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INTRODUCTION

Acquired Immune Deficiency Syndrome (AIDS) is an infectious, incurable disease that seriously impairs the body's ability to fight other diseases, and leads ultimately to death.[1] An epidemic of fear has accompanied the spread of the disease[2] and with it, public attention has turned to quarantine, one of the oldest tools of public health. Public health officials have begun to draft or to consider drafting quarantine regulations applicable to AIDS,[3] and public

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1. The disease is believed to be caused by a retrovirus called Lymphadenopathy-Associated Virus (LAV) by the French group that claims to have isolated it, and Human T-Lymphotropic Virus Type III (HTLV-III) by the American group that claims its discovery. *See* Krim, AIDS: *The Challenge to Science and Medicine*, in AIDS: THE EMERGING ETHICAL DILEMMAS, HASTINGS CENTER REP., Aug. 1985, at 2, 3-4 (special supplement); Laurence, *The Immune System in AIDS*, SCI. AM., Dec. 1985, at 84. Hereinafter the virus will be referred to as HTLV-III.

2. *See, e.g.*, D. ALTMAN, AIDS IN THE MIND OF AMERICA, 16-21, 58-81 (1986) (discussing the fear, hysteria and stigma attached to AIDS); Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11 (1985); Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681, 682 (1985).

3. Colorado legislation that would have permitted the state health department to quarantine persons with AIDS was tabled on May 16, 1986. *Lack Of Accord Kills Colorado Bill*, 1 AIDS POL'Y & LAW (BNA) 2 (May 21, 1986). The California Department of Health considered in 1984 a policy that would have allowed it to quarantine AIDS patients who refused to adhere to recommended medical guidelines. *See* Comment, *AIDS—A New Reason to Regulate Homosexuality?*, 11 J. CONTEMP. L., 315, 340 (1984). In November 1986, Californians will vote on a referendum proposal to add AIDS to the state's list of reportable diseases, making AIDS subject to quarantine. *Californians to Vote on Adding AIDS to Disease List*, 1 AIDS POL'Y & LAW (BNA) 4 (July 2, 1986). Last winter, the Texas Board of Health initially proposed and held hearings on a regulation that would have allowed for the isolation of persons with AIDS who continued to maintain sexual relations or share hypodermic needles. The Texas Health Commissioner later decided to recommend tabling the proposal. *Texas Quaran-*

figures, from conservative religious leaders to members of the medical professions, have called for the isolation of some victims or carriers of the disease.[4]

This renewed interest in quarantine, and the possibility that a quarantine will soon be used somewhere against AIDS, raises many legal questions. Quarantine is the most extreme form of action that the government takes in the name of public health. Although the form of quarantine can vary,[5] it always represents a significant deprivation of an individual's liberty designed to prevent that individual from coming into contact with and spreading the disease to others.[6] This deprivation of liberty raises challenging issues of law and ethics that are made especially difficult to resolve because few courts in recent years have been confronted with quarantine. With the dramatic decline in the incidence of infectious disease in the last fifty years,[7] courts and legislatures have not been required to modernize the law of quarantine.[8] As a result, the existing precedent does not

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tine Plan Withdrawn By Official, 1 AIDS POL'Y & LAW (BNA) 5 (Jan. 29, 1986). Great Britain includes AIDS among the diseases covered by the nation's quarantine laws. *See* STAT. INST. 1985, No. 434.

4. The Reverand Jerry Falwell, leader of the Liberty Foundation (formerly the Moral Majority), has advocated the quarantine of afflicted homosexuals. D. ALTMAN, *supra* note 2, at 67. A Massachusetts neurosurgeon has advocated that a former leper colony be used to quarantine carriers of the HTLV-III virus who persist in "irresponsible" behavior. Foreman, *Mass. Neurosurgeon Suggests Quarantine for AIDS Carriers*, Boston Globe, Nov. 21, 1985, at 30, col. 5 (statement of Dr. Vernon H. Mark, organizer of Massachusetts International Health Services, Inc.) For a discussion of some proposals to quarantine AIDS patients, see D. ALTMAN, *supra* note 2, at 63-68. *See also* Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1281-82 (1986).

5. Quarantine is the isolation of an individual believed to be contagious. Individuals could be confined to their home, a hospital or an institution. *See infra* text accompanying note 41. Traditionally, a public health order to quarantine by confinement to one's home was accompanied by placement of a flag or placard in a conspicuous place on the residence. *See Ex Parte* Culver, 187 Cal. 437, 439, 202 P. 661, 663 (1921). The type of quarantine imposed may vary depending upon the number of people affected and the nature of the disease. For a discussion of the various types of quarantine that could be used against AIDS, see *infra* text accompanying notes 132-44.

6. All other restraints on liberty undertaken in the name of public health are less restrictive (and often more effective) alternatives to quarantine. Although such regulations raise the issue of the state's power to sacrifice an individual's rights in order to protect the public, quarantine poses this question in its starkest context. For a discussion of other, less restrictive state actions taken against AIDS, see Comment, *Preventing the Spread of AIDS By Restricting Sexual Conduct in Gay Bathhouses: A Constitutional Analysis*, 15 GOLDEN GATE L. REV. 301, 307-308 (1985); Tarr, *AIDS: The Legal Issues Widen*, Nat'l L.J., Nov. 25, 1985, at 1, 28-29, col. 1.

7. *See* W. MCNEILL, PLAGUES AND PEOPLES 246-55 (1976).

8. Between World War I and 1960, most quarantine cases decided by courts concerned prostitutes thought to have venereal disease. For a discussion of these cases, see *infra* text

reflect significant contemporary developments in constitutional and public health law.

This Article will explore the historical evolution of the law of quarantine in an attempt to uncover its development through prior understandings of disease, science, and the relationship between the individual and the state. The Article will then take the first steps toward placing the law of quarantine in the context of current legal doctrine and analyzing its applicability to the AIDS epidemic.

I. The History Of Quarantine

Quarantine is one of the oldest forms of public health regulation. The word derives from the Italian *quarantenaria* or the Latin *quadraginta*, which means forty days and refers to the forty day detention placed on ships from plague-ridden ports during the late Middle Ages and early Renaissance.[9] But the term also refers to the isolation of individuals thought to have been exposed to contagious disease.[10] The roots of this form of quarantine have been traced as far back as the Book of Leviticus, which prescribes the ostracism of lepers.[11] Following that Biblical precept, lepers were isolated by official edict throughout medieval Europe.[12]

When the plague struck Europe in the fourteenth century, European cities relied on their experience isolating lepers and denied entrance to persons coming from areas afflicted with the plague.[13] Victims of the plague were isolated in their houses for the duration of the illness, as were all who had come into contact with them.[14]

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accompanying notes 85-95. In the last 25 years, very few quarantine cases have been reported. For a decision of these cases, see *infra* note 195.

9. Random House Dictionary Of The English Language 1175 (unabr. ed. 1967); W. McNeill, *supra* note 7, at 151; G. Rosen, A History Of Public Health 68-69 (1958). *Accord* Cowles, *State Quarantine Laws and the Federal Constitution*, 25 Am. L. Rev. 45, 53 (1891). The term "quarantine" has long been used to refer to the detention and inspection of merchant vessels (and later railroads, trucks and planes) and their cargo. *See* Lee, *Limitations Imposed by the Federal Constitution on the Right of the States to Enact Quarantine Laws*, 2 Harv. L. Rev. 267, 268-69 (1889). Hereinafter, the term "maritime quarantine" will be used to refer to such types of quarantine. The term "quarantine" will refer exclusively to the isolation of individuals.

10. Random House Dictionary Of The English Language, *supra* note 9, at 1175.

11. *Leviticus* 13:46 (New American Standard)("He shall remain unclean all the days during which he has the infection; he is unclean. He shall live alone; his dwelling shall be outside the camp."); W. McNeill, *supra* note 7, at 150-51.

12. G. Rosen, *supra* note 9, at 64.

13. *Id.* at 67-69; W. McNeill, *supra* note 7, at 151.

14. G. Rosen, *supra* note 9 at 67.

Since the plague is usually spread by fleas and rats,[15] the effectiveness of such measures is questionable.[16] However, lacking a scientific understanding of the disease and its transmission, quarantine was one of the few actions that a community could take.[17] Moreover, it set the precedent for a form of public health regulation that was potentially more effective when later applied to other diseases, such as smallpox, that were easily spread by casual contact between individuals.[18]

In England, an early seventeenth century statute required the isolation of plague victims.[19] According to Blackstone, the violation of this statute was a felony, and the matter was of the "highest importance."[20] In colonial America, quarantine was enforced by both local and colonial governments. The earliest reported local quarantine order in America was in 1622 to combat smallpox in East Hampton, Long Island.[21] Historians have found records of maritime quarantines in Boston as far back as 1647.[22] In 1678, individuals with smallpox in Salem, Massachusetts were isolated by local order.[23]

By the time the federal Constitution was drafted in 1787, quarantine had become a well-established form of public health regulation.[24] Although the Constitution does not mention quarantine, arti-

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15. F. CARTWRIGHT, DISEASE AND HISTORY 30 (1972).

