

The Municipal Management of Emergencies: The Houston Plan

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In a multi-event emergency, the federal government does not have the resource to act as all things to all people. The Houston Plan is a management model for the control of an extraordinary domestic emergency. It is grounded in historic models of disease control used by cities in the past, but updated. Its “all-city” or “municipal management” approach contrasts sharply with the “all-hazard” response models currently in vogue in the field of emergency management. In particular, it presents acts that a city can take after its normal resources are overwhelmed by a large-scale outbreak of contagion. The purpose of the plan is not to advocate the assignment of particular functions to city departments or officials, for those are solely within the discretion of city officials. Rather, it is to create a non-prescriptive, flexible model that can act as a guide to municipal officials planning the management of a wide spread emergency, particularly that of an infectious disease such as those caused by a biological weapon of mass destruction, an accidental emission by a high level biological research lab, or a naturally occurring epidemic begun by an antibiotic-immune agent. Thus, its primary purpose is to present a standard of crisis management that can be used in the mass organization of an urban area struck by a domestic emergency.

The plan’s secondary purpose is to prove that in the municipal management of emergencies, a constitutional balance can be reached between the affected individual’s fundamental rights and the compelled and necessary acts that governments must take in order to control a domestic crisis. No matter the extent of the disaster that officials find themselves controlling, they must continue to concern themselves with constitutional rights, particularly those of due process, equal protection and privacy, or expose themselves to liability and possibly even social unrest while in the midst of crisis. This municipal management model presents acts that preserve the constitutional rights of the individual while continuing to meet the government’s interests in quelling the emergency.

In order to prove the efficacy of “municipal management” and to prove that municipal management of a crisis and constitutional rights are not exclusionary, the argument is structured in four parts: 1) a discussion of rights-based emergencies, 2) the current state of emergency management, 3) a hypothetical of a runaway episode of infectious disease, and 4) a plan to bring the outbreak under control through the use of “bottom-up” or municipal management methods. The plan places the

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bottom-up, or individual and group centered, self-governance of the city within the "top-down," or state and federal centered, framework of reasoning currently encouraged in emergency management. This multi-layered model induces the flow of resources from the top and bottom of a crisis to the afflicted city's management authorities. It is also carefully constructed not to sacrifice the fundamental rights of the individual to the pressing interests of the state to control the epidemic. However, by its very nature, a hypothetical-centered model is an artificial device that neither addresses all the problems that can arise in an uncontrolled outbreak, nor provides all the answers; its purpose is simply to raise the specter of an out-of-control outbreak and then attempt to control it analytically.

I. Constitutional Emergencies

Individuals living in common law countries have the right to be protected from a broad spectrum of unreasonable intrusions into their private lives by governments. In the United States this right is secured by the Amendments to the Constitution. What has long gone unrecognized is the fact that common law communities also have the right to be protected from the state's arbitrary intrusions in the interest of self-preservation. This right is buried within the rights of the states and the fundamental rights of the individual as recognized by constitutional law, particularly the Fifth, Fourteenth and Ninth Amendments.¹ These Amendments draw a line in the sand over which governments cannot legally tread without providing a high level of justification. Further, unlike the aforementioned rights-based amendments, the Tenth Amendment provides that the states and people retain all powers not delegated to the national government. The power to protect the health, safety and welfare of state citizens is one such power not specifically delegated to the federal government. It is the right of the local group to work through the state legislatures to secure legislative action aligned with its interests, but it too must remain within the parameters of fundamental law. A part of this group right is the state police powers.

A. *Constitutional Ideals*

In the United States, the long unarticulated right to be protected from unreasonable acts of national self-preservation is espoused by ideals found in the Preamble to the Constitution. Written in the eighteenth century for "We the People of the United States," the Preamble lists the ideals that the government must protect in the name of the common good: "establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." Domestic tranquility, or civil peace, is dependent on the government's interest in replacing anarchy with government, in maintaining justice and in enforcing the law justly.² It is a positive

1. Among other things, the Fifth and Fourteenth Amendments to the Constitution dictate to the federal and state governments the rights ensuring that no one shall be deprived of life, liberty, or property without due process of law. The Fourteenth also provides persons within a state jurisdiction equal protection of the law, while the Ninth works as a net to catch those not specifically listed in the Constitution (unenumerated rights).

2. MORTIMER ADLER, *WE HOLD THESE TRUTHS* 103 (1987).

condition that ensures the right of every citizen to resolve conflict through the law rather than violence.³ This is true whether the conflict is caused by citizens, the government, or natural causes. In domestic emergencies, the balance sought is the resolution of the domestic crisis in a legal way and without reliance on coercive force. To do so effectively, a government must protect the rights of the individual and the group as much as possible while engineering a return to normalcy and the law. Excessive concern over rights in emergencies can create an inability of the government to preserve itself; similarly, too great a dependence on the unprincipled ideas of the common good and common defense or national security⁴ may eclipse the government's interest in maintaining justice and in the even-handed enforcement of the law. In domestic emergencies, governments wield a two-edged sword; cutting too deeply either in the direction of rights or self-preservation may inflict a civic wound that festers, rather than heals with time. In a domestic emergency an individual's rights must be reasonably balanced against the group's right to health and safety and the government's interest in survival.

B. Group Rights

In U.S. jurisprudence, the "right of the group"⁵ has either been assigned to "state interests" or has been ignored in favor of an emphasis on individual rights.⁶ As individual rights flow from a person's interest in personal liberty, group rights flow from the group's collective interest⁷ in self-preservation.⁸ Self-preservation

3. *Id.* at 104.

4. *Id.* at 108. What the writers of the Preamble called the common defense is now called national security.

5. A group right exists when: 1) an aspect of the group's interest justifies holding someone subject to a duty; 2) the "interest" in question is the interests of individual members of a group to a public good, and the "right" is a right to that public good because it serves the interest of members of the group; and 3) the interest of no single member of the group in the public good is sufficient by itself to justify holding another person to be subject to a duty. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 166 (1986).

6. In contrast, the meanings and uses of group rights have become an ongoing debate in Canadian law, especially since that government's constitutional proposal of September 1991, and the regard it provides to constituent communities. Although the literature is inchoate, Canadian communal rights are characterized in two ways: 1) "group rights"—the rights of communities as independent of the individuals who compose the community, which affirm the priority of the group over the individual; and 2) "special rights"—affirm special status for some groups by according them culture-specific rights (French Quebec and aboriginal peoples). WILL KYMLICKA, *Individual and Community Rights*, in *GROUP RIGHTS* 17, 18-19 (Judith Baker, ed., 1994). However there is no enthusiasm for "pure group rights" which protect the historical customs of a community through limitations on basic civil liberties of individuals. *Id.* at 21. These rights, found under the Canadian proposal, have no application in U.S. law. The issues have been discussed in U.S. literature, but not to the depth that occurs in Canadian literature. See Robert P. George, *Individual Rights, Collective Interests, Public Law, and American Politics*, 8 L. & PHIL. 245, 247 (1989); Ronald Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983); Vernon Van Dyke, *Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought*, 44 J. POL. 21 (1982).

7. Collective interests or goods must be differentiated from individual goods: a collective interest is one that is enjoyed communally, while an individual interest is enjoyed by an individual. No one can be involuntarily excluded from a public good or common good and the good requires the efforts of many to be produced. Common goods are participatory; their value lies in the publicity of either their consumption or production. There is no individual right to a collective good. There only exists a collective right held jointly by all who share in it. Denise G. Reaume, *The Group Right to*

becomes a good for which the collective unit strives, sometimes at a temporary cost to others' rights. But a group's right to survival is no more reasonable than the comparable individual right.⁹ This can be assumed from the premise found in rights discussions that all persons,¹⁰ whether standing alone or in a group, have equal worth. That this norm is found in American law can be inferred from the rights-based principle that in the U.S. all are committed to "treat with equal, appropriate respect all creatures who have the neurological prerequisites to become and remain individuals of moral integrity and [to] show equal, appropriate concern for their actualizing their potential to become and remain individuals of moral integrity."¹¹ "Equal appropriate respect" is the same whether one is an insider or an outsider to a group. Thus, stricken individuals should be given the opportunity to make choices about their own lives, as long as their choices do not affect the health and safety of the group.

When the integrity of the nation appears endangered due to the weakness of one locality and the need for national self-preservation is roused, a constitutional flash point is created between the government's interest in self-preservation and the rights of the individual and the group to a parallel good. Historically, nations have had their way with rights until the emergency ends and calmer heads prevail, but this is at some cost. In our history, this pattern can be seen in the emotionalism surrounding cases decided during the Civil War and World Wars I and II. Thus, in emergencies, the right of survival of the individual, group and state come into conflict. In order to preserve civil peace during an emergency, a prudent state balances one against the others.

C. *The Power To Police*¹²

The Founders' purpose for the Tenth Amendment was to retain locally certain powers and to prevent their drifting into centralized hands.¹³ Among those powers reserved to the state was the police power. Generally, it is the power of a state to protect society from harm;¹⁴ it is a sign of the *parens patriae* relationship between a state and its citizens. The Constitution allows a state legislature to achieve any objective it decides on, subject only to Constitutional limitations and federal mandates. Chief Justice Marshall referred to it as the "mass of legislation, which embraces every thing within the territory of a state, not surrendered to the general government, all of which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every

Linguistic Security: Whose Right, What Duties?, in GROUP RIGHTS 118, 118-121 (Judith Baker ed., 1994).

8. See KYMLICKA *supra* note 6, at 22.

9. Reaume, *supra* note 7, at 128.

10. *Id.*

11. RICHARD S. MARKOVITS, MATTERS OF PRINCIPLE 21-22 (1998).

12. *State v. Elec. Util.*, 41 B.R. 874 (N.D. Ill. 1984) (stating police power of a state is power to protect society in general from harm). When an individual is dangerous to others or to property, he is subject to police powers and the individual's interests are infringed for the benefit of society as a whole. Betty L. Crumheller, *Constitutionalizing Civil Commitment: Another Attempt—In Re Harris*, 59 WASH. L. REV. 375, 376 (1984).

13. RUTH LOCKE ROETTINGER, THE SUPREME COURT AND STATE POLICE POWER: A STUDY IN FEDERALISM 6 (1957).

14. See *Elec. Util.*, 41 B.R. at 876.

description, as well as laws for regulating the internal commerce of a state”¹⁵ As recently as 1991, Chief Justice Rehnquist wrote that traditionally the police powers were defined as the authority to provide for public health, safety, and morals.¹⁶

Traditionally the police power has two main attributes: securing and promoting the public welfare and doing so by restraint and compulsion.¹⁷ The object of securing and promoting the public welfare is to improve the social and economic conditions affecting the community at large, improvements that would be difficult to employ by an individual acting alone.¹⁸ The state achieves this goal by acting through the legislature which forces individual compliance. This in turn causes the individual to subordinate a portion of his rights in favor of the group’s welfare.¹⁹ The terms public or group welfare may encompass a number of interests, but they are most often associated with the issues of safety, order and morals, economics, and non-material and political interests.²⁰ The primary social interest was safety, order and morals.²¹ These interests were believed to be so vital to the local community that they were conceded to the states by the Supreme Court even where the exercise of sanctions to promote these interests invaded the realm of interstate and foreign commerce. However, if the group’s right comes into conflict with an individual’s fundamental right, the individual’s fundamental right usually prevails.

1. Federal Police Powers—By implication, the U.S. government is granted a limited police power by the Constitution. It does not have a plenary police power that authorizes federal legislation on the ground that the states are simply unable to handle problems themselves.²² Rather the “necessary and proper” clause of the Constitution²³ gives Congress the right to enact legislation in order to support the powers held by the national government. Among other powers, it has the right to protect the mail, to prevent the evasion of income tax laws, to protect patents, to regulate commerce,²⁴ and to protect the country during national emergencies. However, the necessity clause limits the government to those express powers granted to it under the Constitution. This leaves the general police power within the authority of the states. Congress may concern itself with safety of the local community only to the extent that grants of specific powers permit.²⁵

Early case law recognized that the federal government had a legitimate health function to keep disease from entering the country or from spreading among

15. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824).

16. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2461 (1991).

17. ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 3 (1904).

18. *Id.* at 5.

19. An example of police powers are traffic laws: individuals have surrendered their right to drive without regulation in favor of the community’s right to be protected from hazardous drivers.

20. FREUND, *supra* note 17, at 7.

21. *Id.*

22. *U.S. v. Wright*, 965 F. Supp. 1307, 1314 (D. Neb.1997).

23. U.S. CONST. art. I, § 8, cl. 18.

24. Blewett H. Lee, *Limitations Imposed by the Federal Constitution on the Right of the States to Enact Quarantine Laws*, 2 HARV. L. REV. 267, 272 (1889).

25. *U.S. v. Perry*, 788 F.2d 100, 109 (3d Cir.1986).

the states, to conduct investigations, and to cooperate with the states upon request.²⁶ Its power to act was and is limited to policing public health through regulation of interstate and foreign commerce and through the power to levy taxes and appropriate money for the general welfare.²⁷

The U.S. government exercises its jurisdiction over the public health in two ways, through direct regulation of commerce and through cooperation with or through the instrumentalities of the states.²⁸ Emergency programs, which are instrumentalities of the states, are primarily funded by the national government through grants-in-aid programs.²⁹ This allows the federal government to set policy and to police the standards of state responses to emergencies without direct oversight of each individual state response. In turn, local health authorities who work under state standards and grants are similarly influenced and controlled by these standards.³⁰ Federal statute law allows the Director of the Federal Emergency Management Agency (FEMA) to regulate and set policy over how emergencies will be handled in the states. Federal statute also permits the Secretary of the Department of Health and Human Services to enact and enforce regulations needed to prevent the introduction, transmission, or spread of communicable disease from state to state.³¹ It grants the Secretary the authority to "assist states and their political subdivisions in the prevention and suppression of communicable diseases" and to "cooperate with and aid state and local authorities in the enforcement of their quarantine and other health regulations."³² In all cases, however, this cooperation is contingent upon an invitation from the state or an inability by the state to control the emergency.

On occasion the police power of the state comes into conflict with the federal government's right to police interstate commerce. Although modern law finds the distinction between the police powers of the state and federal governments "too inflexible for practical application," it survives as an accurate measure of the relative weight of interests needed to justify state regulations.³³ The Supreme Court has held that the line marking the proper invocation of commerce clause power from the improper invocation of unenumerated national police power is to be based in part on traditional understandings of the proper roles of the federal, state and local governments.³⁴ But, when the free flow of commerce supersedes a state interest in public health and safety, it does so because the latter was only marginally involved.³⁵ Thus, in the push-pull history of national commerce and local well-being, state interests have often won out.

26. The U.S. government is also charged with caring for the health of Native Americans and its other wards, and supervision of the health of the citizens of the territories and the District of Columbia. James A. Tobey, *Public Health and the Police Power*, 4 N.Y.U. L. REV. 126, 127 (1927).

27. U.S. CONST., art. I, § 8, cls. 1, 3. Michael S. Morgenstern, *The Role of the Federal Government in Protecting Citizens from Communicable Diseases*, 47 UNIV. CINCINNATI L. REV. 537, 544-45 (1978).

28. *Id.* at 545.

29. *Id.*

30. *Id.*

31. 42 U.S.C. § 264(a) (1994).

32. 42 U.S.C. § 243(a) (1994).

33. LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 437 (2nd ed. 1988).

34. *Pierce v. King*, 918 F. Supp. 932, 936 (1996).

35. TRIBE, *supra* note 33, at 437. This is in direct contrast to the earlier case law of Marshall and Story which held Congress's commercial power as a limitation on the reserve power of the states.

