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AIDS Quarantine in England and the United States

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I. INTRODUCTION

The World Health Organization has declared acquired immune deficiency syndrome (AIDS) a world health crisis, "a health disaster of pandemic proportions." Concern over the spread of this epidemic disease prompted England to apply provisions of its 1984 Public Health Act to AIDS in March 1985, allowing a judge to order an AIDS patient detained in a hospital if the judge is satisfied that the patient would not take adequate precautions to prevent the spread of the disease if not detained. In the United States, some health officials, legislators, and individuals have similarly proposed AIDS quarantine measures because of increas-

1. Where is Research?, San Francisco Chron., Sept. 10, 1985, at 38, col. 1; Altman, U.N. Agency Begins Global Push on AIDS, San Francisco Chron., Nov. 21, 1986, at 1, col. 6. The World Health Organization, a Geneva-based agency of the United Nations that coordinates research and health programs among its 166 member countries, estimates 100,000 people have contracted AIDS worldwide, one million people have AIDS-related disorders, and up to 10 million people are infected with the AIDS virus. Id. at 18, col. 4. See infra notes 74-79 and accompanying text.

2. This Note uses the term "AIDS patient" to refer to persons actually diagnosed with the disease because they have contracted one or more of the "opportunistic infections" associated with AIDS. See infra note 69 and accompanying text. The term "AIDS carrier" refers to both AIDS patients and to persons who have been exposed to the AIDS virus as determined by a blood test that detects the presence of antibodies to the virus. Although not all individuals who carry AIDS antibodies also carry the virus in their blood, no practically available test can isolate the presence of the virus. All those with AIDS antibodies may also carry the virus, and are therefore referred to as "AIDS carriers." See infra note 73 and accompanying text.

3. Public Health Act, 1984, ch. 22, §§ 35, 37, 38, 43, 44. See infra notes 229-232 and accompanying text. Over a year earlier, the European Parliament adopted a resolution on the rights of AIDS patients, but considered "that it may be necessary, in certain well-defined circumstances, to limit the rights of patients where they would involve a danger to public health." 35 INT'L DIG. HEALTH LEGIS. 473 (1984).

4. As applied to persons, the term "quarantine" technically means the restriction of the activities of well persons who have been exposed to a communicable disease through contact with an infected person. The purpose of such restrictions is to prevent disease transmission during the incubation period. The term "isolation" is used to refer to separation of infected persons during the period of communicability to prevent transmission of the infectious agent to others. CONTROL OF COMMUNICABLE DISEASES IN MAN 414-15 (A. Benenson 13th ed.
ing concern and fear about AIDS.⁵ These proposals stem, in part, from scattered uncertainty about how AIDS is transmitted⁶ and from media reports of AIDS victims having sexual contact with partners who are unaware of their disease.⁷ A Florida judge has stated that AIDS is the modern day equivalent of leprosy: "The public has reacted to the disease with hysteria. Reported accounts indicate that victims of AIDS have been faced with social censure, embarrassment and discrimination in nearly every phase of their lives, jobs, education, and housing."⁸

Because AIDS is not casually transmitted and has an incubation period of up to seven years,⁹ applying quarantine measures to the epidemic requires an approach different from that taken in the past for other contagious diseases such as tuberculosis or smallpox.¹⁰ The English law provides that the need for detention does not arise unless the patient will infect others either through sexual relations or by direct contact with blood, as in intravenous drug use.¹¹ Any other laws that would quarantine all AIDS patients or carriers¹² may be overbroad and ineffective.¹³ In the United States the use of quarantine to protect the public from AIDS may violate the quarantined person’s fourteenth amendment rights of substantive due process, procedural due process, and equal protection, as well as his or her right to privacy.¹⁴

In light of the constitutional problems posed by quarantining AIDS carriers and the questionable effectiveness of such measures, laws proposed in the United States that are similar to England’s may prove unconstitutional and impractical in the United States. This Note will

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⁵ See infra note 90.

⁷ See infra note 5.
⁸ Adler, supra note 5, at 18, 23; Alter, Sins of Omission, NEWSWEEK, Sept. 23, 1985, at 34; Texas to Request AIDS Quarantine, supra note 5, at 19, col. 5.

¹⁰ See infra notes 71, 81-90 and accompanying text.
¹¹ See infra notes 46-64 and accompanying text.
¹² Public Health Act, 1984, ch. 22 §§ 35, 37, 38; see supra note 3 and accompanying text.
¹³ See supra note 2.
¹⁴ See infra notes 293-299, 309-311 and accompanying text.
examine the use of public health laws to quarantine AIDS carriers in England and the United States. The discussion will first survey the history of quarantine of humans. Second, an overview of the AIDS epidemic will be given and the disease will be compared with other contagious and quarantinable diseases. Third, the Note will analyze the government's authority to regulate public health in England and the United States. Fourth, England's AIDS quarantine law and United States laws and proposals that may be used to quarantine AIDS carriers will be examined. The constitutional and practical problems posed in the United States by the legislation and proposals will be discussed. Finally, ways to prevent inappropriate use of quarantine and more effective alternatives to quarantine will be recommended.

II. HISTORY OF QUARANTINE

The history of quarantine indicates that it was often used to alleviate fears of disease and was based upon inaccurate assumptions about methods of disease transmission. Therefore, quarantine often bore little relationship to preventing the spread of disease and usually sacrificed concern for the afflicted individual in the interest of safeguarding public health.

A. Quarantine in Europe Before 1900

The Old Testament documents perhaps the earliest use of quarantine in its description of the detailed procedures used for quarantine of lepers. The procedures included diagnosis, isolation, and treatment to the extent available, and were a controlling influence on public health regulations throughout history. When the leprosy epidemic spread periodically in Europe between the second and fifteenth centuries, provisions for its control always included versions of biblical quarantine

15. AIDS presents many related legal issues that are beyond the scope of this Note, including mandatory blood testing, quarantine of places where individuals may engage in high-risk sexual activity, exclusion of children with AIDS from schools, employment discrimination against AIDS carriers, segregation of prisoners with AIDS, and government registration of persons exposed to the disease. See Note, Constitutional Rights of AIDS Carriers, 99 Harv. L. Rev. 1274 (1986) [hereinafter cited as Rights of AIDS Carriers] for a thorough analysis of constitutional limitations on AIDS regulations. For a discussion of the relationship between the criminalization of homosexuality and efforts to control AIDS through public health regulations, see Nichols, supra note 5.


procedures. Special commissions decided whether an individual suffered from leprosy, and those who did were ostracized from society as if they had already died.

The next epidemic of historical significance was the bubonic plague, known as the "Black Death," which in the mid-fourteenth century killed between one-quarter and three-quarters of the population of Europe. Because of the high degree of suffering and devastation, the plague was perceived as divine punishment for sin, and people tried to find a scapegoat. Because they were suspected of poisoning the drinking water, Jews were persecuted. Some were herded into wooden structures and burned alive; whole communities of Jews were slaughtered, their bodies loaded into wine casks and floated down the Rhine River. Nobles and cripples were also suspect.

Quarantine measures were instituted because doing something about the disease was psychologically preferable to apathetic despair. Venice had regulations for isolation of infected travelers and quarantine of ships as early as 1348. In 1485 the city adopted regulations requiring all vessels coming from ports where the plague had spread to stay in the harbor for forty days. The forty-day period was based on the length of the Lenten season, which seemed to be as good a reason as any for determining the length of quarantine. The regulations were ineffective, however, because they failed to account for the role of rats and fleas in the

18. Id. at 89-90.
19. Id. at 90-91.
20. Bubonic plague was called the "Black Death" because it is an infection of the blood that often turns hemorrhages black. Roark, Familiar Pattern: AIDS Adds to History of Epidemics, L.A. Times, Feb. 23, 1986, at 20, col. 1.
21. C. Winslow, supra note 17, at 96-97.
22. Id. at 98; Roark, supra note 20, at 21, col. 2.
23. F. Cartwright, Disease and History 46 (1972).
24. Roark, supra note 20, at 21, col. 3.
25. F. Cartwright, supra note 23, at 46. This sort of scapegoating was not limited to the bubonic plague. One commentator has noted, "One of the myths about epidemics . . . is that there is somebody to blame—somebody is responsible." Roark, supra note 20, at 21, col. 1. For example, the Italians considered syphilis the French disease, while the French called it the Italian disease. In the nineteenth century, influenza was known as the Spanish disease, and through the twentieth century it has been labeled the Hong Kong flu or the Asian flu. "In one sense, the sort of scapegoating that goes on is a way to cut down on anxiety . . . a way to believe that somebody else is responsible—that someone else, not us, will get it." Id. (quoting Charles R. Rosenberg, historian of Medicine at the University of Pennsylvania).
27. C. Winslow, supra note 17, at 115-16.
28. Edelman, supra note 16. Forty days is quaranti giorni in Italian; the English word "quarantine" derived from that phrase. F. Cartwright, supra note 23, at 50.
spread of the plague.\textsuperscript{30} Healthy people feared quarantine more than contracting the illness because of the hardships imposed by long-term isolation from society.\textsuperscript{31} Because people obtained some degree of psychological solace from quarantine measures, theories of how diseases spread were advanced to justify continued quarantine.\textsuperscript{32} In addition, where well-defined health regulations were not instituted, nothing placated society's fears of the epidemic. The absence of quarantine measures thus gave rise to violent expressions of popular hates and fears provoked by the unknown nature of the disease.\textsuperscript{33}

From 1664-1665, a second outbreak of bubonic plague caused the Great London Plague, which killed one-sixth of London's population.\textsuperscript{34} Health authorities exterminated thousands of dogs and cats thought to be carriers, ironically increasing the rat population which was primarily responsible for the spread of the disease.\textsuperscript{35} The widespread death led England to institute quarantine measures\textsuperscript{36} that formed the basis of rigorous quarantine laws passed in 1710.\textsuperscript{37} People afflicted with the disease were shut up in closed houses with red crosses on the door.\textsuperscript{38} No one but "inhumane nurses" were allowed to go in or out until a month after all the members of the house were either dead or recovered.\textsuperscript{39} The procedures were cruel and ineffective, which prompted England's chief medical practitioner to propose a health council comprised of politicians, magistrates, and physicians to ensure impartial justice in administration of quarantine laws so that unnecessary hardships were not imposed on those quarantined.\textsuperscript{40}

By the end of the eighteenth century, plague was still considered communicable between persons, and elaborate quarantine measures, involving many cumbersome and unnecessary procedures, remained in effect.\textsuperscript{41} These procedures inadvertently were of some value in controlling the unknown factor of flea-borne infection.\textsuperscript{42}

\textsuperscript{30} W. McNeill, supra note 26, at 170-71.
\textsuperscript{31} C. Winslow, supra note 17, at 116.
\textsuperscript{32} W. McNeill, supra note 26, at 238.
\textsuperscript{33} \textit{Id.} at 172.
\textsuperscript{34} Edelman, supra note 16, at 29.
\textsuperscript{36} Petteway, \textit{Compulsory Quarantine and Treatment of Persons Infected with Venereal Diseases}, 18 \textit{Fla. L.J.} 13 (1944).
\textsuperscript{37} Quarantine Act, 1710, 9 Ann. ch. 2; see Edelman, supra note 16, at 29.
\textsuperscript{38} C. Winslow, supra note 17, at 190.
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.} at 190-91.
\textsuperscript{41} \textit{Id.} at 238.
\textsuperscript{42} For example, provisions requiring that officials stay a cane's length away from persons
During the nineteenth century, cholera epidemics in Asia and Europe led to detailed quarantine regulations.\textsuperscript{43} Health authorities did not know that the disease was caused by unsanitary water and sewage systems, so the regulations failed to account for transmission by water and food.\textsuperscript{44} The quarantines were therefore largely ineffective, which brought criticism from Swiss physicians appointed to investigate procedures used in Turkey and Russia:

[W]hen cholera first appeared in this country the general belief was that the disease spreads principally, if not entirely, by communication of the infected with the healthy, and that therefore the main security of nations, cities, and individuals consists in the isolation of the infected from the uninfected—a doctrine which naturally led to the enforcement of rigorous quarantine regulations; . . . [to] the excitement of panic; and the neglect, and often the abandonment of the sick even by relations and friends. . . . [T]he practical application of that doctrine did no good, but was fraught with much evil.\textsuperscript{45}

B. Quarantine in the United States Before 1900

Quarantine in the American colonies was primarily a local concern regulated by local laws.\textsuperscript{46} Most of these pre-1900 laws were enacted in response to one of the two major epidemics. First, the high incidence of smallpox between 1647 and 1751 led to a series of laws aimed at isolating the sick.\textsuperscript{47} These regulations provided for smallpox victims to be isolated inside homes or sent to quarantine hospitals, also known as “pest-houses.”\textsuperscript{48} Massachusetts was most effective in controlling the spread of smallpox because it had the greatest number of health regulations preventing direct human contact, which was how smallpox was transmitted.\textsuperscript{49}

Second, a yellow fever epidemic appeared in Philadelphia in 1699, which led to a maritime quarantine\textsuperscript{50} in 1700.\textsuperscript{51} Since yellow fever was not casually contagious, but spread primarily by mosquitoes, use of quar-

\begin{thebibliography}{99}
\item[{43}]{Id. at 253-55.}
\item[{44}]{Id. at 254; Roark, supra note 20, at 21, col. 1.}
\item[{45}]{C. Winslow, supra note 17, at 253-54.}
\item[{46}]{Edelman, supra note 16, at 29; Morgenstern, The Role of the Federal Government in Protecting Citizens from Communicable Diseases, 47 U. CIN. L. REV. 537, 541 (1978); J. Duffy, Epidemics in Colonial America 101-03 (1971).}
\item[{47}]{J. Duffy, supra note 46.}
\item[{48}]{Id. at 103.}
\item[{49}]{Id.}
\item[{50}]{A maritime quarantine forbids ships suspected of carrying serious contagious diseases suspected of being infected, and that cloths and furs be aired, waved, and shaken probably prevented some flea infestation. Id. at 238.}
\end{thebibliography}
Quarantine measures failed to control the epidemic and instead resulted in more harm than good. Two medical commentators in 1805 noted this effect:

[Quarantine procedures] have led to the waste of millions of dollars and to the sacrifice of thousands of lives from that faith in their efficacy, which has led to the neglect of domestic cleanliness. Furthermore, a belief in the contagious nature of the yellow fever, which is so solemnly enforced by the execution of quarantine laws, has demoralized our citizens. It has, in many instances, extinguished friendship, annihilated religion, and violated the sacraments of nature, by resisting even the loud and vehement cries of filial and parental blood.52

C. Quarantine in the 1900s

Scientific advances in the twentieth century, including increased knowledge about the transmission of disease, have increased the effectiveness of quarantine measures and limited their application to the control of disease transmitted through direct, usually casual, human contact. Arbitrary and counterproductive quarantine regulations, however, have not been wholly eliminated. For example, nine cases of bubonic plague appeared in San Francisco in 1900, and the city responded by quarantining a district that was populated primarily by Asians.53 The United States Court of Appeals for the Ninth Circuit invalidated the measure because it was discriminatory, unreasonable, unjust, and oppressive.54

Quarantine measures were more successfully instituted to prevent the spread of typhoid fever. Knowledge about typhoid fever led to the recognition that healthy carriers as well as the physically ill could transmit disease.55 Typhoid carriers have been quarantined since early in the century. One such carrier was Typhoid Mary, the "reluctant patient."56 Although she never actually contracted typhoid, Mary Mallon was responsible for infecting fifty-three people by continuing to work as a cook, from having any contact with shore. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1859 (1976).

52. C. WINSLOW, supra note 17, at 205 (quoting B. RUSH, MEDICAL INQUIRIES (1805)).
53. Jew Ho v. Williamson, 103 F. 10 (9th Cir. 1900); see Nichols, supra note 5, at 336; see also infra note 176 and accompanying text.
55. C. WINSLOW, supra note 17, at 344.
56. M. Mills & J. Mills, Typhoid Mary Revisited: Legal Responsibility for Reporting and Quarantine of Patients with Infectious Diseases 6-7 (available from John Mills, M.D., Medical Service, Rm. 5H4, San Francisco General Hospital Medical Center, 1001 Portrero Ave., San Francisco, CA 94110) [hereinafter Mills].
contrary to health department restrictions, thereby spreading typhoid to customers through contaminated food.57 Authorities finally succeeded in quarantining her permanently from 1915 until her death in 1938. The Illinois Supreme Court approved as constitutional the quarantine of another typhoid carrier in 1922 when it ordered quarantine of a boarding house manager who continued to infect her guests through indirect exposure to her contaminated urine and feces.58

Quarantine regulations were also used for polio, which killed 57,000 Americans between 1915 and 1955.59 Not all the regulations were appropriate or effective, however. For example, Milwaukee, Wisconsin, quarantined children in their own backyards during the summer of 1944 on the theory that polio was more virulent in the summer months.60 Actually, polio could be spread at any time of the year by contact with an infected individual because the virus enters the body through the mouth.

Quarantine is not limited to America's past. Victims of venereal disease have also been quarantined throughout this century and continue to be subject to "hold and treat" provisions.61 This type of quarantine is used largely as a convenient police tool for controlling prostitution.62 Today, however, tuberculosis patients are those most often quarantined.63 Courts have upheld quarantine of tuberculosis victims and carriers who refuse treatment when a sufficient threat to public health is shown and proper procedures are followed.64

Thus, throughout history, authorities have responded to epidemic disease and death with extensive quarantine laws. The measures, however, often failed effectively to prevent the spread of disease for two reasons. First, the quarantine laws were based upon false assumptions about the spread of disease. Second, health officials failed to adapt the quarantine procedures to the varying modes of disease transmission. Ul-

57. Id. at 7.
59. Leerhsen, supra note 35.
60. Roark, supra note 20, at 21, col. 1. Other towns feared polio was spread by insects and sprayed substantial quantities of the toxic pesticide DDT. Id. at 20, col. 3.
61. Hold and treat provisions allow authorities to detain persons arrested for prostitution while they are tested, and if necessary, treated for venereal disease. Mills, supra note 56, at 9.
62. Id.; see, e.g., Petteway, supra note 36; Reynolds v. McNichols, 488 F.2d 1378 (10th Cir. 1973); In re Martin, 83 Cal. App. 2d 164, 188 P.2d 287 (3d Dist. 1948); In re Shepard, 51 Cal. App. 49, 195 P. 1077, 1077 (2d Dist. 1921); DENVER REV. MUNI. CODE § 24-131.
63. See Mills, supra note 56, at 9.
timately, the fear of disease led to persecution and social ostracism of those infected, usually without decreasing the risk of illness and death.

III. AN OVERVIEW OF AIDS

Since AIDS was recognized in 1981, knowledge about the disease has continually changed as research progresses. The United States Centers for Disease Control (CDC) have reported that AIDS is a sexually transmissible infection caused by a virus known as HIV. It can result in an improperly functioning immune system that leaves victims vulnerable to opportunistic infections. It is estimated that at least twenty-five to fifty percent of those infected with the virus will ultimately develop AIDS, and a larger percentage may develop conditions related to AIDS. Reported AIDS cases have resulted from exposure to the virus up to seven years before diagnosis of the disease; longer incubation periods may be possible.

At present there is no established treatment for AIDS or vaccine to prevent AIDS. A commercially available blood test has been developed to determine the presence of antibodies to HIV. Presence of antibodies does not necessarily indicate that the active virus is in the blood, that the patient is presently infectious, or that he or she will develop AIDS. A positive antibody test determines only exposure to the virus.


67. The Centers for Disease Control are an arm of the United States Department of Health and Human Services.

68. HIV stands for human immunodeficiency virus and is the currently preferred term for the AIDS-causing agent. Church, Call to Battle, TIME, Nov. 10, 1986, at 18. The AIDS virus was previously referred to as HTLV-III/LAV, which stands for human T-cell lymphotropic virus type III/lymphadenopathy-associated virus. Acquired Immunodeficiency Syndrome (AIDS), 34 MORBIDITY AND MORTALITY WEEKLY REPORT 75S (1985) [hereinafter AIDS]. The weekly report is published by the CDC.

69. Infection by an opportunistic disease is the principal criterion for diagnosing a patient with AIDS. These infections include pneumocystis carinii pneumonia (63% of patients diagnosed); Kaposi's sarcoma, a form of skin cancer (24%); and candida esophagitis, a fungal infection of the mouth and throat (7%). Update: Acquired Immunodeficiency Syndrome—United States, 35 MORBIDITY & MORTALITY WEEKLY REP. 17-18 (1986) [hereinafter Update—United States].

70. Church, supra note 68, at 18.

71. Update—United States, supra note 69, at 20.

72. AIDS, supra note 68, at 75S.

73. Id. at 76S. HIV can be isolated from body fluids and tissues through a complex and expensive procedure involving laboratory growth of virus cultures over a period of six weeks.
As of November 1986, the CDC had been notified of over 27,000 people with AIDS in the United States, and over half of them had died.\textsuperscript{74} Approximately 1.5 million Americans are estimated to be carrying the AIDS virus.\textsuperscript{75} Over ninety percent of adults with AIDS can be placed in groups that are considered "high-risk"; these groups are at greatest risk of contracting AIDS.\textsuperscript{76} These groups include homosexual or bisexual men, intravenous drug abusers, hemophiliacs, heterosexual sex partners of persons with AIDS or at risk for AIDS, and recipients of blood transfusions.\textsuperscript{77} As of November 1986, there were 520 reported cases of AIDS in England, and approximately 250 of those reported having the disease were dead.\textsuperscript{78} Groups at high risk of contracting the disease in England are the same as in the United States.\textsuperscript{79}

Most of the public concern and debate over measures to control the spread of AIDS have centered around how the disease is transmitted. Writing for the New England Journal of Medicine, Dr. Merle A. Sande notes:

> Although our understanding of the disease has been progressing rapidly, the new knowledge has often produced more public concern than relief. The identification of the etiologic agent as a virus—although of critical scientific importance—did little to quell the fears of either the
medical community or the general population. Instead, people reacted to the fact that AIDS is caused by a virus with a hysteria reminiscent of another viral infection—the polio epidemic of the early 1950's. . . . Probably the most sensational information, and perhaps the most misleading, was that the virus had been isolated from saliva and tears. This suggested to the public that the disease might be spread by food handlers, by kissing or shaking hands, or even by contact with fomites. The media did little to dispel these notions; on the contrary, the public was led to believe that AIDS was a highly contagious disease.\footnote{80}{Sande, \textit{supra} note 66, at 380.}

Studies, however, have consistently shown that casual contact with AIDS patients in the home, at work, and at school, and even intensive exposure to contaminated secretions among health care workers, pose virtually no risk of infection.\footnote{81}{A study published in February 1986 of 101 household contacts of 39 AIDS patients found evidence of infection in only one contact, a five-year-old child who most likely acquired the infection before birth from her mother. Both her parents were IV drug users, and her mother was diagnosed with AIDS in 1984. Except sexual partners and children born to infected mothers, none of the family members in more than 12,000 cases reported to the CDC were known to have contracted AIDS. The study concludes that despite prolonged and close contact with patients with AIDS, household contacts who are not sexual partners of, or born to, patients with AIDS are at minimal or no risk of infection with HIV. Types of contact among members of the study included baths, showers, dishes, and toilets, in addition to hugging and kissing. Friedland, \textit{supra} note 65, at 344, 346-47.}

The CDC concluded in November 1985 that "[b]ecause AIDS is not transmitted through preparation or serving of food and beverages, . . . food-service workers known to be infected with AIDS should not be restricted from work unless they have another infection or illness for which such restriction would be warranted." \textit{Summary: Recommendations for Preventing Transmission of Infection with HTLV-III/LAV in the Workplace}, 34 \textit{MORBIDITY \& MORTALITY WEEKLY REP.} 681 (1985) [hereinafter \textit{AIDS in the Workplace}]. Of 1750 health care workers with frequent exposure to the body fluids of AIDS patients, less than 0.1% of workers not otherwise members of high-risk groups were found to have been exposed to the virus. In addition, there is less than a 0.5% chance that the disease can be contracted by an accidental needle stick with a needle contaminated with blood from an AIDS patient. Sande, \textit{supra} note 66, at 381.