16. The potential efficacy of the isolation of individuals during the black death depended upon the type of plague that was prevalent during the 14th century. The more common type of plague, the bubonic plague, is transmitted by rats and fleas; the rarer form, pneumonic plague, can be spread by casual contact between individuals. W. MCNEILL, *supra* note 7, at 110. There is controversy in the literature about the prevalence of the different forms of the disease during the 14th century. *Compare id.* at 146 (black death spread primarily by rats and fleas) *with* F. CARTWRIGHT, *supra* note 15, at 38-40 (pneumonic plague spread by casual contact primarily responsible for black death).

17. *See* W. MCNEILL, *supra* note 7, at 161-63 (describing social upheaval and assaults upon Jewish communities during the black death).

18. *See, e.g.*, Ribble, *Smallpox, Vaccina and Cowpox*, in HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 966-69 (7th ed. 1974) (isolation essential for control of smallpox).

19. 1 Jac. 1, c. 31 (1603).

20. IV W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 161 (5th ed. 1897).

21. D. HOPKINS, PRINCES AND PEASANTS: SMALLPOX IN HISTORY 239 (1983).

22. *Id.* at 238 ("[B]y 1647, vessels arriving in Boston from the West Indies with infected passengers or crew were quarantined in the harbor.").

23. *Id.* at 239.

24. In the early 18th century, Massachusetts passed a law that allowed selectmen to quarantine individuals with smallpox. 1 Acts and Resolves of the Province of Massachusetts Bay 467-70, ch. 9 (1701-02). New York passed its first maritime quarantine act in 1755. 3 Colonial Laws of New York 1071-73, ch. 973 (1755).

cle 1, section 10, acknowledges that states may promulgate and enforce inspection laws.[25] This provision has long been thought to give states the power to keep out articles of commerce that are thought to be infectious.[26] In *Gibbons v. Ogden*,[27] Chief Justice Marshall noted in dicta that a state had the power to quarantine "to provide for the health of its citizens."[28] Quarantine was thus considered a proper exercise of the states' police power.

In 1796, the federal government enacted the first federal quarantine law in response to a yellow fever epidemic.[29] That law gave the President the power to assist states in enforcing their own quarantine laws.[30] In 1799, the Act was repealed and replaced with one establishing the first federal inspection system for maritime quarantines.[31] Thereafter, throughout the nineteenth century, the federal government undertook an increasingly prominent role in implementing maritime quarantines.[32]

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25. U.S. CONST. art. I, § 10, cl. 2.

26. Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 444 (1827); Cowles, *supra* note 9, at 50-52.

The relationship between maritime quarantine and commerce is ambiguous. Quarantine can facilitate commerce by providing a means to establish the wholesomeness of goods. *See* Ellis, *Businessmen and Public Health in the Urban South During the Nineteenth Century: New Orleans, Memphis, and Atlanta*, 44 BULL. HIST. MED. 197, 350-53 (1970) (businessmen mobilized to endorse public health regulation). On the other hand, quarantine can be used to block free trade, a possibility that troubled 19th century advocates of laissez-faire economic policy. *See* W. MCNEILL, *supra* note 7, at 235-36.

27. 22 U.S. (9 Wheat.) 1 (1824).

28. *Id.* at 205. Chief Justice Marshall also speculated that Congress, if it so chose, could override state maritime quarantine laws under its power to regulate commerce. *Id.* at 206. The debate over the relationship between the quarantine power of the states and the federal government's control over interstate commerce continued throughout the nineteenth and into the early twentieth centuries. *See, e.g.*, Compagnie Francaise De Navigation A Vapeur v. Louisiana State Bd. of Health, 186 U.S. 380 (1902); Louisiana v. Texas, 176 U.S. 1 (1900) (dismissed on jurisdictional grounds); Morgan's S.S. Co. v. Louisiana Bd. of Health, 118 U.S. 455 (1886); E. FREUND, THE POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS, 124-30 (1904) (discussing the interaction of the federal government's regulation of interstate commerce and state regulation pursuant to health and safety rationale); Cowles, *supra* note 9, at 45; Lee, *supra* note 9, at 267-82, 293-315. For a discussion of the doctrinal development of the commerce clause, and its relationship to the police power, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 321-30 (1978).

29. Act of May 27, 1796, ch. 31, 1 Stat. 474 (repealed 1799); Maxey, *Federal Quarantine Law*, 43 AM. L. REV. 382, 383 (1909). For a discussion of the constitutionality of the law, see *Gibbons*, 22 U.S. (9 Wheat.) at 205-06.

30. Act of May 27, 1796, ch. 31, 1 Stat. 474 (repealed 1799); Maxey, *supra* note 29, at 383.

31. Act of Feb. 25, 1799, ch. 12, 1 Stat. 619.

32. For a discussion of the growth of federal involvement in combatting contagious disease, see Morgenstern, *The Role of the Federal Government in Protecting Citizens from Com-*

It was the states, however, usually acting through localities, that enacted and enforced the quarantine regulations that required the isolation of individuals afflicted with, or exposed to, contagious disease. Cases discussing such state and local quarantines thus set the early precedent as to the government's power to deprive individuals of their liberty in order to protect the public health.[33] Modern commentators have relied upon these cases in discussions of the powers of the state to quarantine people with AIDS.[34] Yet, for the most part, these cases do not reflect the dramatic changes that have occurred in public law and science in the last fifty years. As a result, they must be understood in the context of their times, and their principles should not be applied today without modifications made in light of recent changes in law and science. Before considering such modifications, this Article discusses the early cases in their historical context and analyzes the form of judicial review conducted in three

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municable Diseases, 47 U. CIN. L. REV. 537, 541-44 (1978). The Public Health Service has already proposed amending the immigration laws to include AIDS as a contagious disease. 51 Fed. Reg. 15. 354-55 (1986) (to be codified at 42 C.F.R. § 34.2). *See also Ban Immigrants with AIDS, Agency Says*, Wash. Times, Feb. 5, 1986, at 2A, col. 2; Cimons, *All Immigrants Face AIDS Test*, L.A. Times, Feb. 4, 1986, at 1-1, col. 3. Federal regulations have been adopted restricting the interstate travel by persons with communicable diseases. *See* 21 C.F. R. §§ 1240.40-.57 (1985).

33. *See infra* text accompanying notes 55-84. Under the commerce power, the general welfare clause, or section 5 of the fourteenth amendment, the federal government could regulate with respect to AIDS, and even enact statutes protecting the rights of individuals infected with the HTLV-III virus. *See* U.S. Const. art. I, § 8 (general welfare clause); Katzenbach v. Morgan, 384 U.S. 641, 649-50 (1966) (Congress can enact voting rights statute under § 5 of the fourteenth amendment); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-59 (1964)(Congress can enact civil rights statute under the commerce clause); Steward Machine Co. v. Davis, 301 U.S. 548, 558 (1937)(Congress has power to create social security tax by inducing states to join the social security program which is enacted under the general welfare clause). Indeed, some commentators have argued that § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), prohibits employment discrimination by employers receiving federal financial assistance against individuals with AIDS or infected with the HTLV-III virus. *See, e.g.*, Leonard, *Employment Discrimination Against Person With AIDS*, *supra* note 2, at 691, 696; Note, *supra* note 4, at 1289 n.86. Recently, the Justice Department issued an advisory opinion stating that the firing of an employee because he is feared to be contagious does not violate the Rehabilitation Act. EMPL. PRAC. GUIDE (CCH) ¶ 5028, at 6054 (Aug. 1986). The Supreme Court has issued a writ of certiorari in a case that should decide whether a contagious disease (tuberculosis) is a handicap for purposes of the Act. Arline v. School Bd., 772 F.2d 759 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 1633 (1986).

Even if there is federal legislation preventing discrimination against persons infected with the HTLV-III virus, the extent to which it would override the traditional state quarantine power is unclear, and would depend in the first instance upon a court's construction of the relevant statute. This Article assumes that there is no federal statutory bar to quarantine, and explores instead the constitutional and judge-made limits on state quarantine powers.

34. *See* Comment, *supra* note 6, at 311-12; Comment, *supra* note 3, at 335-36.

categories of cases: the "classic" quarantine cases,[35] (those generally arising before World War I), cases concerning the quarantine of prostitutes,[36] and one case where quarantine was aimed at a racial group.[37]

II. THE LAW OF QUARANTINE

A. The "Classic" Understanding

By the mid-to-late nineteenth century, many states had statutes enabling officials to isolate and detain individuals infected with or exposed to contagious diseases.[38] The Massachusetts public health statute of 1797[39] was typical. Section 1 stated its purpose: "[T]he better preventing the spread of infection . . . ."[40] The statute gave the selectmen of a town power to

> take care and make effectual provision in the best way they can, for the preservation of the inhabitants, by removing such sick or infected person or persons, and placing him or them in a separate house or houses, and by providing nurses, attendance, and other assistance and necessaries for them; which . . . shall be at the charge of the parties themselves, their parents or masters (if able) or otherwise at the charge of the town or place whereto they belong; and in case such person or persons are not inhabitants of any town or place within this State, then at the charge of the Commonwealth.[41]

Despite the broad authority given to state health officials under the nineteenth century quarantine statutes, prior to the second decade of this century there was little discussion about the constitutionality of the state's power to quarantine individuals.[42] Courts and

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35. *See infra* text accompanying notes 55-84.