2. *State Police Powers*—Courts have long upheld the state's authority to protect the public health.³⁶ The states require no specific grant of authority in the Constitution to legislate with respect to matters traditionally within the scope of the police power,³⁷ and the power over health, safety, and welfare remains with the states although its application may be limited or prohibited by various provisions of the Constitution.³⁸ In *Jacobson v. Massachusetts*, the leading case on a state's power to police for reasons of health and safety, the court defines the state's role: "[a]ccording to settled principles the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."³⁹ It is also worth noting that state laws that impair the obligation of contracts "[need] mention only to call attention to the settled doctrine that no state can, by charter or otherwise, give up its power to guard by legislation the health, safety and morals of its people."⁴⁰ The state does not possess the ability to contract,⁴¹ grant, or bargain away⁴² to the federal government or any other entity the power to legislate for its citizens in these important areas,⁴³ nor can the federal government invade these areas within the state in the name of emergency without an invitation unless an important national interest is jeopardized.

The state's power to act within its borders in the name of the public was unquestioned in early constitutional law. In fact, some regulatory powers predated the Constitution and were an essential attribute of sovereignty.⁴⁴ That a state had a right to delegate its police power to its political sub-divisions (counties, municipalities, and other agencies) and thus to local health departments, was also acknowledged.⁴⁵ Municipalities, through their local health agencies, were given

36. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 205 (1824) (explaining that health laws are part of the mass of laws that were not surrendered by the states and can best be exercised by them); see *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905) ("While this court should guard with firmness every right appertaining to life, liberty or property as secured to the individual by the supreme law of the Land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law. The safety and health of the people of Massachusetts are, in the first instance, for that Commonwealth to guard and protect. They are matters that do not ordinarily concern the National Government. So far as they can be reached by any government, they depend, primarily, upon such action as the state in its wisdom may take . . ."); see also, Tobey, *supra* note 26, at 126-33.

37. *Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Comm'r*, 889 F. Supp. 1431 (1995), *aff'd* 98 F.3d 1262 (10th Cir.1996).

38. *Sammy's of Mobile, Ltd. v. City of Mobile*, 928 F. Supp. 1116 (S.D. Ala. 1996).

39. *Jacobson*, 197 U.S. 11, 25 (1905).

40. William Cowles, *State Quarantine Laws and the Federal Constitution*, 25 AM. L. REV. 45, 48 (1891).

41. *Blue Cross and Blue Shield of Kansas City v. Bell*, 596 F. Supp. 1053, 1058 (D. Kan. 1984), *aff'd* 798 F.2d 1331 (10th Cir. 1986) (explaining contract clause of Constitution does not obliterate police power of the state).

42. *Matter of Jesus Loves You, Inc.*, 40 B.R. 42, 45 (1984).

43. *United States v. Wright*, 965 F. Supp. 1307, 1314 (D. Neb. 1997) (explaining the Constitution does not create a plenary police power that would authorize federal legislation on the ground that the states are simply unable to handle the problem themselves).

44. *Gibbons v. Ogden*, 22 U.S. 1, 207-8 (1824); see also Wendy E. Parmet, *Legal Rights and Communicable Disease: AIDS, the Police Power, and Individual Liberty*, 14 J. HEALTH POL. POL'Y & L. 741, 744 (1989).

45. See *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) ("It is equally true that the state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety."); Tobey, *supra* note 26, at 128 (citing *Keefe v. Town of Union*, 56 A. 571 (Conn. 1903) (explaining that it has long been the policy

broad power to act as agents of the states in the administration of police powers and their functions were liberally interpreted by the courts.⁴⁶ Conceding the police powers of state governments, the early Supreme Court recognized the right to use coercive force and to restrain liberty in the name of the public good.⁴⁷ Eventually the judicial branch claimed the right to review the actions of state health authorities that transgressed the constitutional rights of individuals.⁴⁸ Thus early law recognized almost a plenary power, one immune from constitutional review,⁴⁹ but later cases upheld the constitutional right of the individual from arbitrary,⁵⁰ unreasonable and oppressive legislation.⁵¹

Today the standard of review in police powers cases is bifurcated. When not impinging a fundamental right, the court applies a rational basis standard.⁵² If a fundamental individual right is involved, heightened scrutiny is employed. Although a state has a right and a duty to exercise its police power for the protection and benefit of its citizenry, police power may not routinely be invoked to override individual rights that have been deemed fundamental.⁵³ A fundamental right may only be interfered with to serve a compelling state interest.⁵⁴ But the state must also show that imposition on the individual bears some direct and substantial relation to that legitimate interest.⁵⁵ In an emergency, a state's interest is heightened to the point of self-preservation, thus making the derogation of some individual rights likely. However, there are two tests that must be met when moving against rights. First, a state executive's emergency powers must appear to have been reasonably necessary for the preservation of order.⁵⁶ Second, if there are other ways to achieve a compelling state interest with a lesser burden on a constitutionally protected activity, then the state must not choose the method of greater interference.⁵⁷

In summary, policing for health, safety and welfare purposes is within the bailiwick of the states. The national government must be asked to participate in an emergency where no national interests are at risk. State legislators retain broad discretion in exercising their inherent police powers in passing laws to promote the

of the state to require towns and municipalities to appoint, at their own expense, officers to protect the public health)).

46. Tobey, *supra* note 26, at 128-29.

47. Commonwealth v. Alger, 61 Mass. 53 (1851); Tobey, *supra* note 26, at 126. Forced vaccinations, quarantine and isolation are reliable control measures against communicable disease.

48. Tobey, *supra* note 26, at 129.

49. Tobey, *supra* note 26, at 132. This was carried to the extent that summary measures in the interest of public safety were recognized as part of due process.

50. P.O.P.S. v. Gardner, 998 F.2d 764, 769 (9th Cir. 1993); Arroyo Vista Partners v. County of Santa Barbara, 732 F. Supp. 1046, 1053 (C.D. Cal. 1990).

51. People *ex rel.* Barmore v. Robertson, 302 Ill. 422, 427, 134 N.E. 815, 817 (Ill. 1922).

52. Dodger's Bar & Grill, Inc. v. Johnson Co. Bd. of County Comm'r, 889 F. Supp. 1431, 1440 (D. Kan. 1996).

53. Planned Parenthood of Rhode Island v. Bd. of Med. Review, 598 F. Supp. 625, 629-30 (D.R.I. 1984) (explaining a fundamental right, while not absolute, may be interfered with only to serve a compelling state interest; a state interest becomes compelling when its vindication is more crucial than the vindication of a fundamental right).

54. *Id.*

55. Woodland v. City of Houston, 918 F. Supp. 1047, 1049 (S.D. Tex. 1996), *vacated* 1996 WL 752803 (5th Cir.).

56. Moorhead v. Farrelly, 723 F. Supp. 1109, 1113 (D. Virgin Islands 1989).

57. Attorney Gen. of New York v. Soto-Lopez, 476 U.S. 898, 909-10 (1986), *appeal after remand*, 840 F.2d 162 (2d Cir. 1988), *on remand*, 713 F. Supp. 677 (S.D.N.Y. 1989).

public health, safety, and welfare.⁵⁸ A constant is, however, that if the group's right to protection comes into conflict with an individual's fundamental right, the fundamental right for the most part wins out,⁵⁹ unless the group's protection serves a compelling state interest. The test then becomes whether the interference is necessary and the means were reasonable.

D. *Limitations of Governmental Power*

The Supreme Court's standard of review for issues of public health and the individual has undergone change over the last 100 years. In the first part of the century, the court made many rulings on the reasonableness of acts and regulations that centered on issues of procedural due process⁶⁰ and the right of the state to regulate public health.⁶¹ The question was whether a state action taken in the name of public health was within the police power or constituted unauthorized interference with the individual.⁶² At that time no one doubted that it was an important state duty to preserve the public health.⁶³ Many of the early cases involved issues of due process and the right of the state to require vaccinations.⁶⁴ Public health regulations were ruled to be sound on due process grounds unless proven to be unreasonable, arbitrary, or oppressive,⁶⁵ and reasonable state action came to be measured by medical criteria.⁶⁶ During the 1960s, case law shifted from the state's interest in protecting the group from the contagious to protecting the individual rights of victims of contagion. Whether this shift to a rights-based emphasis was the result of heightened medical effectiveness due to vaccines and antibiotics or the result of the civil rights movement is impossible to determine. But the shift in jurisprudential focus may have caused the minimum rationality

58. *State v. Hines*, 478 N.W.2d 888 (Iowa App. 1991).

59. *Planned Parenthood of Rhode Island v. Bd. of Med. Review*, 598 F. Supp. 625 (D.R.I. 1984) (stating a fundamental right, while not absolute, may be interfered with only to serve a compelling state interest).

60. *Frazier v. Garrison I.S.D.*, 980 F.2d 1514, 1528 (5th Cir. 1993). Due process has two major components: substantive due process, which may require a court to void certain types of governmental acts which infringe on individual freedom of action and individual rights, and procedural due process, which may require governmental assurance that individuals are given certain procedures before being deprived of life, liberty, or property.

61. Many early regulations violated due process. *Palko v. Connecticut*, 302 U.S. 319 (1936) (explaining that due process insures that no person shall be deprived of those rights that are implicit in the concept of ordered liberty); *Morgenstern*, *supra* note 27, at 543 (arguing due process guarantees that every individual shall be treated with at least a minimum of decency and fairness; those arguing against federal intervention claimed that it was unfair for the federal government to promote health by limiting certain individual freedoms); *Nebbia v. New York*, 291 U.S. 502, 525 (1934) (stating that due process clause does not prohibit but merely conditions the exercise of regulatory power for public welfare).

62. *See Dobbins v. City of Los Angeles*, 195 U.S. 233, 236 (1904); *see generally Parmet*, *supra* note 44.

63. *Tobey*, *supra* note 26, at 126.

64. *See Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding compulsory vaccination of adults); *People ex rel. Barmore v. Robertson*, 134 N.E. 815, 817 (Ill. 1922) (upholding a quarantine order); *Allen v. Ingalls*, 33 S.W.2d 1099 (Ark. 1930) (upholding compulsory immunization as a condition of school admission); *Ex Parte King*, 16 P.2d 694 (Cal. App. 1932) (holding compulsory quarantine based on probable cause permissible).

65. *See Jacobson*, 197 U.S. at 38.

66. *Jew Ho v. Williamson*, 103 F. 10, 26 (N.D. Cal. 1900) (holding discriminatory regulation not reasonably related to the goal of preventing the plague when measured against normal medical standards).

standard of review to show its age;⁶⁷ it was ripe for replacement by the more heightened scrutiny standard of individual-oriented Fourteenth Amendment limits: due process, equal protection, and privacy. Currently, public health jurisprudence presupposes illnesses to be a matter for the individual and his doctor,⁶⁸ not the group. It is no longer a special justification for state action.⁶⁹ "[T]he balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not"⁷⁰ now acts as the interpretive nexus for judicial opinions in police powers cases.

1. *Due Process*—Currently substantive due process protections limit a state's authority to use police powers to control a large-scale public health emergency. This disrupts the once settled balance of competing interests found between individual rights, group rights, and governmental interests, and may be the result of the appearance in the courts of politically and emotionally loaded abortion cases and cases covering rights of individuals affected by slow acting infectious diseases such as AIDS. The subject matter of these cases muddled the formerly clear police power discourse. A strong police power limited only by a few constitutional barriers is no longer recognized doctrine.⁷¹ Any act by city or state that appears arbitrary or irrational,⁷² and that infringes on the recognized fundamental rights to life, liberty, or property, is suspect on substantive due process grounds.⁷³ Thus, a substantive due process violation is proved when state action adversely affects a recognized life, liberty, or property entitlement and in doing so does not promote a legitimate state interest by reasonable means.⁷⁴ The oft recognized due process test is whether infringement is justified.⁷⁵ In cases of fundamental rights, a state's legislation or justification of its acts are judicially reviewed using strict scrutiny.⁷⁶

67. Some are attempting to resurrect it however: see Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670 (1973).

68. Parmet, *supra* note 44, at 741.

69. *Id.* at 762.

70. Webster v. Reproductive Health Services, 492 U.S. 490, 521 (1989).

71. Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, HASTINGS CONST. L.Q. 267, 272-73 (1993).

72. Frison v. City of Pagedale, 897 S.W.2d 129 (Mo. Ct. App. 1995).

73. The procedural standard for determining the proper amount of due process balances three factors: a private interest affected by official action, the risk of erroneous deprivation of interests through the procedures used (which includes the probable value, if any, of additional or substitute procedural safeguards), and the government's interest (which includes the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail). *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

74. *Johnson v. Houston Indep. Sch. Dist.*, 930 F. Supp. 276, 286 (S.D. Tex. 1996).

75. *Gurell v. Starr*, 640 So. 2d 228 (Fla. Dist. Ct. App. 1994).

76. *State v. Risjord*, 249 Kan. 497, 819 P.2d 638 (1991) (three levels of judicial review are applicable to due process and equal protection challenges: strict scrutiny—which applies to suspect classifications and fundamental rights and under which the burden is placed upon the state to show that there is a compelling state interest; rational or reasonable basis—which, if there is any rational relationship between the act and the legitimate governmental objective, the act passes muster and under which the person challenging the act bears the burden of showing no rational relationship; and heightened scrutiny—applicable to quasi-suspect classifications under which a statutory classification must substantially further a legitimate legislative purpose); *Sorrell v. Thevenir*, 633 N.E.2d 504 (Ohio 1994) (using strict scrutiny standard in analyzing challenge to legislation under due process clause applies when violated interest is fundamental personal right, such as First Amendment rights, freedom of association, voting, interstate travel, privacy, and fairness in deprivation of life, liberty, or property, which Constitution explicitly or implicitly guarantees).

Because of substantive due process, public health doctrine now lacks the same clear idea of rights found in earlier cases. Merely asserting that state action falls within the police powers no longer ensures its validity in the face of a due process challenge.⁷⁷ Public health today is primarily a matter for individual discretion⁷⁸ and the bequeath of legislative "gratuity" to the individual. An affirmative state obligation to protect and render aid to a group caught in a public health emergency is no longer a subject of clarity. However, a definitive ruling on the rights of those in such an emergency and the limits of state action has yet to be made by the Supreme Court.⁷⁹

a. *The Case of DeShaney v. Winnebago*—Recently the Court has given deference to legislative majorities, placing few or no substantive checks on state action while narrowing the substantive due process doctrine of police powers.⁸⁰ States remain bound to forms of limited constitutional protection while legislatures have received authority to maneuver broadly in the name of public health.⁸¹ The lack of due process obligation upon the state governments to protect public health is reiterated in Justice Rehnquist's instrumentalist, deminimizing approach in *DeShaney v. Winnebago*.⁸² He wrote that the due process clause of the Fourteenth Amendment is phrased as a limitation on the state's power to protect; it does not create an affirmative obligation to do so.⁸³ It therefore follows that there is no affirmative duty on the part of the state to protect its citizens.⁸⁴ "Its purpose [is] to protect the people from the state, not to ensure that the state protect[s] them from each other."⁸⁵ In other words the clause forbids state deprivation of individual life, liberty, or property without due process "but its language cannot fairly be extended to impose an affirmative obligation on the state to ensure that those interests do not come to harm through other means."⁸⁶ Rather, that is left to the democratic political processes⁸⁷ and is a matter of "statutory grace."⁸⁸ Judge Easterbrook confirms the

77. *Paillot v. Wooton*, 559 So. 2d 758, 761 (La. 1990).

78. *Parmet*, *supra* note 44, at 766.

79. *Parmet*, *supra* note 71, at 273.

80. *Id.*

81. *International Paper Co. v. Town of Jay*, 928 F.2d 480, 485 (1st Cir. 1991) (noting court is obliged to give government wide latitude in creating social and economic legislation).

