.

Public health law was the first administrative law. The colonies were ravaged by communicable diseases such as cholera, yellow fever, and smallpox. Early state governments carried out Draconian measures to control these diseases. The early and middle 1800s saw extensive state regulation of all aspects of life, including the core areas of public health and safety.[1] Regulation of food and water, sanitation, and housing conditions, combined with communicable disease control measures such as mandatory vaccination laws and isolation of communicable disease carriers, raised the life expectancy in cities such as Boston by more than fifty years

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1. *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996) (reviewing state regulations in public health and safety, as well as general economic regulation in the nineteenth century).

between 1850 and 2004.[2] Modern environmental law, the heart of many administrative law texts, is an extension of traditional public health law.

For the past twenty-five years, public health law, as taught in law schools, has mostly focused on a very narrow part of public health practice: individual liberties issues in health care, usually focusing on the HIV/AIDS epidemic. Students who take these courses see only a small part of public health practice, missing the close linkage between public health law and environmental law on federal and state levels, and missing almost all of the state and local government law that shapes most public health practice. The students see public health law as individual liberties law, with the primary example being laws enacted to prevent public health authorities from identifying and tracking cases of HIV infection and taking disease control measures to limit the spread of HIV.[3] They learn little, if anything, of the public health consequences of these policies, such as fostering the spread of HIV in the female partners of HIV infected men, especially in minority communities.[4] More fundamentally, students in these courses come to see public health departments as social welfare agencies that should be concerned with delivering social services and that should not interfere with individual freedom. This does not provide a comprehensive model of public health law that can also address issues such as obesity, smoking in private, and the economic rights that must be balanced in many environmental regulations.

Public health law taught as administrative law embeds public health law in a broad and well-understood jurisprudential framework. This gives students a much broader view of public health law jurisprudence, and enables better understanding of the full spectrum of public health law and public health law practice. For students taking administrative law courses, public health law provides problems that are easier to understand and that are more compelling than the Interstate Commerce Commission and Federal Energy Regulatory Commission cases that are

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2. The Shattuck Report found that the average age of death in Boston between 1840 and 1845 was 21.43 years. LEMUEL SHATTUCK ET AL., REPORT OF THE SANITARY COMMISSION OF MASSACHUSETTS 1850, at 104 (Harvard Univ. Press 1948) (1850). Federal health statistics show that life expectancy in 2004 was 77.8 years. NAT'L CTR. FOR HEALTH STATISTICS, HEALTH, UNITED STATES, 2006 WITH CHARTBOOK ON TRENDS IN THE HEALTH OF AMS. 176 (2006), *available at* http://www.cdc.gov/nchs/hus.htm.

3. STEPHEN C. JOSEPH, DRAGON WITHIN THE GATES: THE ONCE AND FUTURE AIDS EPIDEMIC 101 (1992) ("The initial public policy responses to the epidemic were designed as if the most important criterion was to protect civil liberties from abuse by public health actions. Thus, rather than searching for the most powerful disease prevention strategies compatible with the protection of individual rights, the conventional wisdom in AIDS policy became a watered-down version of the opposite: a civil rights strategy against which public health actions were to be measured."); *see also* City of New York v. New St. Mark's Baths, 497 N.Y.S.2d 979, 982-83 (N.Y. Sup. Ct. 1986) (finding that the high death rate caused by AIDS attributed to risky sexual behavior in bathhouses demonstrate a "compelling state interest" to infringe upon individual rights of freedom of association and rights of privacy).

4. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, CDC HIV/AIDS FACT SHEET: HIV/AIDS AMONG WOMEN 3-4 (2006), http://www.cdc.gov/hiv/topics/women/resources/factsheets/pdf/women.pdf (providing statistical evidence on higher rates of AIDS among minority females).

the bane of many administrative law students. Public health law is administrative law on a more human scale and introduces students to the world of state and local administrative law.

I. HISTORICAL BACKGROUND AND ORIGINAL INTENT

From colonial times through the mid-1800s, states were wracked with communicable diseases. In our modern world, we lose track of the primal fear of plagues, so it is important to remind students about the power of these fears and the threat that communicable diseases posed to society throughout history.[5] This background helps students understand why courts granted broad powers to legislatures and public health agencies, as well as why public health and national security laws have common roots.

Most of the colonial cities were built on waterways or along coastlines because trade traveled by water. These coastal areas were surrounded by marshes and wetlands, subjecting the colonies to mosquito-borne illnesses—yellow fever and malaria—as well as water-borne illnesses—typhoid and cholera—driven by poor drinking water sanitation.[6] Smallpox made regular appearances in colonial cities, as did other epidemic diseases, and tuberculosis (consumption) was a constant companion.[7] The classic book, *Rats, Lice and History*, provides a graphic view of this world:

> In earlier ages, pestilences were mysterious visitations, expressions of the wrath of higher powers which came out of a dark nowhere, pitiless, dreadful, and inescapable. In their terror and ignorance, men did the very things which increased death rates and aggravated calamity . . . . Panic bred social and moral disorganization; farms were abandoned, and there was shortage of food; famine led to . . . civil war, and, in some instances, to fanatical religious movements which contributed to profound spiritual and political transformations.[8]

The first demographic study of disease, *The Shattuck Report*, was done in Massachusetts in the late 1840s.[9] This study showed that the life expectancy in

5. Hysterical overreactions to the anthrax letters mailed after 9/11, as well as more recent concerns regarding bird flu, were both driven by this same primal fear. *See* Barry DeCoster, *Avian Influenza and the Failure of Public Rationing Discussions*, 34 J.L. MED. & ETHICS 620, 620 (2006) ("Over the last year, the public has focused its anxious attention on the possible avian influenza pandemic."); Barry Kellman, *Biological Terrorism: Legal Measures for Preventing Catastrophe*, 24 HARV. J.L. & PUB. POL'Y 417, 419 (2001) ("Biological terrorism is truly a despicable subject, raising nightmares of primal fear.").

6. *See* Alex Kreit & Aaron Marcus Raich, *Health Care and the Commerce Clause*, 31 WM. MITCHELL L. REV. 957, 983 (2005) (noting that epidemics such as smallpox, yellow fever, typhoid, and malaria swept the east coast during the early nineteenth century).

7. *See id.* at 983.

8. HANS ZINSSER, RATS, LICE AND HISTORY 129 (spec. ed., Classics of Med. Library 1997) (1935).

9. SHATTUCK ET AL., *supra* note 2.

Boston was approximately 21.5 years, having declined as the city grew more crowded.[10] Section II of the study, "The Sanitary Movement at Home," provides a detailed and horrifying view of communicable diseases in the colonies.[11] Additionally, *Plagues and Peoples*, a history of the political impact of communicable diseases on social order, provides a better understanding of real and perceived threats posed by communicable diseases to states, which was why such diseases were seen as threats to national security as well as health.[12]

Disease threats were the genesis of traditional public health law—abatement of nuisances, quarantine for communicable diseases, regulation of the sale of food and drink—and were key functions of government in the colonial period. Cities such as Boston and New York have regulated public health matters for longer than they have been part of the United States.[13] Both before and after the ratification of the Constitution, cities took draconian actions to stem outbreaks of disease, especially yellow fever, which killed ten percent of the population of Philadelphia in one summer and fall.[14] *Smith v. Turner* discusses the funding of the marine quarantine hospitals and pays particular attention to counsel's argument describing the 1798 yellow fever epidemic in Philadelphia.[15] This case demonstrates that public health measures were well known to the drafters of the Constitution. When the drafters reserved the police powers to the states, public health actions were one of the most important powers the drafters had in mind.[16] The courts accepted such powers because epidemic diseases were as great a threat to the state as war. Ironically, while there is little in constitutional history to support an original intent basis for administrative law, this historical background provides a powerful original intent argument for strong public health laws.

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10. *Id.* at 104 (noting that the life expectancy of a person living in Boston was 27.85 years between 1810 to 1820, and that it declined to 21.43 years between 1840 and 1845); Edward L. Glaeser, *Reinventing Boston: 1640-2003*, at 13, 47 fig.1 (Harv. Inst. of Econ. Research, Discussion Paper No. 2017, 2003) (illustrating that these changes in life expectancy took place during a time period in Boston during which the city became more populous).

11. *Id.* at 48-106.

12. WILLIAM H. MCNEILL, PLAGUES AND PEOPLES (Anchor Books, Doubleday 1998).

13. ESTHER FORBES, PAUL REVERE & THE WORLD HE LIVED IN 76-78 (Sentry ed., Houghton Mifflin Co. 1969) (describing the role of "Selectmen" that the Boston community elected to regulate the outbreak of smallpox in 1764). Paul Revere served on the Boston Board of Health. City of Boston, Boston Public Health Commission (2007), http://www.ci.boston.ma.us/publichealth/ (last visited Mar. 17, 2007).