36. *See infra* text accompanying notes 85-95.

37. Jew Ho v. Williamson, 103 F. 10 (N.D. Cal. 1900). *See infra* text accompanying notes 109-22.

38. *See, e.g.*, IND. CODE ANN. § 6718 (Burns 1901)(*cited in* Town of Knightstown v. Homer, 36 Ind. App. 139, 143, 75 N.E. 13, 14 (1905)); 19 Iowa Acts ch. 151, § 13 (*cited in* Staples v. Plymouth Co., 62 Iowa 364, 365, 17 N.W. 569, 570 (1883)); ME. REV. STAT. ch. 14, § 1 (1857)(*cited in* Pinkham v. Dorothy, 55 Me. 135, 137 (1868)); MICH. REV. STAT. § 15 (1846)(*cited in* People *ex rel.* Bristow v. Supervisors of Macomb County, 3 Mich. 476, 478 (1855)); MINN. GEN. STAT. ch. 10, § 62 (1878)(smallpox only)(*cited in* Town of Montgomery v. Board of County Comm'rs, 32 Minn. 532, 532, 21 N.W. 718, 718-19 (1884)).

39. Act of June 22, 1797, ch. 16, GEN. LAWS OF MASS. (1822).

40. *Id.* at § 1.

41. *Id.* The current Massachusetts public health law is similar to the 1797 Act. *See* MASS. GEN. LAWS ANN. ch. 111, § 95 (West 1983).

42. *See infra* text accompanying notes 47-54. *See also* T. COOLEY, COOLEY'S CONSTITU-

scholars debated the constitutionality of other state actions taken,[43] but they rarely expressed doubts about the validity of quarantine regulations. At that time, the courts presumed that state actions taken within the police power, which was seen as the sovereign power of the state to protect the peace, health and morals of the public, were constitutional.[44] Since quarantine was clearly designed to protect the public from disease, it was easily assumed to be a proper exercise of the police power.[45]

The tacit acceptance of such broad state power over individuals may be understandable when it is remembered that at that time infectious disease was an ever-present threat.[46] It is not surprising that quarantine was seen as emanating from the "higher ground of public welfare"[47] when epidemics were common, and no one was immune from their terror.

The terror of epidemics and the historical roots of quarantine distinguished it as *the* example of a legitimate use of the police power.[48] As an Iowa court[49] said of that state's quarantine statute,

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TIONAL LIMITATIONS, 729-30 (4th ed. 1878). Challenges under the interstate commerce clause to maritime quarantines, however, were not uncommon. *See supra* note 28.

43. *See, e.g.*, Muller v. Oregon, 208 U.S. 412 (1908)(state power to regulate working hours for women); Lochner v. New York, 198 U.S. 45 (1905) (state regulation of maximum working hours); Brown, *Police Power — Legislation for Health and Personal Safety*, 42 HARV. L. REV. 866 (1929); Sutherland, *The Child Labor Cases and the Constitution*, 8 CORNELL L.Q. 338 (1923); Warren, *A Bulwark to the State Police Power — The United States Supreme Court*, 13 COLUM. L. REV. 667 (1913).

44. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905); Mugler v. Kansas, 123 U.S. 623, 661 (1887). The police power has never been adequately defined. *See* L. TRIBE, *supra* note 28, at 323, n.10. For one attempt at a definition, see E. FREUND, *supra* note 28, at 1-14. The roots of the police power in the public health area appear to lie in the law of nuisance. *See* B. SCHWARTZ, THE LAW IN AMERICA 45-46 (1974), and in early cases, quarantine was described in terms of abating a nuisance. *See, e.g.*, Jarvis v. Pinckney, 21 S.C.L. (3 Hill) 123, 137-38 (1836). The evolution of the concept of the police power throughout the nineteenth and early twentieth centuries is beyond the scope of this Article. However, it should be noted that throughout this period the forced isolation of individuals was always considered a legitimate exercise of the police power. *See infra* note 45.

45. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 205 (1824); Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 444 (1827). *Cf.* Jacobson v. Massachusetts, 197 U.S. 11, 37-39 (1905) (forced vaccination against smallpox).

46. A number of other factors may have contributed to the absence of constitutional challenges to quarantine. *See infra* note 59. Prior to the Supreme Court's decision in Monroe v. Pape, 365 U.S. 167 (1961), which facilitated the ability to assert constitutional claims under 42 U.S.C. § 1983, plaintiffs often faced insurmountable procedural difficulties in bringing such claims. In addition, courts at that time were less sympathetic to claims of individual rights that could not be reduced to claims of freedom of contract. *See* Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1974).

47. Warner v. Stebbens, 111 Iowa 86-88, 82 N.W. 457-58 (1900).

48. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623, 660-70 (1887); Gibbons v. Ogden, 22

"[Quarantine] is demanded by humanity, and has long been known to be the effectual method of arresting the spread of contagions."[50] Echoing the same sentiments, the Maine Supreme Judicial Court stated, "It is unquestionable, that the legislature can confer police powers upon public officers, for the protection of the public health. The maxim *salus populi supreme lex* is the law of all courts and countries. The individual right sinks in the necessity to provide for the public good."[51] In *Compagnie Francaise De Navigation A Vapeur v. Louisiana State Board of Health*,[52] the United States Supreme Court went so far as to hold that Louisiana could indefinitely prohibit all *healthy* and *noncontagious* immigrants from entering areas in the state where there was disease[53] on the theory that the immigrants would, as one dissenter wrote, add "fuel to the flame."[54]

The fact that quarantine regulations were universally held to be both constitutional and beneficent, however, does not mean that the courts totally abrogated all review. To the contrary, courts always conducted a limited review. From the middle of the nineteenth century to approximately the time of World War I, the courts were presented with many quarantine cases. Most of these "classic" cases concerned quarantines imposed for acute infectious diseases such as smallpox, yellow fever, and typhus.[55] In such cases, the courts usually upheld the validity of the quarantine statutes or regulations.[56] Nevertheless, they often questioned the actions of particular government officials.[57] Public health officials received their quarantine authority under specific statutes and regulations,[58] and in order for

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U.S. (9 Wheat.) 1, 203 (1824).

49. Staples v. Plymouth Co., 62 Iowa 364, 17 N.W. 569 (1883).

50. *Id.* at 366, 17 N.W. at 570.

51. Haverty v. Bass, 66 Me. 71, 73-74 (1875).

52. 186 U.S. 380 (1902).

53. *Id.* at 385, 397.

54. *Id.* at 399 (Brown, J., dissenting). The Court upheld the quarantine against challenges that it violated the commerce clause, the due process clause of the fourteenth amendment, and treaties between the United States and several foreign nations. *Id.* at 380. The Court did not address an equal protection argument, despite the fact that it appears that the quarantine was racially motivated. *See id.* at 386.

55. For a description of these diseases, see 3 SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE S-105, T-172, Y-2 (1985).

56. *Contra* Jew Ho v. Williamson, 103 F. 10 (N.D. Cal. 1900)(court did not uphold the validity of the quarantine, finding it unjustified and a subterfuge for discrimination). For a more encompassing discussion of *Jew Ho*, see *infra* text accompanying notes 116-23.

57. *See infra* notes 61-68.

58. *See supra* note 38. Some courts, however, perhaps influenced by the law of nuisance, theorized that local governments had an inherent power to quarantine. *See, e.g.*, State v. Rack-

their actions to be valid they had to follow those enactments.

The validity of a detention, however, was rarely contested.[59] Instead, the issue of official authorization usually arose in an action for damages to property caused by a quarantine.[60] Thus, in *Pinkham v. Dorothy*,[61] the plaintiff brought an action in trespass against town officials for impressing his stagecoach and using it to remove sick children to a lodging where they could be nursed. The court adopted a strict interpretation of regulations authorizing quarantine and determined that, despite the power of municipal officials to remove contagious persons and to impress houses so that infected individuals could be kept there, the statute failed to authorize impressing the means of transportation.[62]

The Massachusetts case of *Spring v. Hyde*[63] also illustrates how the courts reviewed official actions taken under quarantine statutes.

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owski, 86 Conn. 677, 679-82, 86 A. 606, 607-08 (1913).