The World Health Organization (WHO) concluded in late 1985 that "[t]here is no evidence that LAV/HTLV-III is spread through casual contact with an infected individual, such as contact in family settings, schools, or other groups living or working together. The risk of infection of health-care workers seems very remote. At present, there is no evidence that blood-sucking insects transmit the disease." \textit{Acquired Immunodeficiency Syndrome: Meeting of the WHO Collaborating Centres on AIDS}, 34 \textit{MORBIDITY \& MORTALITY WEEKLY REP.} 678 (1985) [hereinafter \textit{Meeting of WHO}].

82. The AIDS virus can be spread through vaginal or anal intercourse by entering a person's bloodstream through tiny, invisible tears in the surface lining of the vagina or rectum. The virus may possibly be spread by oral sex, but there is no evidence to confirm this possibility. U.S. \textit{PUBLIC HEALTH SERVICE, DEPT OF HEALTH, SURGEON GENERAL'S REPORT ON AIDS} 16, 25 (1986) [hereinafter \textit{SURGEON GENERAL'S REPORT}]. Because AIDS may be
by injection of contaminated blood, and by intrauterine spread of the virus from mother to fetus.\textsuperscript{84}

These conclusions were reiterated in October 1986, by the United States Surgeon General, who issued the government's first major statement on what the nation should do to stop the spread of AIDS.\textsuperscript{85} The report stresses that AIDS is not spread by common, everyday contact such as shaking hands, hugging, social kissing, crying, coughing, or sneezing. The disease has not been contracted from toilet seats, dining in restaurants (even when an employee there is infected), hot tubs, swimming pools, or shared linens.\textsuperscript{86} AIDS "is contagious in the same way that sexually transmitted diseases, such as syphilis and gonorrhea, are contagious," the report states.\textsuperscript{87} Working independently of the Surgeon General, a committee assembled by the Institute of Medicine of the National Academy of Sciences\textsuperscript{88} endorsed his statements that AIDS is not spread by casual contact.\textsuperscript{89} The findings of the Surgeon General and National Academy of Sciences are consistent with those of other researchers, who have been characterized as "unanimous and vehement" on the point that one cannot contract AIDS by casual contact.\textsuperscript{90}

Nevertheless, AIDS remains a serious health crisis. The National

\textsuperscript{83} In the United States, there were 1100 persons who acquired AIDS by heterosexual contact as of November 1986. The Public Health Service has projected this number will increase to almost 7000 in 1991. Church, supra note 68, at 18-19. The number of heterosexual cases after 1991 may increase dramatically, however, since nothing suggests heterosexuals are less susceptible to the disease than other groups. In Central Africa, the AIDS virus is most frequently transmitted by heterosexual intercourse. \textit{Id.} at 19.

\textsuperscript{84} Sande, supra note 66, at 380-82; Friedland, supra note 65, at 344; \textit{AIDS in the Workplace}, supra note 81, at 682.

\textsuperscript{85} \textsc{Surgeon General's Report}, supra note 82.

\textsuperscript{86} Id. at 21.

\textsuperscript{87} Id.

\textsuperscript{88} The National Academy of Sciences was chartered by Congress in 1863 as a private body to give advice to the federal government. Church, supra note 68. It has been called "the most prestigious body of scientists in the nation." \textit{Grim Prospects}, supra note 74, at 20.

\textsuperscript{89} Church, supra note 68.

\textsuperscript{90} Id. Some argue that, because research on AIDS did not begin until 1981 and the virus may have an incubation period of up to seven years, it is too soon to know with certainty how AIDS spreads. See, e.g., \textsc{California Secretary of State, \textit{Arguments in Favor of the California AIDS Initiative} in California General Election Ballot Pamphlet, Nov. 4, 1986}, at 51 [hereinafter \textsc{California Ballot Pamphlet}]; \textit{A Handy Guide to the State Ballot Propositions}, San Francisco Chron., Oct. 29, 1986, at A4, col. 4. Considering, however, that not one case acquired by casual contact has been reported, \textit{see supra} note 81, and the unanimity among the medical and scientific research communities, it would be difficult to conclude there is a danger of casual transmission.
Academy of Sciences predicts "catastrophe" unless its spread is checked.91 Projections of the United States Public Health Service indicate that by the end of the year 1991, 270,000 people in the United States will have developed AIDS, and 179,000 of them will have died.92 Between five and ten million persons will have been infected.93

With the exception of venereal diseases, AIDS is unlike diseases for which quarantine has been required. AIDS is spread only through sexual contact or blood, or from mother to fetus, not casually or through indirect means such as insect carriers and contaminated water or food.94 AIDS is quite similar in routes of transmission to hepatitis B, which is often fatal. Both viruses are spread through sexual contact, exposure to contaminated blood, and transmission from infected mothers to offspring.95 The risk for hepatitis B infection in households and health-care settings far exceeds that for HIV infection, however.96 And yet, patients with hepatitis B have not been quarantined, and routine screening of patients or health care workers for evidence of hepatitis B infection has never been recommended.97 Rather, control of transmission has emphasized appropriate handling of body fluids and items soiled with body fluids.98

At present, the most effective way to prevent transmission of the AIDS virus is to avoid behavior that could result in exposure to the virus.99 Thus, the World Health Organization, the CDC, the United States Surgeon General, the National Academy of Sciences, and independent researchers have stated that the most important factors in controlling the disease are conducting further research, and decreasing unsafe sexual practices and intravenous drug abuse through education programs and public information.100 Studies from New York and San Francisco, cities with a high incidence of the disease, suggest that such programs have prompted many gay men to change their sexual practices over a relatively short period of time, and rates of venereal disease among this

91. Grim Prospects, supra note 74, at 20.
92. Church, supra note 68.
94. See supra notes 16-64 and accompanying text.
95. Friedland, supra note 65, at 348.
96. AIDS in the Workplace, supra note 81, at 682-83; Friedland, supra note 65, at 348.
97. AIDS in the Workplace, supra note 81, at 683.
98. Id.
100. Church, supra note 68; Meeting of WHO, supra note 81, at 679; AIDS, supra note 68, at 755; Sande, supra note 66, at 382; Grim Prospects, supra note 74, at 21; Surgeon General's Report, supra note 82, at 14; Morgenthau, Future Shock, Newsweek, Nov. 24, 1986, at 30, 34-39 [hereinafter Future Shock].
group have decreased over fifty percent. Similar results have been reported from London, where safe sexual practices among a group of gay and bisexual men have drastically reduced their rates of gonorrhea and HIV infection.

IV. GOVERNMENT AUTHORITY TO REGULATE PUBLIC HEALTH

The governments of both England and the United States clearly possess broad authority to regulate public health and control epidemic diseases such as AIDS. One commentator notes:

The protection and promotion of the public health has long been recognized as the responsibility of the sovereign power. Government is, in fact, organized for the express purpose, among others, of conserving the public health and cannot divest itself of this important duty. This principle was well established in early English law and came with the colonists to America.

Tracing the source of this power, however, proves more intricate for the United States than for England because of the complexities posed by the United States constitutional and federal system.

A. England

1. Government Authority

When it held extensive sovereign power, the British monarchy used that power to control administration of public health. In 1636 Charles I ordered the collection of documents for the information of magistrates in a continuation of quarantine practice to control the plague. Queen Elizabeth proclaimed that anyone suffering from smallpox who approached the royal palaces would be guilty of treason. Administration and execution of the health orders was, however, typically left to local authorities.


102. The rise in HIV infection among the London subjects averaged 7.4% per year from 1982 to 1984. Between 1984 and 1986, this rate fell to 1.8%. The gonorrhea rate fell from 15.3% per year to 5.1%. San Francisco Sentinel, Apr. 10, 1987, at 10, col. 4.


104. C. Winslow, supra note 17, at 122.

105. Liberty and Disease, 92 Just. P. 202 (1928).

106. C. Winslow, supra note 17, at 122-23.
As the power shifted from the sovereign to Parliament, Parliament gradually assumed more responsibility to legislate for public health, and now has the ultimate authority to make health laws in Britain.\footnote{107} The Quarantine Act of 1710 was a comprehensive set of regulations to be applied across the nation,\footnote{108} and the Public Health Acts of 1936 and 1968 included detailed quarantine procedures.\footnote{109}

Today, British health law is codified in the Public Health Act of 1984. Under this Act, a judge may order anyone suffering from a "notifiable disease" to submit to a medical exam and to be taken to a hospital and detained there.\footnote{110} Notifiable diseases are those that must be reported to the proper local authority. These diseases include cholera, plague, relapsing fever, smallpox, and typhus.\footnote{111} The medical practitioner who diagnoses the disease must report the patient's name and address. Local authorities have the power to apply the Act to diseases other than those enumerated as notifiable diseases.\footnote{112} The Act provides that a patient can be removed to a hospital if a judge is satisfied that:

\begin{enumerate}
\item[A] person is suffering from a notifiable disease and—
\begin{enumerate}
\item that his circumstances are such that proper precautions to prevent the spread of infection cannot be taken, or that such precautions are not being taken, and
\item that serious risk of infection is thereby caused to other persons, and
\item that accommodation for him is available in a suitable hospital vested in the Secretary of State . . . .\footnote{113}
\end{enumerate}
\end{enumerate}

The judge may order the patient detained in the hospital if the judge is satisfied that "proper precautions to prevent the spread of disease would not be taken by that person outside the hospital."\footnote{114} Persons who knowingly expose others to a notifiable disease by presence or conduct are fined.\footnote{115}

\footnote{107. Public Health Act, 1984, ch. 1, §§ 1, 8, 23.}
\footnote{108. See supra notes 36-39 and accompanying text.}
\footnote{109. Public Health Act, 1936, ch. 49, §§ 143-172; Public Health Act, 1968, ch. 46, §§ 47-57.}
\footnote{110. Public Health Act, 1984, ch. 22, §§ 35, 37, 38.}
\footnote{111. Id. §§ 10, 11.}
\footnote{112. Id. § 16.}
\footnote{113. Id. § 37.}
\footnote{114. Id. § 37, as modified by the regulations enacted in 1985 to prevent the spread of AIDS. See infra notes 229-232 and accompanying text. The prior section provided that the judge could order detention if the judge is satisfied that the patient "would not on leaving the hospital be provided with lodging or accommodations in which proper precautions could be taken to prevent the spread of the disease by him . . . ." Public Health Act, 1984, ch. 22, § 38.}
\footnote{115. Id. § 17.}
2. Impact of Personal Liberty and the European Convention

While judges can use discretion in administering public health laws, Great Britain has no judicial review of legislation,\textsuperscript{116} its legal system is based on the doctrine of Parliamentary supremacy. Parliamentary supremacy means that no written constitution restricts the English Parliament's authority to adopt any law it wishes to enact, and that no English court reviews Parliamentary enactments.\textsuperscript{117} England does have a constitutional law tradition embodied in documents such as the Magna Carta of 1215, the Habeas Corpus Act of 1679, the Bill of Rights of 1689, and the Act of Settlement of 1700. But Parliament can amend or repeal any of these documents, and courts must apply the current law of Parliament even when in conflict with a previous law.\textsuperscript{118}

Parliament's ultimate law-making authority is tempered somewhat, however, by considerations of personal liberty and the European Convention on Human Rights.\textsuperscript{119} The European Convention on Human Rights\textsuperscript{120} is an international agreement among twenty-one Western European nations that is designed to preserve the basic rights of citizens of the member nations.\textsuperscript{121} The United Kingdom is a signatory and accepts jurisdiction of the European Court of Human Rights. A claimant who loses in a United Kingdom court can petition the European Court for a hearing. If the Court agrees to hear the case, it issues a declaratory judgment; if the judgment is adverse to that of the British court, the United Kingdom is bound by the judgment.\textsuperscript{122} This process was illustrated in a case involving the recommitment of an individual to a hospital for the criminally insane.\textsuperscript{123} The mental health administrator's decision to recommit the claimant was not reviewable on its merits by the English


\textsuperscript{117} Id.