82. *DeShaney v. Winnebago County Dep't. of Soc. Servs.*, 489 U.S. 189 (1989). The reasoning in this case followed earlier decisions involving constitutional tort actions, particularly *Jackson v. City of Joliet*, 715 F.2d 1200, 1205 (7th Cir. 1983), where Judge Richard Posner held that there is no Fourteenth Amendment right to receive elementary protective services. He wrote: "The problem with this argument is that the Constitution is a charter of negative rather than positive liberties The men who wrote the Bill of Rights were not concerned that government might do too little for the people, but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services" See generally MARY ANN GLENDON, *RIGHTS TALK* 76-108 (1991).

83. Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2273 (1990).

84. *DeShaney*, 489 U.S. at 196. "Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."

85. *Id.*

86. *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992).

87. *DeShaney*, 489 U.S. at 196.

88. *Parmet*, *supra* note 71, at 274.

current lack of affirmative obligation to aid in *Archie v. City of Racine*,⁸⁹ where he disparaged claims of a constitutional right to emergency medical care for the individual. He wrote that, "Amendments designed to protect the people from the government . . . , amendments adopted when governmental services were more likely to be viewed as forbidden than as desirable, amendments phrased as prohibitions on governmental action rather than requirement of it, are not a plausible source [of rights]." Thus, the courts reason generally that the due process clause grants no affirmative Fourteenth Amendment due process rights to the individual and that government failure to act is not actionable,⁹⁰ even in the case of emergency medical treatment.

The absence of an affirmative right on the part of the individual and the nonexistence of an affirmative obligation or duty on the part of the state, demotes the right to state protection and aid in an emergency downward to the level of a liberty.⁹¹ In light of recent political machinations over abortion, one can easily understand hesitancy on the part of state legislatures to condone blanket grants of rights. However, it appears this diminution of affirmative individual rights, may have compromised the group's right to receive protection and aid from the state in the form of acts created under the police powers duties.

In an emergency, aid and protection are meant to insure survival for the individual and the group. *DeShaney* can be interpreted as the due process clause trumping the substantive right of the people to receive unlegislated protection and aid from their state during an emergency. One doubts that this declension of the states' long-recognized sovereign obligation to help their citizens during emergencies was intended by the Supreme Court. Rather, it may be a by-product of the court's unarticulated policy agenda to return some kinds of politically charged issues to state legislatures.⁹² In the event of a sudden public emergency there will be great individual and group concern about the law's failure to support strong affirmative obligations on the part of states to protect the health of their citizens. Perhaps as anxiety over terroristic threats grows ever larger, legislatures will reconsider the efficacy of their regulations.

b. State Custody—Even though due process opinions turn away the constitutional duty to aid and protect, *DeShaney* and other cases have also held that once a citizen or group is in governmental custody (such as a quarantine situation), duties are established due to the special custodial relationship that arises from the government's act either of placing the person in danger or otherwise restraining his liberty.⁹³ It is the state's affirmative act of restraining the individual's freedom to

89. 847 F.2d 1211, 1221 (7th Cir. 1988).

90. Bandes, *supra* note 83, at 2273.

91. A liberty is negative in nature; it is an immunity from governmental interference or a limitation on governmental action. BLACK'S LAW DICTIONARY, 918 (6th ed. 1991).

92. At the turn of the century, James Bradley Thayer held the opinion that the democratic political processes were best suited to determine prevailing desires and to explore their fulfillment, and that the best stance for the judiciary was deference to these processes. It is enlightening to compare Thayer's opinion to Brandeis' who held that certain rights should be upheld against contrary majoritarian legislation because they were essential to the state's end of human development; and Pound who discussed laws in utilitarian terms, as promotion of dominant popular desires. See ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 67-93 (1985).

93. *DeShaney v. Winnebago*, 489 U.S. 189, 200; *see, e.g., Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990); *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Estelle v. Gamble*, 429 U.S. 97 (1976); Bandes, *supra* note 83, at 2277-78.

act on his own behalf that triggers the due process clause. It is not triggered by a failure to protect a liberty interest against a harm inflicted by other means.⁹⁴

In a large-scale public health emergency, which by its very nature could require the involuntary quarantine of large segments of the population, a special relationship would be established between the state and the individual. Once this custody relationship occurs, the state is responsible for the individual and has a constitutional duty to support the individual, and to protect him from harm⁹⁵ and from harming others.⁹⁶ A failure to provide care to those in custody, who are not in a position to care for themselves, is a violation of the eighth amendment.⁹⁷ The custodial relationship increases the state's responsibility and possible liability. In effect, while denying the state's responsibility to aid and protect the individual, the Supreme Court increased its potential duty to any individual caught in a large-scale emergency that requires some type of custodial relationship between the state and the individual.

Thus, the Rehnquist court holding, which confers no affirmative due process right to government aid in state action cases, has hobbled the group's right to receive care and treatment outside of custody in an unlegislated emergency "where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."⁹⁸ This leaves one to ponder the court's lack of foresight and to worry about the consequences if state legislatures are caught in a large-scale emergency without comprehensive regulations.

c. *Group Policing*—In a large, unlegislated public health emergency, how does one work around *DeShaney's* sanction of state inaction? A group, through its neighborhood oriented political units, can insure its survival by policing itself, with neighbors helping provide for the support, aid, and protection of neighbors. Because they are not affiliated with either the state or city governments, they work as private, volunteer actors in the emergency. As private actors they are not bound by the Fourteenth Amendment and the federal civil rights statutes.⁹⁹ In turn, the state, through its established political units and agencies, can take charge of the criminal elements, the ill, and the dying. This allows the state to meet its sovereign obligations to its citizens while remaining relatively detached from claims of individual entitlement. Even though there is a public character to the operation and

94. *DeShaney*, 489 U.S. at 200.

95. *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979).

96. *Freeman*, 911 F.2d at 52; *Hunt v. Rowton*, 288 P. 342, 343 (Okla. 1930) cited in *Irvin v. Arrendale*, 159 S.E.2d 719, 725-26 (Ga. App. 1967) (holding state liability may result from failure to isolate known carriers of contagious disease).

97. *DeShaney*, 489 U.S. at 198-99.

98. *DeShaney*, 489 U.S. at 196.

99. *Swayne v. L.D.S. Social Services*, 795 P.2d 637 (Utah 1990) (stating that the general test for determining whether state action is involved in a deprivation of a liberty interest requires that the deprivation be caused by the exercise of a state-created right or privilege, and that the party charged with the deprivation be a person who may fairly be said to be a state actor); *Lovell v. Peoples Heritage Sav. Bank*, 776 F. Supp. 578 (D. Me. 1991); *Ganue v. Lummis*, 662 F. Supp. 718 (S.D.N.Y. 1987), *aff'd* 841 F.2d 1116 (2d Cir. 1988) (because due process and equal protection clauses limit only power of government, showing of state action is required to violate constitutional rights under such clauses); *Miller v. Fairchild Industries, Inc.*, 629 A.2d 1293 (Md. App. 1993) (holding constitutional guarantees restrain and restrict only conduct of government vis-a-vis private individuals; in absence of state action, there can be no violation of constitutional rights); *State v. Pailon*, 590 A.2d 858, 861 (R.I. 1991) (noting violation of due process can occur only if state action is involved).

mutual benefits¹⁰⁰ will occur, it cannot be considered a joint operation. The aid and protection of the group is in the private hands of the neighborhood association while the aid and protection of the ill and the dying individuals fall under the state's jurisdiction. Thus, the group aids the group while individuals are the concern of the state. In this way, the state meets any residual duty that may linger under the police powers (which could rise in subsequent claims) by corralling the most dangerous citizens while, in turn, limiting its duty to aid and protect. The state meets its constitutional burden and the ordinary citizens, who in many states are statutorily charged with acting to prevent and control disease, meet their obligations.¹⁰¹

Group policing of emergencies minimizes state action entanglements between the state and the volunteers who, acting on their own accord, follow their own emergency plans. In actuality, this may provide better protection and aid for citizens than having to passively rely on government plans of either the city, state or federal governments. Plans specific to each group could be wrought by neighborhood associations. Each city would prepare a model plan for its citizen groups who may choose to follow it or draft their own plans. And cannot be said that citizens using a model plan would wield "powers traditionally exclusively reserved to the state."¹⁰² Since the Supreme Court has already held that aid is not something that a state need provide, anything provided by the group to itself is not state action, even if subsidized totally by the state.¹⁰³ Only if the state is actively and overtly involved in assistance, can state action be invoked.¹⁰⁴

2. *Equal Protection*—Amendment Fourteen also limits the infringement of rights by state action on equal protection grounds. The difference between the constitutional concepts of due process and equal protection rests in the fact that due process emphasizes fairness between the state and the individual dealing with the state, regardless of how other individuals in the same situation are treated, while equal protection emphasizes the disparity in treatment by the state between classes of individuals whose situations arguably are indistinguishable.¹⁰⁵ Traditionally, equal protection suggests three conceptual issues, the equality of individuals,

100. To prove that a private organization has a symbiotic relationship to the state, three elements must be proved in their totality: a public character, joint operation, and mutual benefits. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721-22 (1961).

101. See e.g., TEX. HEALTH & SAFETY CODE ANN. § 81.002 (Vernon's 1998).

102. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974).

103. *Blum v. Yaretsky*, 457 U.S. 991 (1982).

104. *Bahr v. National Ass'n of Sec. Dealers, Inc.*, 763 F. Supp. 584, 589 (S.D. Fla. 1991) (stating that while private use of state sanctioned remedies or procedures does not in itself rise to the level of state action that may provide basis for a claim under the Fourteenth Amendment against deprivation of constitutional rights by governmental action, state action may be found in private use of state procedures with overt, significant assistance of governmental officials); *Logsdon v. Ohio Northern Univ.*, 587 N.E.2d 942 (Ohio Ct. App. 1990) (where state is not party, state action may be established for purposes of invoking Fourteenth Amendment protections by showing that state assistance or regulation caused or contributed to plaintiff's damage); *Queen v. West Virginia University Hospitals, Inc.*, 365 S.E.2d 375, 383 (W.Va. 1987) (noting that all that is necessary to determine if any entity is a state actor for due process purposes is to evaluate the nature and extent of state involvement so as to determine if its actions are fairly attributable to the state). It seems reasonable to assume that the option to adopt a model plan by a NOG, lowers the likelihood of a successful state action claim.

105. *Ross v. Moffitt*, 417 U.S. 600, 609 (1974) cited in *Peterson v. Garvey Elevators, Inc.*, 850 P.2d 893, 897 (Kan. 1993).

denials of that equality, and the equal protection of the laws.¹⁰⁶ These issues can be forwarded either by the use of "suspect classifications" or judicially identified "fundamental interests" that are not promoted constitutionally by government or that have no compelling government interest.¹⁰⁷ The same standard of review is used in analyzing both due process and equal protection guarantees¹⁰⁸ and both weigh almost identical factors.¹⁰⁹

Among the fundamental rights¹¹⁰ subject to equal protection scrutiny is the right to interstate¹¹¹ and intrastate¹¹² mobility.¹¹³ The constitutional right to travel is implicated when mobility is deterred, when impeding travel is a primary objective, or when classifications are used which serve to penalize the exercise of the right.¹¹⁴ When a government undertakes to limit the fundamental right to freedom of movement in some manner, it must act gingerly. It must do so in a manner that is narrowly focused on the harm at hand, as well as be sensitive to needless intrusions upon the constitutional interests of the innocent.¹¹⁵ Its acts can be sustained only if they pass the test of strict scrutiny.¹¹⁶ They must be necessary and narrowly drawn to accomplish a compelling state interest. Typically traveling cases are concerned with durational residence requirements which impair the right to travel freely,¹¹⁷ but this is of no concern in the present case. Of paramount importance to the individual in an emergency may be his ability to travel from an emergency zone. The question in a sudden emergency, particularly that of a biological outbreak, is whether one has as strong a right to travel when balanced against the compelling state interest of corralling the problem. The consensus is that minor restrictions on travel do not amount to denial of the fundamental right to interstate travel.¹¹⁸ The act of temporarily quarantining those wishing to leave an area contaminated by a biological agent rather than preventing them from traveling would preserve the constitutional balance, for it demonstrates an attitude of concern¹¹⁹ for those caught in the emergency while it bypasses the appearance of arbitrary action on the part of

106. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1447 (1992).

107. *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969).

108. *Marrujo v. New Mexico State Highway Transp. Dep't*, 887 P.2d 747, 751 (N.M. 1994).

109. *Chiles v. State*, 869 P.2d 707, 718 (Kan. 1994).

110. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973) (noting a fundamental right is a right guaranteed explicitly and implicitly by the Constitution).

111. *Westenfelder v. Ferguson*, 998 F. Supp. 146, 150-51 (D.R.I. 1998) (stating right to travel, which is fundamental right protected by U.S. Constitution, should not be analyzed separately from equal protection, but rather under the fundamental right prong of equal protection doctrine).

112. *Jones v. Evans*, 932 F. Supp. 204, 207 (N.D. Ohio 1996) (noting right to travel under the Fourteenth Amendment encompasses residents of the same state).

113. Mobility is implicit in the concept of a single nation committed to its citizens' freedom. *See e.g., Crandall v. Nevada*, 73 U.S. 35, 44 (1867) (invalidating a Nevada exit tax on travelers leaving the state).

114. *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898 (1986).

115. *Waters v. Barry*, 711 F. Supp. 1125, 1133 (D.D.C. 1989) *cited in* *Hutchins v. District of Columbia*, 942 F. Supp. 665, 672 (D.D.C. 1996).

116. *Davison v. City of Tucson*, 924 F. Supp. 989, 993 (D. Ariz. 1996).

117. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (holding states may not condition the receipt of welfare benefits on durational residency requirement); *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645, 647 (1976) (requiring personal residence at place of governmental employment does not violate the right to travel).

118. *Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991).

119. James M. O'Fallon, *Adjudication and Contested Concepts: The Case of Equal Protection*, 54 N.Y.U. L. REV. 19 (1979).

the government.¹²⁰ Nor should the right to travel in an emergency prevent random registration checks for contaminated individuals in out-of-state¹²¹ or out-of-area vehicles. Individuals have the constitutional right to leave an emergency, but this right must be balanced against the group's need to temporarily halt traveling for public health purposes.

There exists no basis in law to halt travel into an area affected by a public health emergency. To assume one is to suggest a paternalistic attitude,¹²² the same equal protection red flag raised in gender cases. Because the same public health concerns do not apply when healthy persons choose to enter contaminated areas, the right to travel cannot be balanced against a public concern over the possibility of spreading a disease. Someone entering an infected area from the outside is assumed not to be contaminated. In this instance, the fundamental right to mobility dominates. Anyone wishing to enter an emergency area is to receive due respect by being allowed to assume the risk of their own choice.

3. *Privacy*—An issue that one wishes were before the Court is whether in a large epidemic a person, or a family, has either a privacy right or interest in isolating oneself from the world, whether sick or contagious. Justice Brandeis described privacy as the “right to be left alone” and as the right most valued by civilized man.¹²³ It is “an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life.”¹²⁴ *Griswold v. Connecticut*¹²⁵ presented privacy as a Ninth Amendment right retained by the people, while *Mapp v. Ohio*¹²⁶ centered it in the Fourth and *Boyd v. United States* placed it in the Fourth and Fifth.¹²⁷ Prior cases limit it to those interests that can be determined to be fundamental or implicit in the concept of ordered liberty.¹²⁸ Justice Blackmun in *Roe v. Wade* expressed the opinion that privacy was not derived from a particular constitutional provision, but suggested a “preference for finding the right to find it ‘in the Fourteenth Amendment’s concept of personnel liberty.’”¹²⁹ This was seconded by Justice Potter Stewart who employed substantive due process to uphold the right.¹³⁰ So although it is difficult to locate privacy’s constitutional fountainhead, it is no doubt rooted in the importance of autonomy and self-governance.¹³¹ Like other rights contained in or derived from the Bill of

120. *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949).