59. Habeas corpus was available to challenge detentions. *See infra* note 162. However, there are very few reported cases in which quarantine was challenged by habeas corpus prior to 1920. The reasons for this are unclear, but they may have had to do with the fact that quarantine statutes were universally considered constitutional, *see supra* text accompanying notes 42-54, as well as the brevity of most detentions at a time when most endemic contagious diseases were acute. *See supra* note 55. In addition, the average person who was quarantined did not have access to the courts because the only way of contesting a detention was by petitioning for habeas corpus, and no right to appointment of counsel was provided. *See infra* text accompanying notes 157-64. Moreover, the poor were probably the most frequent subjects of quarantine, since it appears to have been imposed most often on individuals living in rooming houses and apartments. The Massachusetts statute, for example, called for the removal of contagious individuals "to a separate house," a measure that would not be necessary where the individual already lived in a separate residence. *See* Act of June 22, 1797, ch. 16, § 1, Gen. Laws of Mass. (1822).

60. In the nineteenth century case of Hand v. Philadelphia, 8 Pa. C. 213 (1890), the plaintiff sought unsuccessfully to recover from the city tort damages for wrongful imprisonment arising from a quarantine. He did recover money from the physician who made an incorrect diagnosis. *Id.* Since an unauthorized quarantine action did not create liability on the part of the city or state, it would have been very difficult for the plaintiff to prevail in tort cases brought against cities or states. Moreover, quarantine was universally considered to be constitutional, *see supra* text accompanying notes 42-54, and health officials were accorded wide discretion in carrying out their mandate. *See infra* text accompanying notes 69-73. In one early twentieth century case, Kirby v. Harker, 143 Iowa 478, 121 N.W. 1071 (1909), plaintiff brought an action for false imprisonment. The court, however, found for the defendant on the theory that he acted within the scope of his authority. *Id. See also* Beeks v. Dickenson County, 131 Iowa 244, 108 N.W. 311 (1906).

61. 55 Me. 135 (1868).

62. *Id.*

63. 137 Mass. 554 (1884). The term "hospital" as used in nineteenth century cases merely referred to a place where the sick were nursed, and did not refer to the acute care, high technology hospital known today. *See* P. STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 145-79 (1982)(discussing the evolution of the hospital).

In that case, the plaintiff was a landlord whose apartment was converted into a "hospital" by the board of health.[64] In an action brought against the town, the court concluded that the board of health did not act within its authority, since the statute did not authorize the board to take possession of plaintiff's premises without plaintiff's consent or a warrant.[65] Because the board acted without authority, the court concluded, the town could not be liable.[66] Such a holding was typical of nineteenth century quarantine cases which concluded that actions of the board were *ultra vires* and that the town therefore was not responsible for any damages incurred.[67] An individual officer, however, could be liable for damages in such a case.[68]

There is, however, another line of cases indicating that the scope of a health officer's authority was very broad.[69] Thus in *Crayton v. Larabee*,[70] the court upheld the quarantine of an individual who merely lived next door to someone with smallpox. The court stated:

> Among all the objects to be secured by governmental laws none is more important than the preservation of the public health. As a

64. 137 Mass. at 554.

65. *Id.* at 560. The court emphasized the distinction between seizing the premises and using them as a hospital. *Id.* at 558.

66. *Id.* at 560.

67. *See, e.g.*, Smith v. Commissioners, 21 Kan. 480 (1879)(town not liable when trustee acted alone in requesting physician to tend the poor); Hersey v. Chapin, 162 Mass. 176, 38 N.E. 442 (1894) (city not liable when board of health acted without authority in turning plaintiff's premises into hospital); Boom v. City of Utica, 2 Barb. 104 (N.Y. Sup. Ct. 1848)(city not liable when alderman acted without authority in turning plaintiff's property into a pesthouse).

68. *See, e.g.*, Beckwith v. Sturtevant, 42 Conn. 158 (1875)(official may be liable for using plaintiff's house as a pesthouse without plaintiff's assent); Aaron v. Broiles, 64 Tex. 316 (1885) (officer liable for removing smallpox patients without providing for their safety and comfort).

69. It appears that prior to World War I, courts were often more likely to read the official's authority narrowly when considering claims for property losses than when considering their power to quarantine itself. *Compare* Pinkham v. Dorothy, 55 Me. 135 (1868)(narrow interpretation of official's authority) *with* Board of Health v. Court of Common Pleas, 83 N.J.L. 392, 85 A. 217 (1912) *and* Haverty v. Bass, 66 Me. 71 (1875) (discussing broad power to quarantine). This tendency may reflect the courts' concern, at that time, with protecting property rights. In addition, courts may have felt compelled to grant officials wide discretion when the issue before the court was whether a potentially infectious individual should be freed (possibly to spread an epidemic). When the issue was who should pay for damages, the threat to the public was less immediate, and the courts may have been more willing to hold officials narrowly to their statutory authority. Ironically, courts intervened *less* often in cases that involved the more serious, initial deprivations of rights.

70. 220 N.Y. 493, 116 N.E. 355 (1917).

> potent aid to its achievement the state creates or authorizes the creation of local boards of health or health officers . . . . The importance of sustaining that board [of health], in all lawful measures, tending to secure or promote the health of the city, should make us cautious in declaring any curtailment of their authority except upon clear grounds. On the contrary, powers conferred for so greatly needed and most useful purposes, should receive a liberal construction for the advancement of the ends for which they were bestowed.[71]

The court held that whenever a health officer judged that someone will be a "probable conveyor of the disease," he may quarantine "as he deems necessary."[72] Although the court did not want to substitute its judgment for the officer's, it refused to sanction arbitrary or unreasonable official conduct. Nevertheless, the officer was only required to "*deem* the action *necessary*,"[73] before imposing a quarantine.

Courts sometimes upheld quarantine orders even when the individuals could not be proven contagious, stating that health officials need not wait until a carrier has made someone ill.[74] And yet, some courts set limits, however weak, on the discretion of health officers.[75] These limits appear in the case of *Kirk v. Wyman*.[76] In *Kirk*, the health officers determined that Miss Kirk, a former missionary, had contagious leprosy and ordered her either to leave the city or be

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71. *Id.* at 501-03, 116 N.E. at 358, (quoting Gregory v. Mayor, 40 N.Y. 273, 279 (1869)).

72. 220 N.Y. 493, 502-03, 116 N.E. at 358.

73. *Id.* at 503, 116 N.E. at 358 (emphasis added). *See also* Varholy v. Sweat, 153 Fla. 571, 575, 15 So. 2d 267, 269 (1943) ("All reasonable presumptions should be indulged in favor of the validity of the action of the legislature and the duly constituted health authorities," although liberty cannot be unreasonably and arbitrarily invaded.); People *ex rel* Barmore v. Robertson, 302 Ill. 422, 432, 134 N.E. 815, 819 (1922) (courts will not "pass upon the wisdom of the means adopted to restrict and suppress the spread of contagious and infectious diseases").

74. Such reasoning led in this century to the frequent quarantine of prostitutes until they could be examined for venereal disease. *See infra* text accompanying notes 85-94. One court held that the question of whether there was an emergency justifying quarantine was left totally to the discretion of the board of health, and was therefore unreviewable. Board of Health v. Court of Common Pleas, 83 N.J. 392, 85 A. 217 (1912). *See also* People *ex rel* Barmore v. Robertson, 302 Ill. 422, 435, 134 N.E. 815, 820 (1922).

75. For example, in *In re* Smith, 146 N.Y. 68, 40 N.E. 497 (1893), the court granted a writ of habeas corpus to individuals in the express delivery business who were quarantined merely because they refused to be vaccinated. The court noted that despite the extensive powers of the health officer, the state could not quarantine merely because there was a possibility petitioners would become ill. *Id.* at 77-78, 40 N.E. at 498-99.

76. 83 S.C. 372, 65 S.E. 387 (1909).

quarantined in a pesthouse which had previously been used only to incarcerate blacks with smallpox.[77] The court noted that state quarantine statutes were not violative of constitutional rights because

> [n]either the right to liberty nor the right of property extends to the use of liberty or property to the injury of others. The maxim *Sic utere tuo ut alienum non laedas* applies to the person as well as to the property of the citizen. The individual has no more right of the freedom of spreading disease by carrying contagion on his person, than he has to produce disease by maintaining his property in a noisome condition.[78]

Nevertheless, in a discussion of the constitutional principles governing state and municipal health regulation, the court stated that health officials cannot be given arbitrary power.[79] According to the court, health officials must ensure that "the means used and the extent of the interference were reasonably necessary for the accomplishment of the purpose to be attained."[80] Reviewing the facts under that standard, the court concluded that the board had acted improperly in ordering that Miss Kirk be sent to a pesthouse since she had been safely quarantined in her home and had not made any attempt to violate the quarantine.[81] The court added that the case before it was unusual in that Miss Kirk was an elderly "lady of refinement," advanced in years, and a "highly esteemed" member of the community.[82]

Although the court in *Kirk* granted broad deference to the health officials, it interceded, perhaps in part because of its sympathy for Miss Kirk, and ordered the officials to adopt a less restrictive alternative by isolating Miss Kirk in a cottage to be built for her outside the city.[83] As the twentieth century progressed, courts became even more willing to scrutinize the decisions of health of-

77. *Id.* at 374, 65 S.E. at 388. The city board of health ordered Miss Kirk quarantined in a city pesthouse. Miss Kirk sought an injunction preventing the city from enforcing its order. An injunction was granted and the board of health appealed. The injunction explicitly affirmed the board's authority to maintain quarantine regulations, but rested on a finding that the "pesthouse was unfit for the habitation of such a patient." *Id.* The Board appealed. *Id.*

78. *Id.* at 378, 65 S.E. at 389.

