Almost 800 years ago, King John at the Battle of Runnymede signed the Magna Carta. The Magna Carta promised among other things that, “No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined... except by the lawful judgment of his peers or by the law of the land.” That last clause, “the law of the land” clause, came down over the centuries to be used interchangeably with the term “due process of law”. But what does it mean?

In an early and important English case, Dr. Bonham’s case, the great English jurist, Sir Edward Cook, gave a partial clue. Cook said the law of the land called for impartiality; someone ought not to be a judge in his own cause or in his own case. Decisions of law should be made with a degree of independence. Over time, other aspects of procedural fairness, including notice, an opportunity to be heard, and protection against arbitrary rule also became associated with due process of law.

However, history suggests additional meanings for the law of the land or due process of law. One possible meaning was restraint upon the king. That was, after all, the lesson of the Magna Carta; parliamentary supremacy— that the king would be under the law not above it.

The law of the land clause also became associated with natural law, the view that there exists a law higher than the law of man or king. Natural law theory introduced the idea that certain rights are vested, they come from a higher law and cannot be taken away without natural law. From this jurists concluded that due process precluded taking property from one person, A, to give it to another, B.

Although the roots to due process derived from English law, due process took on new significance when it appeared in written form in the U.S. Constitution. The 5th amendment in the Bill of Rights states that, “No person shall be deprived of life, liberty, or property without due process of law.” By placing the ancient concept of due process in a written constitution, the Framers bequeathed to the American people the possibility that courts, utilizing the judicial review permitted by Marbury v. Madison, could use the due process to strike down the acts of the legislature or the executive branch.

However, in the early 19th century in Barron v. Baltimore, the Supreme Court decided that the Bill of Rights applied only to the acts of the federal government. Thus, the due process clause of the 5th Amendment did not apply to actions of the states.

The Civil War, however, changed the relationship of the federal government and the states and led to the adoption of the 14th Amendment which introduced a due process clause that now applies to the states. The 14th Amendment, Section 1, says, “Nor shall any state deprive any person of life, liberty, or property without due process of law.” This Amendment permitted federal courts to robustly review state actions to determine if they comport with due process and with the rule of law. For the first time, the police power of a state, which is the traditional power of the state to act on behalf of the public safety, health, and welfare of its citizens, had to comport with due process of law.

The Supreme Court took full advantage of the 14th Amendment’s due process clause during the so-called Lochner era. This was the era of the great public health movement of the late 19th century and early 20th centuries when public health coalesced as a discipline. Cities and states began to create professionalized public health departments. During this era, there was a lot of new law, indeed a new activism on the
part of the government, to the dismay of the Supreme Court. This was also the time of more judicial review. Courts began to analyze whether these new laws comport with so-called substantive due process. Specifically, the Supreme Court examined whether laws were enacted to protect health and safety or whether they were simply redistributive, in effect, taking from A to give to B.

Famously, in 1905, in *Lochner v. New York*, the Supreme Court struck down a New York law that set maximum hours for bakeshop workers. The New York legislature and other authorities claimed that this was a public health law to insure sanitary conditions in the bakery industry. The New York courts agreed and found that this law was justified as a protection against tuberculosis and unsanitary conditions. The United States Supreme Court disagreed, opining that the law was not a health law and instead was a labor law that had the effect of taking away the rights of workers that wanted to work more, in essence taking from A to give to B. The law was struck down as a violation of due process.

During the same year, the Court decided *Jacobson v. Massachusetts*, one of the most famous public health law cases. This case upheld a Massachusetts law that required individuals during a smallpox epidemic to be vaccinated or pay a $5 fine. The Supreme Court ruled the state could require vaccination in order to protect against an epidemic. Yet, *Jacobson* also showed how the idea of due process could be applied to public health laws that affected bodily integrity. It also showed that an individual's control of his or her own body could be thought of as a question of liberty warranting judicial review.

The *Lochner* Era's due process jurisprudence was pretty upsetting to the people behind the New Deal – President Roosevelt and his allies. They were angered by the Court's broad assertion of judicial review and its use of due process, as well as the commerce clause, to reject novel and redistributive pieces of legislation. With his so-called court-packing plan, Roosevelt attempted to take control of the Court. His plan did not prevail, but it did have the desired effect. The Court stopped substituting its own views for that of the federal or state legislatures. Instead, the Court acceded legislation a presumption of constitutionality. As long as there was a rational basis for legislation, it would be upheld. Thus the New Deal jurisprudence emphasized that America was an elected democracy not a judicial autocracy.

