

¹ Governmental Executive Authority and Privacy in the COVID Era

In January, when the world was starting to learn about COVID-19, Vietnam quarantined thousands in state-run lock downs of entire villages in response to small clusters of infection. Three months later, Viet Nam appeared to have beaten back the virus. Crucial to preventing a large outbreak was an aggressive involuntary quarantine involving housings thousands in military barracks, dormitories, etc. When a person was confirmed infected, many contacts, including asymptomatic persons were immediately quarantined in state-run facilities instead of homes where they might infect others.

The Vietnam model² would be the ideal to ensure recovery to open up the economy and to avoid a recurrence, absent a vaccine. Unfortunately such an effort is overruled by US constitutional, statutory civil rights privacy and case law that proscribe such actions.

The Supreme Court has affirmed privacy as a constitutional right under *Griswold v. Connecticut*, *Eisenstadt v. Baird*, *Roe v. Wade*, *Lawrence v. Texas*,³, etc..

With cries to keep the economy open and recent protests over Shelter at Home Orders, what steps can the states and federal government take to prevent the deaths of thousands citizens?

Take Joseph LaLima of LaLima's Barber Shop, Kingston, NY, who defied NY Governor Cuomo's continuing to barber in his home giving haircuts to police, firemen, EMT's, etc. at no cost. Subsequently, LaLima came down with the Corona Virus, was hospitalized, recovered and is declining to disclose his customers for tracing.⁴

The federal government and President finally recognized the need to test, but how useful is testing if positive individuals refuse to quarantine and (2) disclose contacts?

Can positive carriers, possible super-spreaders like Typhoid Mary,⁵ be compelled to disclose?

Can exposed individuals be compelled to self-quarantine, or be incarcerated in involuntary quarantine?

¹ © Eric Taussig, Law Office of Eric Taussig, Privacy Compliance Group LLP

² *The Nation*, 4/24/20 by George Black

³ 381 U.S. 479 (1965); 405 U.S. 438 (1972); 410 U.S. 113 (1973); 539 U.S. 558 (2003)

⁴ see: (https://www.nytimes.com/2020/05/15/nyregion/barber-virus-kingston-ny.html?campaign_id=44&emc=edit_ur_20200516&instance_id=18552&nl=new-york-today®i_id=5305792&segment_id=28082&te=1&user_id=5d3cbc4a8023b3068f9563e0613ff347)

⁵ **Mary** Mallon (September 23, 1869 – November 11, 1938), also known as **Typhoid Mary**, was an Irish-born cook believed to have infected 53 people, three of whom died, with **typhoid** fever, and the first person in the United States identified as an asymptomatic carrier of Spanish Flu.

If the “carriers” are minority due to the jobs, or inability to self-quarantine, are federal and state non-discrimination laws violated?

Will states require carriers to wear a special attire to insure physical distancing?

Will a COVID-Free passport/electronic chip as South Korea and Singapore use be in our future?

If “carriers” who refuse to quarantine become “Typhoid Mary’s”, do they have liability to others?

Do privacy and constitutional rights trump public health concerns?

Can COVID carriers be compelled to quarantine and involuntarily disclose contacts? That is the key to determining which law prevails. While few reported cases have yet started up the appellate ladder involving COVID-19, the question is fascinating and important for future governance.

History of Quarantines

From Venetian times, a connection between seafaring and the spread of infectious disease has been recognized. The term “quarantine” comes from Italian meaning “forty”, the days ships were detained before allowing disembarkation.

In 1647 the Massachusetts Bay Colony enacted a law to prohibit entry from a foreign source.⁶ In 1754, the Port of NY regulated entry to control Yellow Fever.⁷ In 1796, the new federal government enacted “An Act Relative to Quarantine” allowing Federal Revenue Officers to enforce State Quarantine laws.⁸ In 1799, “An Act Respecting Quarantine and Health Laws”⁹ gave the Secretary of Treasury the power of enforcement. After the Civil War, quarantine authority was shifted to the Secretary of War after Congress passed a “Joint Resolution Providing for a More Effective Quarantine on the Southern and Gulf Coasts” to control Yellow Fever.¹⁰

⁶ Williams, Ralph Chester, M.D., The United States Public Health Service, 1798-1950 . Commissioned Officers Association of the United States Public Health Service, Washington, D.C., 1951, pp. 63-65.

⁷ Ibid, pp.67-69.

⁸ An Act relative to Quarantine", May 27, 1796. Fourth Congress, Session I, Ch. 31, 32

⁹ An Act respecting Quarantine and Health Laws", February 25, 1799. Fifth Congress, Session III, Ch. 12

¹⁰ Joint Resolution providing for a more effective System of Quarantine on the Southern and Gulf Coasts.", June 6, 1872. Forty-Second Congress, Session II, Res.