79. *Id.* at 379, 65 S.E. at 389.

80. *Id.* at 380, 65 S.E. at 390. The court stated that the resolution of the case depended on whether the plaintiff, Miss Kirk, could make a prima facie showing "that the manner of the isolation was so clearly beyond what was necessary to the public protection that the court ought to enjoin it as arbitrary." *Id.*

81. *Id.* at 382, 65 S.E. at 390-91.

82. *Id.*

83. *Id.* at 382, 65 S.E. at 391.

ficers.[84] Ironically, this heightened form of judicial review came as health officials increasingly used their quarantine power against prostitutes and venereal disease.

B. *Quarantine, Prostitutes, and Venereal Disease*

Around the time of World War I, health officials began to use quarantine powers against prostitutes on the presumption that they had venereal disease.[85] This use of quarantine marked a significant departure from its prior use. Until then, quarantine had been used primarily against infectious diseases to which the entire community felt vulnerable.[86] Those quarantined for reasons other than venereal disease received the sympathy of the courts,[87] if not of the community-at-large, and their quarantine was enforced by health officials. But when the power to quarantine was turned against prostitutes, as part of the effort to control venereal disease, a great stigma attached to being quarantined.[88] In addition, it became a complement to police work, a way of holding prostitutes longer than many criminal sentences would allow.[89]

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84. *See infra* text accompanying notes 91-123.

85. A. BRANDT, NO MAGIC BULLET: A SOCIAL HISTORY OF VENEREAL DISEASE IN THE UNITED STATES SINCE 1880, at 84-92 (1985). This may be due to the declining incidence of other forms of infectious disease, G. ROSEN, *supra* note 9, at 336-43, the close connection between the battle against venereal disease and the progressive movement, and extreme concern with keeping the army free of venereal disease during the war. *See generally* A. BRANDT, *supra* note 9, at 8-9, 52-121. Cases concerning prostitutes include Reynolds v. McNichols, 488 F.2d 1378 (10th Cir. 1973); City of Little Rock v. Smith, 204 Ark. 692, 163 S.W.2d 705 (1942); *Ex parte* Martin, 83 Cal. App. 2d 164, 188 P.2d 287 (1948); *Ex parte* Clemente, 61 Cal. App. 666, 215 P. 698 (1923); *Ex parte* Dayton, 52 Cal. App. 635, 199 P. 548 (1921) (per curiam); *Ex parte* Arata, 52 Cal. App. 380, 198 P. 814 (1921)(per curiam); *Ex parte* Company, 106 Ohio 50, 139 N.E. 204 (1922); *Ex parte* Fowler, 85 Okla. Crim. 64, 184 P.2d 814 (Crim. App. 1947); People *ex rel.* Baker v. Strautz, 386 Ill. 360, 54 N.E.2d 441 (1944).

86. *Cf. supra* note 59. Venereal disease, in contrast, was seen as affecting "the other," those who had sinned and their "innocent" victims. A. BRANDT, *supra* note 85, at 5, 9, 183, 184.

87. *See* Boom v. City of Utica, 2 Barb. 104 (N.Y. Sup. Ct. 1848); Aaron v. Broiles, 64 Tex. 316, 317-18 (1885).

88. For a discussion of the stigma associated with venereal disease, see A. BRANDT, *supra* note 85, at 22, 179-86. Moreover, examinations for venereal disease involved a greater invasion of privacy than did examinations for diseases such as smallpox. Welch v. Shepherd, 165 Kan. 394, 405, 196 P.2d 235, 243 (1948).

89. These cases often involved "hold and treat" statutes which enabled officials to hold the person until he or she was examined for venereal disease, and if the examination proved positive, until he or she was treated. *See* Reynolds v. McNichols, 488 F.2d 1378, 1380 (10th Cir. 1973). The period in which someone was held for an examination could last quite some time, as authorities could take their time in ordering tests, and could require multiple examinations to confirm the diagnosis. *See Ex parte* Woodruff, 90 Okla. Crim. 59, 210 P.2d 191 (Crim. App. 1949). *See also* Welch v. Shepherd, 165 Kan. 394, 196 P.2d 235 (1948) (approv-

This new association between quarantine and the criminal law led to more petitions for habeas corpus and, ultimately, forced courts to recognize that quarantine was not always in the best interest of the individual. The need for judicial review of the facts supporting quarantine, as well as the authority under which it was implemented, became clear.[90] The courts continued to affirm the broad power of health officials to quarantine, but began to demand that health officials base their actions on some reasonable suspicion that the individual was infected.[91]

In a series of cases involving the quarantine of women suspected of being prostitutes, the California Court of Appeals established standards of proof necessary to detain someone suspected of having a contagious disease.[92] The court held that because quarantine was an unusual restraint on liberty, authorities needed a reasonable ground to believe that the individual was inflicted with an infectious disease.[93] Nevertheless, health officials did not have to make an individual medical determination that a person was infected prior to instituting the quarantine. Courts, having little sympathy for prostitutes, determined that if health officials could prove they had a reasonable basis for believing that a woman was a prostitute, they could rely upon their experience to conclude that it is "reasonably probable" that she was infected.[94]

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ing short-term detention to forcibly examine individual while disapproving of long-term confinement to force consent to examination). *But see Ex parte* Shepard, 51 Cal. App. 49, 195 P. 1077 (1921) (disapproving of long-term detention to force consent in this case, court held that "more than a mere suspicion that an individual is afflicted with an isolable disease is [needed to have a reasonable belief] . . . that such person is so afflicted"). Moreover, quarantine was usually not bailable. *See* Varholy v. Sweet, 153 Fla. 571, 15 So. 2d 267 (1943). *But see Ex parte* Martin, 83 Cal. App. 2d 164, 188 P.2d 287 (1948)(Adams, J., dissenting) (responding to assertion that "parties detained on quarantine orders should not be admitted to bail, it is not without precedent for a court to so release a petitioner seeking relief by way of habeas corpus").

90. When quarantine was applied to other nonvenereal diseases, courts assumed it was in the best interest of the person detained. *See, e.g.*, Haverty v. Bass, 66 Me. 71, 73 (1876). Conversely, when quarantine was applied to venereal disease, courts assumed that continued isolation to force an examination for venereal disease was not in the women's interest, although treatment would be in her interest. Welch v. Shepherd, 165 Kan. at 405, 196 P.2d at 243.

91. *See infra* notes 92, 93, 97 and accompanying text.

92. *Ex parte* Arata, 52 Cal. App. 380, 198 P. 814 (1921) (per curiam). *See Ex parte* Shepard, 51 Cal. App. 49, 195 P. 1077 (1921)(mere fact that a woman agreed to commit sexual acts for consideration on two different occasions is not enough to establish a reasonable belief that the woman has a contagious disease).

93. *Ex parte* Arata, 52 Cal. App. 380, 198 P. 814, 816 (1921) (per curiam); *Ex parte* Shepard, 51 Cal. App. 49, 195 P. 1077 (1921).

94. *Ex parte* Martin, 83 Cal. App. 2d 164, 188 P.2d 287 (1948); *Ex parte* Clemente, 61

The courts, however, were reluctant to stigmatize people other than prostitutes by quarantining them for venereal disease, and, therefore, were less deferential to health officials when the person quarantined was not a prostitute, but merely someone charged with engaging in illicit sexual intercourse.[95] In such cases, courts required that health authorities prove facts other than illicit intercourse to justify the quarantine.[96]

Although the courts retained their generally deferential attitude toward quarantine, the cases concerning venereal disease reflect a growing, albeit mild, willingness to question health officials regarding the necessity for quarantine when applied to the ordinary citizen. Later cases, involving diseases other than venereal disease, reveal similar skepticism. For example, in *State of Arkansas v. Snow*,[97] the court denied a quarantine order placed on someone suspected of having contagious tuberculosis, and remanded the case with orders that the state examine the individual and obtain better proof that the individual was indeed afflicted with the disease.[98]

The more recent quarantine cases reflect other developments that helped to undermine the traditional acceptance by the judiciary of the viability of quarantine as an instrument of public health policy. In the nineteenth and early twentieth centuries, quarantine was used against acute, short-lived diseases[99] and therefore had to be im-

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Cal. App. 666, 215 P. 698 (1923) (per curiam); *Ex parte* Dayton, 52 Cal. App. 635, 199 P. 548 (1921) (per curiam); *Ex parte* Arata, 52 Cal. App. 380, 198 P. 814 (1921); People *ex rel* Baker v. Strautz, 386 Ill. 360, 54 N.E.2d 441 (1944). *Cf. Ex parte* Woodruff, 90 Okla. Crim. 59, 210 P.2d 191 (Crim. App. 1949). The statute authorized health officials to examine those arrested by lawful warrant for sex offenses; because petitioner pled guilty to the vagrancy by prostitution charge, no independent basis was needed. The statute also authorized the examination of each person confined to a penal facility to determine the presence of venereal disease.