121. *U.S. v. Walraven*, 892 F.2d 972, 974 (10th Cir. 1989) (holding police officer’s random registration check on defendant’s out-of-state vehicle did not impede defendant’s right to interstate travel as protected by privileges and immunities clause and equal protection clause).

122. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

123. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) *overruled by* *Katz v. United States*, 389 U.S. 347 (1967); Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

124. *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d. 417, 426 (Mass. 1977).

125. 381 U.S. 479, 485 (1965) (holding that though not explicitly mentioned in the Constitution, the right of marital privacy is supported by the language and history of the Ninth Amendment).

126. 367 U.S. 643, 654-60 (1961).

127. 116 U.S. 616, 630 (1886).

128. *Roe v. Wade*, 410 U.S. 113, 152 (1973) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Ordered “emergencies” have been a part of the common law concept of ordered liberty since *R. v. Hampden, Ship Money Case*, 3 How. St. Tr. 825 (1637) when King Charles I evaded Parliament’s control over the taxing power by declaring an emergency in order to assess taxes.

129. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

130. *Id.* at 170.

131. Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OX. J. OF LEGAL STUD. 18, 21 (1993).

Rights, the constitutional right to privacy applies only against state action.¹³² It is almost a cliché to write that privacy has become the mantra repeated by many who appeal family rights cases.¹³³

Through privacy, the Supreme Court has protected the right to make autonomous decisions in certain areas of fundamental importance.¹³⁴ This particular form of the right sprouts from the "autonomy" branch of the privacy tree.¹³⁵ Autonomous privacy protects intimate personal relationships or activities and freedoms to make fundamental choices involving oneself, one's family and one's relationship to others.¹³⁶ The right to quarantine or isolate oneself during an epidemic may be embraced as an autonomous right of privacy. This right can be inferred from earlier language used by the court to describe the "zones of privacy" recognized by the Constitution.¹³⁷ One's home is one such zone.

Currently areas sheltered by the penumbral right of autonomy are limited by countervailing state interests.¹³⁸ Cases hold that where certain fundamental rights are involved, limits are justified if a legitimate state interest outweighs the private interest.¹³⁹ The state has a strong interest in protecting the public from a communicable disease.¹⁴⁰ In the early part of this century when doctors were limited in their ability to prevent the spread of disease, government induced public quarantine may have been the least restrictive public health response.¹⁴¹ But, today, control measures that are reasonable and pose no health risk to the subject are constitutionally mandated.¹⁴² Involuntary public quarantine may be the most restrictive health response and could cause health risks.

This raises the original question: if someone chooses to isolate themselves or their family inside their home and conscientiously follows all state and municipal mandates issued during a public health emergency, thereby causing harm to none, can the state logically argue that it has a strong interest in removing a family or an individual from the home and into public quarantine? *Korematsu* suggests the answer is no. While *Korematsu* involved the forced detention of individuals based on race and thus triggered the use of strict scrutiny for a suspect classification, it stated in dicta that nothing short of apprehension by authorities of the gravest

132. *Hill v. National Collegiate Athletic Ass'n*, 865 P.2d 633, 650 n. 8 (Cal. 1994) (citing *Pittsley v. Warish*, 927 F.2d 3 (1st Cir. 1991)).

133. See *Whalen v. Roe*, 429 U.S. 589, 600 n.26 (1976).

134. Weber, *AIDS: Legal Issues in Search of a Cure*, 14 WM. MITCHELL L. REV. 575, 607 (1988); *Whalen*, 429 U.S. at 599-600.

135. *Whalen*, 429 U.S. at 599-600. The right to privacy consists of two interrelated strands: confidentiality which protects individual's interest in avoiding the disclosure of personal matters and autonomy which protects individual's interest in making certain personal decisions free of governmental interference.

136. *Klein Indep. Sch. Dist. v. Mattox*, 830 F.2d 576, 580 (5th Cir. 1987).

137. *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

138. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 181 (5th Cir. 1987) (citing *Roe*, 410 U.S. at 153-54).

139. See, e.g., *Addington v. Texas*, 441 U.S. 418, 425-27 (1979) (discussing *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), which used a balancing of factors in indefinite commitment cases for the mentally ill).

140. *Brown v. Stone*, 378 So.2d 218, 222 (Miss. 1979) (holding compulsory small pox vaccination overrides parental interests).

141. Scott Burris, Note, *Fear Itself: AIDS, Herpes and Public Decisions*, 3 YALE L. & POL'Y REV. 479, 480 (1985).

142. Lawrence O. Gostin, *The Future of Public Health Law*, 12 AM. J.L. & MED. 461, 467-71 (1986).

imminent danger can justify the forced removal from one's home.¹⁴³ It may be argued that if one isolates herself in the home, whether contaminated or not, and adheres to all state and municipal guidelines causing no imminent danger to the group, then the private interest may outweigh the state interest. This rights-based view is an alternative to those who practice compulsory public health powers, such as municipal and state health departments, who single-mindedly restrict individual rights in order to prevent possible harm to the community.¹⁴⁴ However, if one stays within one's home and obeys all city and state health mandates, then there is no reasonable basis for removal even if the state asserts an important interest such as safeguarding the public's health. If official mandates are not followed, however, removal is justifiable, necessary, and reasonable.

E. Conclusion

The Constitution provides the states with the power to police for emergency purposes. The Supreme Court, out of political expediency to mandate certain affirmative rights to majoritarian control, has hobbled the group's right to receive unlegislated aid and protection from the state during an emergency. To insure survival, it is desirable for groups of citizens to organize and to take into their own hands basic policing functions, leaving more complex duties in the hands of the state. Those powers that remain with the state are limited by the constitutional principles of due process, equal protection, and privacy.

The best insurance that a city has to survive a wide-spread epidemic which out strips the expertise and abilities of the medical community and emergency responders is an emergency management plan founded in law and which balances individual and group rights against state interests. With thoughtful advanced planning, constitutional balance can be maintained.

II. Emergency Management

Around 1933, the legislative and executive branches began distinguishing between emergencies by dividing them into three principle types: economic, natural, and national security.¹⁴⁵ These groupings are still used. However, a blending of categories can occur, such as when a drought is so pervasive that it becomes a famine that threatens the health and well being of a good portion of the population, or when a naturally occurring epidemic is so widespread and virulent that containing it in a conventional manner could affect the country's military preparedness. Conventional wisdom holds that "response" oriented management methods currently sanctioned for naturally occurring emergencies would also apply in the case of a natural emergency that assumes the proportions of a national security crisis, but this is not the case. In a large-scale or multiple event emergency,

143. *Korematsu v. United States*, 323 U.S. 214, 222 (1944).

144. Gostin, *supra* note 142, at 473.

145. National security emergencies are grouped around the principles of neutrality, defense, civil defense, and hostilities or war. Applications of the term "emergency" in U.S. positive law can be found in Chapter III, below. J. MALCOLM SMITH & CORNELIUS P. COTTER, *POWERS OF THE PRESIDENT DURING CRISES* 14-25 (1960).

a federally unsanctioned method of management should be used, one rooted in the collective self-help acts of the citizenry.

A. *Federal Management*

1. *Executive Action*—The President has the power to exercise domestic emergency power in two ways: constitutionally as Commander in Chief of the military and statutorily through the many federal agencies created by Congress. This distinction is important, as agencies operate under the positive law of the land. The Commander in Chief must also operate under the law, but he has the power to trigger the rule of military necessity,¹⁴⁶ a term of art usually referred to as martial law when used domestically.¹⁴⁷ Although it is sometimes alleged that the President has “inherent powers” to act in cases of civil emergency, for the most part this emergency power has been incorporated into the police power provisions of 42 U.S.C.A. section 5191.¹⁴⁸

Martial law is the “exercise by a government of a right of self-defense.”¹⁴⁹ It is the power to preserve the constitution when constitutional methods prove inadequate. In the great majority of cases, however, federal troops in support of civil authorities would act under statutory authority and not that of martial law. Martial law is reserved for those times when the civil courts are closed.¹⁵⁰ It is never applicable when the state and local governments are capable of enforcing the law. In most instances the decision to impose martial law is made by the President.¹⁵¹ He normally announces his decision by a proclamation that contains his instructions concerning its exercise and any limitations that he may deem reasonable.¹⁵² “[H]owever, the decision to impose martial law may be made by the local commander on the spot if the circumstances demand immediate action, and time and available communications facilities do not permit obtaining prior approval from higher authority.”¹⁵³ And “[w]hether or not a presidential proclamation exists, it is incumbent upon the area commander to weigh each proposed action against the threat to public order and safety in order that necessity may be determined.”¹⁵⁴

As Commander in Chief, the President has the constitutional authority to take those actions necessary to defend the nation. The President thus may act to preserve the structure of the state and restore order. Conflict could arise when a local emergency rises to the level of a national security emergency, such as when a large number of a city’s residents are exposed to an antibiotic-immune biological agent, or in a worse case scenario, when a number of cities in a state or several states are exposed to the same agent. As Commander in Chief, the President’s power is limited to those specific acts that secure national defense, and defense of the nation at the cost of the locality is one such act. The President is the sole judge of the exigency. Federal Armed Forces are committed only after the state and local

146. Military necessity is defined in *Ex Parte Milligan*, 71 U.S. 2 (1866); *Hirabayashi v. United States*, 320 U.S. 81, 90 (1943); *Ex Parte Endo*, 323 U.S. 283, 298 (1944).

147. GENERAL SERVICE SCHOOLS, MILITARY AID TO THE CIVIL POWER 202 (1925).

148. *Id.* at 54-55.

149. *Id.* at 232; see also *Luther vs. Borden*, 7 How. 1, 45-6 (1849).

150. *Milligan*, 71 U.S. at 127.

151. 32 C.F.R. § 501.4 (1998).

152. *Id.*

153. *Id.*

154. *Id.*

civil authorities have utilized all of their own forces and are unable to control the situation, or when the situation is beyond their capabilities, or when they will not take appropriate action.¹⁵⁵ Only the President has the authority to order out federal troops in a domestic situation. The Department of the Army is the branch directed to assume responsibility for military support in disasters within the continental U.S. It is its responsibility to use, coordinate, and control the resources made available by the other military forces of the Department of Defense (DOD).¹⁵⁶

In the President's statutory capacity to respond to emergencies, he can employ power in one of two ways: through either "major disaster assistance" or "emergency assistance" programs. A major disaster is any natural catastrophe,¹⁵⁷ in the determination of the President, that causes damage of sufficient severity and magnitude to warrant a supplement to the state's and local government's "disaster relief."¹⁵⁸ On the other hand, an "emergency" is "[a]ny occasion or instance for which, in the determination of the President, federal assistance is needed to supplement state and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States."¹⁵⁹ To the former category are added connotative words used when defining the class of emergency. The latter's lack of a clear definition belies its civil defense origins.

These two types of statutory assistance have striking similarities and differences. Upon the request of a state governor, the President who implements "major disaster assistance" may:

- 1) direct any federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under federal law (including personnel, equipment, supplies, facilities, and managerial, technical, and advisory services) in support of state and local assistant efforts;
- 2) coordinate all disaster relief assistance (including voluntary assistance) provided by federal agencies, private organization, and state and local governments;
- 3) provide technical and advisory assistance to affected state and local governments for--
 - (A) the performance of essential community services;
 - (B) issuance of warnings of risks and hazards;
 - (C) public health and safety information, including dissemination of such information;
 - (D) provision of health and safety measures; and
 - (E) management, control, and reduction of immediate threats to public health and safety; and

155. 32 C.F.R. § 501.1(a) (1998).

156. 32 C.F.R. § 502.4(f) (1998).

157. Natural catastrophes include hurricanes, tornadoes, storms, high water, wind driven water, tidal wave, tsunami, earth quake, volcanic eruption, landslide, mudslide, snowstorm, or drought, or regardless of cause, any fire, flood, or explosion, in any part of the United States which causes severe damage. See 44 C.F.R. § 206.2(17) (1998).

158. *Id.*

159. 44 C.F.R. § 206.2(9) (1998).

- 4) assist state and local governments in the distribution of medicine, food, and other consumable supplies, and emergency assistance.

42 U.S.C.A. § 5170a. In addition, the President may provide “essential assistance” in a major disaster to immediate threats to life and property by pledging federal resources as follows:

(a)(1) Federal resources, generally

Utilizing, lending, or donating to state and local governments federal equipment, supplies, facilities, personnel, and other resources, other than the extension of credit, for use or distribution by such governments in accordance with the purposes of this chapter.

(2) Medicine, food, and other consumables

Distributing or rendering through state and local governments, the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief and disaster assistance organizations medicine, food, and other consumable supplies, and other services and assistance to disaster victims.

(3) Work and services to save lives and protect property
Performing on public or private lands or waters any work or services essential to saving lives and protecting and preserving property or public health and safety, including--

- (A) debris removal;
- (B) search and rescue, emergency medical care, emergency mass care, emergency shelter, and provision of food, water, medicine, and other essential needs, including movement of supplies or persons;
- (C) clearance of roads and construction of temporary bridges necessary to the performance of emergency tasks and essential community services;
- (D) provision of temporary facilities for schools and other essential community services;
- (E) demolition of unsafe structures which endanger the public;
- (F) warning of further risks and hazards;
- (G) dissemination of public information and assistance regarding health and safety measures;
- (H) provision of technical advice to state and local governments on disaster management and control; and
- (I) reduction of immediate threats to life, property, and public health and safety.

42 U.S.C.A. § 5170b. The statute, divided into two sections, 5170a and 5170b, allows the President to determine whether a stricken area will receive one, or the other, or both types of aid. In this manner, something of a federal escape clause is provided when the pledging of too much aid would be either uncalled for because of the state's need to act responsibly or because it could be damaging to the government's store of resources.

The second form of statutory aid is more open ended. In “emergency assistance”¹⁶⁰ aid is again requested by the state governor¹⁶¹ unless the emergency is the primary responsibility of the federal government,¹⁶² such as a national security emergency. In that case, when determining whether an emergency exists, the President need consult only with the governor if it is “practicable.” And the President’s determination of the emergency may be made with regard to subsection (a) or (b) below of the emergency assistance statute,¹⁶³ making it less limited and more flexible than major disaster assistance. In his statutory capacity, the President may:

- (a)(1) direct any federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under federal law (including personnel, equipment, supplies, facilities, and managerial, technical and advisory services) in support of state and local emergency assistance efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe; (emphasis added)
- (2) coordinate all disaster relief assistance (including voluntary assistance) provided by federal agencies, private organization, and state and local governments;
- (3) provide technical and advisory assistance to affected state and local governments for--
 - (A) the performance of essential community services;
 - (B) issuance of warnings of risks or hazards;
 - (C) public health and safety information, including dissemination of such information;
 - (D) provision of health and safety measures; and
 - (E) management, control, and reduction of immediate threats to public health and safety;
- (4) provide emergency assistance through federal agencies;
- (5) remove debris in accordance with the terms and conditions of section 5174 of this title;
- (6) provide temporary housing assistance in accordance with section 5174 of this title; and
- (7) assist state and local governments in the distribution of medicine, food, and other consumable supplies, and emergency assistance.
- (b) General

Whenever the federal assistance provided under sub-section (a) of this section with respect to any emergency is inadequate, the President may also provide assistance with respect to efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe.¹⁶⁴

160. 42 U.S.C.A. § 5192(a) (1995).

161. 42 U.S.C.A. § 5191(a) (1995).

162. 42 U.S.C.A. § 5191(b) (1995).

163. *Id.*

164. 42 U.S.C.A. § 5170b (1995).

These sections grant a federal police power and the right to enter the state for emergency public health reasons that have either occurred or will occur.