With Yellow Fever outbreaks came the 1878 "Act to Prevent the Introduction of Contagious or Infectious Diseases into the United States"¹¹. That act created the Division of Quarantine within the Marine Hospital Service (MHS) with federal quarantine responsibility. Section Two directed:

"[W]henever any infectious or contagious disease shall appear in any foreign port... infected with cholera or yellow fever, ... shall immediately give information ...to the Supervising Surgeon-General of the Marine Hospital Service..."¹²

The Yellow Fever epidemic's cities like Memphis and New Orleans catastrophic. In ten days, twenty-five thousand people fled Memphis, and one third of the remaining twenty thousand citizens succumbed to the disease. The effects on commerce were devastating. Communications and trade were stopped almost entirely throughout the lower Mississippi Valley, and trains were packed with fearful refugees. Meanwhile travel between towns was hampered by the many local quarantines which turned away newcomers at the point of shotguns. New Orleans estimated that it lost \$5,000,000 in commerce due to the 1878 epidemic.

The 1878 Act shifted regulatory control of quarantine regulations to the federal government. The Act authorized the Surgeon-General to create rules and regulations for quarantine enforcement, so long as those rules did not "conflict with or impair any sanitary or quarantine laws or regulations of any State or municipal authorities..."¹³

The caveat that federal regulations not contradict state laws reflected the view that quarantine and health regulation remain a state police power. In ways, the statute went further than simply allowing the Surgeon General to create regulations; it also authorized state and municipal health officers to "act as officers or agents of the national quarantine system". The statute provided that "there shall be no interference in any manner with any quarantine laws or regulations as they now exist or may hereafter be adopted under State laws."¹⁴

In 1888, Congress enacted "An Act to Perfect the Quarantine Service of the United States," that provided for penalties for violations of quarantine laws and established new quarantine stations.¹⁵ In reaction to smallpox epidemics in Hong Kong, Congress authorized the construction of a quarantine station on California's Angel Island.

¹¹ www.nih.gov, NIH timeline and "An Act to Prevent the introduction of contagious or infectious diseases into the United States.", April 29, 1878. Forty-Fifth Congress, Session II. Ch. 66.

¹² An Act to Prevent the introduction of contagious or infectious diseases into the United States.", April 29, 1878. Forty-Fifth Congress, Session II. Ch. 66, Section 2

¹³ Id., Section 2

¹⁴ Id., Section 5.g

¹⁵ The penalties provided for in the Act included "a fine of not more than three hundred dollars" and/or "imprisonment for a period of not more than thirty days". The quarantine stations authorized by the Act included those at the Delaware Bay, at Cape Charles on the Chesapeake Bay, on the Georgia coast, at Key West, at San Diego Harbor, at San Francisco Harbor, at Port Townsend, and at the entrance to Puget Sound. "An Act to perfect the quarantine service of the United States.", August 1, 1888. Fiftieth Congress, Session I, Ch. 727.

With yellow fever continuing, 1890 brought the Interstate Quarantine Act that authorized the MHS to prevent the interstate transmission of cholera, yellow fever, smallpox, and bubonic plague.¹⁶

In 1891 Congress provided for the exclusion of those with "loathsome or dangerous contagious disease[s]".¹⁷ The Act mandated medical inspection of immigrants at port of entry. The Act was aimed to prevent the ingress of immigrants carrying yellow fever, cholera, and plague and was deemed pivotal after an 1890 cholera epidemic in Europe and Asia. Congress also authorized medical inspection of immigrants in the 1892 Immigration Act providing for the exclusion of "convicts, lunatics, idiots, and others unable to care for themselves".

In 1896, the Supreme Court passed upon the validity of federal quarantine powers under the Commerce Clause and the simultaneous power held by states to implement their own quarantines in *Bartlett v. Lockwood*¹⁸ in 1896. The Court upheld the "authority of Congress to establish quarantine regulations to protect the country...and ...its commerce from contagious and infectious diseases,"¹⁹ . It also, however, recognized that this federal power did not invalidate state laws relating to the same policy domain, citing Congress's decision "in view of the different requirements of different climates and localities and of the difficulty of framing general law upon the subject, ...to permit the several States to regulate the matter of protecting the public health as to themselves seemed best."