14. J.H. POWELL, BRING OUT YOUR DEAD: THE GREAT PLAGUE OF YELLOW FEVER IN PHILADELPHIA IN 1793, at vi, 242-47, 282 (1949) (explaining that in 1783, 5,000 of Philadelphia's 55,000 inhabitants died of yellow fever). This compelled the Assistant Committee to take draconian measures to mount "resistance to disaster." Smith v. Turner, 48 U.S. (7 How.) 283, 341 (1849).

15. 48 U.S. (7 How.) at 299-300 (arguing that yellow fever outbreaks in cities such as Philadelphia and New York served as the impetus to the enactment of quarantine laws).

16. Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Persons*, 16 HAST. CONST. L.Q. 329, 334 (1989); *see* NOVAK, *supra* note 1, at 194 ("[P]ublic health was at the center of a legal and political revolution that culminated in the creation of modern constitutional law and a positive administrative state.").

II. COMMERCE CLAUSE AND CONGRESSIONAL LIMITS ON STATE POLICE POWER

Since public health powers are part of the core of powers left to states by the Constitution, public health cases are a key part of modern Commerce Clause jurisprudence. By reading public health cases, students can better understand the tension between a state's right to regulate and the federal preemption of that right by a specific statute or through the Dormant Commerce Clause. These are not administrative law cases in the classic sense, in that they are usually taught in constitutional law rather than administrative law, but they are critical to understanding the state and local administrative law that underlies public health practice. The doctrines that emerge from these cases are not yet settled; however, as new controversies—municipal regulation of trans fats to improve the public's health, for example—they raise powerful Dormant Commerce Clause issues.[17]

Gibbons v. Ogden involved a conflict between the federal regulation of steamships on navigable waterways and New York laws regulating steamships.[18] The New York laws concerned both commerce and public health and safety because, among other reasons, the boilers of steam engines during that period were prone to explode.[19] This case was well argued and the arguments are published with the opinion, including an argument by Daniel Webster.[20] The United States Supreme Court analyzed the conflict between the powers reserved to the states and the Congressional powers implicit in the Commerce Clause, and in the process brought Commerce Clause jurisprudence into existence.[21] For public health students, *Gibbons* has much to say about state versus federal powers that is still relevant to disputes such as whether states can regulate greenhouse gases to protect citizens from global warming.

Smith v. Turner, cited earlier for its descriptive history of yellow fever in the United States, concerned a New York State tax on passengers arriving in the United States.[22] The state collected the tax to pay for the public health services that the

17. *See* Jonathan S. Goldman, *Take That Tobacco Settlement and Super-Size It!: The Deep-Frying of the Fast Food Industry?*, 13 TEMP. POL. & CIV. RTS. L. REV. 113, 129 n.113 (2003) (arguing that the federal government has the ability to regulate fast food chains pursuant to the Commerce Clause, while federal law, through the Food and Drug Administration, preempts states and local municipalities from passing legislation relating to the content and safety of food). N.Y. City Dep't of Health & Mental Hygiene, Bd. of Health, Notice of Adoption of an Amendment (§81.08) to Article 81 of the New York City Health Code (2006), http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-08.pdf.

18. 22 U.S. (9 Wheat.) 1, 1-2 (1824).

19. Joseph C. Sweeney, *Limitation of Shipowner Liability: Its American Roots and Some Problems Particular to Collision*, 32 J. MAR. L. & COM. 241, 247 (2001) ("The age of the steamboat was also the age of spectacular explosions of steam boilers causing many deaths, injuries and substantial cargo damage.").

20. *Gibbons*, 22 U.S. (9 Wheat.) at 3-33.

21. *Id.* at 186-222 (establishing that Congress has plenary power to regulate interstate commerce on navigable waters).

22. 48 U.S. (7 How.) 283, 298-300 (1849).

state provided to the ports.[23] The Court had a detailed discussion regarding the use of the state's police powers to protect the public health.[24] However, Congress had also legislated in this area, establishing quarantine hospitals, a rare example of early direct federal public health efforts.[25] *Turner* looked at the conflict between the state's exercise of its public health powers and federal government's power to deal with international trade and travel. While the Court recognized the preeminence of state law in quarantine and communicable disease control, it found that the federal government's right to regulate international commerce trumped the state's power to tax foreign travelers, even if this tax supported public health measures.[26]

In *Railroad Co. v. Husen*, the Court considered a Missouri statute that was intended to prevent the spread of disease by cattle transported through the state.[27] The state argued that the statute was a proper exercise of its police power because it had an exception that allowed the transportation of cattle through the state if they were not unloaded.[28] The plaintiffs argued that the law was overbroad because it created a presumption that if any diseased cattle were found along the transportation route, the shipping companies were responsible if they had shipped any cattle.[29] Plaintiffs claimed that this effectively banned the shipping of all cattle through Missouri from March through October, and thus it violated the Interstate Commerce Clause.[30] The Court held that while the state had broad powers to impose quarantines and regulate dangerous goods, if such laws interfered with interstate commerce, they had to be narrowly tailored to limit their effects on commerce.[31] In *Husen*, the Court cited many pertinent cases that upheld state transportation regulations in other contexts. In *City of Philadelphia v. New Jersey*, for example, the Court relied on the same principles as those noted in *Husen* to invalidate a New Jersey law that prevented other states from shipping solid or liquid waste to disposal sites in New Jersey.[32]

The milk cases addressed the fascinating regulatory tension between legitimate sanitary regulations and discriminatory trade regulations passed under the guise of public health and safety. Milk is a staple of the American diet but, at the same time, it poses difficult food sanitation issues. Milk spoils easily; it transmits common cattle diseases such as brucellosis and tuberculosis to people; and it is easily contaminated with bacteria that cause human disease, such as

23. *Id.* at 403.
24. *Id.* at 329-36.
25. *Id.* at 424-25.
26. *Id.* at 414-17.
27. 95 U.S. 465, 468-69 (1877).
28. *See id.* at 469.
29. *Id.*
30. *Id.* at 466-67.
31. *Id.* at 472-73.
32. 437 U.S. 617, 621-24 (1978).

listeriosis.[33] Nevertheless, milk is an important local farm commodity.[34] In *Miller v. Williams*, an early Dormant Commerce Clause case, a Maryland court considered a Baltimore public health regulation that banned cream produced more than fifty miles from the city from being used in ice cream produced in Baltimore.[35] The court found that while the City had the right to regulate the use of cream, it had to do so in a manner that did not discriminate against suppliers of cream from localities outside Baltimore.[36] A pair of state supreme court cases eventually explored the proper scope of state milk regulations: *James v. Todd* upheld an Alabama regulation,[37] while *Otto Milk Co. v. Rose* struck down a Pittsburgh regulation.[38] Public health law students should compare and contrast these cases to determine if there is an acceptable standard for this type of regulation. More recently, similar issues have arisen as states confront cases involving contaminated foods, such as fresh spinach.[39]

In *Massachusetts v. Hayes*, the court examined the issue of direct federal preemption of state health and safety regulations through a Commerce Clause-based law.[40] The Medical Device Amendments of 1976 (MDA) gave the Food and Drug Administration (FDA) authority to regulate medical devices.[41] The MDA provided that states could not pass laws that imposed different or conflicting standards on FDA-regulated devices.[42] *Hayes* involved a challenge to a Massachusetts consumer protection law regulating the sale and fitting of hearing aids and providing for more stringent medical examination guidelines than the FDA regulations required.[43] The court found that the state's regulation was preempted by the FDA regulation.[44] *Hayes* emerged as a key precedent for the battle between the states and Congress over the right to control the regulation of tobacco.

The Tobacco Labeling Act cases are of two types: cases prohibiting tort law claims that conflict with the Tobacco Labeling Act, and cases prohibiting state and

33. Linda Bren, *Got Milk? Make Sure It's Pasteurized*, 38 FDA CONSUMER 29, 30 (2004), *available at* http://www.fda.gov/fdac/features/2004/504_milk.html.

34. Econ. Research Serv., U.S. Dep't of Agric., Dairy, http://www.ers.usda.gov/Briefing/Dairy (last visited Oct. 14, 2006) ("Milk has a farm value of production second only to beef among livestock industries and equal to corn.").

35. 12 F. Supp. 236, 237 (D. Md. 1935).

36. *Id.* at 244.

37. 103 So. 2d 19, 27 (Ala. 1957).

38. 99 A.2d 467, 472-73 (Pa. 1953).

39. *See, e.g.*, Stacy Finz & Erin Allday, *Spinach Growers Were Warned About Produce Safety: State, Federal Officials Concerned by 20 Reports of Tainted Greens*, S.F. CHRON., Sept. 19, 2006, at A-1; Ctrs. for Disease Control & Prevention, *Ongoing Multistate Outbreak of* Escherichia coli *Serotype O157:H7 Infections Associated with Consumption of Fresh Spinach – United States, September 2006*, 55 MORBIDITY & MORTALITY WKLY. REP. 1, 1-2 (2006).