Both the major and emergency assistance statutes spring from the same legislative policy and both share the same basic language. However, as the underlining in the emergency section indicates, marked additions to the major assistance statute are found in the emergency statute. The degree of assistance offered by the emergency assistance act establishes a broad, unspecific right on the part of the President to invade the state's police powers for reasons of health and safety, whether or not invited. The assistance offered in a major disaster seems to be designed only to supplement depleted state resources where an emergency allows for repeated dips into federal resources to respond to a catastrophe. In the case of major disasters, provisions are made under the "essential assistance" section of the statute for the use of federal resources after the event,¹⁶⁵ while resources provided in grants of emergency assistance can be used to prevent emergencies. This difference is no doubt due to the fact that emergencies can rise to the level of civil defense needs and can require a commitment by the national government far beyond that required by major assistance. Forseeably, a local emergency or a string of emergencies could cause the quick depletion of stored government resources and the need to add additional ones. Thus, there is a need for executive choice between the two levels of aid. But both types of statutory emergencies depend upon FEMA to police and coordinate assistance and expenditures, and both types can rise to the level of a national security emergency by including either a physical or cyber threat on an area's infrastructure such as electrical power systems, gas and oil storage and transportation, banking and finance, transportation, water supply systems, emergency services, and the continuity of government.¹⁶⁶

The President therefore controls three separate ways to manage emergencies. Each method is responsive to a different level of severity and impact on the affected area and/or the national government.

2. *Military Aid to Civil Authorities*—In the past the Joint Chiefs of Staff have used two terms to define military intervention in the local affairs of foreign communities. The terms "civic action" and "civil affairs" were used to differentiate between two types of local incursion. Although these definitions are dated, they open a window on the military distinction between the types of assistance that the U.S. military provides to civilians. One is a type of disaster relief, the other an act of military necessity during emergencies, the purpose of which is to bring about stability in an area.

"Civic action" is the use of preponderantly indigenous military forces on local projects that were useful to the local population.¹⁶⁷ They include such fields as education, training, public works, agriculture, transportation, communications, health, sanitation, and others that contributed to economic and social development, which, in turn, also served to improve the relations between the military forces and

165. 42 U.S.C.A. § 5170b(c) (1995).

166. 42 U.S.C.A. § 5195 (1997).

167. EDWARD BERNARD GLICK, *PEACEFUL CONFLICT: THE NON-MILITARY USE OF THE MILITARY* 22 (1967) (quoting U.S. Joint Chiefs of Staff PUB. 1, *DICTIONARY OF UNITED STATES MILITARY TERMS FOR JOINT USAGE* 90-91 (1964).

the local population.¹⁶⁸ More specifically, civic action is a "blend of [U.S.] military assistance with indigenous self-help."¹⁶⁹ It "can and should be activated in times and areas of peace as well as in times of war or occupation."¹⁷⁰ Civic action assumes that: 1) the military merely complements host programs, 2) the military will work on projects that civilians have chosen, 3) the military will not compete with other organizations in the area, rather it will work until other civilian agencies can do the job, 4) local resources will not be degraded by civic action, and 5) civic action will lessen dependence on U.S. military personnel and aid.¹⁷¹ Disaster relief is one form of civic action, but so are acts generated for counterinsurgency purposes.¹⁷² The formal diversion of military equipment and material for civilian relief and rehabilitation in Korea by President Dwight Eisenhower is one example of civic action.

On the other hand, "civil affairs" are those phases of the activities of a commander that enhance the relationship between the military forces, civil authorities, and the people of a friendly or occupied country or area. It usually involves performance by the military of certain functions or the exercise of certain authority normally the responsibility of the local government. This relationship may occur prior to, during, or subsequent to military action or other emergency and is normally covered by a treaty or an agreement (express or implied). Civil affairs are usually activated after hostilities or emergencies.¹⁷³

To this day, it remains Army policy to assist civil authorities, recognized relief agencies, and federal agencies charged with disaster relief in the event of major disasters or emergencies.¹⁷⁴ It assists civilians both foreign and domestic as long as the assistance does not adversely affect military preparedness.¹⁷⁵ In the past, the Army has had a distinguished career in assisting foreign civilian populations, especially in the public health area. The Army Medical Department provided civilian disaster assistance to fight smallpox and yellow fever in Cuba, smallpox in Puerto Rico, and bubonic plague, cholera, and small pox in the Philippines.¹⁷⁶ Additionally, no one can forget the brilliant work of Major Walter Reed in determining the cause of and containing Cuba's yellow fever epidemic at the turn of the century.¹⁷⁷

In the U.S. its assistance during times of emergencies is well known. Its officers and men have distinguished themselves helping civilians after floods, hurricanes, and volcanic eruptions. Military assistance to the civilian population can begin one of two ways: 1) when directed by higher authority, as in a Presidential declaration of an emergency, or 2) when a serious local emergency requires an immediate response¹⁷⁸ by a locally stationed commander. The former has been used often, the later seldom because with it comes local command accountability for initiating the response and because enhanced electronic

168. *Id.*

169. *Id.* at 22 (quoting Colonel Truman F. Cook).

170. *Id.* at 68.

171. *Id.* at 73-74.

172. *Id.* at 75, 82.

173. *See generally id.* at 67-99.

174. AR 500-60, ch. 2-1b.

175. 10 U.S.C.A. §§ 376, 382(a)(2) (1998).

176. GAINES M. FOSTER, *THE DEMANDS OF HUMANITY: ARMY MEDICAL DISASTER RELIEF* 32-47 (1983).

177. *Id.* at 41-42.

178. AR 500-60, chapters 2-1b, 2-10b, 2-1f, 2-10.

communications have limited the lengthy delays that once occurred in command communication systems, thereby lessening the need for an immediate response without higher authority. And again, assistance can never be allowed to reach the level of reducing military effectiveness or preparedness. As an example of this protective policy, Congress recently charged the President with taking reasonable measures to reduce the reliance of civilian law enforcement officials on DOD resources used to counter threats posed by the use or potential use of biological and chemical weapons.¹⁷⁹ In the official printing of this statute parts (a)-(c) of this section were censored. The omitted parts no doubt aim to reduce the reliance of local civilian emergency response officials on the same resources. Logically, this is the only policy position that can be taken in the case of multiple urban exposures or a large-scale exposure such as that addressed by the Houston Plan in section IV of this article.

Both the Constitution and Congress have placed limits upon the use of military forces within the United States. The military can only act to aid civilian forces, not act as a peace keeping force. The Posse Comitatus Act¹⁸⁰ forbids the use of any part of the Army or the Air Force in a direct law enforcement role unless authorized by either the Constitution or the Congress. If a local area has a law enforcement emergency, it can apply to the Attorney General for assistance.¹⁸¹

A constitutional exception to the limited use of the armed forces is based on the government's inherent legal right "to insure the preservation of public order and carry out governmental operations within its territorial limits, by force if necessary."¹⁸² This emergency authority allows prompt and vigorous federal action, including the use of military forces, to prevent loss of life or wanton destruction of property. The authority extends to restore governmental functioning and public order when a sudden and unexpected civil disturbance, disaster, or calamity seriously endangers life and property and disrupts normal governmental functions to such an extent that local officials are unable to control the situation.¹⁸³ The test of whether the local authorities can control the situation is either statutory or at the determination of the President. This type of situation is unlike cases of pure domestic violence where the test is constitutional and support is triggered by the application to the President by either the state legislature or by the state executive when the legislature cannot be convened.¹⁸⁴

3. Legislative Policy—When a local emergency endangers civilian lives and property, individuals must give thought to their responsibility to defend themselves and their area. This need for self-help was put forward in a proclamation by President Roosevelt when he invited each citizen to give thought to his duty and responsibility to defend the country and to inform himself about civil defense.¹⁸⁵ Roosevelt's invitation to acts of self-help precipitated the Federal Civil Defense Act of 1950.¹⁸⁶ The plan commonly called the "Blue Book"¹⁸⁷ placed operational

179. 50 U.S.C.S. § 2316(d) (1997).

180. 18 U.S.C.A. § 1385 (1994).

181. 42 U.S.C.A. § 10501 (1995).

182. 32 C.F.R. § 215.4(a)-(c)(1) (1998).

183. 32 C.F.R. § 215.4(c)(1)(i) (1998).

184. U.S. CONST. art. IV, § 4.

185. Proclamation No. 2519, 55 Stat. 1693 (1941).

186. Ch. 1228, 64 Stat. 1245 (1951).

control of local civil defense systems in the hands of state governments, with the federal government maintaining policy responsibilities.¹⁸⁸ But concerns over low probability occurrences (like atomic, radiological, chemical, bacteriological, and biological weapons) caused an escalation in preparedness and created an acceptance of extraordinary executive powers.¹⁸⁹ Thereafter, the powers and relationships set up to effectuate responses to a preparedness or to a civil defense emergency were determined convenient for application to any garden-variety emergency. Therefore, it is not surprising that arrangements created in anticipation of a military emergency were also applied to natural catastrophes.¹⁹⁰ After much Bedouin-like wandering between government agencies, federal administrative power over civil defense and natural emergencies settled principally in FEMA.¹⁹¹

Current literature about emergency management is, for the most part, the product of FEMA.¹⁹² As a Congressional creation, it closely tracks the management methodology established by the Stafford Act,¹⁹³ which sets the national standard for all emergency management in the U.S. Because no one institution can be all things to all areas, especially a national one whose aid is available to every state, its organizing purpose is to establish a minimum standard of effectiveness in emergency situations for the localities. Through literature and training, FEMA stresses to state and local authorities the fact that they are accountable for the giant's share of the emergency management for their area. At the same time, it formulates ways that their duty can be shared with the federal government. Emergency training, review of emergency systems and plans, and partial funding¹⁹⁴ are but three of the carrots dangled by Congress in an effort to standardize local emergency management. In order to standardize responses, FEMA emphasizes the "all hazard" approach to emergency management, which it encourages and supports through its ability to review the emergency plans of the states and localities.¹⁹⁵

In the all-hazard model, emergency response is divided into four separate management phases: mitigation, preparedness, response, and recovery. 1) Mitigation is any long-term activity that eliminates or reduces the probability of occurrence or the effects of a disaster. 2) Preparedness is the creation of plans to save lives, to minimize damage, and to enhance disaster response operations.

187. ROBERT S. RANKIN & WINFRIED R. DALLMAYR, *FREEDOM AND EMERGENCY POWERS IN THE COLD WAR 14-15* (1964).

188. *Id.* at 50.

189. 32 C.F.R. § 301 (1998).

190. J. MALCOLM SMITH & CORNELIUS P. COTTER, *POWERS OF THE PRESIDENT DURING CRISIS 24* (1960).

191. 50 U.S.C.A. § 2251, the civil defense statute, was repealed and became part IV-B of Chapter 68 of 42 U.S.C.A. This act, for the most part, transferred civil defense preparation to FEMA.

192. A catalogue of FEMA's publications can be ordered by writing to: FEMA, P.O. Box 2012, Jessup, MD 20794-2012. FEMA's Emergency Management Institute also offers free home study courses which are available on a wide range of topics in emergency management: homeowner safety, pets and disasters, fire fighting, nuclear disasters, and emergency management, are but a few available by writing to: 16825 South Seton Avenue, Emmitsburg, Maryland 21717.

193. Disaster Relief and Emergency Assistance Amendments of 1988, Pub. L. No. 100-707, 102 Stat. 4689 (1988), which incorporated the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, 88 Stat. 143 (1974), is the core of 42 U.S.C. § 5121-5202 (1988).

194. FEMA shares disaster assistance with the localities through the regulation of emergency planning (44 C.F.R. § 206.4 (1993)), FEMA-State Agreements (*id.* at 206.44), Disaster Assistance Programs (*id.* at 206.141-.191), and the Hazard Mitigation Grant Program (*id.* at 206.430-.440); 42 U.S.C.S. § 11005 (1997).

195. 44 C.F.R. § 206.13 (1998).

Preparedness is typically the bailiwick of state and municipal planners whose responsibility it is to imagine and prepare for future disasters and to test, through the use of exercises, the reaction of those departments charged with responding. 3) Response is the activities that occur during and immediately following a disaster. Typically, organized teams move to care for and reduce the number of casualties, to reduce any damage to property, and to speed recovery operations. 4) Recovery endeavors to return a community to minimum operating standards, to return it eventually to its previous conditions to the extent possible governed by the circumstances, and to protect it from future disasters through improvements.¹⁹⁶ By parsing emergency management into four separate phases, order is given to what would otherwise be a chaotic enterprise. Not only is the four-part all-hazard plan an easy teaching tool, but it can also be used by the federal government as a way of choosing and isolating that part of a local emergency in which it wishes to involve itself.

B. State and Local Management

1. Executive Action—As the states look to the President for extraordinary relief during a time of emergency, the “political subdivisions”¹⁹⁷ of the states look to their governors. In some states, this creates a pass-through effect which causes the governors to be little more than middlemen in their state’s large-scale emergencies. This effect is supported by the levels of bureaucracy needed to gain federal assistance and the speed with which requests are filed. Procedurally, all requests for a declaration by a political subdivision are made in writing to the governor. If federal help is requested, which it usually is in large emergencies, the governor of the affected state in turn petitions the President by applying through the regional FEMA office.¹⁹⁸ This office forwards the governor’s request to its national headquarters, which, in turn, forwards it to the President. Requests are granted based on a finding that the local situation is of such “severity and magnitude that effective response is beyond the capabilities of the state and the affected local governments and that federal assistance is necessary.”¹⁹⁹ As a part of the request, the governor must take “appropriate action under state law” by directing the execution of the state’s emergency plan for that particular type of disaster. The governor furnishes to FEMA information describing the state and local efforts and resources that have been or will be used to alleviate the emergency. It must also define the type and extent of federal aid required. Based upon the governor’s request, the President “may” declare that an emergency exists.²⁰⁰

In federally declared “major disasters” and “emergencies,” in exchange for federal largess and at the president’s discretion, federal authorities can assume control of all state and local disaster relief. This puts a city struck by a large naturally occurring epidemic or chemical disaster at a disadvantage, because it

196. FEMA, *THE EMERGENCY PROGRAM MANAGER* 4-8 (1993).

197. Typically, the political subdivisions of a state are the counties or parishes and the incorporated cities.

198. FEMA regional offices cover territories similar to the old offices of Civil Defense. Region VI which includes Houston, also includes the states of Arkansas, Louisiana, New Mexico, Oklahoma and Texas. The regional center is located in Denton, Texas.

199. 42 U.S.C.A. § 5191 (1995).

200. *Id.*

places the care and well being of an entire city into the hands of federal authorities rather than into the hands of the state and local officials who are more attuned to the strengths and weaknesses of the area and those of its population. Control of a local problem by federal agencies would no doubt raise the same complaints that have been repeatedly voiced against federal agencies in the past: "a dismissive attitude" when dealing with local authorities, "a preoccupation with turf," and "a reluctance to cooperate,"²⁰¹ or in other words, institutional arrogance.²⁰²

a. *The Texas Disaster Act of 1975*—Under the Texas Disaster Act of 1975 the governor is given the responsibility "[of] meeting the dangers to the state and people presented by disasters."²⁰³ Once the governor declares an emergency, the state's emergency plan is activated.²⁰⁴ This, of course, triggers the deployment and use of any resources to which the plan refers.²⁰⁵ State plans have been previously coordinated with those of the federal government²⁰⁶ and the local political units have been given state assistance in designing their plans.²⁰⁷ In order to meet unspecified dangers, the legislature allows the governor the authority to issue, amend, or rescind executive orders, proclamations, and regulations, giving his decrees the force and effect of law.²⁰⁸ Thus, the governor effectively becomes the commander in chief of all state agencies, boards, and commissions that have emergency responsibilities, plus the National Guard is also available at his discretion.

The Act also provides the procedure for the declaration of a local disaster. The presiding officer of a governing body of a political subdivision declares a local state of disaster.²⁰⁹ The declaration of a local disaster activates all local and/or inter-jurisdictional emergency management plans and authorizes the furnishing of aid.²¹⁰ The local authority, however, is not granted the same sweeping powers as the governor to deal with the emergency. Once the disaster is declared, plans are activated, and aid and assistance have begun, the statutes are silent as to the scope of power and the role of the local leader. This legislative silence should be deafening in the post-*DeShaney* world of emergency policy.