Another 1896 case presented the question of whether state or federal laws would prevail in the case of conflict, in *Hennington v. Georgia* where Justice Harlan stated:

"If the inspection, quarantine, or health laws of a State, passed under its reserved power to provide for the health, comfort, safety of its people, come into conflict with an act of Congress, passed under its power to regulate interstate and foreign commerce, such local regulations, to the extent of the conflict, must give way in order that the supreme law of the land — an act of Congress passed in pursuance of the Constitution— may have unobstructed operation."²⁰

This case established that federal power would help enforce state laws regarding maritime travel, it would neither negate the commerce power nor federalize state quarantine laws. This ruling left little question that Congress could enact quarantine laws and the Surgeon General could enforce them even if those laws conflicted with state quarantine laws.

¹⁶ 51st Congress, Session I, Chapter 51, March 27, 1890: "An Act to prevent the introduction of contagious diseases from one State to another and for the punishment of certain offenses."

¹⁷ Id

¹⁸ 160 U.S. 357 (1896)

¹⁹ 160 U.S. 357; 16 S. Ct. 334. January 6, 1896, pp. 361-362.

²⁰ *Hennington v. Georgia* , (1896) 163 U.S. 299, 309.

The 1893 Act had to avoid both Constitutional and political pitfalls from the “states' rights” side of the issue, but also opposition from those who wanted a comprehensive federal public health organization.

19th century legislation was directed at immigrants; 20th century legislation had to address immigration, tourism and business travel of a magnitude never contemplated by the 19th century legislation.

The most severe test came with the 1918 influenza pandemic, (Spanish Flu) caused by an H1N1 virus with genes of avian origin. Although no consensus exists regarding where the virus originated, in the US, it was first identified in military personnel returning from World War I.

Some 500 million people or one-third of the world’s population became infected with this virus. The number of deaths was estimated to be 50 million worldwide with about 675,000 in the US. Mortality was high in children under 5, adults 20-40 years old, and 65 years and older. The high mortality in healthy people, including those in the 20-40 year age group, was unique.

While the H1N1 virus has been studied, the properties making it devastating are still not well understood. With no vaccine to protect against influenza infection and no antibiotics to treat secondary bacterial infections, control efforts were limited to nonpharmaceutical interventions such as isolation, quarantine, personal hygiene, use of disinfectants, and limitations of public gatherings, that were applied unevenly.

The global pandemic lasted two years, but there was a “second wave’ caused by returning troops that were largely unregulated. In October 1918, more than 195,000 Americans died. Autopsies showed significant lung damage. The failure of the federal government to impose large scale quarantines with a shortage of nurses was blamed for the spread and high death rate.

A third wave developed in Australia, spreading back to Europe and the US. It is believed that President Woodrow Wilson contracted the Spanish Flu in 1919 while in Paris negotiating the Versailles Treaty to end World War I.²¹ Ironically the White House stayed totally silent.²²

POST SPANISH FLU DEVELOPMENTS

In post-World War I government promulgated a list of "dangerous contagious diseases" which, if present at a ship's port of origin, would require scrutiny by quarantine inspectors. The "dangerous contagious diseases" listed during this time included: yellow fever, smallpox, plague, cholera, leprosy, anthrax, and typhus. In 1924, Congress provided for a system of overseas medical inspection of immigrants prior to their departure for the United States. The Act of 1924²³ required that immigrants get clearance from a physician attesting to their health.

²¹ See *New Yorker*, 04/117/2020

²² *Id.*

²³ “An Act to Limit the Immigration of Aliens”, Public Law 68-139

Regulations promulgated by the Department of Agriculture have kept the Public Health Service's quarantine powers limited human diseases and some animal diseases that can be transmitted to humans. The Plant Quarantine Act of 1912 authorized the Department of Agriculture to "establish and maintain quarantine districts for plant diseases and insect pests; to permit and regulate the movement of fruits, plants, and vegetables therefrom..."²⁴

World War II impacted the PHS as officers were tasked with contagious disease control necessitated by war. The Public Health Service Act of 1944 (PHS Act) created little new law; consolidating the 1878 Act and others.²⁵ The Surgeon General could promulgate regulations regardless of state or local regulations. Sections 361(b) and (c) clarified the detention and apprehension powers involved in medical inspections of people coming from other countries. Prior to passage of the 1944 PHS Act, persons suspected of having dangerous communicable diseases were detained at the point of entry, but whether they might be released on certain conditions remained unresolved. Subsections (b) and (c) provided for the release of detainees on meeting requirements that ensured that the disease not spread. This provision was needed due to increased air travel. In 1967 the Division of Quarantine Control was transferred to the Center for Disease control (CDC). With the disappearance of smallpox, health inspections and quarantines disappeared from US airports.

The current version of Section 361 of the PHS Act does not differ.²⁶ However, the implementation differs. Implementation changes involved both a diminished federal public health presence and increased level of responsibility delegated to the states.