40. 691 F.2d 57, 59 (1st Cir. 1982).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 64.

local regulations regarding the advertising of tobacco. Tobacco use is the most important preventable public health problem in the United States. Until recently, tobacco was considered an important domestic crop and international export and, accordingly, there was little regulation of tobacco use beyond laws directed at collecting tobacco taxes. In the mid-1960s, however, Congress passed the Cigarette Labeling and Advertising Act (Act), which, while requiring warning labels on cigarettes, limited the rights of states to regulate tobacco sales and advertising.[45] *Cipollone v. Liggett Group, Inc.* represents the tort preemption line of the Tobacco Labeling Act cases.[46] *Cipollone* includes an excellent discussion of the legislative history of the Act and its amendments.[47] *Cipollone* illustrates how the Act, which ostensibly required tobacco companies to warn smokers about the risks of tobacco, was actually passed in order to protect tobacco companies. *Lorillard Tobacco Company v. Reilly*, represents the line of the Tobacco Labeling Act cases aimed at limiting state and local regulations regarding the advertising of tobacco.[48] In *Lorillard*, the Supreme Court struck down a Massachusetts state law limiting tobacco advertising.[49] The Court discussed the tension between federal inaction regarding tobacco regulation and states' efforts to regulate the sale and use of tobacco. Echoing the sentiments of Justice Brandeis, tobacco regulation is an excellent example of the idea that states should be allowed to be laboratories for social policy innovation.[50]

III. EVOLUTION OF STANDARDS FOR JUDICIAL REVIEW OF PUBLIC HEALTH LAW

A key issue in administrative law is the relationship between courts and agencies. If 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. However, if courts do not review agency actions, this inaction will undermine the separation of powers. This is a core issue in administrative law, with the Supreme Court limiting judicial efforts to impose additional requirements on agency decision-making,[51] upholding significant deference to agencies for some actions,[52] but establishing rules for when such

45. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331-1340 (1965)).

46. 505 U.S. 504 (1992).

47. *Id.* at 513-15.

48. 533 U.S. 525 (2001).

49. *Id.* at 570-71.

50. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

51. Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 555 (1978) ("[T]he role of a court in reviewing the sufficiency of an agency's consideration of environmental factors is a limited one, limited both by the time at which the decision was made and by the statute mandating review.").

52. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . .").

deference is limited.[53] Determining the proper standard for judicial review in administrative law is controversial because agency deference prevents opponents of public actions from being able to contest these actions.

Jacobson v. Massachusetts is a key public health law and administrative law case,[54] noteworthy for its judicial review jurisprudence and its balancing of individual versus societal rights, as will be discussed later in this article. In *Jacobson*, the Court reviewed a state law giving the health department the power to require smallpox vaccinations for all adult citizens when the health department determined that the community was threatened by smallpox.[55] The statute provided a criminal fine for those who refused to be vaccinated.[56] Reverend Jacobson, who was resisting the vaccination order,[57] wished to present evidence of the risks of vaccination, which were very real at that time.[58] At issue in *Jacobson* was whether Reverend Jacobson would be allowed to present evidence opposing the scientific basis of the mandatory vaccine law and ask the court to review the agency's balancing of the risk and benefits of mandatory smallpox vaccinations.[59] Although the Court's discussion focused on the legislature's power, this power was actually delegated to and exercised by the state Board of Health, rather than being a self-executing statute.[60] The Court found that the smallpox vaccination law was a legitimate policy choice by the legislature and that the defendant could not collaterally attack the legislative findings or the decision by the health department that the law should be applied.[61] The *Jacobson* standard was later articulated in *Williams v. Mayor of Baltimore*:

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53. United States v. Mead Corp., 533 U.S. 218, 228 (2001) ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position.") (citations omitted).

54. 197 U.S. 11 (1905).

55. *Id.* at 12.

56. *Id.*

57. Wendy E. Parmet et al., *Individual Rights Versus the Public's Health — 100 Years After* Jacobson v. Massachusetts, 352 NEW ENG. J. MED. 652, 652 (2005).

58. *Jacobson*, 197 U.S. at 23. The current smallpox vaccine is also dangerous, which was a major issue debated during the smallpox vaccination campaign in 2003. *See* Edward P. Richards et al., *The Smallpox Vaccination Campaign of 2003: Why Did It Fail and What Are the Lessons for Bioterrorism Preparedness?*, 64 LA. L. REV. 851, 865-69 (2004).

59. *Jacobson*, 197 U.S. at 23-24.

60. *Id.* at 27.

> The Revised Laws of that Commonwealth, c. 75, § 137, provide that "the board of health of a city or town if, in its opinion, it is necessary for the public health or safety shall require and enforce the vaccination and revaccination of all the inhabitants thereof and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit five dollars."

Id. at 12.

61. *Id.* at 30-31.

> It is not the function of a court to determine whether the public policy that finds expression in legislation of this order is well or ill conceived. 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.[62]

While not a traditional public health case, *Williams* is frequently cited as the standard the Supreme Court uses to evaluate agency discretion in public health law cases.

The fluoridation cases allow the discussion in *Jacobson* to be extended to preventive measures for conditions that are much less serious than smallpox. The addition of small amounts of sodium fluoride to drinking water greatly reduces tooth decay in children, particularly in areas of the country where water supplies do not contain sufficient natural fluoride.[63] The Centers for Disease Control and Prevention (CDC) identified the fluoridation of water as one of the major achievements in public health in the twentieth century.[64] Yet, fluoridation has been and continues to be one of the most controversial public health measures. Approximately fifty-six percent of the population in the United States receives water with sufficient sodium fluoride to reduce dental caries.[65] This represents a combination of naturally occurring fluoride and fluoride added during drinking water treatment. Resistance to fluoridation has both scientific and political roots. Sodium fluoride is a deadly poison if taken in larger amounts than the traces used in water treatment processes.[66] Even in the amounts found naturally in some drinking water and in fluoridated drinking water, fluoride may have minor, deleterious effects on some individuals.[67] Fluoridation became a right wing political issue during the early part of the Cold War because it was considered a Communist-inspired plot to weaken Americans.[68]

Courts have heard a series of cases challenging a state's right to fluoridate water, which generally proceed on the theory that fluoride has not been proven

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62. 289 U.S. 36, 42 (1933) (citations omitted).

63. Ctrs. for Disease Control & Prevention, *Achievements in Public Health, 1900-1999: Fluoridation of Drinking Water to Prevent Dental Caries*, 48 MORBIDITY & MORTALITY WKLY. REP. 933, 936 (1999).

64. *Id.* at 933.

65. Ctrs. for Disease Control & Prevention, *Recommendations for Using Fluoride to Prevent and Control Dental Caries in the United States*, 50 MORBIDITY & MORTALITY WKLY. REP. 10 (2001), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5014a1.htm.

66. AM. DENTAL ASS'N, FLUORIDATION FACTS 31 (2005), *available at* http://www.ada.org/public/topics/fluoride/facts/fluoridation_facts.pdf.

67. Ctrs. for Disease Control & Prevention, CDC Statement on the 2006 National Research Council (NRC) Report on Fluoride in Drinking Water, http://www.cdc.gov/fluoridation/safety/nrc_report.htm (last visited Feb. 27, 2007).

68. This is the subject of a rant by General Ripper in *Dr. Strangelove*, the classic Cold War movie. DR. STRANGELOVE OR HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB (Hawk Films Ltd. 1964).

effective and that, even if it is effective, there is no justification for forcing individuals opposed to fluoridation to drink fluoridated water to benefit others.[69] Simple Internet searches demonstrate that this controversy is still alive and that it still prevents many poor children from receiving adequate fluoride to prevent tooth decay. Students may also wish to see if their local drinking water meets recommended fluoride standards.

While *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* is not discussed in most public health law courses, it is the most important precedent for understanding how courts will review all agency decisions, including public health cases.[70] *Chevron* involved the regulation of industrial pollution under the Clean Air Act and a challenge by an environmental group claiming that these regulations exceeded the governing agency's power.[71] The Court developed a two-step analysis for this and other agency regulations, at least for those promulgated through the notice and comment process.[72] First, the Court determines whether the enabling law for the agency clearly gives the agency power to regulate in the particular regulatory area or clearly prohibits the regulation.[73] If the regulation is clearly provided for by Congress, or if it is clearly prohibited, the Court can rule without going further. If the regulation is consistent with the enabling law, but not clearly allowed, the Court then determines whether the regulation is a reasonable implementation of congressional direction.[74] Difficult cases, including *Chevron*, are those where a statute grants broad power with only a general expression of intent. In these cases, the *Chevron* analysis is very deferential to agencies. While this may allow agencies to weaken regulations in administrations that do not support strong public health and safety regulations, it is beneficial in the long term because it leaves agencies free to change directions under each different administration. *Chevron* also answers the question of how the Court would rule on traditional public health law cases, such as *Jacobson*, if presented to the Court today. Because *Chevron* is more deferential than the standards used by the historical courts to review cases like *Jacobson*, it is clear that the Court would not overrule such a case today.