\textsuperscript{118} Id. This situation has led to proposals for a British Bill of Rights, with provisions for procedures similar to United States judicial review of legislation to ensure compliance with the Bill of Rights. \textit{See} L. Scarman, \textit{English Law—New Dimensions} (1974); M. Zander, \textit{A Bill of Rights?} 5-18 (3d ed. 1985). The absence of any reported English cases involving judicial review of quarantine of interested persons demonstrates Parliament's ultimate authority in drafting such health regulations and the latitude for administrative discretion in applying them.

\textsuperscript{119} Abernathy, \textit{supra} note 116, at 441-42.


\textsuperscript{121} Id. at 441.

\textsuperscript{122} Id. at 442.

The court could determine only whether the administrator had abused his discretion by acting in bad faith or capriciously; it could not examine the reasons for the detention. The European Court of Human Rights required that appropriate procedures be instituted to ensure that the patient’s mental defect persisted and detention was necessary in the public interest. Britain complied with the European Court’s judgment.

In addition to the European Court’s requirement that detention of the mentally ill be necessary in the public interest, British statutes sometimes require sufficient public interest to justify orders of public health officials and courts that restrict personal liberties in an effort to safeguard public health. A finding of such public interest is not always sufficient to support a law. For example, Victorian “anti-vaccinationists” defeated compulsory vaccination laws in 1907 despite the public interest in preventing disease, partly because of the belief of the Victorian people in maintaining individual freedom at all costs. But in 1928 a patient who refused to be examined for smallpox was imprisoned. A commentator noted at the time that “even in these more enlightened and lenient days it is not unreasonable to make it a punishable offense that a man should show recklessness in carrying a disease or contumacy in refusing to undergo reasonable and necessary examination.”

Today, the Public Health Act of 1984 allows a judge to order medical exams if “in the public interest.” Cases concerning economic regulations have held that an act done in the public interest must involve a direct benefit to the public, and is to be decided in light of all the circumstances as they presently exist. In addition, some cases have balanced the public interest against the right of privacy recognized in recent British common law. This right of privacy is invoked not to wholly abrogate statutes, but to construe them and to govern court proceedings.

125. Id.
126. Abernathy, supra note 116, at 442. The European Court arguably would require similar procedural safeguards for detention of the physically ill.
129. Liberty and Disease, supra note 105.
130. Id.
developing this area of the common law, English courts have indirectly
drawn on the written constitutions of Commonwealth members, the Eu-
ropean Convention on Human Rights, and the American cases that de-
lineate a right of privacy.\textsuperscript{134} Recent English cases have required a strong
showing of necessity to justify invasion of privacy by medical exams and
blood tests, and have balanced the interests of the individual and the
public.\textsuperscript{135} For example, the strong public interest in the administration
of justice required a plaintiff in a personal injury case to submit to a
medical exam by the opposing party’s physician when the plaintiff had no
reasonable ground for refusing.\textsuperscript{136}

\textbf{B. United States}

\textbf{1. Federal and State Authority}

Although the United States Constitution reserves responsibility for
public health to the states, the federal government has the power to legis-
late for interstate and international health problems.\textsuperscript{137} The federal gov-
ernment derives its power to regulate for interstate and international
public health from its power to regulate interstate commerce, levy taxes,
and appropriate money for the general welfare.\textsuperscript{138} The remaining power
to regulate public health is reserved to the states by the Constitution and
is part of the states’ police power.\textsuperscript{139}

Historically, the power to regulate public health has remained with
the states. For example, in 1799 Congress assumed that quarantine was
a local function and directed that federal officials merely assist the states
in their execution of the state laws.\textsuperscript{140} Chief Justice Marshall declared in
1824 that quarantine acts and other health laws are best exercised by the
states and cannot be surrendered to the federal government.\textsuperscript{141} A 1905
Supreme Court case acknowledged a state’s authority to enact reasonable

\begin{itemize}
\item \textsuperscript{134} \textit{Id.} at 364-66.
\item \textsuperscript{135} \textit{Id.} at 360; \textit{Starr} v. \textit{National Coal Board}, 1 W.L.R. 63, 75 (1977); \textit{S v. McC}, 1972 A.C.
\item \textsuperscript{136} \textit{Starr}, 1 W.L.R. 63, 75.
\item \textsuperscript{137} \textit{U.S. Const.} art I, § 8, cl. 1, 3, 8. \textit{See generally} Morgenstern, \textit{supra} note 46, at 544-46;
\textit{Tobey, supra} note 103, at 126-29.
\item \textsuperscript{138} \textit{U.S. Const.} art. I, § 8, cl. 1, 3, 8.
\item \textsuperscript{139} “The police power is the right inherent in a government to enact laws, within constitu-
tional limitations, to promote the health, safety, morals, order, comfort, and general welfare of
the people. The power is, obviously, very broad and involves the right to restrict the use of
liberty and property.” \textit{Tobey, supra} note 103, at 126. The power is reserved to the states by
the tenth amendment. \textit{U.S. Const.} amend. X; \textit{Gibbons v. Ogden}, 22 U.S. (9 Wheat.) 1, 112-
16 (1824).
\item \textsuperscript{140} \textit{See} Edelman, \textit{supra} note 16, at 30.
\item \textsuperscript{141} \textit{Gibbons v. Ogden}, 22 U.S. (9 Wheat.) at 112-16.
\end{itemize}
regulations to preserve the health and safety of its citizens.\textsuperscript{142} In later cases the Court said states are free to adopt public health regulations that do not conflict with federal action.\textsuperscript{143}

The federal government nevertheless plays a role in health laws through direct regulation of interstate commerce (including food, drugs, and hazardous substances shipped between states), and through cooperation with and assistance to the states. In 1879 Congress created the National Board of Health to promote state development of health programs.\textsuperscript{144} Prior to the 1930s, however, intervention of the federal government in public health through legislating health laws was thought to violate substantive due process.\textsuperscript{145} Increased federal power during the Depression led to reconsideration of constitutional restrictions on federal health laws and expanded the role of the federal government.\textsuperscript{146} In 1934, the United States Supreme Court held that due process conditions, but does not prohibit, the exercise of federal regulatory power for the public welfare.\textsuperscript{147} In 1935 the Social Security Act\textsuperscript{148} authorized federal investigations of methods to control communicable disease and granted federal aid to state and local health departments.\textsuperscript{149} In 1944 the Public Health Service Act\textsuperscript{150} empowered the federal communicable disease center to investigate disease and quarantine the ill.\textsuperscript{151}

Current federal law allows for measures to prevent the spread of disease by people traveling between states and from foreign countries.\textsuperscript{152} In addition, the federal government assists in local health matters by

\textsuperscript{142} Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding mandatory vaccination).
\textsuperscript{143} Minnesota Rate Cases, 230 U.S. 352, 406-08 (1913).
\textsuperscript{144} Morgenstern, supra note 46, at 542.
\textsuperscript{145} For a discussion of substantive due process, see infra notes 187-194 and accompanying text.
\textsuperscript{146} Morgenstern, supra note 46, at 542-43.
\textsuperscript{147} Nebbia v. New York, 291 U.S. 502, 525 (1934).
\textsuperscript{148} 49 Stat. 620 (1935).
\textsuperscript{149} Morgenstern, supra note 46, at 543.
\textsuperscript{150} 58 Stat. 682 (1944).
\textsuperscript{151} Edelman, supra note 16, at 35.
\textsuperscript{152} Regulations to Control Communicable Diseases, 42 U.S.C. § 264 (1982). Under § 264(d), the National Advisory Health Council may recommend that regulations be used for: the apprehension and examination of any individual reasonably believed to be infected with a communicable disease in a communicable stage and (1) to be moving or about to move from a State to another State; or (2) to be a probable source of infection to individuals who, while infected with such disease in a communicable stage, will be moving from a State to another State. . . . Such individual . . . may be detained for such time and in such manner as may be reasonably necessary.

Section 266 gives the federal government special quarantine powers in wartime to examine and detain any person believed to be infected with a disease or who may infect members of the armed forces or those engaged in production of supplies for the armed forces. 42 C.F.R.
funding and cooperating with state and local governments, and by formulating guidelines and regulations for local health authorities.\textsuperscript{153} Most power, including the power to quarantine victims and carriers of disease, however, remains with the states.

State codes provide for quarantine of victims and carriers of certain communicable diseases, but vary in the procedures specified and in the consequences of noncompliance with health department orders.\textsuperscript{154} California’s Health and Safety Code allows the Department of Health to quarantine individuals if, in the judgment of a department official, "such action is necessary to protect or preserve public health."\textsuperscript{155} The Code provides that health officials may "take possession or control of a person" to carry out its authority.\textsuperscript{156} A specific section relating to tuberculosis requires that there be "reasonable grounds" for quarantine of tuberculosis patients.\textsuperscript{157} Violations of orders issued by the Health Department as well as willful exposure of another person to disease are misdemeanors punishable by fines and a maximum of ninety days in jail.\textsuperscript{158}

New York has similar quarantine regulations, but its public health law contains more detailed provisions for willful exposure.\textsuperscript{159} If a patient is unable or unwilling to conduct himself or herself in a manner so as not to expose others to the disease, a health officer is empowered to make an investigation and file a complaint with a judge.\textsuperscript{160} If the judge is satisfied that the complaint is well-founded, the patient will be committed to a hospital or institution.\textsuperscript{161} Hospital officials may later discharge the patient when they deem it appropriate.\textsuperscript{162} The law specifically authorizes the right to appeal the magistrate’s decision.\textsuperscript{163}

\textsuperscript{153} 42 C.F.R. §§ 67.101-67.118 (1986) allow for federal grants for state and local health services research centers, and set standards and regulations for the centers to follow. 21 C.F.R. 1240.3-1340.905 (1986) provide for travel restrictions, reporting disease, and inspection to prevent spread of disease among states.

\textsuperscript{154} Connecticut’s quarantine laws were extensively revised in 1984. See infra notes 257-259 and accompanying text.


\textsuperscript{156} Id. § 3053.

\textsuperscript{157} Id. § 3285.

\textsuperscript{158} Id. §§ 3350-3354. "Willful exposure" as used in this context refers to a diseased individual intentionally and knowingly exposing unknowing individuals to his or her contagious disease.


\textsuperscript{160} Id. § 2120(2).

\textsuperscript{161} Id. § 2120(3).

\textsuperscript{162} Id. § 2120(5).

\textsuperscript{163} Id. § 2124.
Colorado's public health laws provide for isolation of persons who are found to pose a danger of communicating contagious diseases in light of evidence discovered after investigation by a health officer. Specific sections allow officials to examine those reasonably suspected of carrying venereal diseases and to quarantine those infected.

Texas law allows quarantine if a judge reasonably suspects that an individual is infected with a communicable disease or if a patient fails to comply with a health department order. The patient is specifically given the right to a hearing before he or she is quarantined and to consult counsel. After detention, the patient has the right to institute a habeas corpus action. Texas has more severe penalties for knowing refusal to abide by health department control measures than most other states; such a refusal is a third-degree felony. Willful exposure of others to disease is a misdemeanor.