COVID Concerns

Though public health policymakers do not embrace the quarantine inspection of the past, authorities have cast the communicable disease threats as national security concerns. Even before 9/11 and the anthrax scare, the National Intelligence Council (a division of the CIA) reported to Congress that "new and re-emerging infectious diseases will pose a rising – and in the worst case, catastrophic – global health threat that will complicate U.S. and global security over the next twenty years."²⁷

²⁴ The Plant Quarantine Act", Act of August 20, 1912 (as amended through Public Law 106-170, Dec. 17, 1999)

²⁵ 42 U.S.C. 92 and 42 U.S.C. 25

²⁶ 42 U.S.C. 264. "Regulations to control communicable diseases:(a) Promulgation and enforcement by Surgeon General. The Surgeon General, with the approval of the Administrator [Secretary], is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions..."

²⁷ cnn.com, "Infectious diseases threaten U.S., world security: House panel hears dire warning from health experts". June 29, 2000.

Since diseases that never reach the US threaten security, and despite the impossibility of keeping infectious diseases out of the country, the current approach is to detect diseases and stop them before they gain momentum. In 1999, Surgeon General Satcher articulated this view:

"The health of the American people cannot be fully protected unless efforts are focused on maintaining a system of worldwide health surveillance. It is startling to think that in under thirty-six hours, ...an individual, a disease, or a product can travel from any one point on the globe to another, and thereby pose a serious threat to the health of the entire world."²⁸

Thus, President Trump had the authority to limit admissions to the US based on a the COVID-19 threat. Of course, whether the limits on admissions had any effect is questionable as the US has now the largest number of COVID cases and deaths in the world²⁹. Even though COVID originated in Wuhan, the US excluding travelers from Wuhan or other parts of China had little if any effect as the two earliest points of infection were in Seattle and New York City, with the virus spreading from Europe to NY. The jet age has limited the efficacy of exclusionary policies.

With state mandatory lock downs and orders to shelter in place, but with far more exceptions than in other countries, came many issues including the need to allow for certain essential functions such as the purchase of food, etc. and allowing breaking quarantine for exercise, etc. Initially urban areas became the center of COVID infection and restrictions within the New York area becoming the center for initial COVID spread.

Immediately after restrictions were imposed, questions arose about constitutional and statutory rights from the right to free speech, religion, travel, etc. Statutes such as HIPPA, the ADA and limitations on freedoms became issues for state and the federal government. As many state governors declared "States of Emergency", there were limitations on freedom of travel, worship and other rights.

Quarantine & Tracing

As a practical matter, most state executive emergency orders to "Shelter in Place" relied on voluntary cooperation, but there were many violations and for the most part a lack of enforcement. As described earlier, the Kingston NY barber who cut hair from the rear of his home of essential workers such as police and firemen, only to ultimately come down with COVID and be hospitalized, cooperation was nonexistent. Tracing became impossible due to his lack of cooperation and even though the Ulster County District Attorney indicated that he might prosecute, no follow-up occurred. After leaving the hospital, Lalima said:

²⁸ Satcher, David, M.D., Ph.D. "The History of the Public Health Service and the Surgeon General's Priorities". 54 Food Drug L.J. 13, 1999, pp. 17.

²⁹ 187,300 as of September 4, 2020

“I am aggravated to the nines, ...is Cuomo [the Governor] going to pay me? Is he going to make up the difference? Is he going to pay my taxes? Is he going to pay the heat and electric? Is he going to feed my family, he asked?”³⁰

During the pandemic, businesses were compelled by executive order to close, and even some considered essential did not open for fear of contagion. As phased reopening proceeded, many businesses requested immunity from liability. The Trump Administration in “*Cares Act*” relief provided broad immunity from customer and employee lawsuits for contracting COVID.³¹

Complicating matters is that most workplace safety is regulated by the state though there are some federal laws on employment issues, including imposing a duty on employers to have safe workplaces (OSHA). Each state has its own workers’ compensation for employees who are injured at work, and lawsuits by customers who accuse a business of negligence are generally brought in state courts under a patchwork of standards.

Even states lauded for their enforced ‘shelter in place’ edicts agreed to broad immunity for healthcare workers and hospitals and surprisingly nursing homes, which despite the frequency of fatalities of COVID deaths, were granted immunity.³²

Contact tracing has been used as a tool for hundreds of years to contain diseases like tuberculosis, yellow fever and Ebola. A rudimentary form was even used to track the route of a syphilis outbreak in the 16th century. Initially, South Korea, Ireland and New Zealand used the method to successfully control the spread of COVID. The methodology of contact tracing for COVID-19 is to reach individuals who have spent more than 15 minutes within six feet of an infected person and ask them to quarantine for two weeks even if they test negative, monitoring themselves for symptoms during that period. Unfortunately, few locations have reported success, and from the beginning of the US epidemic, states and cities have struggled to find carriers of COVID due to inadequate testing and unconscionable delays in obtaining test results.