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69. *See, e.g.*, Wilson v. City of Mountlake Terrace, 417 P.2d 632, 635 (Wash. 1966) (rejecting the argument that fluoridation exceeded the City's police powers since it was furnishing fluoridated water only to its inhabitants); Rogowski v. City of Detroit, 132 N.W.2d 16, 24 (Mich. 1965) (holding that, by virtue of constitutional, statutory, and charter provisions, the City possessed "adequate authority for enactment of the [fluoride] ordinance"); Kaul v. City of Chehalis, 277 P.2d 352, 357 (Wash. 1954) (en banc) (finding that the City's fluoridation efforts were "a valid exercise of the police power and violated no constitutional rights guaranteed to appellant").

70. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

71. *Id.* at 840.

72. There is less deference for regulations that do not go through public comment and participation. United States v. Mead Corp., 533 U.S. 218, 231 (2001).

73. *Chevron*, 476 U.S. at 842-43.

74. *Id.* at 845.

In *City of New York v. New St. Mark's Baths*, the New York City Health Department sought a permanent injunction to close gay bathhouses.[75] This case is a good vehicle for discussing the failure of public health agencies to confront the disease threat posed by the bathhouses in the early- and mid-1970s, as well as the repercussions of that failure when HIV became a virulent threat to the bathhouses in the late-1970s.[76] This failure has it roots a decade earlier in the failure of the Swine Flu immunization program. The official report prepared by the United States Department of Health, Education, and the Workforce (HEW) on the Swine Flu panic in 1976 provides good background.[77] At the CDC's urging, the White House implemented a nationwide emergency vaccination program for a new strain of flu, Swine Flu, which public health authorities feared would lead to a national flu pandemic.[78] The vaccination program became a public relations nightmare, however, when the vaccine was thought to cause a serious neurological disease.[79] The resulting scandal discredited public health authorities and undermined political support for the government taking strong public health actions.[80] The result was catastrophic, both to the law and to the public's health.

In the aftermath of the Swine Flu disaster, frightening data emerged about an epidemic of Hepatitis B that was sweeping gay bathhouses.[81] This data illustrated that almost every gay man who frequented the bathhouses became infected with the deadly, incurable virus.[82] Rather than closing the bathhouses, as states would have done in the past, bathhouses were allowed to continue operating, and health departments were directed to work with them to improve public health education about the risks of Hepatitis B exposure in bathhouses. Unfortunately, when HIV began to spread among bathhouse patrons in the late 1970s, it quickly infected most

75. 497 N.Y.S.2d 979, 981 (N.Y. Sup. Ct. 1986) (permanent injunction proceeding), *aff'd*, 562 N.Y.S.2d 642 (N.Y. App. Div. 1990).

76. For extensive materials on the history and failure of HIV law, see Edward Richards, Testimony Before the Presidential Advisory Council on HIV/AIDS: AIDS Law - Past and Future (June 21, 2005), http://biotech.law.lsu.edu/cphl/slides/aids-com.htm.

77. RICHARD E. NEUSTADT & HARVEY V. FINEBERG, THE SWINE FLU AFFAIR: DECISION-MAKING ON A SLIPPERY DISEASE (1978), *available at* http://biotech.law.lsu.edu/cphl/history/books/sw/index.htm.

78. *Id.* at 5-9.

79. Unthank v. United States, 732 F.2d 1517, 1518-19 (10th Cir. 1984); NEUSTADT & FINEBERG, *supra* note 77, at 97-98.

80. *See* NEUSTADT & FINEBERG, *supra* note 77, at 2-3.

81. *See* James R. Thompson, *Understanding the AIDS Epidemic: A Modeler's Odyssey*, *in* APPLIED MATHEMATICAL MODELING: A MULTIDISCIPLINARY APPROACH 41, 55 (D.R. Shier & K.T. Wallenius eds., 1999); *see also* Herbert W. Hethcote & James A. Yorke, *Gonorrhea Transmission Dynamics and Control*, *in* 56 LECTURE NOTES IN BIOMATHEMATICS (S. Levin ed., 1984).

82. RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC (1988).

patrons before the first case was diagnosed.[83] Gay bathhouses are still open in many cities and remain a major vector for HIV infection.[84]

Efforts to close gay bathhouses, while epidemiologically sound, have been very controversial due to resistance from gay activists and some public health officials who do not believe in mandatory public health actions.[85] Bathhouse owners attempted to present expert testimony to contest the rationale for closing the bathhouses.[86] Citing *Williams*, the court in *New St. Mark's Baths* held that as long as the state's actions had a rational relationship to the state's objectives, the regulated parties could not use the courts to attack the agency's policy decisions unless the agency had acted in an arbitrary and capricious manner.[87] This case illustrates the tension between preventing the spread of HIV, which hits minority communities particularly hard, and the privacy rights of infected persons.[88]

Similarly, *New York State Society of Surgeons v. Axelrod* provides an example of how courts can use the rational relationship test to uphold clearly incorrect public health policies.[89] A major medical professional organization in New York sued the state Commissioner of Health to force him to add HIV to the state's list of "communicable and sexually transmissible diseases," which made such listed diseases reportable in New York State.[90] The Commissioner refused, despite clear evidence that HIV was a communicable disease.[91] The court upheld the state's refusal, finding that the Commissioner made a policy decision about the best way to handle HIV infection and that plaintiffs could not contest this policy, even if the factual basis for the Commissioner's decision was weak.[92]

FDA v. Brown & Williamson Tobacco Corp. applies *Chevron* to the FDA's proposed regulations on the tobacco industry.[93] The case also supports teaching

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83. *Id.*

84. Sue Fox, *New Rules for Bathhouses OKd: L.A. County Supervisors Tentatively Approve an Ordinance to Require Health Permits*, L.A. TIMES, Sept. 8, 2004, at B1; Andrew Jacobs, *The Beast in the Bathhouse: Crystal Meth Use by Gay Men Threatens to Reignite an Epidemic*, N.Y. TIMES, Jan. 12, 2004, at B1; Regina McEnery, *Bathhouse Spurs HIV Concerns: Cleveland Health Officials Push for Prevention Measures at New Club*, PLAIN DEALER, July 16, 2006, at A1.

85. For an excellent discussion of the politics of closing bathhouses, see JOSEPH, *supra* note 3, at 100-09.

86. City of New York v. New St. Mark's Baths, 497 N.Y.S.2d 979, 983 (N.Y. Sup. Ct. 1986).

87. *Id.*

88. This "AIDS exceptionalism," which did not treat HIV in the same manner as other communicable diseases, has begun to come to an end, with new CDC recommendations and funding guidelines requiring named reporting, contact investigation, and reductions in the barriers to testing such as elaborate counseling requirements. *See* Thomas R. Frieden et al., *Applying Public Health Principles to the HIV Epidemic*, 355 NEW ENG. J. MED. 2397 (2005).

89. New York State Soc'y of Surgeons v. Axelrod, 572 N.E.2d 605, 609 (N.Y. 1991).

90. *Id.* at 606.

91. *Id.* at 606-07.

92. *Id.* at 609 (explaining that the court's review was "limited to whether [the Commissioner's] determination is rationally based, i.e., whether it is unreasonable, arbitrary or capricious").

93. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125-26 (2000).

public health because it has an extensive history of tobacco and tobacco regulation in the United States.[94] The Supreme Court raised the interesting issue of the role of regulatory precedent in statutory interpretation. Until these regulations, the FDA maintained that it had no authority over tobacco, and that Congress had specifically given other agencies this authority. Yet the clear language of the Food and Drug Act seemed to cover nicotine in tobacco. The Court ultimately found that the FDA did not have authority over tobacco,[95] but in doing so, Justice Scalia and Justice Breyer exchanged their traditional roles. Justice Scalia, by signing the majority opinion, agreed with the argument that tobacco regulations must be viewed in light of a long history of congressional intent to exempt tobacco from FDA regulation. Justice Breyer, in dissent, argued that the history of tobacco regulation should be ignored and that the Court should only look at the plain language of the statute.[96]

IV. DUE PROCESS FOR ADMINISTRATIVE ACTIONS

Due process is a fundamental issue in public health and in administrative law in general. Students must learn to understand the differing standards for criminal law due process, administrative due process for restrictions of persons, and due process for economic rights and government benefits. Due process for economic rights is the most common issue in public health and in administrative law in general.