The Court, however, quickly disregarded its own admonition and began, once again, to wield the due process sword. This time, however, the sword was used in an attempt to prevent the government from depriv-
damental right at stake and yet the Court ruled that the due process clause prevented states from outlawing private sodomy by consenting adults. Hence, the designation of a right as fundamental or not does not always determine how what due process permits.

Other than substantive due process, there is procedural due process which is not about what states may do but about how they must go about applying their general rules to individuals.

The Court has offered a balancing test to determine what procedural due process demands. This test balances the importance of the private interest of the individual with the risk that the state will make a mistake as well as the cost of the enhanced process desired by the individual in order to come up with an answer. The process required by procedural due process ranges from the core of notice to the right to a full trial with access to the courts and counsel as well as everything in between. The specific demands of procedural due process depend on the nature of the right as well as what substantive due process permits. Thus if a state can commit someone only if he is dangerous to himself or others then the question to be answered by a procedural due hearing is whether that person is in fact dangerous to himself or others. Procedural due process keeps the state within the boundaries of substantive due process.

Critically, federal constitutional protections are only a floor. Individuals may have greater substantive and procedural rights under state and federal statutes, regulations, or state constitutions.

Justice Harlan once said, “Due process has not been reduced to any formula. Its content cannot be determined by reference to any code. The best that can be said is that through the course of this court’s decisions it has represented the balance which our nation built upon the postulates of respect for the liberty of the individual has struck between at liberty and the demands of an organized society.” The same can be said for public health law. It is a confused, ambiguous, complex, ever-changing balance but one that is necessary to ensure the protection of public health under law.

**Francis Schmitz**

The Constitution provides many explicit due process rights. These include the right of writs to habeas corpus, except during a rebellion or invasion, which provides a way for people to challenge their incarceration. These also include the right to a jury trial in the state and district where the crime was committed as well as the right to a grand jury indictment in federal court. There is also the right to an impartial jury with one’s peers, the right to know the charges in evidence, and the right to confront and cross examine opposing witnesses. The Constitution prohibits ex-post facto laws, double jeopardy, and bills of attainder, which involves the conviction and sentencing for a crime, usually treason, by a legislative act. One has the right not to testify against oneself or incriminate oneself. There is also the right to a speedy and public trial, the right to compel witnesses to appear, the right to counsel, and the right to appeal. The 14th Amendment will apply most of these rights to the states. Many of these protections will apply throughout the criminal justice process from investigation, arrest, and charging to various pre-trial proceedings, the trial, the sentencing, and the appeal.

The well known *Miranda* warnings also provide due process rights to an accused. The prosecution may not use a suspect’s statements after law enforcement officers take him into custody or otherwise restrict his freedom of action in a significant way unless the prosecution demonstrates the use of procedural safeguards effective to secure the suspect’s 5th Amendment privilege against self-incrimination.

A public health official who, without a law enforcement officer present, takes a statement from somebody where they confess to putting botulism toxins in the salad bar for example, is not a custodial interrogation. However, if one is not under arrest but reasonably believes he or she is not free to leave because the person is surrounded or intimidated, a court may consider the interrogation custodial. There are, however, some public safety exceptions to *Miranda*.

Under case law, courts have ruled that non-testimonial communications taken by authorities do not violate the 4th Amendment or 5th Amendment. Non-testimonial communications may include blood samples, voice samples, trying on a piece of clothing, DNA samples, and handwriting samples. In *Griffin v. California*, it was decided that the self-incrimination clause as applied to the states by the 14th Amendment, prohibits prosecution and the courts from commenting on the defendant’s refusal to testify.

In a criminal case, due process also requires the prosecution to prove beyond a reasonable doubt every element of the crime for which a defendant is charged. The burden of proof in a civil case is the preponderance of evidence, which is generally defined as the greater weight of the credible evidence. There may be a higher standard, one of clear and convincing evidence, for involuntary civil commitment or quarantine. This test is generally defined as being highly probable that the claim is true. For parole revocations, minimum requirements for due process include a parolee’s right to confront and cross-examine adverse witnesses unless a hearing officer finds good cause for not allow-
ing confrontation. For probation revocations, one will have an appointed counsel.