2. Impact of the United States Constitution

The gradual expansion of constitutional rights by the United States Supreme Court has restricted the states' broad police power to legislate for public health and required the courts to balance individuals' rights and liberties against the protection of public health. The rights that limit authority to make health laws include equal protection, substantive and procedural due process, and privacy.

a. Equal Protection

The fourteenth amendment right to equal protection of the laws requires states to treat each individual equally in drafting and administering its laws. Equal protection is denied when laws or regulations classify individuals, and either distinguish between persons who should be regarded as similarly situated or do not distinguish between persons who should be regarded as differently situated. To survive constitutional challenge, a classification must be rationally related to a legitimate state

165. Id. §§ 25-4-404 to 405.
167. TEX. REV. CIV. STAT. ANN. art. 4419b-1, § 4.02(d) (Vernon Supp. 1987).
168. Id.
169. Id. § 6.02.
170. TEX. REV. CIV. STAT. ANN. art. 4419b-1, §§ 6.04, 6.05 (Vernon Supp. 1987). See infra note 244 and accompanying text for an example of application of this law.
If state action abridges a fundamental right or creates a class based on suspect criteria, however, a higher standard of equal protection applies. Such a law is subject to strict scrutiny by the courts. In this situation, the state has the heavier burden of showing the classification bears a substantial relationship to furthering a compelling governmental interest, and the state must choose the least drastic means to accomplish its purpose by using a narrowly tailored law. Furthermore, even if a law does not contain classifications, it may still abridge equal protection if it is administered in such a way that it discriminates unreasonably.

Courts have applied the rational basis standard in deciding the validity of various public health regulations enforced against particular groups of people. For example, a 1900 San Francisco ordinance that required only Chinese and Asiatic persons to be inoculated against bubonic plague before they left the city was found unconstitutional because it violated equal protection. The court held that the racial classification was not rationally related to the objective of preventing the spread of disease.

Quarantine of group members suspected of being infected with venereal diseases has also been challenged on equal protection grounds. In 1921 the California Court of Appeal relied on the equal protection guarantee of the Constitution in deciding the validity of various public health regulations enforced against particular groups of people. For example, a 1900 San Francisco ordinance that required only Chinese and Asiatic persons to be inoculated against bubonic plague before they left the city was found unconstitutional because it violated equal protection. The court held that the racial classification was not rationally related to the objective of preventing the spread of disease.

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antee in holding that a prostitute could not lawfully be quarantined solely because she was a prostitute. The court stated that her constitutional guarantees to personal liberty required more than a mere suspicion that she had venereal disease. The prevalence of venereal disease in the military during World War II led to renewed efforts to control it through quarantine of prostitutes. In 1944 the Attorney General of Florida argued in favor of such measures:

The problem of venereal disease suppression cannot be disassociated from the problem of vice control....

Any campaign directed at the suppression of communicable diseases must of necessity depend for its success upon the segregation and treatment of infected persons....

While quarantine provisions cut deeply into private personal rights, the subject is one respecting which a mincing policy is not to be tolerated. It affects the public health so intimately and so insidiously, that considerations of delicacy and privacy may not be permitted to thwart measures necessary to avert the public peril....

For the most part these diseases are all associated with either commercial vice or amateur promiscuity. Of course there are exceptions, cases where the infected person has been guilty of no immorality, no promiscuity, but by and large venereal disease infections are found among a class which cannot be trusted to observe a self imposed isolation....

[Quarantine is established by health authorities and does not require a judicial determination either of infection or of the necessity for isolation. Obviously such a requirement would render laws for the protection of the public health nugatory.]

Subsequently, a California court upheld quarantine of a group of prostitutes in 1948 because they were in a class of persons more likely than not to be infected with venereal disease. The court based its decision on a local health officer's testimony that four cases of venereal dis-

179. Id.
181. Id. at 13-14, 16, 21-22.
182. In re Martin, 83 Cal. App. 2d 164, 167-68, 188 P.2d 287, 289-90 (1948). The Martin court cited In re Shepard, 51 Cal. App. at 51, 195 P. at 1077, but distinguished it on the ground that the Shepard court found the facts were insufficient to establish reason to believe the prostitute was infected. The Martin court stated, "whether or not a quarantine order is justified depends upon the facts of each individual case, and the obvious corollary thereof is
ease had reportedly been contracted at the women's apartment house, and the court found there was probable cause to believe that prostitutes, as a class, were infected. The dissent, however, argued strongly that the evidence did not support the conclusion, that even a prostitute was entitled to fundamental liberties, and that the zeal of health officers should not transcend constitutional rights of an accused.

As recently as 1973, the United States Court of Appeals for the Tenth Circuit upheld as constitutional a Denver ordinance allowing detention of anyone arrested for a sex offense in order to examine and treat him or her for venereal disease. The court stated that detention is a reasonable infringement of liberty in light of the social costs of the disease and found a rational presumption that those arrested were likely to be infected.

b. Substantive Due Process

Under the doctrine of substantive due process, laws made by the states under the police power are subject to judicial review to ensure that fundamental rights guaranteed by the Constitution are not infringed upon. If a law limits the fundamental rights of individual citizens, it must be no broader than necessary, it must be rational and reasonable (as determined by the court), and it must be necessary to promote a compelling or overriding interest of the government.

Since 1937 the United States Supreme Court has limited the application of substantive due process analysis to laws affecting fundamental rights and has deferred to state legislative judgments on economic and social welfare matters. Even when laws affect fundamental rights, some courts tend to uphold the law if there is any conceivable argument that it is related to a legitimate governmental end. For example, the
Fifth Circuit noted, "Only when a law is a totally arbitrary deprivation of liberty will it violate the substantive due process guarantee."\textsuperscript{190}

Because quarantine necessarily infringes upon the fundamental right of liberty,\textsuperscript{191} laws imposing quarantine are subject to judicial review to ensure they meet the requirements of substantive due process. For example, a California case involving the San Francisco bubonic plague outbreak in 1900 held that quarantine of the city's Chinese district was unconstitutional.\textsuperscript{192} In its review of the state's exercise of police power, the court considered whether the law was reasonable and necessary under the circumstances, and whether it was designed to accomplish the purpose intended. Because it served no legitimate purpose and was unrelated to preventing the spread of disease, the law was found to be unreasonable and oppressive, and therefore in violation of the due process clause of the fourteenth amendment.\textsuperscript{193}

In 1922 the Illinois Supreme Court upheld the partial quarantine of a typhoid carrier, but only after thoroughly scrutinizing the regulations utilized to ensure they were not arbitrary, oppressive, or unreasonable:

Health authorities cannot promulgate and enforce rules which merely have a tendency to prevent the spread of contagious and infectious diseases, which are not founded upon an existing condition or upon a well-founded belief that a condition is threatened which will endanger the public health. The health authorities cannot interfere with the liberties of a citizen until the emergency actually exists. . . . Effective quarantine must therefore be not so much the isolation of the person who is sick or affected with the disease as a prevention of the communication of the disease germs from the sick to the well. . . . Quarantine, in the very nature of the regulation, is not a definite or uniform measure, but it must vary according to the subject. One of the important elements in the administration of health and quarantine regulations is a full measure of common sense.\textsuperscript{194}

\textsuperscript{190} Woods v. Holy Cross Hosp., 591 F.2d 1164, 1176 (5th Cir. 1979) (quoting J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 410 (1978)).


\textsuperscript{192} Jew Ho v. Williamson, 103 F. 10 (C.C.N.D. Cal. 1900).

\textsuperscript{193} Id. at 20-21, 24, 26. Because the law also singled out the Asian community, the court held that the law violated equal protection. Id. at 26.

\textsuperscript{194} People ex rel. Barmore v. Robertson, 302 Ill. 422, 433-34, 134 N.E. 815, 819-20 (1922) (citations omitted).
Recent controversy over civil commitment of mentally ill individuals and detention of tuberculosis patients has increased judicial sensitivity to unnecessary restraints. Many courts have required that these patients be given the procedural due process guaranteed by the fourteenth amendment.\(^{195}\)

The United States Supreme Court has not clearly specified the procedures required when persons are involuntarily committed to state institutions for mental treatment. But it is clear that such persons cannot be detained without a fair procedure to determine whether they pose a danger to society or themselves.\(^{196}\) Furthermore, the duration of detention must bear a rational relationship to the purpose of confinement.\(^{197}\) Various state and federal courts have implemented these requirements and also imposed others. For example, California courts have held that the patient's interest in personal liberty is equally vital whether the patient is deprived of freedom in a criminal or civil proceeding.\(^{198}\) Restrictions on liberty, no matter how well-intentioned, require the close scrutiny afforded by the due process clause.\(^{199}\) Before individuals may be committed to hospitals or institutions because of mental illness, some courts require that they be given a prompt, mandatory hearing to establish probable cause for detention.\(^{200}\) In addition, California law mandates that the patient have an opportunity to consult counsel\(^{201}\) and the right to a jury trial.\(^{202}\) Although the United States Supreme Court has required states at least to employ a "clear and convincing evidence standard" of the danger posed by the patient,\(^{203}\) California has required proof

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\(^{195}\) See ROTUNDA, supra note 187, § 17.4, at 216-18; Mills, supra note 56, at 10.


\(^{201}\) CAL. WELF. & INST. CODE § 5302 (West 1984).

\(^{202}\) Id.

beyond a reasonable doubt.\textsuperscript{204}

A recent case involving a recalcitrant tuberculosis patient who refused to be treated provides an example of the types of procedural safeguards being instituted.\textsuperscript{205} In that case, the patient and the Los Angeles County Department of Health, in a landmark settlement, established required procedures. The patient must receive a copy of the detention order stating the reasons for his or her confinement.\textsuperscript{206} A jury hearing must be available if the patient requests one,\textsuperscript{207} in addition to representation by an attorney,\textsuperscript{208} and an evaluation by an independent physician.\textsuperscript{209} Nine of twelve jurors must agree that there is clear and convincing evidence of current infectiousness, that the patient would not voluntarily receive treatment, and that his or her release would constitute a threat to public health.\textsuperscript{210}

d. \textit{Privacy}

Before the state can enact public health laws that intrude into intimate human relations or expose intimate details of people’s lives, it must show a compelling interest sufficient to override their right to privacy.\textsuperscript{211} The United States Supreme Court has struck down state health laws that infringe upon this fundamental right.\textsuperscript{212} The right of privacy has been found to emanate from the “penumbra” of the Bill of Rights and is applied to the states through the fourteenth amendment.\textsuperscript{213} The Court has found privacy interests in marriage,\textsuperscript{214} decisions about procreation,\textsuperscript{215} and abortion.\textsuperscript{216} In \textit{Bowers v. Hardwick}, however, the Court explicitly refused to extend the federal constitutional right to privacy to confer a fundamental right upon homosexuals to engage in consensual sodomy in

\begin{itemize}
\item[204.] \textit{Roulet}, 23 Cal. 3d at 230-33, 590 P.2d at 7, 10, 152 Cal. Rptr. at 431-34; \textit{Feagley}, 14 Cal. 3d at 351, 535 P.2d at 381, 121 Cal. Rptr. at 517.
\item[206.] \textit{Balderas}, Civ. No. 000617, at 4-6.
\item[207.] \textit{Id.} at 17.
\item[208.] \textit{Id.} at 9.
\item[209.] \textit{Id.} at 10.
\item[210.] \textit{Id.} at 18.
\item[211.] \textit{See} Nichols, \textit{supra} note 5, at 320.
\item[214.] \textit{Griswold}, 381 U.S. at 485-86, 499.
\item[216.] \textit{Roe}, 410 U.S. at 113 (law that prohibited abortions unless necessary to save mother’s life held unconstitutional).
\end{itemize}
the privacy of their homes.\textsuperscript{217}

State regulations limiting privacy rights must be justified by a compelling state interest, and the law must be narrowly drawn to express only legitimate state interests.\textsuperscript{218} The scope of the privacy right has recently been broadened to include a general individual interest in avoiding disclosures of personal matters and in making certain kinds of important decisions with regard to one's own body.\textsuperscript{219} Some courts have held the right to privacy in sexual matters protects disclosure of one's "associational activities" (including sexual partners), and the state must show much more than a rational relationship to a legitimate state interest before it can compel such disclosure.\textsuperscript{220} A 1985 Florida case prevented discovery of blood donors' names when a transfusion recipient developed AIDS and sought civil recovery from the donors.\textsuperscript{221} The Florida Court of Appeal held that the donors had a constitutional privacy interest in avoiding disclosure of personal matters concerning sex practices, drug use, and medical histories in light of the social ostracism associated with AIDS.\textsuperscript{222}