201. Michael Grunwald, *FBI Accused of Mistake in TWA Probe*, HOUSTON CHRONICLE, Nov. 26, 1998 at A24 (referring to the Federal Bureau of Investigation's inability to work with the National Transportation and Safety Board's investigators on the crash of TWA's Flight 800 to the damage of the investigation).

202. This is particularly worrisome when a federal agency may be involved in the daily policing of a municipality's civilians. The problematic nature of the issues that can arise were demonstrated when 18-year-old Esequiel Hernandez Jr. was shot by Marines policing the border for narcotics as he herded the family goats in a desolate area of Presidio County, Texas, where no emergency existed. Thaddeus Merrick, *Pentagon Changes Policy On Use of Troops in Drug War on Border*, HOUSTON CHRONICLE, Jan. 29, 1999, at A32.

203. TEX. GOV'T CODE ANN. § 418.011 (West 1998).

204. TEX. GOV'T CODE ANN. § 418.015 (West 1998).

205. *Id.* § 418.015(a)(2).

206. *Id.* § 418.042(12).

207. *Id.* § 418.044. Without being privy to such plans, it is assumed that they follow the all-hazard model established by Congress in the Stafford Act.

208. *Id.* at § 418.012 (West 1998). Although this is the same degree of control claimed during the seventeenth century by England's King Charles I for his emergencies, one doubts that so broad an executive authority was the Texas legislature's intention.

209. *Id.* at § 418.108(a).

210. TEX. GOV'T CODE ANN. § 418.108(d).

2. *Municipal Management*— A leveling process occurs when only one system of emergency management is officially sanctioned. Responses are narrowed to those condoned at the national level. This can limit the ability of local officials to respond creatively and uniquely to a disaster. Local planners and emergency managers have been trained not to see much further than the “response” methods used in ordinary emergencies to the broader management techniques required when an entire city, or many cities in a state, or many cities in several states are in a crisis. It is important that the localities plan for their emergencies, but it is also important that they be encouraged to employ their unique strengths. As each region of the country differs in its emergency needs, each region should differ in its plans for extraordinary emergencies.

Needed in a large-scale disaster is a management methodology that draws from the resources of the entire municipality rather than from federally sanctioned executive departments, volunteer organizations, and the mayor’s crisis management team. Because the response needed would be an “all-city” effort, it would require the full use of the city’s resources, down to the individual citizen. In other words, a municipal management stratagem rather than a federal response stratagem would be required. Unfortunately, this type of broad thinking is not recognized in the current elitist approach to emergency management supported by the federal model which classifies the city’s inhabitants as private citizens (a passive role) and therefore outside the inner-circle of active decision makers and workers.

The all-hazard approach fails to adequately address the civil defense style of management needed to control a multi-event emergency. The level of response needed in a large-scale emergency would quickly push current emergency management techniques into disordered chaos. Relying on only one management model places blinders on the civil authorities charged with control. In a large crisis, self-preservation may be compromised by adherence to the one-tiered model,²¹¹ when a flexible methodology would be better suited to combat an extraordinary emergency.

In the all-city model each resident of the city becomes a statutory volunteer in his preservation and that of the city. Each citizen becomes part of a private annex to the municipal team. Each is given responsibilities by his neighborhood group that must be met for their own well being.²¹² For some residents the responsibilities are large, like supplying isolated residents with food. Other residents may have responsibilities as simple as policing one’s family or neighbors. As the city must become self-reliant in order to preserve itself, its citizens learn to rely on each other rather than on the state and national governments for their daily care and well being. Because the rapid isolation of a city and the full use of its resources are the only responses that insure self-preservation in instances of multiple municipal exposure to biological agents, local areas must prepare themselves to draw from the at-hand resources of their areas rather than wait upon slower moving state and federal bureaucracies to respond with resources.

Planning for the full utilization of all available resources by a city is municipal management. It harkens back somewhat to old state-centered civil

211. “[T]otal federal assumption of emergency planning by these regional offices may sacrifice needed attention to particular hazards for uniformity purposes.” Anna Mastracco, et al., *Federal and State Coordination: Disaster Relief*, 46 ADMIN. L.R. 539, 549 (1994).

212. An example of broad thinking is found in the Texas Communicable Disease Prevention and Control Act which states: “[E]ach person shall act responsibly to prevent and control communicable disease.” 1 TEX. HEALTH & SAFETY CODE ANN. § 81.002 (Vernon’s 1998).

defense systems, but it shifts emphasis down to self-governing neighborhood groups that function within state and federal support umbrellas. This management model tracks the growing emphasis on "sustainable communities" found in urban planning.²¹³ Usually associated with environmental goals, the term implies concerned citizens cooperating with each others in common goals and strategies.²¹⁴ Citizens are encouraged to act in participatory, local processes in ways that contribute to their own sense of well-being.²¹⁵ Generally, sustainable strategies favor bottom-up over top-down approaches, self-reliance over dependency, and a local rather than regional or national focus.²¹⁶ In municipal management the "sustainable focus" would cause citizens to work together for the group's preservation; self-help would become their tool.

Self-help is defined as the "recruitment and mobilization of peers in an informal and non-hierarchical setting."²¹⁷ Political self-help has long embraced the idea that lower levels of government or communities need to finance or develop projects through their own efforts.²¹⁸ A long recognized attribute of self-help is the concept of community. The community of propinquity, or geographic community, is one of the earliest social frameworks in the history of humanity.²¹⁹ Being a part of a social system creates loyalty to the community and to its members, which translates into support in times of need and crisis.²²⁰ Community self-help may demonstrate a "fundamental pattern of bonding among people."²²¹

In the past, traditional communities were characterized by mutual aid, which may be a recognized "natural human force;"²²² accordingly, "[i]n times of illness, personal crisis or community disaster, when formal helping modes are nonexistent or inaccessible, . . . commitments are expressed in the form of mutual-aid."²²³ Mutual aid finds expression in processes such as "emotional bonding, identification with the larger social entity, empathy, sharing of information and skills, sharing of material resources, and opportunities to pursue and realize self-interests."²²⁴

When it is recognized that in seventy-five percent of all instances, disaster rescues are made by neighbors because outside sources are not available,²²⁵ the importance of nurturing a strong network of citizens who help each other is evident. One study found close to sixty percent of those surveyed turn to a neighbor for help during an ordinary life crisis.²²⁶ This rate rises during emergencies. But neighbor-helping is not necessarily a simple extension of close relationships; rather, it

213. MARK ROSELAND, TOWARD SUSTAINABLE COMMUNITIES: RESOURCES FOR CITIZENS AND THEIR GOVERNMENTS 22 (1998).

214. *Id.* at 23.

215. *Id.*

216. *Id.*

217. Benjamin Gidron & Mark Chesler, *Universal and Particular Attributes of Self-Help: A Framework for International and Intranational Analysis*, 11, No. 1 PREVENTION IN HUMAN SERVICES 1, 3 (1994).

218. Francine Lavoie et al., *Preface* to 11 No. 1 PREVENTION IN HUMAN SERVICES xiii (1994).

219. Gidron, *supra* note 217, at 7.

220. *Id.* at 8.

221. *Id.* at 36.

222. *Id.* at 12.

223. *Id.* at 13.

224. *Id.*

225. DONALD I. WARREN, HELPING NETWORKS: HOW PEOPLE COPE WITH PROBLEMS IN THE URBAN COMMUNITY 59 (1981).

226. *Id.* at 60.

illustrates a relationship based on mutual aid and problem coping.²²⁷ Nor is it arguable that some groups or communities respond while others do not, rather neighbors helping neighbors is similar across all neighborhood types.²²⁸

Some states may have used this social phenomena as the basis for emergency statutes. Under the Texas Disaster Act each individual in the state has a statutory duty to conduct and to manage herself and affairs and property in a way that reasonably assists (and does not detract from) state and public management of emergencies.²²⁹ This obligation includes "appropriate personal service," which is recognized under the constitution and statutes of the state and the common law.²³⁰ Thus, in Texas, each citizen has a statutory duty and a responsibility to render all reasonable acts officially requested during emergencies. If this responsibility has been written into an area's emergency plan, then a failure to comply with the plan or with a rule, order, or ordinance adopted under the plan is a statutory offense punishable by a fine not to exceed \$1000 or a jail term of up to 180 days.²³¹ This duty is further emphasized in Houston's municipal ordinances which state that failure to comply with lawful orders issued under the authority of the city during a declared state of disaster is unlawful, and violations are punishable offenses.²³² Thus in Texas, generally, and in Houston in particular, reasonable participation by its citizens in an extraordinary emergency is not an option, but a statutory duty.

The next two sections of this paper contain a hypothetical emergency and develop in detail the use of the municipal management to control it. Together they demonstrate in a practical exercise how a community can help itself in an extreme circumstance by employing all of its at-hand resources while continuing to comply with constitutional principles.

III. The Hypothetical

A biological agent of unknown etiology is released in the population of Houston, Texas, a city of two million people in a county of four million. Suddenly, hundreds and then thousands are brought to local hospitals. One-third of those exposed are dead or dying, one-third are in various stages of the sickness and in need of care, and one-third are either immune or have not been infected. The drug-resistant agent proves to be extremely virulent and quickly becomes airborne when introduced to a host's lungs. Within 24 hours of the first admission, the emergency rooms of the local hospitals are full and triage camps established on hospital parking lots are functioning beyond capacity. For the most part, those living within the city's inner Loop 610 are affected, but sporadic outbreaks are soon evident in the suburbs and in surrounding Texas cities. It is quickly discovered by local infectious disease doctors that the agent was not of weapons grade and that the incident was naturally occurring and accidental.²³³ Later it is learned that a

227. *Id.* at 61.

228. *Id.* at 83.

229. TEX. GOV'T CODE ANN. § 418.151(a) (West 1998).

230. *Id.*

231. *Id.* § 418.173 (1998).

232. HOUSTON, TEX., MUN. ORDINANCE 92-1449, § 29 (Nov. 4, 1992).

233. The hypothetical is constructed as naturally occurring and accidental in order to avoid discussions of federal intra-agency responsibilities that would be involved in the handling of a biological outbreak caused by a weapon of mass destruction.

contamination in the newsprint supply used by the local newspaper (daily circulation of 560,000) acted as the vector.²³⁴ Those readers handling the paper and touching either their eyes, nose or mouth became infected. The mayor of Houston avoided exposure because it is his habit of reading the news over the internet.

IV. The Houston Plan²³⁵

A. *The National Executive*

1. *The President uses his constitutionally designated power as Commander in Chief,*²³⁶ *rather than his statutory power under the emergency statute, to order the military to defend the nation by keeping the disease from spreading outside the affected city.*—The President believes that if internal management of the contagion is left in local hands, then national resources would be better freed to insure containment. This strategy also prevents the concentrated use of federal resources in one locality when other localities may soon be similarly situated and in need of assistance. He does, however, pledge the technical and advisory assistance of federal agencies under the “emergency” statute²³⁷ after the receipt of a request from the state’s governor.

2. *Fearing that the capabilities of the state and local authorities cannot prevent the spread of the outbreak to other states,*²³⁸ *the President orders the Department of Defense (DOD) to have the federal armed forces act in two capacities:*

a. Aid to Civil Authorities:

- 1) To prepare space at each military installation in the affected state and some surrounding states for the possible quarantine of civilians.²³⁹ The DOD is reminded that anyone breaking the law while in military quarantine will be handed over to the civil authorities once quarantine is completed.²⁴⁰

234. The newspaper was chosen as a vector because of the toxic effects ink actually has on micro-organisms.

235. The Houston Plan is presented in narrative rather than in outline form. In this way the pragmatic, statutory, and constitutional reasons for taking certain actions can be addressed in detail. I have attempted to place those aspects that one might normally see in a plan at the beginning of each paragraph.

236. U.S. CONST. art. II, § 2.

237. 42 U.S.C.A. § 5191 (1995).

238. 32 C.F.R. § 501.1(a) (1998):

Federal Armed Forces are committed after state and local civil authorities have used all of their own forces and are unable to control the situation, or when the situation is beyond the capabilities of state and local civil authorities, or when state and local civil authorities will not take appropriate action.

239. *Id.* § 501.1(2)(c) (1998): “The Army does not operate temporary confinement/detention facilities unless local facilities under the control of city, county, and state governments and the U.S. Department of Justice cannot accommodate the number of persons apprehended or detained.”

240. *Id.* Persons not normally subject to military law taken into custody by the military forces incident to the use of Armed Forces will be turned over as soon as possible to the civil authorities.

- 2) To provide limited military resources to civil authorities.²⁴¹
 - a) Military Assistance to Safety and Traffic (MAST) is ordered to respond with personnel, equipment and supplies. MAST responds to serious medical emergencies involving designated civilian communities.²⁴² Its purpose is to provide interim emergency medical support until civilian services can be established, but it requires a prior agreement or understanding.²⁴³

b. Civil Defense:

- 1) To form a *cordon sanitaire* around the city using the federally funded highways to ensure that the epidemic does not spread beyond the contagious inner-core of the city.²⁴⁴ Fear of weakening the armed forces through exposure to the infection prevents the President from ordering troops to take an active part in the management of the disease within the city. He knows from historical example that the military's best role in a domestic crisis is to provide support to the civilian authorities and to ensure that the disease is contained; too broad a use of the military incites fear and civic disorder. Further, he warns the DOD that no declaration of "martial law" will be tolerated unless civil authority breaks down.
- 2) To transport supplies to the boundary of the cordon sanitaire.
- 3) To allow citizens willing to undergo quarantine the right to leave the area, once quarantine is complete.
- 4) To establish road blocks on all large federal and federally funded highways in the state. Anyone traveling either with a driver's license showing the zip codes 770-, 772-, 773-, 774-, and 775-,²⁴⁵ or without any license or other form of identification, will be questioned and/or quarantined at the nearest civilian medical or law enforcement, or military facility.

3. *The Department of Public Health, the CDC, FEMA, and other federal agencies are ordered to respond to the contagion with advisors and resources.*

- a. The CDC is ordered to provide support to the area. The center has locally based doctors and epidemiologists on site at Houston's Medical Center, but it also sends in additional field teams. It is ordered to notify municipal officials of the correct medicines and disinfectants to use, and the optimal length of quarantine.

241. 32 C.F.R. § 215.3(c) (1998): Military resources include military and civilian personnel, facilities, equipment, and supplies under the control of the DOD.

242. Army Regulations 500-4, para. 3a. See, Major Michael D. Hockley, *A Legal Guide to Providing Army Assistance to Local Communities*, 27-50-164 ARMY LAW, 29, 30 (Aug. 1986).

243. Army Regulations 500-4, para. 4b.

244. In a large-scale biological outbreak, as in the release of a micro-organism into an urban area by a high level biological research lab, the exposed part of the city should be cordoned off from the unexposed areas. In effect the cordoned area becomes like a floating island into which flows supplies and experts from the outside.

245. My appreciation goes to Norm Wigington of the Texas Department of Transportation for explaining the federal, state, and local systems of roads and for suggesting the use of zip codes as a quick and accurate means of identifying area residents.

b. FEMA is ordered to provide support to the area. It contacts the regional center in Denton, Texas, and places it on 24 hour alert. It immediately ships rolls of plastic sheeting similar to that used to cover roofs damaged by storms, sleeping bags, and ready meals to the city.

4. *Governors of the states surrounding Texas are immediately notified of the outbreak.*—The President suggests that these states create roadblocks on all roads leading from Texas into their states. Anyone bearing either the listed zip codes or no identification must be quarantined. Airline traffic should also be monitored and records searched for passengers arriving from Houston. All other governors are quickly advised of the problem.