Wilfredo Lopez

Following are four situations which demonstrate how the concepts of substantive and procedural due process come into play in public health practice.

1) In 2003, the New York City Department of Health and Mental Hygiene instituted a new inspection protocol that was viewed initially as an internal direction to department inspectors telling them how to treat particular violations, properly codified in the Health Code, when they observe them on field inspections. It is axiomatic that an enforcement agency, such as the Health Department, has broad discretion with regard to which strategies to employ when enforcing the Health Code. That is, it can choose to enforce by way of education, warning or by compulsory means such as the issuance of notices of violation (NOV) resulting in administrative hearings and the possible imposition of fines. Fines can range from $200 to $2,000 per violation, and the operating programs make recommendations within that codified range to the hearing examiners. Hearing examiners are not bound by such recommendations and can deviate from them.

As a matter of internal policy the Health Department had previously classified violations as “general”, “critical” or as “public health hazards”. If, on a given inspection, less than four general violations were observed, a warning would be given. However, if four or more general violations, or one critical or public health hazard were observed, an NOV would be issued. Furthermore, depending on the severity level of a violation a point value had been assigned. The accumulation of 28 or more points was deemed a failed inspection, resulting in a re-inspection within a short period of time. It should be noted that depending on such factors as the level of compliance and available resources, the periodicity of inspection is largely discretionary.

Therefore, a change in the inspection protocol that instructed inspectors on the specifics of which and how many general violations needed to be observed in order to issue an NOV, or what the point value of a particular violation should be (e.g., 9 cracked eggs are more dangerous than 2, or 3 meats out of temperature are worse than 1), was not initially deemed a rule change necessitating a formal rulemaking process. By reclassifying some general violations as critical, the new protocol tended to “unbundled” previously grouped violations, resulting in the issuance of more NOV’s. And since a higher severity level carried a higher recommended fine, greater monetary penalties could potentially result.

The New York State Restaurant Association brought suit in federal court alleging that the new inspection protocol needed to be formally promulgated. It also complained about the higher recommended fines and a long-standing regulation that forbade the transfer of a permit, and requiring a new permit and a pre-permit inspection when a restaurant is sold or significantly renovated.

Finally, the complaint challenged the Health Department’s website. Innovatively, inspection reports were put on the website so that one can look up a particular restaurant by neighborhood or zip code and get its latest inspection report. A caveat was placed on the site stating that the violations might not yet have been adjudicated. That led to some consternation on the part of the restaurant owners because they can go to a hearing and get some of those violations dismissed and yet those violations would continue to appear on the website until the next inspection. (The department currently updates the website monthly to reflect adjudications.)

The complaint argued that, taken together, the actions complained of amounted to a constitutional deprivation of substantive due process, even if separately they did not.

Substantive due process can be viewed as a requirement that government act with fundamental fairness and not grossly abuse its authority. All these actions together led the Restaurant Association to accuse the department of being grossly abusive in its governmental actions because they were not promulgated as rules, were motivated by a desire to generate revenue, and deprived the plaintiffs of their ability to conduct business. The department viewed the protocol and the other actions as strategies to increase compliance.

The court did not accept the plaintiff’s combination of factors theory, finding no support from case law and the case was dismissed. The ruling held that the complaint did not allege government action that is outrageously arbitrary, conscious shocking, or a gross abuse of government authority.

One of the lessons of this case is that a claim of substantive due process deprivation carries a
2) Procedural due process, to summarize, comes down to notice and opportunity to be heard. The New York City Administrative Code authorizes the Board of Health to declare certain conditions and the premises that they exist in to constitute a public health nuisance, and to order the abatement or remediation of such conditions. Nuisance is defined as anything that is dangerous to life or detrimental to health. It is impossible to have a listing of everything that might constitute a public health nuisance, making vague language a necessity in order to be able to protect the public.