The Slaughter-House Cases examined opposition to a New Orleans statute that regulated the slaughterhouse industry.[97] They are important historical records of a common public health problem during the period, as well as important constitutional law cases. The slaughterhouse district in New Orleans was located in swampland east of the French Quarter and was subject to flooding and poor drainage, which created significant health risks from poorly managed offal and blood.[98] The City required the consolidation of existing slaughterhouses and regulated the industry, including charges.[99] The plaintiffs attacked these laws under the newly ratified Fourteenth Amendment, claiming that the Fourteenth Amendment granted them broad rights to due process and protection of their property rights.[100] The Court rejected this challenge, reading the Fourteenth Amendment narrowly in order to preserve the state's police powers.[101] This decision provides a useful forum for discussing the tension between individual rights and the public's health. However, civil rights scholars have criticized the

94. *Id.* at 143-59.

95. *Id.* at 161.

96. *Id.* at 163 (Breyer, J., dissenting).

97. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

98. *Id.* at 64; Herbert Hovenkamp, *Technology, Politics, and Regulated Monopoly: An American Historical Perspective*, 62 TEX. L. REV. 1263, 1297-1301 (1984).

99. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 59-60.

100. *Id.* at 66.

101. *Id.* at 79-82.

Slaughter-House Cases because of the Court's narrow reading of the Fourteenth Amendment.[102] Students should think about what an expansive reading of the Fourteenth Amendment in these cases would have done to states' authority to carry out the sanitary revolution, which dramatically raised life expectancy between 1850 and today.

Village of Euclid, Ohio v. Ambler Realty Co. is the classic case upholding zoning laws as a public health measure against challenges that they were an unconstitutional taking.[103] One of the most important strategies in the sanitation movement was the implementation of urban zoning laws to improve the quality of life in residential housing. This case provides good discussions about housing and environmental issues in public health. The original New York City zoning laws were also an illustrative model for such laws throughout the United States.[104]

Goldberg v. Kelly was a major break with the Court's precedent of limited due process rights for administrative termination of government benefits and thus is one of the new property cases.[105] While a Burger Court decision, *Goldberg* was authored by Justice Brennan and more resembles a Warren Court opinion. The plaintiffs in *Goldberg* were welfare recipients who were contesting the process New York used to terminate their benefits.[106] Specifically, plaintiffs wanted a pre-termination hearing, the right to give oral rather than written evidence, and other due process considerations.[107] Justice Brennan, writing for the majority, held that the termination of welfare benefits was such an important event for indigent persons that it required the state to give them a chance to be heard before termination.[108] The Court also granted plaintiffs' request that they be allowed to testify orally, rather than providing written comments, reasoning that persons on welfare might not be able to effectively prepare written testimony and were unlikely to be represented by counsel.[109] The Court did not grant plaintiffs' request for appointed counsel, however.[110] It is important for students to understand the

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102. James W. Fox, Jr., *Re-readings and Misreadings:* Slaughter-House, *Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67, 68-69 (2002); Robert J. Kaczorowski, *The Chase Court and Fundamental Rights: A Watershed in American Constitutionalism*, 21 N. KY. L. REV. 151, 174-91 (1993); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 937-38 (1986).

103. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394-96 (1926).

104. City of New York, Building Zone Resolution (July 25, 1916), *available at* http://biotech.law.lsu.edu/cphl/history/laws/ny_index.htm.

105. 397 U.S. 254 (1970).

106. *Id.* at 255-56.

107. *Id.* at 259-60.

108. *Id.* at 261.

109. *Id.* at 269.

110. *Id.* at 270. While some commentators have argued that the state must provide appointed counsel for administrative proceedings, the United States Supreme Court has only required appointed counsel in very limited circumstances outside of criminal proceedings. *Compare* Lassiter v. Dep't of Social Servs., 452 U.S. 18, 33 (1981) (holding appointed counsel unnecessary in a parental status termination proceeding), *with* In re Gault, 387 U.S. 1, 36-37 (1967) (finding appointed counsel necessary in juvenile

rationale in the *Goldberg* case, as well as the burden the expansion of these due process rights had on the agency. This burden lead the Supreme Court to limit *Goldberg* to its facts only six years later.

The Supreme Court revisited the *Goldberg* rights in *Mathews v. Eldridge*.[111] At issue in *Mathews* was whether *Goldberg* created a general right to pre-termination hearings for federal benefits[112] that would be applied to the termination of Social Security Disability Insurance benefits.[113] The Court held that the agency could balance the value of the benefits against the cost of the due process and the likelihood that the requested process will improve the accuracy of the decision-making and expressed these as what has been called the *Mathews* factors:

> (1) the private interest that will be affected by the official action;
> (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
> (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[114]

The Court found that a pre-termination hearing would not significantly improve the accuracy of the decision-making and thus was not required.[115] While not directly overruling *Goldberg*, the Court has not applied the *Goldberg* rights in any subsequent cases. The *Mathews* factors are at issue in all public health due process cases and represent a special case of cost-benefit analysis. Accordingly, students should explore how these factors would be applied in the public health context.

Heckler v. Campbell also examines the awarding of Social Security Disability Insurance benefits.[116] The government promulgated regulations defining the nature of work that could be done by persons with various disabilities.[117] The intent of the regulations was to simplify the review and hearing process by limiting the issues that the fact-finder would have to determine on an individualized basis.[118] The Court found that it was constitutionally permissible to use regulations to create administrative presumptions which then could not be appealed in individual cases.[119] This is an important principle in public health law because it means that

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delinquency determination hearings because of the "awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21").

111. Mathews v. Eldridge, 424 U.S. 319 (1976).

112. *Id.* at 325-26.

113. *Id.* at 323-24.

114. *Id.* at 335. The *Mathews* rationale is core to the Court's administrative due process jurisprudence. *E.g.*, Wilkinson v. Austin, 545 U.S. 209, 211 (2005) (citing *Mathews*, 424 U.S. at 335).

115. *Mathews*, 424 U.S. at 348-49.

116. 461 U.S. 458, 458 (1983).

117. *Id.* at 459-60.

118. *Id.* at 461-62.

119. *See id.* at 467.

regulated parties cannot appeal or litigate matters established by administrative regulations. Thus, a restaurant owner cannot contest the proper temperature to keep hot soup if that temperature has been established by a regulation. *Heckler*, taken with *Mathews* and *Chevron*, provides the framework for using administrative regulations in public health.

V. ADMINISTRATIVE SEARCHES

Administrative searches are one of the most difficult concepts in administrative law, and public health law poses some of the most challenging factual situations. All law students, as well as all viewers of television police dramas and readers of crime literature, are indoctrinated with the probable cause mantra, which provides that law enforcement officials cannot search without a warrant, which must be based on probable cause and must describe, with specificity, the objective of the search. Administrative searches get little attention in administrative law courses and are often ignored in public health law courses, but they are the main strategy for routine public health enforcement. Whether inspecting restaurants, chasing rats in housing blocks, testing persons for tuberculosis, or enforcing Good Manufacturing Practices in high-tech drug companies, when a public health agency collects data, it is usually engaged in some sort of administrative search. Students should understand the process and limits of administrative searches. Administrative search jurisprudence is important in many other areas of administrative practice, including national security law, where it has been used to try to justify measures such as the warrantless interception of domestic phone calls. It is likely that courts will revisit administrative searches as the war on terrorism pushes the boundary between administrative and criminal searches.

Frank v. Maryland is the starting point for understanding administrative searches and represents the law on administrative searches from the ratification of the Constitution until *Frank* was modified in 1967.[120] *Frank* is an archetypical public health case. The Baltimore Health Department's rat inspector, acting on a complaint, found evidence of severe rodent infestation at the defendant's home.[121] The inspector entered the defendant's yard looking for evidence of rats and asked the defendant to allow him to inspect the basement.[122] The defendant refused, and the inspector, still without a warrant, returned with the police and had the defendant arrested for refusing entry to a health inspector.[123] Justice Frankfurter delivered the majority opinion—a classic Frankfurter opinion—and reviewed the history of criminal law and administrative law searches from the English kings to the current

120. 359 U.S. 360 (1959). For a discussion of the Court's later refinement of the *Frank* holding, see *infra* notes 127-131 and accompanying text.

121. *Frank*, 359 U.S. at 361.