In contrast, contact tracing in both Europe and Asia works. In Berlin, Germany giving one’s mobile telephone number to strangers is the rule. “Berlin has been emerging from its coronavirus lockdown in full force, and the cost of freedom, the price of having a snippet of our pre-corona lives — date night with your husband, a haircut — is handing over contact details.” A registry of who was where when, for how long is mandatory so the detectives of the German health authority can trace the contacts of the infected.”³³ In Germany where privacy is a national

³⁰ See footnote 3 & https://www.nytimes.com/2020/05/15/nyregion/barber-virus-kingston-ny.html?campaign_id=44&emc=edit_ur_20200516&instance_id=18552&nl=new-york-today®i_id=5305792&segment_id=28082&te=1&user_id=5d3cbc4a8023b3068f9563e0613ff347

³¹ The Coronavirus Aid, Relief, and Economic Security (CARES) Act, Public Law 116-136

³² Governor Cuomo of NY by executive fiat granted immunity to nursing and senior living facilities. *NY Law Journal* p. 1 July 16, 2020 where the immunity provision was buried in a budget bill. Later, legislation was considered to “claw back” the immunity, but it was quite limited. Senate Bill S 8885

³³ Berlin Dispatch, *N.Y. Times*, June 7, 2020

religion, Germans casually hand over their name, address, etc. Unfortunately in the US contact tracing is failing due to inadequate tracing and the reluctance of carriers to snitch.

In China, the approach is to issue a COVID Clean Passport. China adopted a patchwork system of colored health codes to download onto one's mobile phone. They' are a type of digital health certificate that turns green if you're healthy and you are cleared to work and can travel. It turns red if you have been in direct contact with someone who's sick or you got COVID. If you get COVID you are quarantined and have an electronic sensor attached at your wrist, door or on your phone to insure you remain home. But with privacy and anonymity, France is using mobile phone Bluetooth instead of geo-localization. It is not about where an individual has been but whom you may have come into contact with for a certain period. It works on codes and numbers, not people's identities. If you or someone became infected, anyone who came close would automatically receive an alert, but you would not know who it was from. It is ironic that many Americans will give up privacy with GPS apps such as WAZE to report traffic jams, but not for a demonstrable health hazard.

The issue of cyberbullying has arisen in South Korea where contact tracing and individual identification is publicly accessible. Authorities using digital devices to contact trace disclosed enough information about locations and events where COVID carriers were present to allow trolls to identify these carriers by name, age, gender, etc., and then harass, and in some instances defame them. Thus, restaurants visited by identified carriers are viewed as cursed and then boycotted.³⁴

In the US the issue is “snitching”, particularly with college students. For example, an incident at Cornell, students posted a Snapchat picture of mask-less students at a party. Within days, an online petition was created demanding that those students' admission to Cornell be revoked.³⁵

Legal Issues

Although contact tracing has legal issues, they are not as onerous as they appear. While employers in the U.S. and internationally have increasingly more data privacy regulations to pay attention to such as the General Data Protection Regulation in the EU, the California Consumer Privacy Act and Illinois Biometric Privacy Act, the data privacy legal environment for government entities have less restrictive rules.

There is also a lack of understanding of what Health Insurance Portability and Accountability Act (HIPAA) is. HIPAA was designed to facilitate the portability and interoperability of health care records for healthcare providers, not for data privacy. HIPAA data is considered health information and is limited to covered entities like hospitals and doctors' offices. For instance, a patient's email address is considered health information under HIPAA, but outside the health system, an email address is not considered as such and does not get HIPAA protection. HIPAA also does not apply to anonymous non-identifiable data, the data remaining after being stripped

³⁴ NY Times, September 19, 2020. Also see: <https://www.nytimes.com/2020/09/19/world/asia/south-korea-covid-19-online-bullying.html?searchResultPosition=3> and

<https://www.nytimes.com/2008/09/05/business/worldbusiness/05iht-sknet.html?searchResultPosition=1>

³⁵ <https://www.nytimes.com/2020/09/02/nyregion/colleges-universities-covid-parties.html?searchResultPosition=1>

of personally identifiable information. So if tracing is done without identification and the data remains anonymous, there is no HIPAA issue even for medical sleuths to trace potential carriers.