Most nuisance abatement orders are served individually and advise the affected parties of their opportunity to object to the order and the process for doing so, thereby comporting with the notice and opportunity to be heard aspects of procedural due process. However, when a nuisance is citywide and personal service of individual orders would cause a delay prejudicial to the public health, the administrative code also authorizes the service of orders to abate to be made by publication. Publishing an order in a newspaper of general circulation for three consecutive days, constitutes good service of that order and, therefore, notice to all affected parties, including owners or other persons in control of the offending property. After issuing an order, the department conducts inspections to see if the order has been obeyed. If the department determines that the conditions still exist, it can execute the order and abate the nuisance itself or have an agent do so. The cost of executing that order becomes a tax lien against the property which, in essence, is a deprivation of property. While the orders served by publication do not offer an opportunity to be heard. However, procedural due process is a flexible concept. In effect, due process is that process which is due under the circumstances. When exigent, or immediately life threatening circumstances exist such that affording an opportunity to be heard prior to abatement would unduly endanger the public’s health, an exception to normal due process can be established. No one would argue with government’s right to break down a wall in order to diffuse a bomb about to explode.

An example of such a process can be found in relation to West Nile Virus (WNV). Because water accumulations provide a vector for mosquitoes carrying WNV to breed, and because mosquitoes breed every five (5) days or so and are present citywide, in 2000 the Board of Health determined that water accumulations, and conditions conducive to such, were immediately dangerous to life or detrimental to health, declared them to constitute a public health nuisance, and ordered the abatement or elimination of such conditions. That order was served by publication. Every year the department republishes that order making it effective between March 15 and October 31, the mosquito breeding season in New York. Because of the emergent nature of the danger, and because service of individual orders would be impractical and prejudicial to public health, this process is utilized to allow for the immediate abatement of water accumulation and conditions conducive to mosquito breeding. The department can abate those conditions upon discovery and even enter upon private property without further notice as long as there are no locked fences or the owner is not blocking access, in which case an application to a court for an access warrant would be made immediately. In this way the public’s health can be protected with due deference to the principles of constitutional due process.

3) Agency rulemaking provides a clear example of how both substantive and procedural due process principles are applied in practice. The New York City Charter provides a framework for agency rulemaking. In order to summarize, when the department promulgates a rule,
such as an amendment to the Health Code, the proposed rule must be published along with an explanation of the rule's purpose and an announcement of where and when a public hearing will be held. A public hearing is required so that people are given an opportunity to submit written testimony, or appear and give oral testimony. Such a rulemaking process comports with substantive due process in that it provides fundamental fairness and protection against arbitrary rules, and procedural due process is complied with in that notice and opportunity to be heard are the hallmark of the promulgation process.

4) In 2003, in the midst of the SARS outbreak, the New York City Health Code was amended to modernize its civil detention provisions relative to compulsory isolation and quarantine. The new and flexible provision affords detained persons with due process of law respectful of individual civil liberties. The health commissioner has the authority to detain cases, contacts, or carriers, or suspected cases, contacts or carriers of diseases that may be transferred from person to person and which may pose a significant threat to the public health resulting in severe morbidity and mortality. The commissioner must make the determination by clear and convincing evidence that the health of others is or may be endangered by such a person. The clear and convincing standard is an aspect of fundamental fairness. If one is detained, an individualized written order must advise the individual of their rights and the basis of the detention. This amounts to notice. The detention cannot continue beyond the point which the individual is no longer a danger and, in any case, not for longer than 60 days without a court order. If they request to be released, the department has to go to court within three business days and get a court order in order to continue that detention. That order must be acquired within five business days of the request. These provisions afford an opportunity for a formal court hearing. For detentions not exceeding three business days, a detainee has an opportunity to be heard in order to dispute the detention. A right to counsel is also built into the provision. If a detainee requests the city to provide counsel, it must do so free of charge regardless of ability to pay. Again, these can be viewed matters of fundamental fairness, although perhaps not constitutionally required.

Other orders such as home isolation orders may also be issued and an opportunity to be heard must also be provided upon request. A home isolation order is less severe than a custodial civil detention thereby requiring less due process. In a declared state of emergency requiring mass detentions, individualized orders may not be feasible and perhaps may require an application for a court order en masse.

References
1. 8 Co. Rep. 107a, 114a C.P. 1610.
15. New York City Charter §1043.