95. *See, e.g., Ex parte* Dillon, 44 Cal. App. 239, 186 P. 170 (1919) (per curiam) (individuals who engage in illicit intercourse, but are not prostitutes, cannot be presumed to have venereal disease); Huffman v. District of Columbia, 39 A.2d 558 (D.C. 1944) (burden of proving the presence of disease is on the health officer unless the suspected person is a known prostitute); Hill v. Hilbert, 92 Okla. Crim. 169, 222 P.2d 166 (Crim. App. 1950); Caves v. Hilbert, 92 Okla. Crim. 175, 222 P.2d 169 (Crim. App. 1950) (individual who engages in illicit sex cannot be presumed to have venereal disease). *But see Ex parte* Irby, 113 Kan. 565, 215 P. 449 (1923)(petitioner who signs affidavit stating she is not a prostitute is not entitled to automatic release; whether petitioner is a prostitute is a factual determination made by the health official).

96. *See supra* note 95 and accompanying text.

97. 230 Ark. 746, 324 S.W.2d 532 (1959).

98. *Id.*

99. *See, e.g.*, Beckwith v. Sturtevant, 42 Conn. 158 (1875)(smallpox); Harrison v. Mayor of Baltimore, 1 Gill 264 (Md. 1843)(smallpox and typhus); Highland v. Schulte, 123 Mich. 360, 82 N.W. 62 (1900)(smallpox); Young v. Flower, 3 Misc. 34, 22 N.Y.S. 332 (1893)

plemented immediately to achieve the desired effect. Later cases reflect a changing epidemiology. The contagious diseases that were the subject of most litigated quarantine orders after World War I were venereal disease and tuberculosis.[100] With both diseases, but particularly with tuberculosis, individuals could be quarantined for long periods of time because neither disease kills quickly.[101] More important, by the middle of this century, these diseases were treatable,[102] and therefore did not present as terrifying a threat to the community as the plague or smallpox did in an earlier age. Thus, for the first time, courts and health officials could afford to be concerned with matters of proof and legal procedure. As science provided more methods of fighting disease, and more ways to understand it, courts could begin to question the methods proposed by experts for controlling disease.

C. Quarantine and Racial Discrimination

The application of quarantine to prostitutes illustrates how quarantine can be used to harass, isolate and exclude socially disfavored groups.[103] This use—or misuse—of quarantine is significant, not only because the quarantine power is so broad, but also because fear often brings out the worst in a community. During World War II, the federal government, claiming to face "the gravest imminent danger to the public safety,"[104] evacuated all Japanese-Americans on the west coast to relocation camps. That wartime quarantine is now generally recognized as unnecessary and grounded in racial hatred.[105] Disease is similar to war, in that it often exacerbates latent

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(cholera).

100. *See supra* notes 85-98 and accompanying text.

101. Holmes, *Syphilis*, in HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 877-81 (7th ed. 1974); Stead, *Tuberculosis* in HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 860 (7th ed. 1974).

102. Holmes, *supra* note 101, at 883-85; Stead, *supra* note 101, at 867-69.

103. *See supra* notes 88-89, 94-95 and accompanying text. The danger of harassment or abuse is present in an AIDS quarantine. *See infra* text accompanying note 205.

104. *See* Korematsu v. United States, 323 U.S. 214, 218 (1944).

105. A. GIRDNER & A. LOFTIS, THE GREAT BETRAYAL: THE EVACUATION OF THE JAPANESE-AMERICANS DURING WORLD WAR II 482 (1969); M. GRODZINS, AMERICANS BETRAYED: POLITICS AND THE JAPANESE EVACUATION 361 (1949); Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1071-74 (1978). On January 21, 1986 the Court of Appeals for District of Columbia overruled the dismissal (based on the statute of limitations) of a suit brought by some Japanese-Americans subject to the detention. Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986).

prejudices and hostilities.[106] Thus, the state of Louisiana, in a time of epidemic, used its quarantine power to exclude all Southern European and West Indian immigrants.[107]

The courts have seldom explicitly addressed the discriminatory potential of quarantine.[108] At the turn of the century, however, at least one federal court did so. In *Wong Wai v. Williamson*,[109] the court invalidated a quarantine ordinance under the equal protection clause of the fourteenth amendment. The plaintiff was a Chinese resident of San Francisco who challenged a city ordinance that required all Chinese residents of the city to be innoculated against bubonic plague prior to leaving the city.[110] The innoculation, which could cause death, was justified by the city on the grounds that there was plague in the city and Asians as a race were highly susceptible to the disease. The court, however, noted that the regulation discriminated against Asians and could not be justified since the evidence did not support the city's claims.[111] Moreover, the ordinance could not accomplish its stated purpose because the innoculation was only effective if given prior to exposure.[112] The innoculation, in this case, was only administered to Chinese or Asian individuals leaving the city and, therefore, could not possibly stop the spread of disease. The court struck down the regulation, reminding the city that even the police power is subordinate to the Constitution.[113]

The city of San Francisco responded to the decision in *Wong Wai* by passing a resolution stating that nine people in the city had died from bubonic plague, and quarantining the area in the city

106. F. CARTWRIGHT, *supra* note 15, at 46-47.

107. *See supra* text accompanying notes 52-54. For a discussion of how people in Louisiana (and elsewhere) attributed epidemics to outsiders, see Ellis, *supra* note 26, at 203.

108. A review of the cases reported in the early and mid-nineteenth century does not demonstrate that quarantine was often used in a discriminatory manner, although it is not unreasonable to speculate that it was instituted most often against the poor, who were disproportionately minority immigrants and blacks. *See, e.g.*, Beckwith v. Sturtevant, 42 Conn. 158 (1875)(involving a family living in a tenement on factory grounds); Harrison v. Mayor of Baltimore, 1 Gill 264 (Md. 1843) and Young v. Flower, 3 Misc. 34, 22 N.Y.S. 332 (1893)(involving immigrants as they arrived by boat); Highland v. Schulte, 123 Mich. 360, 82 N.W. 62 (1900)(involving an unemployed tenement dweller). *See also supra* note 59. The more recent cases against prostitutes most likely reflect a deeply rooted disapproval of and prejudice towards that group, and the fact that syphilis, like AIDS, is a sexually-transmitted disease. *See supra* notes 88-89.

109. 103 F. 1 (N.D. Cal. 1900).

110. *Id.* at 2-3.

111. *Id.* at 7, 9.

112. *Id.* at 7-8.

113. *Id.* at 9-10.

where most of the Asian community lived.[114] The resolution further exempted from the quarantine certain specific houses within the quarantine area that belonged to non-Asians.[115] In *Jew Ho v. Williamson*,[116] the court, obviously angered by the city's actions, found the quarantine completely unjustified.[117] The court found that the evidence failed to support the city's claim that the bubonic plague had caused deaths[118] and that no sound rationale existed for the quarantine. The court noted that because people could circulate freely within the large area quarantined, any plague that existed could still be spread.[119] Moreover, the exemptions for non-Asians suggested that the ordinance was merely a subterfuge for discrimination.[120] The court, therefore, invalidated the quarantine, but held that the city could order a limited quarantine if bubonic plague were shown to exist.[121] In order to avoid discriminatory administration by the city, the court ordered that physicians for the Chinese association could attend the autopsy of any Chinese resident suspected of dying from the plague.[122]

Jew Ho illustrates how quarantine can become the tool of racism and discrimination, and how courts can protect against that abuse by applying a strict review under the equal protection clause.[123] It is a precedent that should not be forgotten if quarantine is once again used as an instrument of public health regulation.