Further, anonymous data is fair game, legally. “There is no regulation of ‘anonymized’ data. It can be sold to anyone and used for any purpose. Once data is been scrubbed, it cannot be used to identify an individual and is therefore safe for sale, analysis and use,” noted “Re-Identification of ‘Anonymized’ Data,” a 2017 Georgetown Law Technology Review article.³⁶

Few are aware of the Genetic Information Nondiscrimination Act (GINA) or the privacy protections it provides. “GINA is quite protective in employment arena in the sense that employers of more than 15 employees are not allowed to use genetic information to discriminate, so they can’t make hiring, firing, promotion, wage, any decisions based on genetic information,” which includes family medical history, genetic test results and COVID testing.

Legislatures have been enacting legislation to allow tracing. A bill regulating the use of contact tracing has moved its way through the NY legislature. Senate Bill S8450C regulates all information that includes or can reveal the identity of any individual and any COVID-19 related information or test results. New York established this initiative to control the pandemic. Senate Bill 8450C applies to every entity employed or under contract with either the state and/or local government, engaged in contact tracing. The permissible purposes are disclosures to the appropriate health care providers for clinical diagnosis, care, treatment and record keeping.

In August, 2020, U.S. Medicare issued a blanket e-mail to covered participants that stated:

“If you've been in close contact with someone who tested positive for COVID-19, you may be contacted by a contact tracer or public health worker from your state or local health department in an effort to help slow the spread of the disease. Here is what to know if you get a call:

- **A contact tracer may call** to let you know you may have been exposed to someone with COVID-19. All information you share with a contact tracer, like who you've been in contact with and your recent whereabouts, is confidential.
- **You may be asked to self-quarantine for 14 days.** This means staying home, monitoring your health, and maintaining social distance from others at all times.
- **You may be asked to monitor your health and watch for symptoms of COVID-19.** Notify your doctor if you develop symptoms and seek medical care if your symptoms worsen or become severe.

Sincerely,

The Medicare Team”

³⁶ 4 Geo. L. Tech. Rev. 125 (2019)

Medicare does not explain what is “confidential”, but accepts the concept of contact tracing, involuntary quarantine and disclosure.

In the educational arena the limited applicability of HIPAA is supplemented by the Clery Act of 1990 (20 U.S.C. § 1092(f)) requiring schools that receive federal funds to disclose threats to immediate safety, which of course, COVID presents, as well as the Family and Educational Rights and Privacy Act. While the Clery Act was directed at controlling crime to provide transparency in campus crime statistics, it is worded in such a way as to require educational institution attention to the pandemic and requirements for reporting, etc. as it requires immediate notification of significant dangers to the health or safety (e.g. weather, disease outbreak).

The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a Federal law that protects the privacy of student education records. The law applies to schools that receive funds from the U.S. Department of Education and may well be of significant concern for school and college student COVID tracing, as it limits disclosure of certain information without the consent of the student. Usually, student medical treatment records remain under the protection of FERPA, not HIPAA. This is due to the "FERPA Exception" written within HIPAA.

Ethical and Legal Considerations

There are four basic types of privacy: informational, physical, decisional and proprietary. Two are relevant in the COVID context of contact tracing.

Informational privacy involves the maintenance of a confidence such as reading someone’s personal email without consent. Physical privacy relates to the right to be alone or to decline to associate with someone. Decisional privacy is a governmental decision such as prohibiting same sex marriage. Proprietary privacy would be the theft of information, such as information on a person’s bank account.

COVID tracing involves the possibility of breaching informational and decisional privacy if a COVID positive individual declines to quarantine themselves or inform others of prior or future contacts.

Typhoid Mary did not know of her condition, nor did the authorities; but a known COVID super-spreader can be quarantined and traced with prompt and effective testing.

Privacy Concerns and Governmental Powers

Recently a US company, Anomaly Six LLC, with ties to the defense and intelligence communities, embedded its software in mobile apps, allowing it to track the movements of hundreds of millions of mobile phones world-wide, according to the Wall Street Journal. It stated that it is able to draw location data from more than 500 mobile applications, in part through its own software development kit, or SDK. An SDK allows the company to obtain the phone’s location if consumers have allowed the app containing the software to access the phone’s GPS coordinates.

Consumers have no way to know whether SDK's are embedded in apps; most privacy policies don't disclose that information. Anomaly is a federal contractor that provides global-location-data products to branches of the US government and private-sector clients.