5. *Leaders of other nations are quickly notified of the outbreak.*—It is suggested that all airline flights, trains, and cruise ships should be monitored and records searched for Houstonians and those whose tickets were routed through Houston, and that they be quarantined. In the cases of Canada and Mexico, it was also suggested that automobile, bus, and pedestrian traffic be closely scrutinized.

6. *All federal courts and offices within the infected area are ordered closed.*—The first day federal courts and offices officially reopen will be counted as the next day after the last full day open for determining filing dates, etc. All employees are ordered home. They are requested to report to the local government for voluntary crisis management duties, particularly unassigned federal peace officers, customs agents, FBI agents, etc.

7. *The Federal Aviation Administration is ordered to place a skeleton crew of air traffic controllers in residence at each airport.*—Although it is understood that the city is closing the airports, supplies and hospital planes will continue to arrive during the outbreak. The airport will support only emergency and specially cleared traffic. Controllers volunteering for this duty will receive heightened compensation in exchange for living on the premises for the duration of the outbreak.

8. *The Postmaster General is ordered to close all area post offices.*—Because the method of transmission is unknown, the mail could be a vector and therefore should not be touched or moved until clearance is given by the Department of Health. All mail delivery and shipping is to cease. All undelivered mail in Houston is ordered warehoused until further notice.

9. *All federal prisons are to remain closed to new prisoners.*—Any prisoner due for release is given the choice of remaining in prison after the release date, in which instance s/he will receive a reasonable per diem for each day remaining in prison. Otherwise, the prisoner is released either inside or outside the city. In order to stop the infection's spread into the prison population, the warden has the choice either of appointing personnel or accepting volunteers to reside in each facility for the duration of the epidemic. If the infection in the city grows worse, prisoners

with good records will be allowed to volunteer for municipal care-taking duties in consideration for reduced sentences or a presidential pardon.

B. The State Executive

1. *A formal request for aid is made to the regional FEMA office.*
2. *The National Guard in and near Harris County is ordered to report to the mayor of Houston for orders.*²⁴⁶—Guard units situated in outlying areas are put on alert.
3. *The Department of Public Safety (DPS)*²⁴⁷ *is ordered to:*
 - a. Have local officers block all the roads leading inside and outside Houston's Beltway 8 until the arrival of the military. All civilians attempting to travel outside the Beltway are told that they will be delayed in their travel plans. They will be allowed to leave as soon as military forces arrive and a short period of quarantine is completed. It is suggested that they return to the city to wait out the epidemic in their own homes or with a friend, or if non-residents, in a hotel. Anyone wishing to travel into Houston is told of the epidemic but is not stopped from traveling into the infected area.
 - b. Establish road blocks in each county for driver's license checks on all state roads leading outside Houston. Anyone holding a driver's license displaying a listed Houston zip code is escorted to the nearest hospital or military base for quarantine. The length of all quarantines is mandated by the CDC.
 - c. Assume that all cars of quarantined persons are contaminated. Cars are to be parked separately from all others by the driver and locked. Their exteriors are to be disinfected by DPS. They are to be returned only to the driver after the successful completion of quarantine, thus preventing relatives from picking up possibly contaminated automobiles. The interior of the car of anyone proved contagious is ordered disinfected before returning it either to the owner or to a family member.
 - d. The head DPS officer of each county must issue a certificate of good health to everyone completing quarantine. This information is recorded in the DPS computer network²⁴⁸ in order that forged certificates be easily identified and in order that anyone with a certificate and a computer verification need not be detained twice for quarantine. Any DPS officer or employee providing false certificates or computer data will be prosecuted. As each person is released from quarantine, it is suggested that they stay in the area until a general all-clear is issued by state health

246. 32 C.F.R. § 502.5(d) (1998): National Guard forces, if not in active federal service, remain under the control of the state governor and are considered part of the local resources available to civil authorities. Federally owned National Guard equipment may accompany a unit when ordered into disaster relief operations by a governor.

247. In Texas, statewide emergency management is the responsibility of a department of DPS.

248. TEX. GOV'T CODE ANN. § 411.042 does not currently provide for recording information on the Bureau's data after the declaration of an emergency.

authorities in order to prevent the many difficulties that they will encounter while traveling, like the numerous roadblocks established in the state. However, no one is to be prevented from traveling once quarantine is complete.

e. All unassigned DPS and sheriff's officers and constables living inside Houston are to report to their neighborhood governments for peace keeping duties. They are ordered to support their neighborhoods by keeping order during the epidemic and by providing general support. They are also ordered to keep a daily journal of all the events taking place in their neighborhood and of the acts that are taken by themselves or others.²⁴⁹ Officers continue to receive full pay during the emergency.

4. *District civil and criminal administrative judges are asked to:*

a. Close all state and county courts. For all legal purposes other than the counting of prisoners' jail time, administrators are ordered to follow the federal model.

b. Oversee the conversion of the courts of local volunteer emergency judges into electronic administrative courts for the duration of the epidemic.

1) Emergency judges are to:

a) Place into guarded quarantine all individuals escaping or attempting to escape from civilian and military quarantine during the epidemic.

i. Depending on the judge's discretion, guarded quarantine can consist of either taking the individual into custody or assigning some form of electronic monitoring, such as leg band, satellite, or internet reporting system under the authority of a pre-trial release organization.²⁵⁰

b) Electronically arraign and release all civilians performing criminal acts where no issue of force is involved.

c) Electronically arraign and place into custody all defendants charged with crimes of force. Before placement in the county jail population, defendants must undergo quarantine.

5. *All state offices and agencies are closed.* For determining filing dates, etc., administrators are ordered to follow the federal model.

249. The best defense against a liability claim is documentation. No matter how severe the incident, as much information as possible should be collected and recorded. Emergency experts suggest that the following information be taken in risk management situations: date and time of incident; exact street location of incident; type of activity writer involved in at time of incident; brief but thorough description of how the incident occurred; type of injury or loss or damage; actions taken to prevent incident; names, addresses and telephone numbers of witnesses; statements made by witnesses, bystanders, and injured parties; site and weather conditions; and, vehicle positions, if appropriate. They stress that the most important point is that the information be available for later retrieval in the event of litigation. JONATHAN D. KIPP & MURREY E. LOFLIN, *EMERGENCY INCIDENT RISK MANAGEMENT: A HEALTH AND SAFETY PERSPECTIVE* 36-38 (1996).

250. My appreciation goes to G.D. McInnis for this suggestion.

6. *All state prisons within the city limits are to remain closed to new prisoners.* Administrators are ordered to follow the federal model.

C. *The Municipal Executive*²⁵¹

1. *The governor is asked for emergency relief.*

2. *The Emergency Operations Center is activated and the mayor immediately takes up residence, along with his emergency staff.*—Advisers provided by the various federal and state agencies take up residence in the center at the discretion of the mayor. The mayor understands that in crisis situations the best decisions are those made jointly. He is also cognizant of the fact that the federal and state advisers will provide him with the points of view of their respective agencies, which may or may not be in the best interest of his citizens.

3. *The city's public relations and information officer is put on emergency status.* The officer activates all of the city's sources for information distribution. Of particular importance are the city's electronic communication resources. The mayor realizes that the media is a very important tool in the crisis; it can either boost the city's morale by showing citizens working through the crisis or harm morale by showing negative aspects of the situation. He asks the local stations to continue broadcasting their standard fare for he knows that a constant interruption in the daily programming could signal chaos. He asks the news directors to run only news clips showing the city's efforts at control and officials, workers, and citizens helping each other. Once the crisis has officially concluded, then the extent of the epidemic can be examined in detail. Twice daily the mayor holds an electronic press conference which is designed specifically to present the city's management of the disease. After each mayoral news update, messages are repeated requesting all residents to remain in their residences until the epidemic is over and that physical isolation from each other is the only way to prevent contamination. He also stresses the temporary nature of the crisis. To prevent the spread of contamination, all news conferences and interviews are conducted electronically.

4. *The National Guard is ordered to:*

a. Guard and distribute the city's supplies of food. Each neighborhood oriented government (NOG)²⁵² is provided with a Guard unit whose responsibility it is to distribute the NOG's supply of food and drink during the course of the epidemic. The mayor knows that with an orderly, efficient, and incorruptible food distribution system, the citizens of

251. For the purpose of this exercise, the city and county executives are treated as one.

252. Neighbor Oriented Governments are volunteer organizations of citizens groups which are not officially affiliated with the city. The city of Houston is divided into 88 NOGS. Each NOG is composed of neighborhood associations and other volunteer citizens groups within its area. Each NOG is independent and creates its own internal structure and officers. As a self-governing body, it sets its own policy and objectives. Houston's NOGs are the inspiration of its current mayor, Lee P. Brown.

Houston will feel safe and secure and will be more likely to remain within the confines of their residences.

- 1) All food distributorships, grocery stores, and restaurants inside the afflicted area are closed to the public.
 - 2) One or more large food warehouses are to be designated collection and shipping points to the NOGs. They are to receive all federal, state, and local supplies of food. Employees are asked to take up residence and to act as stock clerks and record keepers.
 - 3) One centrally located grocery store or food distributorship in each NOG volunteers to act as food distribution point to the neighborhoods. Employees take up residence and act as stock clerks and record keepers. The names, telephone numbers, and e-mail addresses of the manager or agent of each closed facility in the NOGs are collected by the Guard so that they can be opened if the supply of food runs low and the stock in the closed facility must be used.
- b. Guard and distribute the city's supplies of pharmaceuticals. Like the food distribution system, an orderly, efficient and incorruptible drug distribution system will contribute to the morale of the city's residents.
- 1) One or more large pharmaceutical warehouses is designated as a collection and shipping point to all NOG pharmacies and field hospitals. They will receive all federal, state and local supplies of drugs.
 - 2) One centrally located drug store in each NOG volunteers to act as distribution point to the neighborhoods. Employees take up residence to act as pharmacists, stockers, and record clerks.
 - 3) At each closed pharmacy, one pharmacist must be on call at all times in order to provide information about standing prescriptions. This also places a representative of each pharmacy on call if the central warehouse's supply of medicines runs low.
 - 4) Transport NOG pharmaceuticals to designated Houston Fire Department stations.
- c. Make available to each NOG transports to carry infected persons choosing to be moved to a field hospital. Each transport used in this capacity must bare a mark (e.g. fly a red flag or be marked with red cloth or paint) in order to distinguish it as a vehicle for the infected. The vehicle must be of a design that can easily be disinfected after each delivery.
- d. Guard all public quarantine facilities and field hospitals.

5. *The city's Health and Human Services Department is ordered to:*

- a. Assign emergency medical providers (doctors) and emergency medical services providers (medical staff) and volunteer providers and service providers to NOGs, to Houston Fire Department stations, and to field hospitals.
- b. Actively recruit more emergency medical providers, and service providers and volunteers for the quarantine facilities and field hospitals.

- c. Assign emergency medical services volunteers to the NOGs to decontaminate the homes of those residents moved to public quarantine facilities or field hospitals.
- d. Assign volunteer organizations, particularly the Red Cross, Salvation Army, and Mennonite Disaster Service to assist in nursing and general care at NOGs field hospitals and in public quarantine facilities.
 - 1) Once a volunteer begins work in the field hospital or quarantine facility, s/he is considered contaminated and cannot leave without first undergoing quarantine.
- e. Open public quarantine facilities and field hospitals.
 - 1) Quarantine Facility:
 - a) The Astro-Complex is chosen for its large covered space, isolation, ease of supply, and central location.
 - b) Anyone determined by authorities to require public quarantine and all homeless not assigned to residential shelters for the duration of the outbreak, are moved to the multi-building complex.
 - c) Anyone found to be infectious is immediately moved to a field hospital.
 - d) The military model (discussed below), is followed in full. Once quarantine is complete, individuals are released unless they are unassigned homeless.
 - e) All those without homes are provided tented living quarters on the grounds of the Astro-Complex and are encouraged to help by serving the quarantined and isolated.
 - 2) Field Hospitals:
 - a) The airports are selected as sites of public field hospitals because of their large covered ground space, isolation, and ease of supply. If more space is needed, there is room for tents on the tarmac. Secondary sights are notified of possible use: public buildings such as the sports arenas, convention centers, concert halls, and the civil and criminal courthouses. Hotels are high on the list of private buildings that can be used for field hospitals, if volunteered/contracted/commandeered into service. Only as a last resort will public underground and covered parking lots be considered or private property, such as cruise ships, be commandeered.
 - i) All hospital supplies arriving at the airport by plane or truck are to be unloaded by the on-board crew on the tarmac away from the terminals and without assistance from ground personnel. No outside supply plane or crew is allowed access to the terminals. Only hospital planes brought in for the treatment of the sick are allowed to link with the terminals.
 - ii) No maintenance or fueling of planes is to occur until the end of the epidemic; planes requiring either are grounded for the duration of the epidemic.
 - iii) All interiors and exteriors of aircraft linked with the terminals must be decontaminated by the Health

Department using mandated CDC methods prior to reuse.

- iv) All airport employees and volunteers remaining on site or acting as ground crews are considered contaminated. All must become residential and perfect quarantine before leaving the airport.
- v) The cargo terminals will act as staging areas for the operations of the Departments of Public Works and Solid Waste.
- b) All personal items of patients arriving at the field hospital are removed and burned.
- c) Bedding for the sick is restricted. To limit contamination, cots are not allowed; a sleeping bag or loose bedding is preferred. By placing the bedding directly on sheets of plastic supplied by FEMA, when a patient dies workers are able to wrap the deceased in the bedding and plastic. In this way, all contaminated bedding leaves with the deceased.
- f. Investigate all cases of individuals accused of breaking homebound quarantine.

6. *The city's Solid Waste Department is ordered to:*

- a. Prepare for nocturnal body removal from the field hospitals and the NOGS. The department is asked to seek volunteers from within its ranks at increased pay. If none present themselves, then to seek them generally.
- b. Obtain trucks with freezing or refrigeration units²⁵³ from private companies for body pickup.

7. *The city's Public Work's Department is ordered to prepare ground for mass graves and contact with incineration facilities.*—Because of the contagious nature of the dead, private burials are forbidden. The projected death count may exceed a half million or more. Burial sites are to be dug first at the airports, and then on other public grounds within the city, like the parks and golf courses. The department is asked, when possible, to make the burial sites outside the view of local residents. Sites for mass cremation are also sought. If the death count escalates too rapidly, permission for emergency burials at sea using sea/land cargo containers from refrigeration/freezer ships in international waters will be sought from the President. It is also to seek volunteer workers, if needed.

8. *Emergency employees of the city's departments of Solid Waste, Public Works, and Health are ordered to become residential for the duration of the epidemic.*—Because workers may accidentally become contaminated, they must be kept isolated from the general population. They are provided with rooms and meals at designated high-rise hotels assigned to those whose work could cause them to become exposed. Here, their health is closely monitored by medical personnel, and their off-duty movements are supervised by the National Guard. Once the epidemic ends, all personnel are required to complete quarantine before returning to

253. Freezing and refrigeration decreases the replication of most infectious agents.

the general population. Since they must also move about the city, the public utility companies are ordered to establish similar programs.

9. All city offices are closed and employees not assigned emergency duties are asked to return home and to voluntarily report to their NOGs.

10. Each NOG is asked to:

- a. Compile a list by address of all the households and their residents on a block by block basis within 12 hours. The list is to be used for record and statistical purposes and to assist in food and medicine distribution to the homebound population.
- b. Assume catering functions for all homebound residents in their areas.
- c. Document for the city all care-taking expenses incurred during the epidemic, and keep a log of their activities and those of their Associations during the epidemic.