III. Applying The Law Of Quarantine To AIDS

A. Quarantines Against AIDS

Before addressing the current legal status of quarantine and its applicability to the AIDS epidemic, it is useful to review the types of quarantine that could be applied to AIDS or HTLV-III infection. Historically, quarantine has taken many forms. Quarantine against smallpox and the other endemic communicable diseases of the nineteenth century involved the short-term isolation, and often removal to a pesthouse, of individuals infected with or exposed to an infec-

114. Jew Ho v. Williamson, 103 F. 10, 11-12 (N.D. Cal. 1900).
115. *Id.* at 23.
116. *Id.* at 10.
117. *Id.* at 26.
118. *Id.* at 24-26.
119. *Id.* at 22.
120. *Id.* at 23.
121. *Id.* at 26.
122. *Id.*
123. *Id.* at 10.

tious disease.[124] In this century, regulations have provided for the short-term "holding" of prostitutes suspected of having venereal disease,[125] and the commitment to sanitariums of individuals with contagious tuberculosis.[126]

The nature of the disease influences the form of quarantine adopted. AIDS is unlike any disease recently faced by man. Unlike smallpox,[127] AIDS is not highly contagious.[128] It can only be transmitted through sexual relations (in which body fluids are exchanged), needle sharing, exposure to infected blood or blood-products, and from mother to child during the prenatal or perinatal period.[129]

AIDS is also unlike syphilis in the modern era in that it is not curable and is invariably fatal.[130] Moreover, people may be asymptomatic carriers for all of their lives.[131] These unique characteristics of the disease raise practical and legal questions about the type of quarantine a state may adopt.

An AIDS quarantine could take several forms.[132] Theoretically,

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124. *See supra* text accompanying notes 55-72.

125. *See supra* text accompanying notes 85-94.

126. *See* State v. Snow, 230 Ark. 746, 324 S.W.2d 532 (1959).

127. *See* Ribble, *supra* note 18, at 966-68. "Smallpox is not as contagious as measles or influenza, and ordinarily face-to-face contact with an infected person is required to transmit the disease." *Id.* at 967.

128. A. BRANDT, *supra* note 85, at 182.

129. *Leads From the MMWR—Self-Reported Behavioral Changes Among Homosexual and Bisexual Men—San Francisco*, 254 J. A.M.A. 2537 (1985).

130. Krim, *supra* note 1, at 4, 6; A. BRANDT, *supra* note 85, at 171-72 (penicillin effected a cure rate of 90 to 97% for syphilis and gonorrhea). Syphilis was, however, a deadly epidemic in sixteenth century Europe. Holmes, *supra* note 101, at 876.

131. Krim, *supra* note 1, at 5.

132. The steps necessary for a state to enact an AIDS quarantine will vary according to the scope of the existing quarantine statute in that state. Some states, such as Alaska, have quarantine statutes that authorize quarantine for certain specifically named diseases. ALASKA STAT. § 18.15.120 (1949)(authorizing tuberculosis control program). To establish an AIDS quarantine, legislative action would be necessary. Other states, however, have general quarantine statutes that apply to contagious or communicable diseases. For example, Delaware delegates to the appropriate state health agency the authority to declare which diseases are communicable and to regulate the quarantine procedure. DEL. CODE ANN. tit. 16, § 505 (1983).

Other states authorize state or local officers to quarantine without further defining regulations. For example, COLO. REV. STAT. § 25-1-650 (1982), authorizes local health officers to quarantine anyone with a communicable disease that poses danger to the public health.

Some state statutes authorize quarantine for venereal disease. Some statutes apply only to specific venereal diseases. Since AIDS is not included within the definition of venereal disease, such statutes could not apply to AIDS without being amended. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 3001 (West 1979)(defining venereal disease); § 3050 (West 1979)(authorizing the state department to establish and maintain places of quarantine).

Other statutes do not define venereal disease, and it is possible that such statutes could be

a state could impose a quarantine on anyone who tested positive on the commonly available enzyme-linked immunosorbent assay (ELISA) test.[133] The test detects the presence of antibodies stimulated by the body's exposure to the HTLV-III virus.[134] The test could be administered to individuals during routine medical examinations and procedures, or in association with a mass screening program[135] such as that being undertaken by the military.[136] A mass quarantine would raise civil rights concerns even greater than those associated with other variations of AIDS quarantines because of the many "false positives" resulting from the antibody tests.[137] Such an approach would also face enormous practical and political difficulties, given current estimates that one to two million Americans are now infected with or have been exposed to the virus.[138] Indeed, it is unlikely that most states have the resources available for such a drastic form of quarantine.

A second conceivable form of quarantine would apply only to individuals clinically diagnosed as having AIDS, as opposed to everyone infected with the virus.[139] This form of quarantine would re-

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construed as authorizing an AIDS quarantine. *See, e.g.*, N.Y. PUB. HEALTH LAW § 2303 (McKinney 1985)(authorizing health officers to quarantine any person with a venereal disease which is or may become communicable).

133. The test is designed and commonly used to detect the presence of antibodies to HTLV-III in human blood. Krim, *supra* note 1, at 4.

134. Krim, *supra* note 1, at 4-5 ("Although this virus stimulates the production of antibody, the latter does not effectively neutralize the virus."); Levine & Bayer, *Screening Blood: Public Health and Medical Uncertainty*, in AIDS: THE EMERGING ETHICAL DILEMMAS, HASTINGS CENTER REP., Aug. 1985, at 8 (special supplement) (out of 8 million annual tests, 40,000 will be falsely positive); T. Brennan, *Ban on HTLV-III Antibody Testing: Individual Rights, Medical Ethics and the Acquired Immunodeficiency Syndrome*, at 7-8 (1985)(unpublished manuscript)(reprints available from the author at Massachusetts General Hospital, Boston, Massachusetts)(out of 7 million annual tests for blood donors, it is estimated that 13,600 will test falsely positive).

135. Any screening for evidence of exposure to AIDS raises grave civil liberties issues. Levine & Bayer, *supra* note 134, at 11; Nat'l L.J., *supra* note 6, at 28, col. 1; T. Brennan, *supra* note 134, at 7-9.

136. Keller, *Military Says It Will Use AIDS Replies in Ousters*, N.Y. Times, Oct. 29, 1985, at A1, col. 2. The Defense Department plans to screen all active duty military personnel for the AIDS virus. *Id.* at A1, col. 4. Those who have the disease will be given medical discharges. *Id.* Those who have the virus but are asymptomatic will be retained in the service but will have restricted duties. *Id.* at A19, col. 1.

137. *See* Levine & Bayer, *supra* note 134, at 9; T. Brennan, *supra* note 134, at 7-8 (false positive rates). *But see* Nat'l L.J., Nov. 25, 1985, at 28, col. 1 (tests have a small margin of error for "false positives" and "false negatives").

138. Krim, *supra* note 1, at 5; Boffey, *AIDS in the Future: Experts Say Deaths Will Climb Sharply*, N.Y. Times, Jan. 14, 1986, at C1, col. 4.

139. The definition of AIDS, as established by the Centers for Disease Control, refers only to individuals with opportunistic infections or those with other significant symptoms plus a

duce the practical problems associated with a quarantine imposed on the estimated one to one and a half million persons infected with the virus, although some states would still have to handle large numbers of cases, and would be responsible for individuals who are often extremely ill and in need of extensive care.[140] Moreover, such an approach would fail to stem the growth of the epidemic, since individuals with clinical AIDS comprise only a small percentage of those capable of spreading the disease,[141] and indeed, are often less likely to transmit the disease than carriers who are not ill themselves.[142]

Finally, a state could impose some sort of "behavior linked" quarantine, isolating individuals with AIDS, or HTLV-III infection, who refuse to stop or are found unlikely to stop engaging in activities that spread the disease, such as intravenous drug abuse, prostitution and anal intercourse.[143] The behavior-linked quarantine has numerous advantages as far as the state is concerned. The number of individuals affected would be greatly reduced, removing many of the practical and political difficulties, while enabling state officials to show that they are taking action against the "horror cases" reported by the press.[144] However, because this approach reaches only those

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positive serologic or virologic test for HTLV-III and a suppressed immune system. *Leads from the MMWR—Revision of Case Definition of Acquired Immunodeficiency Syndrome for National Reporting—United States*, 254 J. A.M.A. 599 (1985).

140. As of June 1986, the Centers for Disease Control reported a cumulative total of 21,000 cases of AIDS in the United States, with over 11,000 fatalities. Pear, *Tenfold Increase in AIDS Death Toll is Expected by '91*, N.Y. Times, June 8, 1986, at A1, col. 3. The government has predicted more than a tenfold increase in the number of cases within the next five years. *Id.* For a discussion of the problems and costs associated with caring for individuals with AIDS, see Sullivan, *AIDS: Bellevue Tries to Cope with Disease It Cannot Cure*, N.Y. Times, Dec. 23, 1985, at A1, col. 5; Hardy, Rauch, Echenberg, Morgan & Curran, *The Economic Impact of the First 10,000 Cases of Acquired Immunodeficiency Syndrome in the United States*, 255 J. A.M.A. 209 (1986); Waldman, *The Other AIDS Crisis: Who Pays for the Treatment?* WASH. MONTHLY, Jan. 1986, at 25.

141. *Cf.* Krim, *supra* note 1, at 3-5.

