

QUARANTINE, MASKS, AND THE CONSTITUTION¹

As Americans, we are privileged to live in a free and open society. The Constitution guarantees our rights. However, “the Constitution is not ‘a suicide pact.’”² Sheriffs, clergy and others claim a constitutional right to ignore stay at home orders, go unmasked, and gather in large groups. These claims are patently ridiculous. Public health is a primary reason for the formation of government. This article explores the legal bases of the government's right to order quarantine as part of its inherent police power to act for the greater public good.

The concept of isolation to avoid spread of disease is as old as the Old Testament. “Come, my people, enter your chambers, and shut your doors behind you; hide yourselves for a little while until the fury has passed by” (stay at home) (Isaiah 26:20 ESV).

And “a plague ridden person,³ . . . shall cover the lower part of their face” (wear a mask) and “cry out unclean, unclean” (so people can take care to avoid them). As long as they have the disease they remain unclean. They must live alone; they must live outside the camp. Leviticus 13:45-46 NIV. And the Cohen/High Priest shall see the plague-spot, and he shall quarantine the plague-spot for seven days. The Jewish holiday of Passover is an early example of a quarantine.

¹ © Marc S. Stern 2020. Marc S. Stern, Attorney, 1825 NW 65th St. Seattle, WA 98117
marc@hutzbah.com.

² *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1883, 198 L. Ed. 2d 290 (2017).

³ Leprosy, now known as Hansen’s Disease, is a bacterial disease is treated with antibiotics.

Sanitary laws were the first public health measures. An early record of these laws is in Leviticus 11.

Quarantine in the modern world originates from *quarantena*, the Venetian language term meaning “forty days,” the 40-day isolation of ships and people practiced as a measure of disease prevention related to the plague.⁴ The legal principles employed to sustain state public health police power were *sic utere tuo ut alterum non laedas* (use that which is yours so as not to injure others) and *salus publica suprema lex esto* (public well-being is the supreme law).⁵

“[T]he tendency of judicial and public opinion to translate the maxim, *salus populi suprema lex*; the public health is the highest law; and whenever a police regulation is reasonably demonstrated to be a promoter of public health, all constitutionally-guaranteed rights must give way, to be sacrificed without compensation to the owner.” Tiedeman, *State and Federal Control of Persons and Property*, § 169.⁶

Quarantine was established in England as part of the common law. It was even mentioned, albeit in another aspect, in the *Magna Carta* in 1215. Blackstone observed that “disobeying quarantine orders merited severe punishments, including death.”⁷

⁴ Sehdev, Paul S. (2002). “The Origin of Quarantine.” *Clinical Infectious Diseases*. 35 (9): 1071–1072. doi:10.1086/344062. PMID 12398064.

⁵ Gostin LO, Burris S, Lazzarini Z. The law and the public's health: a study of infectious disease law in the United States. *Colum. L Rev.* 1999; 99(78-88):59–128.

⁶ *State v. Superior Court for King Cty.*, 103 Wash. 409, 419, 174 P. 973, 976 (1918).

⁷ Sir William Blackstone, (1723 – 1782), *Commentaries on the Laws and Constitution of England*, ABA Press, 2009 at 419.

At the time of the adoption of the U.S. Constitution the United States and the states adopted English common law as the law of the land. Quarantine was a recognized component of the police powers⁸ at the time the U.S. Constitution was adopted. The common law is all the statutory and case law background of England and the American colonies before the American Revolution. (See *Martin v. Superior Court*, 176 Cal. 289, 292-293 [168 P. 135, L.R.A. 1918 B 313]; Civ. Code, § 22.2; Black's Law Dictionary (4th Ed.) pp. 345, 346). *People v. Rehman*, 253 Cal. App. 2d 119, 150, 61 Cal. Rptr. 65 (Cal. Ct. App. 1967).

Justice Marshall, in *Gibbons v. Ogden*, 22 U.S. 1 (1824), writing for the majority, found that quarantine was part of the police powers that remained with the states when they adopted the constitution.