Recurring Contact Tracing Problems

On August 12 just as New Zealanders were celebrating 100 days without community spread of COVID, once again pubs, stadiums, etc. were open. Two days later, that changed as four new cases, were identified. Officials said the cluster had grown to 17, as they struggled to map out how the virus returned to an isolated island nation championed for its pandemic response. One theory is that it came through cargo transfer. Some of the infected New Zealanders worked at a warehouse with imported food. Another focus was quarantine facilities for returning travelers, the source of an outbreak in Melbourne, Australia. A mystery and a few cases — that's all it took for New Zealand to say goodbye to normalcy. Prime Minister Ardern immediately announced a new lockdown for Auckland, a city of 1.7 million people, along with testing, contact tracing and quarantine blitz that aimed to quash Covid-19 for the second time. Many other places have faced a similar challenge — Hong Kong, Australia and Vietnam have all confronted new waves after early triumphs.

Constitutional Priorities

Many early cases involving constitutional rights focused on the “right to free speech,” “right to assemble,” “right to bear arms,” and “freedom to practice religion” as opposed to state executive powers to regulate these activities on the grounds of safety, health and welfare of the general populace.

The cases have arisen in the context of the near total shutdown with “shelter in place” orders. With those orders have come “exceptions,” primarily for the need for the sheltered population to obtain food and other necessities. This has resulted in exceptions for certain business shutdowns as the state governors have carved out exemptions for “necessary” businesses such as grocery stores, gas stations, drug stores, that often sell non-required goods and services as adjuncts. These exceptions have generally allowed individuals to shop and stock up on necessities, but also other items if the store is a Walmart, Target or similar.

The shelter in place restrictions have limited religious gatherings. Even if gatherings are allowed there have limits on the size and venue. In some states, exceptions included liquor stores and abortion clinics, raising the ire of some who are opposed to abortion and/or alcohol. Thus far, in cases coming before the courts, the executive power of the State governors to prioritize necessities have been upheld by state and federal courts including items or services that may not appear to be necessities.³⁷

³⁷ Id.

Although many believed that houses of worship provide legal sanctuary including regulation such as the size of gatherings, etc., California in limiting pandemic attendance at religious services, was affirmed in a 5 to 4 Supreme Court decision where Chief Justice Roberts held that:

“Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports and theatrical performances, where large groups of people gather in close proximity for extended periods of time, and the order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.”³⁸

However, on November 26, 2020 in *Roman Catholic Diocese of Brooklyn, et al v. Cuomo*, 592 U.S. __ (2020), the Court in another 5 to 4 decision reversed itself with new Justice Barrett casting a decision holding that Governor Cuomo’s restrictions were “unduly harsh” and while the Court is not a public health expert, the State had treated secular businesses more leniently and less rationally creating a reason to reverse the Cuomo limitation on the size of religious gatherings.

Mask Mandates

Required wearing of masks has become both a legal and political problem. Thus far executive authority has trumped personal and political speech. The rationale behind this is that almost all gubernatorial orders have been characterized as (1) emergency (due to the pandemic) and (2) temporary (until the pandemic expires). Again, emergency orders tend not be overruled. As historic emergency orders have been restricted to war time; unusual weather events of relatively short duration, there are few cases to research. Masks can be customized with messages that likely cannot be limited due to First Amendment protections, but refusing a reasonably narrow executive order to wear a mask is likely not constitutionally protected during a pandemic.

In some states, the issue of whether gun shop sales can be banned as non-essential has been avoided by governors backing down or having closures upheld. In NY, the Governor shut down a gun and ammunition seller, allowing it to sell to governmental entities but not civilians.³⁹ The Court cited that citizens could purchase guns and ammunition at Walmart, refusing to overrule the NY Governor’s executive order shutting down speciality gun shops. In contrast PA, CT & NJ, have backed down after gun advocates sued allowing gun stores to open based upon alleged constitutional challenges.⁴⁰

Privacy Information that Can be Collected Without Consent and Knowledge

³⁸ *South Bay United Pentecostal Church, et al v. Gavin Newsom, Governor, et al.* __U.S.__ (5/30/2020)

³⁹ *Dark Storm Industries v. Cuomo*, No. 1-20-CV 0380 (ND NY, 07/08/20)

⁴⁰ NBC News, April 7, 2020

In the wake of the 9/11 terrorism tracking increased as a result of enactment of the Patriot Act that expanded the government's ability to lawfully monitor phone and data communications. This ability of government to regulate the collection of data appears unchallenged. In addition, the expansion of the government's ability to track activity through financial transactions and citizen activity on the Internet is now regulated.

As HIPPA protects health information only to health care providers and then only so-called "covered entities" that transmit/transact electronically health plans, etc., the Electronic Communications Privacy Act (ECPA) places limits on private sector disclosure to the government by electronic communication providers, but does not prevent transfer of "non-content" information. ECPA has exemptions for "emergencies" when the danger of death or serious injury require disclosure to the government.