122. *Id.*

123. *Id.*

case.[124] *Frank* is a decision that is surprising to most law students and many lawyers, because the Court upheld the warrantless search and the conviction of the defendant, for refusing to have his house searched for rats.[125] *Frank* provides a valuable history of searches, but the core of the majority opinion is the distinction it draws between the limited purpose for administrative searches: the prevention of harm through administrative orders and penalties, and the sole purpose of a criminal search: gathering evidence for a criminal prosecution. The distinction the Court made between criminal and civil purposes and between punishment and prevention had a profound effect on later Supreme Court decisions in cases involving quasi-criminal proceedings, as discussed earlier in this article. Furthermore, Justice Douglas wrote a stirring dissent in which he questioned both the majority's interpretation of history as well as its policy.[126]

After *Frank* was decided in 1959, the Court began to rethink criminal rights and privacy in general in the area warrant cases.[127] The Court limited *Frank*'s principle of warrantless entry for administrative searches in a pair of 1967 decisions: *See v. Seattle*, which concerned commercial property,[128] and *Camara v. Municipal Court*, which involved a personal residence.[129] In both cases, the Court found that warrantless searches were an invitation to improper behavior and even harassment.[130] In place of warrantless searches, the Court created the area warrant, a warrant that is not based on specific probable cause but is based on a general health inspection program applied to a defined set of houses.[131] For example, a city health department might request an area warrant to inspect all the homes in a given neighborhood for rats as part of a rat inspection program that attempts to inspect all homes at least every five years. The Court also recognized that under some circumstances—the need to do surprise inspections in restaurants, for example—warrantless searches might still be necessary.[132] The Court also recognized that for licensed or permitted businesses, the state may require warrantless entry during

124. *Id.* at 363-66.

125. *Id.* at 373.

126. *Id.* at 376-81 (Douglas, J., dissenting).

127. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (recognizing the Fifth Amendment protection from self-incrimination creates privacy rights that extend to suspects in custody and that these suspects must be clearly informed of their right to invoke this Constitutional protection by remaining silent); Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing a zone of privacy created by the Constitution that protects married couples in their decisions regarding contraception); Mapp v. Ohio, 367 U.S. 643 (1961) (recognizing that Fourth Amendment privacy rights render evidence obtained through searches and seizures in violation of the Constitution inadmissible).

128. 387 U.S. 541 (1967).

129. 387 U.S. 523 (1967).

130. *E.g., id.* at 530-31 ("For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security.").

131. *Id.* at 536-39; *See*, 387 U.S. at 545.

132. *See*, 387 U.S. at 545 n.6.

regular business hours as a condition of licensure or permitting.[133] This exception that allowed the state to make warrantless inspections a condition for licensed and permitted businesses lead to the closely regulated industry cases.

The closely regulated industry cases are classic administrative search cases which deal with health and safety violations that usually are not crimes on their own. These cases involve businesses such as pharmacies, firearm dealers, or automobile salvage yards, where the typical violations the inspectors are looking for are crimes. In these cases, remedies were generally administrative orders to remediate, or perhaps a civil fine. The cases reached courts in the form of prosecutions for refusing to comply with the administrative orders. These cases tested the *Frank* distinction between prevention and punishment.

In the first of these cases, *New York v. Burger*, the defendant operated an automobile salvage yard.[134] New York law provided that salvage yards were required to permit warrantless entry for inspections.[135] The police searched the defendant's yard, and to do so they entered with the implied consent granted by the owner as a condition of obtaining a permit to run the salvage yard.[136] The police found parts from stolen automobiles and arrested the defendant-owner.[137] In *Burger*, the Court identified three factors for deciding whether a warrantless inspection is valid:

> First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made . . . . Second, the warrantless inspections must be "necessary to further [the] regulatory scheme." . . . Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.[138]

Based on these factors, the Court found that having criminal penalties in addition to administrative sanctions for violations of business regulations did not transform an administrative search into a criminal search.[139] The Court was silent,

133. *E.g.*, *id.* at 546 ("[N]or do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product.").

134. 482 U.S. 691, 693 (1987).

135. *Id.* at 693-94.

136. *Id.* at 693-95.

137. *Id.* at 695-96.

138. *Id.* at 702-03 (citations omitted).

139. *Id.* at 716-17.

however, on whether the police could have arrested the defendant if they had found a criminal violation unrelated to his licensed junkyard business.[140]

Burger should be read with *People v. Keta*, a case joined with *People v. Scott*, in which the New York Court of Appeals reviewed the *Burger* facts under the New York State Constitution.[141] The court found that the state constitution provided broader protections against warrantless searches which might result in criminal prosecution.[142] The court held that searches which might result in criminal prosecution, as that which occurred in *Burger*, must be based on a warrant that meets criminal probable cause standards.[143] *Scott* therefore provides a useful contrast between state and federal analysis.

There are three key discussion points for administrative warrants. First, a warrant is only necessary if the owner refuses entry. Most public health searches are done with the owner's permission and thus do not require a warrant.[144] Since the legislature can require more protections by statute than is required by the constitution, these standards could be changed if there was popular objection to area warrants or warrantless searches as a condition of licensure and permitting. What is unknown is whether courts would rethink area warrant requirements if people refused searches often enough that the warrant process interfered with the health department's ability to do its job. This would not be an issue in criminal cases, but it would be a logical application of *Mathews* for the Court to rethink area warrants if their use substantially interfered with public health and safety inspections.

Second, there are a series of important but unresolved questions concerning how courts would rule if evidence of unrelated criminal activity is found during the search. For example, what if the rat inspector finds a stash of illegal machine guns or illicit drugs? Does Frankfurter's limited purpose mean that this evidence cannot be given to the police and used in a criminal prosecution? Or, as many law enforcement agencies believe, is this a case of plain view, as long as the inspector was legally on the premises? If the FBI or police departments train public health inspectors to look for evidence of crimes, would this render the public health inspectors agents of the police and thus defeat the plain view argument? It is interesting that there are no United States Supreme Court opinions addressing the

140. The Court explains that an administrative search is "not rendered illegal" by the fact that a law enforcement officer with the authority to arrest for other crimes or violations conducts the administrative search, but does not address the implications, if any, for an unrelated arrest made pursuant to this broader authority during the course of executing the inspection pursuant to the administrative warrant. *Id.* at 717. This has been addressed in at least one state case, which rejected a prosecution based on illegal weapons found during a restaurant inspection. City of Chicago v. Pudlo, 462 N.E.2d 494, 499-501 (Ill. App. Ct. 1983).

141. People v. Scott, 593 N.E.2d 1328, 1339 (N.Y. 1992).

142. *Id.* at 1341-43.

143. *Id.* at 1343.

144. Camara v. Mun. Court, 387 U.S. 523, 539 (1967).

problem of evidence of criminal activity that is unrelated to the purpose of the administrative search being found during an administrative search.

Third, in a subsequent case, the Supreme Court justified the search and arrest of a gun dealer on the implied consent theory.[145] How far can the government go in requiring individuals to give up their rights to refuse warrantless inspections as a condition of government licenses and permits? Could it be part of the building permit for homes, thus assuring free access forever?

VI. MANDATORY VACCINATIONS, TESTING, AND REPORTING

While *Jacobson v. Massachusetts* deals with mandatory vaccinations,[146] it is a critical precedent for the testing and reporting cases. Testing and reporting are the foundations of disease epidemiology, which is a fundamental component of science-based public health. The right to do such testing and reporting is a special case of administrative searches, but it became very controversial in the 1980s as states debated requiring mandatory reporting of positive HIV test results.[147] Reporting and testing provides a vehicle for discussing the tension between individual privacy and the public's health.

Jacobson contains classic language about the shared rights and responsibilities of members of society[148] and provides a good opportunity for students to discuss modern fears of vaccination and how states have responded to them. *Jacobson* was decided the same term as *Lochner v. New York*.[149] Reading these cases in parallel provides a very different view compared to the traditional reading of *Lochner* as opposing all state health and safety regulations. It is interesting that, until recently, most constitutional law books ignored *Jacobson*. The Court has reaffirmed *Jacobson* in much more controversial areas; *Jacobson* is a key precedent in the majority opinion in *Kansas v. Hendricks*, a decision which upheld the preventive detention of sexual predators.[150] There are also a number of

145. United States v. Biswell, 406 U.S. 311, 315 (1972).

146. *See supra* notes 54-61 and accompanying text.

147. Edward P. Richards, *Communicable Disease Control in Colorado: A Rational Approach to AIDS*, 65 DENV. U. L. REV. 127, 130-31 (1988) (discussing the tension between advocates for mandatory HIV reporting by public health departments and the American Civil Liberties Union's stance that such reporting infringes on patient privacy and autonomy).

148.

> But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.

Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905).

149. 198 U.S. 45 (1905).