V. AIDS QUARANTINE LAWS AND PROPOSALS

Although the drafters of England's quarantine measure for AIDS intended its use to be restricted to rare and exceptional cases, the law has already been applied to quarantine an apparently inappropriate patient.\textsuperscript{223} Similar laws in the United States that may be applied to quarantine persons with AIDS may not survive constitutional challenge and are likely to prove ineffective even if upheld.

\begin{footnotes}
\item 217. Bowers v. Hardwick, ___ U.S. ___, 106 S. Ct. 2841 (1986). The Court upheld Georgia's sodomy statute, GA. CODE ANN. § 16-6-2 (1982), which bans all acts of sodomy including those between members of the opposite sex. The statute provides that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." The Court did not reach the issue of whether the statute as applied to sodomy between heterosexuals is constitutional. Id. at 2842 n.2.
\item 218. Roe, 410 U.S. at 155.
\item 221. Id. at 800.
\item 222. Id. at 802.
\item 223. See infra notes 233-237 and accompanying text.
\end{footnotes}
A. England

In February 1985 an AIDS patient in England attempted to discharge himself from the hospital with a fixed catheter in his vein.\textsuperscript{224} The catheter could have provided the means for infection of others if his blood had entered someone else's bloodstream. This incident led to a move in Parliament to make AIDS a notifiable disease.\textsuperscript{225} If AIDS were made notifiable, all sections of the Public Health Act of 1984 would apply to the disease.\textsuperscript{226} After much debate, Parliament decided making AIDS notifiable would not assist in the control of the disease.\textsuperscript{227} Based on its previous experience with venereal diseases, Parliament determined that patients would not come forward for treatment or studies.\textsuperscript{228} Britain's Secretary of State for Social Services stated the government's solution:

There might be very rare and exceptional cases where the nature of a patient's condition would place him in a dangerously infectious state which would make it desirable to admit him or to detain him in hospital. There has not so far been any such case, nor are we aware of any present risk of one. We are satisfied that we need to take powers now to be in a position to protect the public in the event of such a risk arising. It is my intention, therefore, to lay regulations under the Public Health [Control of Disease] Act [of] 1984 which would give reserve powers to authorities to detain a patient when he is in a dangerously infectious condition.

I must stress that these powers have no relevance to the overwhelming majority of AIDS patients. We have no intention of dealing with AIDS patients generally under greater restraints than other patients. We need these reserve powers for the very rare case that might eventually arise somewhere some time.\textsuperscript{229}

Sections of the Public Health Act made applicable were those providing for mandatory medical exams, removal to and detention in a hospital, and removal of and isolation of bodies.\textsuperscript{230} The new regulations also modified the section allowing detention in a hospital.\textsuperscript{231} Judges may order detention if satisfied that a patient would not take proper precautions to

\textsuperscript{224} AIDS May Be Made a Notifiable Disease, The Times (London), Feb. 11, 1985, at 3, col. 3.
\textsuperscript{225} Id.
\textsuperscript{226} PARL. DEB. H.C. (5th ser.) 498-500 (1985).
\textsuperscript{227} Id. at 499.
\textsuperscript{228} Id.
\textsuperscript{229} Id.
\textsuperscript{230} See supra notes 110-115 and accompanying text.
\textsuperscript{231} Public Health Reg., S.I. 1985, No. 434.
prevent the spread of disease outside the hospital.\textsuperscript{232}

The new English law was first used to detain a patient in September 1985.\textsuperscript{233} An AIDS patient in Manchester expressed his wish to leave the hospital where he was being treated for AIDS-related illnesses, but he did not try to leave. The city's medical officer requested that detention be ordered by the city magistrate because his release "would be very dangerous."\textsuperscript{234} At a five-minute hearing on September 14, 1985, based solely on the medical officer's request, the magistrate ordered the patient detained for three weeks, with indefinite extensions. The patient was not represented by counsel. The Terence Higgins Trust, established to help AIDS victims, appealed the decision.\textsuperscript{235} The order was overturned on September 24, but the judge said that the prior decision was proper because, at the time it was rendered, the patient's condition was worse.\textsuperscript{236} Since his condition had improved substantially and the appeal was unopposed, the order was lifted. When asked whether the risk of contamination by the patient had ended, the medical officer told the judge, "The evidence which I now have is such that I could not seek to justify his detention. . . ."\textsuperscript{237}

\textbf{B. United States}

The move for AIDS quarantine in the United States was initially prompted by media reports of recalcitrant patients who refused to abstain from sexual relations or inform their partners after being diagnosed with AIDS. For example, an Alameda, California man was treated several times for gonorrhea at a public health clinic after being diagnosed with AIDS.\textsuperscript{238} He claimed to have had sex with three to five men per week without telling them of his condition.\textsuperscript{239} In Houston, Texas a male prostitute with AIDS vowed to continue to have sex with strangers, despite urgings of doctors and health officials.\textsuperscript{240} Members of the commu-

\textsuperscript{232} Id.
\textsuperscript{233} Court Orders Man to Remain in Hospital, The Times (London), Sept. 16, 1985, at 3, col. 1; British Hospital Attempts AIDS Quarantine But Loses in Court, The Advocate, Oct. 29, 1985, at 22, col. 1.
\textsuperscript{234} Court Orders Man to Remain in Hospital, supra note 233, at 3, col. 2.
\textsuperscript{235} Id.
\textsuperscript{236} Judge Lifts Detention Order on AIDS Man, The Times (London), Sept. 25, 1985, at 3, col. 7.
\textsuperscript{237} Id.
\textsuperscript{238} Adler, supra note 5, at 18.
\textsuperscript{239} Id.
\textsuperscript{240} Anti-Gay Crusade in Houston, San Francisco Chron., Oct. 24, 1985 at 4, cols. 2-3.
nity finally persuaded the individual to check into a hospital for treatment.

The Texas Health Commissioner requested in November 1985 that AIDS be added to the list of quarantinable diseases.\textsuperscript{241} As with the British AIDS quarantine measure, the intent was to order quarantine only in "extraordinary cases," in which an "unmanageable person" poses a public health threat by engaging in activities, sexual or otherwise, that could spread the disease.\textsuperscript{242} The proposal was strongly criticized by the American Civil Liberties Union, which stated that the "draconian nature of quarantine" renders it useless in controlling a disease like AIDS, since quarantine has been effective only for diseases spread by casual contact.\textsuperscript{243} While the debate went on, the city of San Antonio sent letters to the seventeen local AIDS victims which stated that they would be sent to prison for two to ten years if any shared hypodermic needles, donated blood or body organs, or had sexual contact with someone who did not have AIDS.\textsuperscript{244} Although the quarantine proposal received tentative approval from the Texas Board of Health, the Commissioner withdrew it in January 1986, stating that the battle against AIDS requires a high degree of trust and cooperation between the gay community and the health department. He thought this would be jeopardized by implementing the quarantine.\textsuperscript{245}

In California, prompted by reports of recalcitrant patients, the chief of the infectious disease section of the Department of Health Services proposed a policy to quarantine AIDS patients' residences by posting signs on their homes indicating that a person who resides there has a communicable disease.\textsuperscript{246} This action would be carried out if there were a documented failure of the patient to follow health department recommendations and an AIDS support group could not help the patient change his or her behavior.\textsuperscript{247} The proposal stressed that all attempts at voluntary compliance must be exhausted before quarantine would be im-

\textsuperscript{241} Texas to Request AIDS Quarantine, supra note 5, at 19, col. 5.
\textsuperscript{242} Id.
\textsuperscript{243} Id. at 19, col. 6.
\textsuperscript{244} The New AIDS Risk: A Term in Jail, NEWSWEEK, Oct. 28, 1985, at 98. See supra note 170 and accompanying text for the statute giving the city such authority. An even less sensitive proposal was inadvertently broadcast on Houston television when a former five-term mayor of Houston suggested that one solution to the AIDS epidemic was "to shoot the queers." A Nasty Gaffe in Houston About Gays, San Francisco Chron., Oct. 26, 1985, at 4, col. 6.
\textsuperscript{246} Nichols, supra note 5, at 341; Pagano, supra note 5.
\textsuperscript{247} Nichols, supra note 5, at 340.
An attorney for the state Office of Legal Services agreed that such patients could be quarantined under the conditions outlined because their constitutional rights would not outweigh measures necessary for public health. Due to privacy considerations, however, she strongly cautioned against the release of names to support groups unless it could be shown to be an absolutely necessary and effective means of protecting the public health. The attorney also stated that quarantine of homes would be unrelated to the desired goal, and that general regulations for posting placards in quarantine situations had been repealed in 1957. As of November 1986, the proposal had not been enacted, and there were no further reports of action on it.

Supporters of past presidential candidate Lyndon LaRouche successfully placed an AIDS initiative on the California ballot for the November 1986 election. The proposition was defeated by more than a two-to-one margin, and its opponents included most of the California

248. Pagano, supra note 5, at 17.
249. Nichols, supra note 5, at 342-43.
250. Id. at 343.
251. The text of the initiative, which is the first AIDS quarantine measure to be put before voters in the United States, is as follows:

Section 1. The purpose of this Act is to: A. Enforce and confirm the declaration of the California Legislature ... that acquired immune deficiency syndrome (AIDS) is serious and life threatening to men and women from all segments of society, that AIDS is usually lethal and that it is caused by an infectious [sic] agent with a high concentration of cases in California;
B. Protect victims of [AIDS], members of their families and local communities, and the public health at large; and
C. Utilize the existing structure of the State Department of Health Services and local health officers and the statutes and regulations under which they serve to preserve the public health from [AIDS].

Section 2. [AIDS] is an infectious [sic], contagious and communicable disease and the condition of being a carrier of the HTLV-III virus is an infectious [sic], contagious and communicable condition and both shall be placed and maintained by the director of the Department of Health Services on the list of reportable diseases and conditions ..., and both shall be included within the provisions of [the portions of the Health and Safety Code and Administrative Code allowing quarantine, isolation, exclusion from school and food-handling jobs, and travel restriction, inter alia], and all personnel of the Department of Health Services and all health officers shall fulfill all of the duties and obligations specified in each and all of the sections of said statutory division and administrative code subchapter in a manner consistent with the intent of this Act, as shall all other persons identified in said provisions."

CALIFORNIA BALLOT PAMPHLET, supra note 90, at 49. A federal judge forced the proponents to delete two sentences from a ballot pamphlet argument that stated, "AIDS is not hard to get; it's easy to get," and "potential insect and respiratory transmission has been established by numerous studies." The judge concluded the statements were false and misleading opinions.

medical establishment and Republican and Democratic candidates for both governor and United States senator. If it had passed, the new law would have made AIDS and the condition of being a carrier of the AIDS virus a reportable disease. Furthermore, it provided that AIDS patients and carriers would be considered to have an infectious, contagious, and communicable disease. Thus, public health officers would have been mandated to protect public health by utilizing existing laws to exclude AIDS patients and carriers from schools and public employment, to limit their travel, and to quarantine them.

A bill introduced in the Illinois legislature in November 1985 would create a panel of seven doctors to develop an “AIDS Contagion Control System.” This system could recommend that the state public health department quarantine AIDS victims “where such quarantining would be effective and prudent in contagion control.”

Connecticut extensively revised the quarantine section of its Public Health Code in June 1984 to allow quarantine of persons with communicable diseases who are a public threat because they are unable or unwilling to prevent exposure to others. The Connecticut code allows the patient the right to an attorney and a court hearing within seventy-two hours. The court must determine, by clear and convincing evidence, whether the patient is infected with a communicable disease and poses a substantial threat to public health, and whether confinement is a necessary and least restrictive means of preventing exposure.