In *People ex rel. Barmore v. Robertson*, 302 Ill. 422, 427, 134 N.E. 815, 817 (1922), the Illinois Court held:

That the preservation of the public health is one of the duties devolving upon the state as a sovereign power will not be questioned. Among all the objects sought to be secured by governmental laws none is more important than the preservation of public health. The duty to preserve the public health finds ample support in the police power, which is inherent in the state, and which the state cannot surrender. Every state has acknowledged power to pass and enforce quarantine, health, and inspection laws to prevent the introduction of disease, pestilence, and unwholesome food, and such laws must be submitted to by individuals for the good of the public. The constitutional guaranties that no person shall be deprived of life, liberty, or property without due process of law, and that no state shall deny to any person within its jurisdiction the equal protection of the laws, were not

⁸ Police power is the capacity of the states to regulate behavior and enforce order within their territory for the betterment of the health, safety, morals, and general welfare of their inhabitants. "Police Power". *Encyclopædia Britannica*. Retrieved 2020 6-30.

intended to limit the subjects upon which the police power of a state may lawfully be asserted in this any more than in any other connection. 12 R. C. L. 1271; *Booth v. People*, 186 Ill. 43, 57 N. E. 798, 50 L. R. A. 762, 78 Am. St. Rep. 229; *State v. Robb*, 100 Me. 180, 60 Atl. 874, 4 Ann. Cas. 275; *Kirk v. Wyman*, 83 S. C. 372, 65 S. E. 387, 23 L. R. A. (N. S.) 1188; *Ayres v. State*, 178 Ind. 453, 99 N. E. 730, Ann. Cas. 1915C, 549.

The U.S. Supreme Court again addressed the issue of police power in *Compagnie Francaise de Navigation a Vapeur v. Bd. of Health of State of Louisiana*, 186 U.S. 380, 385, 22 S. Ct. 811, 814, 46 L. Ed. 1209 (1902), holding, “The state board of health may, in its discretion, prohibit the introduction into any infected portion of the state, persons acclimated, unacclimated, or said to be immune, when in its judgment the introduction of such persons would add to or increase the prevalence of the disease.”

Three years later the court specifically upheld a law requiring vaccination in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 38, 25 S. Ct. 358, 366, 49 L. Ed. 643 (1905):

The authority of the state to enact this statute is to be referred to what is commonly called the police power,—a power which the state did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and “health laws of every description; . . .”

The court concluded:

. . . that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression. Extreme cases can be readily suggested.

Jacobson, supra, at 38; *see, also, Zucht v. King*, 260 U.S. 174, 176, 43 S. Ct. 24, 25, 67 L. Ed. 194 (1922).

As for claimed denial of Constitutional rights, *see* Justice Oliver Wendell Holmes' unanimous decision in the case of *Schenck v. United States*, 249 U.S. 47 (1919), "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."

In Washington the law is, "That the preservation of the public health is a proper subject for the exercise of the police power goes without saying; indeed, it is the first concern of the state." *State ex. rel McBride v. Superior Court for King Cty.*, 103 Wash. 409, 419, 174 P. 973, 976 (1918).

This has been the clear holding by other state courts that have addressed the issue. *Ex parte Roman*, 19 Okla. Crim. 235 (1921):

The power of the Legislature to prevent the introduction and spread of infectious and contagious diseases cannot be questioned, and, the power to make quarantine regulations is one of the most important conferred upon the health authorities, and such regulations constitute a proper exercise of police power.

See, also, State v. Hutchinson, 246 Ala. 48 (1944), 18 So. 2d 723; *Dowling v. Harden*, 18 Ala.App. 63, 88 So. 217 (1023); *Ex Parte Caselli*, 62 Mont. 201, 204 P. 364 (1922).

Ex parte Co., 106 Ohio St. 50, 60, 139 N.E. 204, 207, 1 Ohio Law Abs. 10 (1922), found, quoting with approval, *Zucht v. King*, 43 Sup. Ct. 24, 67 L. Ed. 194:

Mr. Justice Brandeis in the opinion regards and states it as:

(1) ‘Settled that a state may, consistently with the federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative.’

(2) ‘Settled that the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law.’

(3) ‘Settled that in the exercise of the police power reasonable classification may be freely applied, and that regulation is not violative of the equal protection clause merely because it is not all embracing.’

In Justice Jackson's well-known words, the Constitution is not “a suicide pact.”

Terminiello v. Chicago, 337 U.S. 1, 37, 69 S.Ct. 894, 93 L.Ed. 1131 (1949) (dissenting opinion).

The Constitution itself takes account of public necessity. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1883, 198 L. Ed. 2d 290 (2017).

We are now the subject of a pandemic in which over 130,000 persons have died and many more die daily. There is, as of yet no cure and there is no vaccine. It is the primary purpose of government to “provide for the public Welfare.”⁹

If masks and distancing will alleviate this loss, no man or woman has a constitutional right to disregard the public welfare. Law enforcement officials, sworn to uphold the law and serve the public welfare should do the job for which they swore an oath. Anything else is a defalcation of their sworn obligation.

⁹ Preamble to the U.S. Constitution.