150. Kansas v. Hendricks, 521 U.S. 346, 350 (1997).

quasi-criminal law cases where the Court upholds significant deprivations of liberty to protect the public's health.[151]

State v. Armstrong is a classic tuberculosis control case[152] that offers an opportunity to examine tuberculosis, which, along with malaria and HIV, is one of the great international health issues. Few students know that tuberculosis was once the leading cause of death in the United States and was much more widespread than HIV is today in the United States.[153] Worldwide, tuberculosis is still a leading killer, second only to HIV/AIDS for infectious disease deaths (many of the HIV/AIDS deaths are caused by secondary infection by tuberculosis), with malaria close behind in that category.[154] A good resource is a CDC publication, *TB Notes, 2000*, a special issue of the agency's *TB Notes* newsletter.[155]

Armstrong is a mandatory tuberculosis testing case. Armstrong was a Christian Scientist who wanted to register as a university student.[156] The State University's Board of Regents required all students to have a chest x-ray for tuberculosis, a common requirement at that time.[157] Armstrong resisted having the x-ray, on the grounds that it was against her religion.[158] The court held that personal religious beliefs must be subordinated to the protection of the public health.[159] In the context of a discussion of quarantine and restrictions of individuals, *Armstrong*

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151. These cases are reviewed in Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 HASTINGS CONST L.Q. 329, 352-84 (1989) (discussing, *inter alia*, Addington v. Texas, 441 U.S. 418 (1979) (indefinite civil confinement for a violent mentally ill convict to protect the general welfare); Barefoot v. Estelle, 463 U.S. 880, *reh'g denied*, 464 U.S. 874 (1983) (reduction of the state's burden of proof to uphold a death sentence where a "probability" existed that Barefoot posed a future risk); Allen v. Illinois, 478 U.S. 364 (1986) (indefinite regulatory detention of a sexual predator with the propensity to commit sexual assault again to undertake fact finding)).

152. 239 P.2d 545 (Wash. 1952).

153. DIV. OF TUBERCULOSIS ELIMINATION, U.S. DEP'T OF HEALTH & HUMAN SERVS., QUESTIONS AND ANSWERS ABOUT TB 1 (2005), http://www.cdc.gov/nchstp/tb/faqs/pdfs/qa.pdf. *Compare* Ctrs. for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., *Cases of HIV/AIDS, by Area of Residence, Diagnosed in 2004 – 33 States with Confidential Name-Based HIV Infection Reporting, in 16* HIV/AIDS SURVEILLANCE REP. 6 (2004), http://www.cdc.gov/hiv/topics/surveillance/resources/reports/2004report/pdf/2004SurveillanceReport.pdf ("In 2004, the estimated rate of AIDS cases in the United States was 14.1 per 100,000 population."), *with* CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., TB NOTES 2000, at 2 (2000), http://www.cdc.gov/nchstp/tb/notes/TBN_1_00/tbn1_00.pdf [hereinafter CDC, TB NOTES 2000] ("By 1904 the TB death rate for the United States was 188, by 1920 the rate was 100 per 100,000 . . . .").

154. WORLD HEALTH ORG., THE WORLD HEALTH REPORT 2004: CHANGING HISTORY 120 tbl.2 (2004), http://www.who.int/entity/whr/2004/en/report04_en.pdf; WORLD BANK, CONFRONTING AIDS: GOVERNMENT PRIORITIES FOR PREVENTION AND COPING 3 (1997), http://www.worldbank.org/aidsecon/confront/present/lima/sld003.htm.

155. CDC, TB NOTES 2000, *supra* note 153. *TB Notes, 2000* has several articles that can be assigned for class.

156. *Armstrong*, 239 P.2d at 546.

157. *Id.*; CDC, TB NOTES 2000, *supra* note 153, at 5-6.

158. *Armstrong*, 239 P.2d at 546.

159. *Id.* at 549.

is a case that illustrates the implications of a Christian Scientist refusing treatment for tuberculosis, which can result in lifetime isolation.

In a similar vein, *Reynolds v. McNichols* reviewed a Denver regulation requiring that prostitutes who were arrested be held until they were either tested for gonorrhea or accepted epidemiological treatment, such as antibiotic treatment for gonorrhea, based on their known high risk of infection.[160] In addition to privacy claims, the petitioner made an equal protection claim based on the requirement that prostitutes be detained, but not their clients.[161] A related and helpful companion case is *Cherry v. Koch*, which includes a good history of prostitution laws.[162] The *Reynolds* Court rejected these claims, finding that the City's "hold and treat" orders were a valid exercise of the police power and that detaining only prostitutes, who were at much higher risk of infection than their clients, was a rational response to the problem of the gonorrhea epidemic.[163]

While public health reporting laws go back to the colonial period, the Supreme Court did not directly address mandatory public health reporting until 1977, with its decision in *Whalen v. Roe*.[164] New York passed a law requiring all prescriptions for narcotics and other Schedule II controlled substances to be reported to the State.[165] The State would use this information to identify improper prescribing practices and the diversion of controlled substances into illegal channels.[166] A group of physicians and patients sued to have the law declared an unconstitutional intrusion into personal privacy.[167] In an argument later repeated in the battles over HIV reporting, the petitioners alleged that reporting would deter people from seeking treatment and accepting necessary narcotic prescriptions.[168] The Supreme Court found that public health reporting laws were a valid exercise of the State's police powers and were not an impermissible intrusion into personal privacy.[169] The Court assumed in its opinion that the State would restrict access to this information to legitimate public health purposes.[170]

People v. Adams revisited the testing of prostitutes in the age of HIV/AIDS.[171] Illinois passed a law requiring persons convicted for a series of prostitution-related

160. 488 F.2d 1378, 1380 (10th Cir. 1973).

161. *Id.* at 1383.

162. 491 N.Y.S.2d 934 (N.Y. Sup. Ct. 1985).

163. *Reynolds*, 488 F.2d at 1383; *see also* Edward P. Richards & Katharine C. Rathbun, *The Role of the Police Power in 21st Century Public Health*, 26 J. SEXUALLY TRANSMITTED DISEASES ASS'N 350, 353 (1999) (discussing the Denver program).

164. 429 U.S. 589 (1977).

165. *Id.* at 593.

166. *Id.* at 591-93.

167. *Id.* at 595, 598.

168. *Id.* at 600.

169. *Id.* at 603-04.

170. *Id.* at 605-06.

171. 597 N.E.2d 574 (Ill. 1992).

crimes to be tested for HIV.[172] The court presented a detailed review of the law on involuntary testing in general and on the special issues involved in testing prisoners.[173] The court held that the testing did not violate the prisoners' constitutional rights.[174]

In *Ferguson v. City of Charleston*, the Court reviewed a program in which pregnant women were tested for illegal drug use while obtaining prenatal care.[175] The women did not consent to this testing.[176] The testing was done to protect the fetus; if a woman tested positive, she was threatened with criminal prosecution unless she complied with a drug treatment program.[177] This is an important case, touching both on the administrative search issues discussed previously in this article and the right to mandate public health testing. The Court found that the public health rationale in this case was a subterfuge because the test results were used for criminal law purposes.[178] This violates a constitutional bright line that the Court has established between public health authority and criminal law authority.[179] When discussing this case, students should consider whether it is a ban on all unconsented testing of pregnant women for illegal drugs, or whether it only bans unconsented testing that is used for law enforcement.

The Court, in *Smith v. Doe*, reviewed the newly fashionable laws that require public notification about the identity and whereabouts of persons convicted of sexual offenses.[180] The Alaska law at issue in this case requires detailed information, including pictures, about persons convicted of sex crimes and child kidnapping, to be made public; the state chose to do so by posting the information on the Internet.[181] Petitioners attacked the law as additional punishment imposed after their conviction of a crime and asserted that the law violated the Ex Post Facto Clause.[182] The Court rejected this challenge, holding that the purpose of this law was prevention, not punishment.[183] According to the Court, since the law did not punish the offenders, it did not violate the Ex Post Facto Clause.[184] Students reading *Smith* should be directed to the Court's circular rationale for finding that this was not a punitive law.[185]

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172. *Id.* at 576.

173. *Id.* at 580-83.

174. *Id.* at 586.

175. 532 U.S. 67, 70 (2001).

176. *Id.*

177. *Id.* at 72.

178. *Id.* at 82-83.

179. *Id.* at 79-80 n.15.

180. 538 U.S. 84, 89 (2003).

181. *Id.* at 91; ALASKA STAT. § 12.63.010 (2004).

182. *Smith*, 538 U.S. at 91; U.S. CONST. art. I, § 10, cl. 1.

183. *Smith*, 538 U.S. at 96.

184. *Id.* at 103-04. It is revealing that the petitioners, as sex offenders, did not bother to bring privacy claims.

185.

The reasoning in *Smith* echoes *Frank v. Maryland* and extends a long line of cases that redefine seemingly criminal proceedings as quasi-public health actions, and which thus do not trigger criminal due process protections. Rejecting the high point of criminal due process protections reached by the Warren Court in the case of *In re Gault*,[186] these cases allow criminals to be held without bail to prevent them from committing crimes;[187] allow pretrial detainees, including material witnesses in protective custody, to be incarcerated and treated as prisoners;[188] and generally allow the state broad latitude to use criminal law tools without criminal law due process protections if done with a public health rationale.[189] Students should discuss the applicability of this theory of prevention versus punishment in the context of the detention of terrorist subjects; these ideas can be revisited after further discussions on restrictions and habeas corpus.