Finally, the Fourth Amendment's unreasonable search and seizure protections are limited to situations where the government compels or demands information. As most information is voluntarily provided, it is unprotected by the Fourth Amendment.

In an April 3, 2020 article in *Wired* it was reported that Google released anonymous information on individuals in some 131 countries for "stay home" and "shelter in place" orders during the pandemic. While an argument could be made that tracing a super-spreader requires accessing a person's cell phone records that might require a warrant, the general requirement of the Supreme Court in the *Carpenter* case is that monitoring for more than 7 days triggers a prohibition for "unreasonable search and seizure" as it "violates a legitimate expectation of privacy in the record of a suspect's physical movement."⁴¹ It should be kept in mind that *Carpenter* was not related to health and safety but to robbery suspects where 127 days of cell phone records were suppressed by the Court. As information from COVID carriers could be repurposed, the so-called "sneak and peek" provisions of the Patriot Act would enable the "Typhoid Mary's" of the 21st Century to be traced and identified. In other countries, tracing has been extensive and without individual consent. Location history in Israel, Singapore, South Korea, etc. has been used to control COVID transmission. Thus, tracing will likely be upheld by the courts just as quarantines have been historically upheld and enforced.⁴²

Problems to be Resolved

The US is now enduring a second COVID wave that will likely be addressed with more restrictive lifestyles. In the interim, how will President Trump or President-Elect Biden handle post-COVID restrictions?

The recent concern of a crisis caused by the spread of COVID-19 to the President and other government officials including senators during the election campaign at a gathering to announce a Supreme Court nominee on September 28, 2020 has placed the spotlight on quarantines,

⁴¹ *Carpenter v. United States*, 585 U.S. __ (2018)

⁴² Johns Hopkins University Tally, October 11, 2020

contact tracing, immunity and how to address the COVID pandemic with super-spreader events emanating from the White House.

While no one can predict the future, Michigan may indicate whether executive powers will prevail with emergency orders over constitutional and statutory limitations. The Michigan Supreme Court decided on October 9, 2020 that Gov. Gretchen Whitmer violated her constitutional authority by not obtaining additional legislation from the State legislature. The Michigan Supreme Court ruled 4-3 that a state law allowing the governor to declare emergencies and keep them in place without legislative input is unconstitutional. The court ruled that the 1976 Emergency Management Act did not give Whitmer the power, after April 30, to issue or renew any executive orders related to the pandemic without legislative approval.⁴³ The ruling, requested by a federal judge earlier, serves as advice to the federal court and indicates how the court would rule on a suit challenging Whitmer's emergency powers.

According to an investigative report in the NY Times on October 9, 2020, the Centers for Disease Control and Prevention (CDC) drafted a sweeping required mask order, mandating all passengers and employees on all forms of public and commercial transportation in the US, including airplanes, trains, buses and subways, and in transit hubs such as airports, train stations and bus depots, to wear masks, but it was blocked by the White House, according to federal health officials. The order would have been the toughest federal mandate aimed at curbing the spread of COVID, which continues to infect more than 50,000 Americans a day. The officials said that it was drafted under the agency's "quarantine powers" and that it had the support of the Secretary of Health and Human services, but the White House Coronavirus Task Force, led by Vice President Pence, declined to even discuss it.⁴⁴ That same report also confirmed that the coronavirus task force overruled the CDC Director's order to keep cruise ships docked until mid-February. That plan was opposed by the tourism industry in Florida, an important swing state in the presidential election.

Contract tracing is also authorized under emergency orders for the health and safety of the populace. Unfortunately, the example set by the federal government by President Trump's failure to properly contact trace his White House Reception for Supreme Court nominee Amy Coney Barrett, will likely discourage candid contact tracing. As of October 20, 2020 that "super-spreader" event has morphed into a spread to no less than 50 individuals.⁴⁵ The worst aspect being that CDC guidelines were ignored at both the Rose Garden event and a later campaign meeting that the CDC was excluded from engaging in contact tracing.⁴⁶

Despite the Supreme Court's most recent decision in *Catholic Diocese*, it would appear that federal and state quarantine laws can be used as a predicate for a governmental executive to issue narrowly crafted temporary emergency orders that can supersede constitutional rights of freedom of assembly, religion, etc. Similarly, mandatory mask orders will also likely be enforceable.

⁴³ __Mich.__ (2020)

⁴⁴ NY Times, Oct. 9, 2020

⁴⁵ Washington Post, Oct.8, 2020

⁴⁶ Id