In his thoughtful consideration of the new law, Professor Alvin Novick of Yale University notes that it has not been established whether the law is or will be applicable to AIDS patients or carriers of the HIV virus, but that “[i]f it is to be applied, procedures must be established that are so sensitive and rational that they can be understood by reasonable people to be necessary, appropriate, respectful of persons, beneficent, and fair.”

Federal action on AIDS has been limited primarily to funding research programs and providing assistance to local health departments. However, debate on an appropriations bill that included funding for

254. See supra note 251.
255. See Higham, supra note 5, at 25, col. 2.
256. Id.
258. Id. § 19a-221(c), (e).
259. Id. § 19a-221(e), (f).
260. Novick, supra note 5, at 81.
AIDS research in 1986 was lively.\textsuperscript{261} The bill included an amendment to empower the Surgeon General to use funds to quarantine any bathhouse or massage parlor that might facilitate transmission of AIDS.\textsuperscript{262} In opposition to the amendment, Representative Waxman noted that the Surgeon General already has such authority, and the authority is limited because most responsibility for control of infectious disease has traditionally been left to state and local authorities.\textsuperscript{263}

Numerous proposals for AIDS quarantine have also been advanced by groups and individuals. In November 1985, Dr. Veron Mark, a Harvard professor and neurosurgeon, proposed that Massachusetts declare AIDS a "dangerous transmissible disease," which would allow quarantine of "irresponsible" carriers on an island that was used as a leper colony until the early twentieth century.\textsuperscript{264} He also proposed testing of all venereal disease carriers and drug addicts. Spokesmen for the Massachusetts Health Department said it had no plans to impose such a quarantine.\textsuperscript{265} Another Harvard medical professor has prepared "standby regulations" for cities to use if necessary to confine willful transmitters of AIDS.\textsuperscript{266} The regulations provide for progressively more stringent confinement if a patient refuses to use voluntary controls.\textsuperscript{267}

Two scientific research organizations have proposed an AIDS study to be performed for the military.\textsuperscript{268} It would be aimed at proving AIDS is casually transmitted, implementing procedures that would prevent servicemen from associating with high-risk groups, quarantining those exposed to AIDS, and requiring "mandatory and overt identification" of those exposed.\textsuperscript{269} The researchers conceded that some of the measures

\begin{footnotes}
\footnotetext[262]{H.R. 3424, at H8030.}
\footnotetext[263]{Id. at H8032 (statement of Rep. Waxman). In April 1986, the State Department proposed a rule that would add AIDS to a list of seven diseases for which permanent immigrants to the United States are excluded. The proposed rule would effectively require all immigrants entering the United States as permanent residents to be tested for exposure to AIDS. \textit{U.S. May Ban Aliens with AIDS}, San Francisco Chron., April 25, 1986, at 26, col. 1.}
\footnotetext[264]{Quarantine for AIDS?, \textit{NEWSWEEK}, Nov. 25, 1985, at 6.}
\footnotetext[265]{Id.}
\footnotetext[266]{Adler, \textit{supra} note 5, at 18.}
\footnotetext[267]{Id. at 24.}
\footnotetext[268]{The organizations are the Advanced Investigation of Medical Science Group (AIMS) and the Institute for Cancer Research. Both have done previous research for the military; the AIMS Group has researched classified work on biological and chemical warfare. Two of the researchers are senior scholars of the Hoover Institute at Stanford University, a conservative research center. "Extreme" Proposal by AIDS Researchers, San Francisco Examiner, Feb. 9, 1986, at A-1, A-20, col. 4.}
\footnotetext[269]{Id. at A1, col. 1. The identification method alludes to the yellow Star of David re-}
\end{footnotes}
would be in direct conflict with the Constitution.\textsuperscript{270}

Paul Cameron, a decertified psychologist and consultant to California Representative Dannemeyer, advocates quarantine of all AIDS patients and carriers, and predicts such quarantine measures will be in place by 1987.\textsuperscript{271} A Washington Post article by neurologist Richard Restak calls for quarantine of AIDS victims, but not carriers, and argues that because quarantine is not a civil rights issue, only medical considerations should dictate its validity.\textsuperscript{272}

C. Constitutional Problems

If laws similar to the English AIDS quarantine law were applied in the United States, they would pose several problems with respect to United States constitutional rights. This section will analyze the constitutional problems posed by the British law and by the various laws and proposals that may be used in the United States to quarantine AIDS patients.

1. Equal Protection

The constitutionality of AIDS quarantine laws depends largely on whether they are subject to the “strict scrutiny” standard of equal protection.\textsuperscript{273} The strict scrutiny standard must apply if courts conclude that quarantine of some or all AIDS carriers abridges a fundamental right or affects a class based on suspect criteria.\textsuperscript{274} Any law that provides for involuntary detention, as in quarantine, necessarily involves loss of liberty and thus impairs fundamental rights.\textsuperscript{275} Those quarantined would also lose the fundamental rights of freedom of association, interstate travel, and privacy.\textsuperscript{276} Therefore, quarantine laws should be subject to strict scrutiny. Under that standard the state has a heavy burden of showing a compelling governmental interest in the quarantine of those persons affected by the law. Additionally, the law must be narrowly

\textsuperscript{270} Id. at A-1, col. 2.
\textsuperscript{271} Fettner, The Evil that Men Do, New York Native, Sept. 23, 1985, at 23.
\textsuperscript{272} Restak, Worry About Survival of Society First; Then AIDS Victims' Rights, Washington Post, Sept. 8, 1985, at C1, col. 1.
\textsuperscript{273} See supra notes 173-174 and accompanying text.
\textsuperscript{274} Id.
\textsuperscript{275} Id.
\textsuperscript{276} See supra note 172 and accompanying text.
drawn to employ the least drastic means to accomplish its purpose.\textsuperscript{277}

If courts for some reason determine that this heightened scrutiny does not apply, the law's classification of those to be quarantined only need to be rationally related to a legitimate state objective.\textsuperscript{278} States could more easily demonstrate a rational relationship between quarantining a group of people and preventing the spread of AIDS than they could prove quarantine constitutes the least drastic means of accomplishing that objective.\textsuperscript{279}

If the English AIDS quarantine law\textsuperscript{280} were reviewed under the United States constitutional requirements of equal protection, the government might not be able to meet its heavy burden of demonstrating the law is the least drastic means of controlling AIDS. Because the AIDS law is limited to those situations in which a patient is dangerously infectious and would not take proper precautions to prevent the spread of disease, the law appears to be narrowly drawn to affect only AIDS patients who would willfully or recklessly spread the disease.\textsuperscript{281} Preventing such behavior is probably a compelling governmental objective. Quarantine of such patients, however, may not be the least drastic means of accomplishing such an objective. Educating and counseling the patients and, if required, imposing sanctions against them are reasonable alternatives that could achieve the goal of controlling AIDS.\textsuperscript{282} Educating the public to avoid unsafe sex is also a less restrictive and reasonable alternative to quarantine of those who will not take proper precautions to prevent the spread of disease. Because the AIDS virus is so widespread and the entire population is at some risk of being infected through unsafe sex, everyone should take precautions to prevent infection. Individuals who follow these recommendations thus cannot catch AIDS from either willful transmitters or unknowing carriers. Sexual partners of these patients could be infected only by consenting to participate in unsafe sexual practices. Like the English AIDS law, other laws in the United States used to

\textsuperscript{277} Almost all quarantine laws would arguably meet the rational relationship test. Quarantine of recalcitrant patients, AIDS carriers, and high risk groups, to varying degrees, all bear a rational relationship to controlling the spread of AIDS.


\textsuperscript{279} See supra note 191.

\textsuperscript{280} See supra notes 229-232 and accompanying text.

\textsuperscript{281} The section of Britain's Public Health Act that allows medical exams of groups suspected of carrying communicable disease was not made applicable to AIDS under the new AIDS quarantine regulations. See supra notes 229-232 and accompanying text.

\textsuperscript{282} Such attempts also provide reasonable alternatives and less drastic means than quarantine of all AIDS patients or carriers.
quarantine recalcitrant patients would pose similar constitutional problems.

Even if the English law were constitutional per se under American standards, its administration has proven, in at least one situation, to be discriminatory in violation of equal protection. The AIDS patient who was quarantined after expressing a desire to leave the Manchester hospital may have been denied equal protection because he was unreasonably singled out of a group of persons similarly situated (AIDS patients) as one to be quarantined. No evidence suggested he was more dangerously infectious than other AIDS patients, and he did not indicate that he would not take proper precautions to prevent the spread of his disease. Thus, his quarantine was an instance of unreasonable discrimination and therefore a violation of the equal protection guarantee.

Existing United States quarantine laws are not a per se violation of equal protection because they contain no unreasonable or suspect classifications. They are not, however, free from possible discriminatory administration. As in the quarantine of prostitutes, quarantine of AIDS carriers may sometimes be used as a political or social sanction against minorities rather than for demonstrably valid public health reasons. Many states outlaw sodomy between homosexuals, and such laws may be used to justify quarantine of AIDS carriers. In addition, because currently most AIDS carriers are gay men, quarantine laws may be applied to AIDS as a social sanction against homosexuality. Such unequal administration of the laws would violate equal protection.

Proposed laws that would quarantine all AIDS carriers, like the 1986 California initiative measure, probably could not survive strict scrutiny. First, the government must demonstrate a compelling interest furthered by such a law. While safeguarding the public health is clearly a compelling interest, dispelling society's fear of disease is not. If legislatures enact such quarantines merely in response to public hysteria, and not for valid health reasons, the laws would not meet the compelling state interest requirement.

283. See supra note 175 and accompanying text.
284. See supra notes 233-237 and accompanying text.
285. Id.
286. See supra notes 154-170 and accompanying text.
287. See supra notes 178-186 and accompanying text.
288. Novick, supra note 5, at 82.
289. See supra note 217.
290. See supra note 77.
292. See supra note 251 and accompanying text.
Furthermore, a law allowing quarantine of AIDS carriers would not be sufficiently narrow to survive strict scrutiny. Because all AIDS carriers are not necessarily infectious, laws providing for their quarantine may be overbroad. Moreover, only carriers who are infectious and participate in unsafe sexual practices or share needles can transmit the disease. Additionally, quarantine of high-risk groups, such as gay men, would prove similarly overbroad. Only some gay men are AIDS carriers, and not all AIDS carriers are gay men, so such classifications would not be substantially related to the goal of controlling the AIDS epidemic. Finally, such laws might discourage persons who suspect they have AIDS from coming forward for testing and treatment, thus defeating the objective. In sum, laws containing such classifications would be overinclusive and tend to defeat the governmental interest in controlling AIDS.

If only persons actually diagnosed with AIDS (AIDS patients) were quarantined, such a quarantine may not bear a substantial relationship to the objective of preventing the spread of AIDS. Although it would arguably have some effect on the epidemic, the law would not account for the spread of AIDS by carriers. Because quarantine of carriers also appears unconstitutional, neither classification in an AIDS quarantine law appears to be an acceptable, constitutional alternative.

Texas regulations imposing a prison sentence on AIDS patients who engage in any sexual conduct are also overbroad. Since it is possible to engage in sexual practices that pose no risk of transmission, the law goes much further than necessary.

Moreover, quarantines are likely to be enforced arbitrarily since those patients seeking public health care would be the ones most easily identified by authorities. The English patient's arbitrary detention in Manchester is an apt illustration of how quarantine could violate equal protection by arbitrary enforcement.

293. See supra note 73 and accompanying text.
294. See supra note 82 and accompanying text.
295. See supra notes 81-90 and accompanying text.
296. See supra notes 76-77 and accompanying text. Quarantine proposals also may advocate detention of all sex offenders, prostitutes, or intravenous drug abusers. Similar equal protection problems would be posed by these classifications.
298. Quarantining all AIDS carriers is also impractical. See infra notes 331-340 and accompanying text.
299. See supra notes 241-244 and accompanying text.
301. See supra notes 233-237 and accompanying text.
2. Substantive Due Process

Review of quarantine laws using a substantive due process analysis is closely related to an analysis under the equal protection clause. Although some decisions have upheld restrictions on liberty absent a "totally arbitrary" basis for such a deprivation, the substantive due process guarantee generally requires that laws limiting fundamental rights be no broader than necessary and bear a reasonable relationship to an overriding governmental interest.