VII. RESTRICTIONS OF INDIVIDUALS AND HABEAS CORPUS REVIEW

Public health law is the one area of administrative law that deals with the physical restriction of individuals and habeas corpus review. Most law students never learn about habeas corpus jurisprudence, and many practicing lawyers, even public health lawyers, do not understand its reach or significance. This may explain why some scholars argue that quarantine and isolation laws are unconstitutional unless they provide specific constitutional due process provisions.[190] Habeas corpus is one of the most fundamental promises in the Constitution, and it applies to the states.[191] Habeas corpus always provides due process for persons detained by states for public health purposes, without regard to whether states have specific statutes providing habeas corpus review. The basic habeas corpus procedure is that the detained individual has a right to a hearing before a judge, forcing the state to show the legal authority for the individual's detention and the state's prima facie case for the detention.[192] Since habeas corpus is critical to understanding due process in public health detentions, it is useful to start with *Ex Parte Milligan*, President

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> The Act itself does not require the procedures adopted to contain any safeguards associated with the criminal process. That leads us to infer that the legislature envisioned the Act's implementation to be civil and administrative. By contemplating "distinctly civil procedures," the legislature "indicate[d] clearly that it intended a civil, not a criminal sanction."

Id. at 96 (citation omitted).

186. 387 U.S. 1 (1967); *see supra* note 110 and accompanying text.

187. United States v. Salerno, 481 U.S. 739, 755 (1987).

188. Bell v. Wolfish, 441 U.S. 520, 523-24 (1979).

189. *Id.* at 539. For a detailed discussion of this case and *Salerno*, see Richards, *supra* note 151, at 356-59, 378-84.

190. LAWRENCE O. GOSTIN ET AL., IMPROVING STATE LAW TO PREVENT AND TREAT INFECTIOUS DISEASE (1998), *available at* http://www.milbank.org/010130improvinglaw.html.

191. U.S. CONST. art. I, § 9, cl. 2; Harris v. Nelson, 394 U.S. 286, 290-91 (1969).

192. Hamdi v. Rumsfeld, 542 U.S. 507, 526 (2004).

Lincoln's attempt to suspend habeas corpus.[193] This case is a good review of the constitutional basis for habeas corpus.

Beyond *Ex Parte Milligan*, however, is *Korematsu v. United States*, the Japanese internment case.[194] It is a useful case to read in a public health law class because it was based on a traditional combined national security/public health and safety rationale.[195] Japanese Americans were quarantined to prevent their harming society, as if they were potential carriers of a communicable disease.[196] The Supreme Court upheld the detention in language that is reminiscent of contemporary debates about the detention of terrorists.[197] A companion case, *Hirabayashi v. United States*, upheld a criminal conviction for not complying with a detention order.[198] The factual basis for *Hirabayashi* and *Korematsu* was reconsidered in a 1984 case in which a district court vacated Korematsu's conviction pursuant to a writ of *coram nobis*.[199] The Supreme Court has never rejected the legal basis for *Korematsu*, however, and it therefore continues to provide a good starting point for a discussion of whether, faced with an equivalent threat today, the Court would act differently than it did in 1944.

Hamdi v. Rumsfeld updates *Ex Parte Milligan* to modern times.[200] Congress and the President attempted to limit the judicial review of the detention of citizens held in the United States on terrorism charges.[201] The Court found that the defendant did have a right to have his detention reviewed by the courts, but did not categorically deny the President the right to carry out these detentions.[202] Justice Scalia added a powerful dissent, arguing against the principle of open-ended detentions and reviewing the history of detention back to Blackstone:

> Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper . . . there would soon be an end of all other rights and immunities . . . . To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less

193. 71 U.S. (4 Wall.) 2 (1866).
194. Korematsu v. United States, 323 U.S. 214, 215-16 (1944).
195. *Id.* at 223.
196. *Id.* at 223-24.
197. *Id.*
198. 320 U.S. 81, 104-05 (1943).
199. Korematsu v. United States, 584 F. Supp. 1406, 1419-20 (N.D. Cal. 1984).
200. Hamdi v. Rumsfeld, 542 U.S. 507, 530-31 (2004).
201. *Id.* at 510-11.
202. *Id.* at 518, 533-37.

> public, a less striking, and therefore a more dangerous engine of arbitrary government . . . .[203]

Hamdi raises the issues of long-term preventive detentions in lieu of criminal prosecutions. When reading *Hamdi*, students should consider whether the issues are the same for long-term detentions for posing a risk to the public health such as the indefinite detention of a person with drug-resistant tuberculosis who remains infectious despite consenting to treatment.

In *Varholy v. Sweat*, the petitioner was detained on suspicion of carrying a venereal disease[204] (a sexually transmitted infection or STI). She brought a habeas corpus proceeding to demand her release and also made a claim for bail.[205] The court discussed the habeas corpus process in public health cases and the rationale for denying bail in public health cases.[206] *Varholy* is a good vehicle for introducing students to STI control laws and their importance to the military, especially before penicillin became available to treat STIs after World War II.[207]

In a similar vein, *In re Halko* is a classic tuberculosis isolation case.[208] The petitioner was confined in a state hospital because he was infected with contagious tuberculosis.[209] He requested habeas corpus review of this confinement.[210] The court explained the basis for holding persons infected with tuberculosis and the need to periodically review their detentions.[211] Notably, courts did not have hearings before traditional public health detentions;[212] orders to confine individuals were issued *ex parte*. The first opportunity for a confined individual to be heard was usually the habeas corpus hearing.[213]

City of Newark v. J.S. stands alone in equating public health detentions with mental health detentions, and imposing mental health detention standards on the detention of an infectious tuberculosis carrier.[214] This case has not been followed in

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203. *Id.* at 555 (Scalia, J., dissenting) (quoting 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131 (1765)).

204. 15 So. 2d 267, 268 (Fla. 1943).

205. *Id.*

206. *Id.* at 269-70.

207. Peter Neushul, *Science, Government, and the Mass Production of Penicillin*, 48 J. HIST. MED. ALLIED SCI. 371, 395 (1993).

208. 54 Cal. Rptr. 661 (Cal. Ct. App. 1966).

209. *Id.* at 661.

210. *Id.*

211. *Id.* at 664.

212. Ex Parte Roman, 199 P. 580 (Okla. Crim. App. 1921); Richards, *supra* note 151, at 342.

213. The provision of pre-detention hearings for simple public heath orders is a relatively new practice. Older cases (see *Varholy v. Sweat*, 15 So. 2d 267 (Fla. 1943); *Crayton v. Larabee* 116 N.E. 355 (N.Y. 1917)) are habeas corpus proceedings precisely because there was no pre-detention hearing; had there been, it would have obviated the need for a habeas corpus hearing.

214. 652 A.2d 265, 275-77 (N.J. Super. Ct. Law Div. 1993).

any other jurisdictions. It should be contrasted with states that provide extra due process protections by statute.[215]

States are generally free to provide greater protections than are required by the United States or states' individual constitutions. Students should consider whether the analysis in *City of Newark* is correct, as well as the impact of the administrative costs it imposes on public health agencies. In particular, the requirement of a hearing with appointed counsel is very difficult for smaller health departments and those without the funds to pay for appointed counsel. This can make the department reticent to detain individuals, even when they pose a significant threat to others, as happened in Texas in the 1980s.[216] Students should also consider what due process rights would be appropriate for the isolation of tuberculosis carriers using a *Mathews* analysis.

CONCLUSION

Public health law is properly seen, and taught, as administrative law. These lessons are only an example of how administrative law principles can be taught through public health law. This is consistent with the historical development of public health law[217] and its contemporary practice. Teaching public health law as administrative law is critical if students are to understand the functioning of public health agencies within the larger governmental structure. Public health law provides challenging examples that are more understandable to students than are arcane federal regulatory examples.

215. *See, e.g.*, Greene v. Edwards, 263 S.E.2d 661, 663 (W. Va. 1980).

216. Ctrs. for Disease Control & Prevention, *Outbreak of Multidrug-Resistant Tuberculosis – Texas, California, and Pennsylvania*, 39 MORBIDITY & MORTALITY WKLY. REP. 369, 369-72 (1990) (documenting the spread of multi-drug resistant tuberculosis to several persons in different places in Texas by a tuberculosis carrier that the state's public health authorities were unable to isolate).

217. *See* JAMES A. TOBEY, PUBLIC HEALTH LAW 217-34 (3d ed. 1947).