11. The Houston Police Department (HPD) is ordered to:

- a. Retain a skeleton staff of volunteer officers in residence at police headquarters and sub-stations for operational purposes.
- b. Have each unassigned officer report to his NOG for voluntary peace keeping functions. Full pay will be given to each officer during the emergency.
- c. Follow the state's judicial model for incarceration of those caught escaping quarantine, and/or performing violent and non-violent crimes.
- d. Set aside one or more police buildings or substations for confining those who escape from the military or public quarantine facilities.
 - 1) Nonviolent escapees are to be held in quarantine and then released to the general population of the city without penalty.
 - 2) Threatening or violent escapees are to be electronically arraigned, quarantined, and incarcerated.
 - 3) Anyone held either in quarantine or in incarceration who shows signs of infection is immediately moved to a secure section of a field hospital.
- e. For purposes of release of municipal prisoners who have completed their sentences into the general population, HPD will follow the federal model.
- f. All officers are to follow the state model of record keeping.

12. The Houston Fire Department (HFD) is ordered to:

- a. Put all personnel on 24 hour alert until the epidemic ends.
- b. Assess and coordinate with the doctors, medical staff, and volunteer doctors and staff the medical and pharmaceutical needs of NOG residents:
 - 1) Provide emergency medical assistance to NOG residents in their homes and determine whether the services of a doctor are needed.
 - 2) Communicate with the NOG the medical, pharmaceutical, and care needs of the homebound.
 - 3) Distribute drugs and medications to the homebound.

- 4) Assess whether the sick wish to be moved to a field hospital.
- 5) Report to the NOG any need for body removal from houses.
- c. Designate separate working and residential stations or quarters for HFD medical response personnel from that of fire fighting personnel.
- d. All doctors, HFD, and volunteers acting as medical responders must complete quarantine before returning to the general population.

13. The closing of the municipal courts is ordered—Court administrators are ordered to follow the state model.

14. The closing of the port is ordered.

- a. Goods/commodities are neither to move into or out of the port. All warehoused goods/commodities must remain stored until the cause of the epidemic is determined.
- b. The Health Department will determine whether warehoused goods/commodities pose a health danger, and if so, will prescribe and supervise the decontamination procedures mandated by the CDC.
- c. The port will conditionally reopen if cruise ships are commandeered for field hospitals.

15. The closing of the rail stations is ordered.

- a. All incoming trains are rerouted around the city for fear of accidental contamination.
- b. Those within the city are ordered not to depart until they are determined not to be contaminated or are decontaminated by the Health Department.

16. A general order is issued that all businesses inside the boundaries of Beltway 8 are to immediately close and that all employees are to return to their residences.

- a. Businesses within the city limits but outside the Beltway are placed on notice that they will be closed if it is determined that the disease has spread outside the cordoned area.
- b. They are asked to voluntarily close to protect themselves from the disease and in order to reduce the chance of accidental spread.

17. A general order is issued that no public meetings of any type are to be held.—As public gatherings may spread the contagion, none are allowed. Religious services are to be through electronic means and all ministrations to congregations are to be conducted electronically.

18. A dusk to dawn curfew is ordered on all city residents.

D. The Commander of the Federal Troops

1. The commander orders that Beltway 8 (which circles the city) serve as a cordon sanitaire around Houston.

- a. The Beltway is closed to all traffic (including domestic police traffic) except to that of military personnel.
- b. Highways 6, 1960, and 2100 are ordered to serve as a fall-back line if infection beyond the control of the medical authorities is discovered outside the Beltway.
- c. The perimeter of the Grand parkway is to act as the second fall-back line.

2. All federal highways which intersect the Beltway from inside the city are ordered closed.

- a. Those highways dissecting Houston (radial freeways leading into the center of the city) are to act solely as avenues of military supply to the city.
- b. When it is determined that an area between intersecting radial highways is no longer infected, the federal cordon is to be lifted in that area. Thus, the military cordon will become an ever-narrowing circle as the city returns to normalcy.

3. Round-the-clock sentries and patrols of the Beltway are ordered.

- a. No Houston citizen is allowed to cross the military cordon; anyone attempting to do so will be detained, held in quarantine, and then released either inside or outside the city (depending on his choice).
- b. Anyone threatening/using violence will be quarantined and then taken to the closest HPD substation for electronic arraignment and incarceration.

4. Intersections of Beltway 8 and state or federal highways are to act as staging areas for the regular forces and the National Guard.

5. Military residential facilities for supply personnel are erected outside the Beltway.

- a. Soldiers are ordered not to loiter or gather in groups or mingle with the citizens without specific orders to do so.
- b. Personnel working supply are not to have contact with quarantine personnel.

6. Military residential facilities for quarantine personnel are erected inside the Beltway.—Quarantined personnel are to be closely monitored for infection by medical personnel.

7. *Portable furnaces for burning contaminated items and Advanced Suites for Trauma Casualties*²⁵⁴ *outfitted to combat infectious disease are ordered dropped by helicopter.*

8. *Quarantine areas are ordered erected inside the Beltway.*

- a. The military commander establishes a series of separately standing, guarded, and fenced tent camps that are spread in a large semi-circle around an induction/examination center.
- b. Each tented area is identified by a letter and the number of hours that has been successfully performed in quarantine by individuals inside each tent camp (e.g., O,6,12,18, etc. hours) is also clearly marked.
- c. The total amount of time in quarantine is mandated by the CDC.

9. *Anyone requesting quarantine in order to leave the area must consent to the following:*

- a. All possessions are locked in vehicles; anything brought into a quarantine area is burnt.
- b. All persons seeking quarantine are medically examined, first electronically (to rule out obvious cases of infection) and then physically. All clothing is incinerated and sterile clothing supplied.
 - 1) If symptoms are found, the person is immediately transported to the nearest field hospital.
 - 2) If no symptoms are discovered, the individual is grouped with other arrivals and placed in the first available tent camp to begin quarantine.
- c. His car is parked in a designated area. The license number of the driver and the tag number of the automobile of each car being parked is noted.
 - 1) The cars of those quarantined are assumed contaminated.
 - 2) The exteriors of all cars are disinfected as soon as they are parked.
 - 3) The interior of cars of persons found to be infected are ordered disinfected before returning them to either their owner or a member of his family.
- d. If the numbers of those wishing to leave the city swell beyond the capacity of the quarantine facilities, waiting lists will be established.

10. *The military commander is to issue certificates of good health to residents completing quarantine.*

- a. The name, address and driver's license number of those granted certificates is supplied to DPS and recorded on their computer network.
- b. It is suggested to each citizen as they are released from quarantine that they stay near the area where released until the epidemic is over in order to prevent further difficulties while traveling.

254. Prototype suites have been built by the Oak Ridge Centers for Manufacturing Technology. They were developed by the U.S. Army, U.S. Marines, Harvey Mudd College, and San Jose State University. Mariette Dichristina, *The Ninth Annual Best of What's New: The Year's 100 Greatest Achievements in Science & Technology*, POPULAR SCI., Dec. 1998, at 53, 82.

- c. No one is restrained from traveling if they choose to do so.

11. All roadway transportation of goods/commodities to outside the city is halted.—Until the scientific basis for the outbreak is ascertained, all cargo is considered contaminated.

12. Before leaving the area, but after decontamination and striking and burning the quarantine tents and bedding, and decontamination of all vehicles, the commander and his men pass the CDC recommended number of hours in quarantine to determine whether they are infectious before moving out.

E. Neighborhood Oriented Governments

1. The NOG leadership.²⁵⁵

- a. Activates its emergency committee.²⁵⁶
- b. The emergency committee activates its emergency plan:²⁵⁷
 - 1) Calls to action and distributes the telephone numbers and email addresses and committee descriptions and assignments of the emergency committee members to the neighborhood Associations and Block Captains.
 - 2) Activates its volunteer support teams that work in conjunction with the National Guard, HPD, and HFD.
 - 3) Ensures that the Associations and the Block Captains are supplied with suitable equipment (disposable gloves, face masks, etc., and the disinfectant mandated by the CDC).
 - 4) Coordinates and forwards food requests from the Block Captains.
 - 5) Coordinates and forwards food supplies to the Block Captains.
 - 6) Arranges with the city for body removal.
- c. Keeps formal records of everything distributed to it and all actions taken.

2. The Neighborhood Association.²⁵⁸

255. The following is a model of NOG organization: Each NOG is subdivided into Associations according to natural geography, civic groupings, or deed restrictions. High rise buildings are counted as one Association. Each Association is subdivided into blocks headed by a Block Captain and his lieutenant(s). Each Association has a governing council which sends representatives to the NOG.

256. In the model NOG, one of the prerequisites for the emergency committee is possession of an internet connection in order to facilitate communication between the city, the NOG, its subdivisions, and the committee's members. The emergency committee has the following standing subcommittees: finance and records, law and order, medical and pharmaceutical, care-giving (nursing, decontamination, etc.), and communication. This list does not preclude the creation of other committees, if the need arises.

257. The purpose of a NOG emergency plan is to ensure that each resident within its border receive the supplies needed, that all orders issued from the mayor's emergency center are complied with, and that the peace is kept.

258. Some NOGs are subdivided into self-governing civic associations. Others are not divided at all. Where no other subdivisions exist, all reports/requests are made directly to the NOGs by the Block Captains.

- a. Collects requests for supplies of food from the Block Captains and forwards them to the NOG.
 - b. Each day it e-mails to the NOG and the city the names and addresses of the ill and the dead. This allows the city to pin point areas hot with infection and it allows the NOG to arrange for nocturnal pickup of the deceased.
 - c. Completes such other duties assigned to it by the NOG.
3. *The Block Captains:*²⁵⁹
- a. Meet with the head of each household to explain the NOG emergency plan and the orders that have been issued by the municipal emergency center.
 - 1) In multi-family residences, the Block Captains meet with the designated leader of the building or complex, or with the building manager to explain the emergency plan and orders.
 - 2) The name, age, address, telephone number and e-mail address of each householder and his family members are recorded.
 - a) Block Captains are to remain at a distance while conducting interviews, and, out of fear of contagion, at no time is anything to change hands between the Block Captains and the homebound residents.
 - b. Report the food, health and medical needs of the block to the Association or NOG (whichever has been designated).
 - c. Determine the care needs of the block during twice daily house-to-house interviews of the housebound. Each morning, requests for supplies are electronically transmitted to the Association or the NOG for next day delivery.
 - d. If an inhabitant of a residence is found to be infected, the Block Captain:
 - 1) Asks if the infected (isolate) wishes to protect his family by moving to a field hospital. If transport is desired, the Block Captain requests transportation from the NOG.
 - a) All isolates are to bring either sheets and blankets or, more preferably, a sleeping bag with him to the Field Hospital.
 - 2) Asks each individual member of the family that is not infected if he wishes to be moved to a quarantine facility. If transport is desired, the Block Captain requests transportation from the NOG. If healthy family members choose to remain in their residence with an isolate, they too must become isolates.
 - a) All quarantines are to bring either sheets and blankets or, more preferably, a sleeping bag with him.
 - b) Those successfully completing quarantine will be provided reasonable lodging until their home has undergone decontamination.

259. Block captains are either elected by their block, volunteer, or are appointed by the Association or the NOG.

- c) The family is informed by the Block Captain of the probability that all remaining will become exposed to the infection and die.
 - d) To disobey any state and municipal laws and ordinances means instant transportation of isolates to a field hospital or to a public quarantine facility (as determined by the local Health Department).
 - e) To the dwelling, the Block Captain posts a notice that the residence is contaminated. All communication (except electronic) with those inside is prohibited except that with municipals officials and designated volunteers.
- 3) Records the house number and the names and ages of and forwards to the Association and the NOG with the names of the ill noted.
 - 4) Immediately disinfects the front door and porch of the residence using the method mandated by the CDC.
 - 5) Checks the house twice daily to ensure that the notice is in place and that the food and medical needs of the isolates are being met.
 - 6) At no time does the Block Captain either enter any residence or have physical contact with anyone or anything inside a residence while determining the needs of those within. Entering a residence is the responsibility of HFD and the Health Department and its physicians.
 - 7) If the Block Captain determines that there is no response from within a house, the NOG and Association are notified.
 - 8) If it is determined that members of an infected house have broken their isolation, the Block Captain immediately contacts the Association and the NOG and reports the infraction.
 - a) A no tolerance stance is taken against isolates who knowingly and purposefully break isolation.
 - b) Anyone in the household leaving the house will be immediately removed and sent into isolation or quarantine (as determined by the Department of Health).

F. The Single Family Unit

1. Isolates:

- a. Each family chooses whether its sick members will remain within their residence or be transported to the nearest field hospital.
- b. Upon the death of an isolate, the family calls the Block Captain who reports it to the NOG and to the Association. The NOG arranges for a nocturnal pick-up of the deceased. A special NOG team wraps the deceased in his bedding and moves him to the curb for pickup by the city.
- c. After removing all bedding, worn clothing, soaps, etc. of the sick family member, they are placed in a plastic bag by the NOG team and put with the body for removal and burning by the Solid Waste Department.
- d. If no other isolates are in residency, the house is disinfected at the expense of the owner.

e. Householders remaining with the sick are also considered isolates until the quarantine period mandated by CDC is perfected with no illness or deaths and the house has been disinfected.

2. *Homebound:*

a. To avoid infection, homebound families must quarantine themselves. They must remain inside their residences during the duration of the epidemic.

1) They are advised to talk to their friends and neighbors only at a distance through open windows or doors, or electronically.

2) All physical contact between individuals and other households is discouraged.

b. They are to rely heavily on electronics for news of the epidemic, for religious and devotional services, and for entertainment.

G. *The Individual*

1. *The Homebound Individual:*

a. The individual chooses whether he will remain in the residence during the epidemic or whether he will leave the city.

1) All desiring to leave the city must perfect quarantine.

2) All desiring to become homebound are subject to a "slowed tolerance" threshold.

a) Any individual abusing homebound quarantine (as determined by state statute or city ordinance) is subject to being placed under electronic surveillance and under the authority of a pre-trial release organization at his own expense.

b) A consistent pattern of the breaking of homebound quarantine (as determined by state statute or city ordinance) and the individual is electronically brought before a emergency judge by the NOG for possible charges or fines.

2. *The Infected Individual:*

a. If diagnosed by an emergency medical provider as infected, the individual chooses whether he will remain in the residence or be removed to a Field Hospital.

1) If an ill individual chooses to become an isolate, the individual forgoes any due process right to remain at home if the isolation is broken.

b. Each family member chooses whether he shall remain with the infected individual or be transported to a quarantine facility.

c. The individual chooses whether he will be treated medically. All wishing to remain in their homes without medical assistance are allowed to do so.

d. Any individual who violates isolation is subject to immediate removal to a public quarantine facility or a field hospital.

- e. The removal procedure is as follows:
 - 1) The Block Captain pins on the isolates door notice of an isolation infraction.
 - 2) The Block Captain reports the infraction to the NOG.
 - 3) The NOG refers the complaint to the Health Department.
 - 4) The Health Department investigates the incident.
 - 5) If removal is not arbitrary but is justifiable on a reasonable ground, the individual(s) is/are immediately removed.
- f. A right to appeal removal is recognized, and an electronic hearing is granted after a reasonable amount of time (as determined by the state statute or city ordinance).
- g. At owner's expense the houses of all isolates are disinfected.

V. *Conclusion*

Fear of exposure to a biological agent can cause a desire on the part of government to trample constitutional concerns in favor of self-preservation. Historically some cities treated biological outbreaks as invading enemies. All liberties recognized in law went out the door as national and local governments attempted to control disease by coercive force. This placed men in the role of aggressors ready to dispatch diseased neighbors in the name of self-preservation. Groups of citizens working together for their own preservation by providing for each other, lessens the need for coercion from a centralized government. A law-based municipal management plan grounded in citizen involvement and freedom of choice allows for compelled, necessary acts that must be taken in order to control an emergency while still protecting fundamental rights against arbitrary transgression by government. Basic individual rights need not be sacrificed to government interests; both can be met with adequate planning and thoughtful action.