Thus, a law like the English AIDS quarantine measure may not prove constitutional in the United States. Quarantining patients with AIDS who fail to take precautions to prevent its spread (for example, by engaging in unsafe sex) bears a reasonable and nonarbitrary relationship to preventing willful or reckless infection of others. However, if the purpose of the law is to prevent the spread of AIDS, rather than to stop only the willful spread of AIDS, the law's relationship to its purpose is more tenuous. Some argue that these types of laws would have a minimal effect on the epidemic, while depriving those quarantined of fundamental rights without any substantial public benefit. Nevertheless, courts would probably find such a law to be reasonably related to checking the AIDS epidemic.

There are, however, less restrictive means to accomplish these objectives. The English law is broader than necessary because it does not require authorities to consider other alternatives, such as education and counseling, before quarantine is imposed. For example, education programs in San Francisco, New York, and London, designed to educate the public about the risks of unsafe sex and how to change sexual practices, have resulted in a lower incidence of venereal disease among high risk groups. Such programs are a reasonable, less restrictive alternative to quarantine. Thus, United States laws and proposals that would quarantine AIDS patients and carriers without attempts to educate them about how voluntarily to prevent infection would be broader than necessary.

302. See supra note 190 and accompanying text.
303. See supra note 187 and accompanying text.
304. See supra notes 229-232 and accompanying text.
305. See supra note 82.
306. See supra note 298 and accompanying text.
307. See Novick, supra note 5, at 82.
308. See infra notes 331-340 and accompanying text.
309. See supra notes 101-102 and accompanying text.
310. See supra notes 241-272 and accompanying text. The 1983 California Health Depart-
3. Procedural Due Process

Before an individual could be involuntarily detained pursuant to any AIDS quarantine law in the United States, he or she must receive the procedural safeguards guaranteed by the due process clause. At a minimum, these safeguards must include a hearing to determine, by clear and convincing evidence, that the individual poses a danger to himself or society, and that the duration of the quarantine bears a rational relationship to the purpose of confinement.

The English AIDS measure violates procedural due process because a judge only needs to be "satisfied" that a patient would not avoid transmission if not confined. Thus, a mere suspicion that a patient will fail to take precautions to prevent infecting others may be enough to satisfy the judge that the patient should be quarantined. Confinement would therefore be based on predictions and assumptions about future behavior that may not be substantiated. Furthermore, the English law does not require a prompt, mandatory hearing on probable cause even if requested, and no jury trial is available. It is evident that the English law would violate United States procedural due process requirements.

On the other hand, Connecticut law satisfies most procedural due process requirements, except for the right to a jury trial. Other United States proposals have not specified procedures to be used, so it is unclear whether they would violate due process rights if enacted.

4. Privacy

Although Bowers v. Hardwick held homosexuals have no fundamental right to engage in sodomy, it did not reach the issue of sodomy or other sexual activity between men and women. Prior opinions protect-

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312. "See supra notes 195-206 and accompanying text.
313. "See supra notes 229-232 and accompanying text.
315. In this situation, jury trials are not required by the United States Constitution, but are required by some states. See supra notes 195-206 and accompanying text.
316. Application of the law would also violate procedural guarantees of the European Convention on Human Rights, as in the case of commitment of the mentally ill. See supra notes 123-126 and accompanying text.
320. "See supra notes 257-259 and accompanying text.
ing the right to make decisions about one's own body and the right of married persons to make certain decisions about sexual matters arguably give AIDS carriers the right to engage in sexual relations with persons of the opposite sex. Thus, quarantine laws intended to prevent such individuals from engaging in any sexual relations may infringe on their right to engage in safe heterosexual conduct.

The English law could also infringe on such a right. English judges may conclude AIDS patients who intend to have safe sex are not taking "proper precautions" under the English AIDS quarantine law, and therefore order them quarantined. In addition, the determination of a patient's sexual behavior will necessarily involve some observation or documentation of behavior, which would be a serious infringement of the individual's privacy rights. Quarantine under such conditions in the United States would violate the fourteenth amendment right to privacy.

The privacy right also may protect AIDS carriers from quarantine laws that require public disclosure of their names or the names of their sexual partners. The English AIDS quarantine measure does stop short of requiring disclosure of the names of AIDS patients. Unlike the English law, however, Connecticut's quarantine measures contain no provisions to prevent disclosure of names, and arguably could require it. California's Health Department proposal would disclose names to allow counseling groups to contact patients, which may violate a patient's privacy rights. Posting a placard at a patient's home would necessarily violate privacy; moreover, no compelling need would be satisfied by such a measure.

D. Practical Problems

Aside from the constitutional issues raised by application of quarantine laws to AIDS patients in the United States, these laws also present a

321. See supra note 219.
322. See supra note 212.
323. See supra note 82.
324. See supra notes 229-232 and accompanying text.
325. See supra notes 220-222 and accompanying text. Although English common-law privacy cases have not explicitly found a privacy interest in sexual relationships, English courts may consider the patient's privacy interests before ordering quarantine. See supra notes 133-136 and accompanying text.
326. See supra notes 229-232 and accompanying text.
327. See supra notes 257-259 and accompanying text.
328. See supra notes 246-249 and accompanying text.
329. See supra note 249 and accompanying text.
host of practical problems that must be considered. Knowledge of the
disease is increasing more rapidly than medical literature can report it;
thus, people applying quarantine legislation may not have the informa-
tion necessary to make rational decisions. In addition, quarantine of any
significant percentage of AIDS patients would be cost-prohibitive to the
public, especially because quarantined persons will have lost the
means of financing their own care. The insurance industry estimates the
cost of the AIDS epidemic will be fifty billion dollars between 1986 and
1991. If AIDS patients are quarantined, these costs would skyrocket.
And because quarantine of AIDS patients would probably have little ef-
fect on the spread of the epidemic, only a small savings in health care
would result. A report of the University of California projected
that, if the California AIDS initiative had passed, the state would have
incurred costs as high as nineteen billion dollars during the first year the
law was in effect.334

In addition to financial costs, quarantine laws necessarily present
social costs. Using antibody tests as a basis for quarantining individuals
has serious social consequences. Professor Novick observes that some
persons “who test positive, would look and feel well and their future
course of health cannot now be predicted. It would surely be inappropri-
ate to confine them to a hospital, and the social consequences of restrict-
ing their freedom could well be devastating to them and to society.”335
Novick considers such consequences as the cost of health care, needs of
the patient’s family, and loss of home and job. Furthermore, AIDS quar-
tantine may be used as a social sanction to regulate homosexual behavior,
as the quarantine of prostitutes was used in the 1940s as a vice control
measure.336

Finally, quarantine may have little or no effect on curbing the epi-
demic. The National Academy of Sciences flatly rejected a national

330. Novick, supra note 5, at 81-82, raises a number of issues that indicate the ramifications
of AIDS quarantine. This discussion of practical problems is largely based on his article.

331. A study of the economic impact of AIDS reported that the first 10,000 AIDS cases in
the United States resulted in $1.4 billion in hospital costs and $4.8 billion in lost wages. Rag-
D-1, cols. 1, 4.

332. Id. at D-1, col. 1.

333. See supra note 309 and accompanying text.

334. Rexroat, AIDS Law Would Be Costly, Study Says, San Francisco Chron., Aug. 13,
1986, at 7, col. 6. A more conservative estimate of seven billion dollars was projected by
legislative analysts. CALIFORNIA BALLOT PAMPHLET, supra note 90, at 49.

335. Novick, supra note 5, at 82.

336. See supra notes 61-62, 178-186 and accompanying text.
AIDS quarantine as a means for controlling the spread of AIDS. It is argued that quarantine would be of little help since "those diagnosed with AIDS do not usually pose great danger." AIDS quarantine has been called "a practical and moral impossibility" because "no conceivable quarantine system would be adequate, and none, given the fearsome medical needs of AIDS patients, would be ethically acceptable."

VI. ALTERNATIVES AND RECOMMENDATIONS

The United States Surgeon General and National Academy of Sciences have stressed that education programs are the most effective tool for curbing the spread of AIDS. Wide-ranging efforts to urge the public to use safe sex practices and refrain from sharing needles are presently the only viable way to stop transmission from people who harbor the virus.

Furthermore, counseling recalcitrant patients is a reasonable alternative to quarantine. It is conceivable that some individuals would refuse to change their unsafe sexual behavior, but implementing quarantine procedures to handle these individuals poses serious risks to fundamental rights of the vast majority of other AIDS carriers. The dangers to liberty and potential for arbitrary applications of the laws (as in the English case) outweigh the benefit to the public.

Nevertheless, if quarantine is implemented for those exceptional cases, the laws must be narrowly drawn and require rigid procedural safeguards to ensure that only those exceptional persons are affected. There must be documented evidence of unsafe sexual practices with unknowing partners. Patients must have: the right to representation by counsel who are preferably experienced advocates of AIDS patients; a prompt hearing requiring clear and convincing evidence of probable cause to detain; and frequent review of the situation to determine if detention remains necessary. In addition, quarantine administrators and judges or juries hearing cases must receive regularly updated medical information.

338. *Id.*
339. *Future Shock*, supra note 100, at 34.
341. This evidence must be obtained in a manner such that privacy rights are not violated. As the impetus for AIDS quarantine came from publicized reports of AIDS patients who would not refrain from unsafe sex, AIDS quarantine should be limited to those cases where health authorities obtain this information without surreptitious observation of private behavior.
Finally, review boards composed of physicians, public health experts, lawyers, civil rights advocates, public health department representatives, and citizens should be formed to assess the fairness and effectiveness of the procedures, and to advise the legislatures and courts of necessary changes.

The necessity for such detailed procedures and safeguards must not be overlooked for the sake of convenience or efficiency in handling a "public emergency." Quarantining persons other than those "exceptional cases" because it is "impossible to bring about an immediate segregation" of the dangerous from the nondangerous would be an obvious violation of equal protection and due process. As Justice Murphy stated in his dissenting opinion in Korematsu, "Any inconvenience that may accompany an attempt to conform to procedural due process cannot be said to justify violation of constitutional rights of individuals."

VII. CONCLUSION

Since ancient times, quarantine has been used to control disease. Although it was often effective in checking the spread of deadly epidemics, quarantine was also used to vent public fear and prejudice and bore little relationship to scientific evidence. With the advance of science, however, the power of the governments of England and the United States to make useful public health regulations based on accurate scientific information and to institute quarantine measures, when required, has become extensive. The strengthening of constitutional rights in the United States during the last century has checked this power somewhat, and American courts must balance the rights of individuals with the government's interest in safeguarding the public health.

Because AIDS is not transmitted by casual contact, measures to quarantine AIDS victims should not be imposed in the same way as quarantine of other contagious diseases. While England's AIDS quarantine measures were intended to account for the different mode of AIDS transmission, implementation of these measures has indicated that the British attempt to legislate an effective and rational AIDS quarantine has failed. Because England's law has no reasonable standards or adequate safeguards to protect the patient's rights or to determine the actual danger to public health, the English law would violate American constitutional guarantees of equal protection, substantive and procedural due protection.

342. Novick, supra note 5, at 81-82.
344. Id. at 242.
process, and privacy. Although United States laws proposed to quarantine AIDS patients may provide some procedural safeguards, the inability to assess accurately infectiousness, the danger of isolating groups as a social sanction, and the ineffectiveness of quarantine in limiting the spread of AIDS create serious unresolved problems with AIDS quarantine laws. Counseling recalcitrant patients and education programs for the public to inform, to minimize hysteria, and to reduce unsafe behavior are the reasonable and less restrictive alternatives.