142. *See* Lieberson, *The Reality of AIDS*, N.Y. Rev. Books, Jan. 16, 1986, at 48, col. 3 (based on excerpt from *Nature* by Dr. Robert Gallo with the assistance of Flossie Wong)(doctor's experience suggests that AIDS patients have less virus in their blood than "healthy" carriers, and a New York City judge could not conceive of the potential of unrestrained AIDS patients "running around" infecting others).

143. *See generally Leads From the MMWR*, *supra* note 129, at 2537-38 (survey indicates homosexual and bisexual men are restricting sexual behavior that encourages the spread of AIDS); Lieberson, *supra* note 142, at 48, col. 2. ("Legal restrictions have rarely proved successful against the ingenuity of sexual desire at finding outlets.").

144. For example, on December 23, 1985, a Chicago prostitute who was reportedly "spreading" AIDS was arrested and then released on bail after being given an HTLV-III antibody test. Officials were reportedly unable to hold her because they lacked quarantine power. *See Prostitute Seized in Chicago Is Said to Have Spread AIDS*, N.Y. Times, Dec. 26,

who can be shown to engage in dangerous behavior, its effectiveness in preventing or slowing the spread of the epidemic would be limited. Furthermore, because such an approach would inevitably vest broad discretion in health officials, and make quarantine less costly and more politically viable, it may pose the greatest civil liberties threat. An analysis of the legal and constitutional issues arising from a quarantine aimed at AIDS is, therefore, necessary.

B. The Changing Legal Climate

Any analysis of the current legal status of quarantine must begin with the proposition that quarantine is constitutional, at least under some circumstances. The cases affirming the power of the government to institute quarantines are legion.[145] No court has held that quarantine can never be constitutional. Nor would such a principle hold much appeal to any but the most committed libertarian. The notion that the liberty of the individual must sometimes be restricted for the good of the community is one that cannot be seriously questioned, particularly in a society as complex and interdependent as ours.[146] The established legal doctrine pertaining to quarantine must, however, be applied to modern circumstances with extreme caution. Both law and science have changed since the time when quarantine was a standard tool against infectious disease. A court giving unquestioning approval to quarantine in modern circumstances would be utilizing an anachronistic rationale.

Judicial review of an AIDS quarantine will be influenced by changing attitudes toward science. During the middle of this century, the individualistic conception of health care triumphed over the earlier public health model.[147] The modern emphasis on health as a matter of individual concern and responsibility makes quarantine appear more drastic and intrusive on individual rights than it once did. Moreover, it is likely that any "scientific solution" to AIDS, including one involving quarantine, will be subjected to closer scrutiny

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1985, at A21, col. 6. *See also infra* note 217.

145. *See supra* notes 44, 73-74. *See, e.g.*, Reynolds v. McNichols, 488 F.2d 1378 (10th Cir. 1973); *Ex parte* Martin, 83 Cal. 2d 164, 188 P.2d 287 (1948); Haverty v. Bass, 66 Me. 71 (1876).

146. *See* cases cited *supra* note 145.

147. P. STARR, *supra* note 63, at 180-97 (earlier concern was with sanitary reform and cleansing the environment). The decline in infectious disease may have played a part in de-emphasizing the need for broad social reforms in medicine, but the emergence of AIDS may change this pattern. Nevertheless, commitment to the individualistic model was never total, as evidenced by the concern about the environmental causes of cancer.

than it would have been subjected to one hundred years ago.

In an era of high technology, and an increased reliance on science, the public has come to recognize the dangers of such dependency and to question science in general, and medicine in particular.[148] Perhaps influenced by such factors, courts today are much less likely than they once were to defer to the opinions or recommendations of administrative experts.[149] All of this suggests that courts today will review quarantine regulations far more carefully than they once did. And yet, contagious diseases are no longer considered commonplace. This fact alone may make it more difficult to come to terms with AIDS and to question the drastic steps, including quarantine, that are offered as solutions.[150]

Legal doctrine has also changed since the time when most quarantine cases were decided. In an era of few regulations, when the Constitution was seen as creating substantive limitations on regulations affecting rights of contract and property, the police power was the exception. Where the health and safety of the community was at stake, the state could regulate free from the bounds of substantive due process.[151] Quarantine was unique among the police power regulations because it was one of the oldest and most widely accepted means of regulating for the public health.[152]

Today, constitutional doctrine is radically different. Since the demise of substantive due process,[153] courts adhere to a more positivistic view of the role of government, and affirm regulations that are

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148. *See* P. STARR, *supra* note 63, at 381-419 (discussing how the very success of medicine led to societal distrust of it). For a powerful example of such questioning of the medical profession, see I. ILLICH, MEDICAL NEMESIS: THE EXPROPRIATION OF HEALTH (1977)(health care has turned into a sick-making enterprise and the medical establishment has become a major threat to health).

149. *See* Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1669, 1678-83 (1975). *But see* Youngberg v. Romeo, 457 U.S. 307, 324 (1982)(court advocates deference to professional judgment).

150. *See* D. ALTMAN, *supra* note 2, at 11-16 (discussing the politicization of AIDS).

151. *See* Brown, *supra* note 44, at 866. *See also* L. TRIBE, *supra* note 28, at 433-42. Maritime quarantines, however, were often reviewed under the interstate commerce clause. *See supra* note 28.

152. *See supra* text accompanying notes 48-54. In the late nineteenth century and until the New Deal, many regulations were passed which the states characterized as health and safety regulations. *See* L. TRIBE, *supra* note 28, at 433-42. The Supreme Court reviewed such regulations to determine if they were in fact legitimate uses of the police power or forms of economic regulation passed in the guise of police power regulations. *See, e.g.*, Dobbins v. Los Angeles, 195 U.S. 223, 235-41 (1904).

153. *See* L. TRIBE, *supra* note 28, at 427-55.

not necessary for preserving health and safety.[154] On the other hand, courts routinely subject to constitutional scrutiny regulations that previously would have been regarded as coming within the police power of the state and thus free from judicial review.[155] The term "police power" has lost its dispositive connotation. The fact that quarantine falls within the police power no longer ends the constitutional analysis. Today, a quarantine regulation, like any other infringement of liberty, will be reviewed for the procedural protections it provides, and for its reasonableness.[156]

C. *Procedural Review*

One striking difference between the early quarantine cases and today's jurisprudence is the different attitude toward procedural protections. In the nineteenth century, statutes did not require that any judicial order, nor any notice and hearing, accompany a quarantine.[157] Moreover, while some state statutes required a warrant to remove an individual to a hospital, or to impress property,[158] absence of a warrant did not render a detention unlawful. According to the court in *Haverty v. Bass*,[159]

> [w]e do not perceive how it could be of importance to the sick man, whether a warrant was obtained or not. It would be the merest form in the world, as far as he is concerned. There is no provision for any examination by the justices, nor for notice to any parties to be heard, nor could any appeal be had.[160]

The lack of procedural protection was not viewed by the *Haverty* court as a constitutional defect because procedural rights were subordinated to the greater need to provide for the public health.[161]

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154. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963)(courts will not sit as superlegislative bodies substituting their own social and economic philosophies for that of the legislature). Courts, however, closely scrutinize regulations that impinge upon modern conceptions of "fundamental rights" or violate the equal protection clause of the fourteenth amendment. *See infra* note 196 and accompanying text.

155. *See infra* note 207 and accompanying text.

156. *See infra* text accompanying notes 170-82, 193-200.

157. *See* statutes cited *supra* note 38.

158. *See* Pinkham v. Dorothy, 55 Me. 135 (1868); Spring v. Hyde Park, 137 Mass. 554 (1894).

159. 66 Me. 71 (1876).

160. *Id.* at 73. *See also Ex parte* Johnston, 40 Cal. App. 242, 180 P. 644 (1919)(adoption of measures to protect public safety is a valid exercise of state police power and, therefore, arrest without a warrant in a particular case will not override this power).

161. 66 Me. at 74. *Contra* Kirk v. Wyman 83 S.C. 372, 379, 65 S.E. 387, 390 (1909)(notice and hearing required unless an emergency situation places the safety of the

Moreover, as the court noted, the individual was not totally without any procedural redress. Habeas corpus was always available,[162] and following any unlawful detention, an individual could bring an action for damages.[163] The state, however, was not required to initiate procedures before or during the course of the quarantine.[164]

Later statutes, particularly those drafted in this century authorizing quarantines for venereal diseases and tuberculosis, established minimal procedural guidelines for the enforcement of a quarantine.[165] In *State v. Snow*,[166] for example, the court was able to reverse a state order to quarantine for tuberculosis only because the authorizing statute required initial judicial approval before enforcement.[167] Yet, despite the inclusion of procedural protections in many modern statutes, case law mandating such protections is hard to find.[168] This may be because there are few quarantine cases that post-date the due process revolution of the early 1970's.[169]

Today, our jurisprudence is far more process-oriented. The due process clauses of the fifth and fourteenth amendments of the Constitution are now seen as requiring procedural protections whenever an individual is deprived by the state of liberty or property.[170] The procedure that must be provided depends upon such factors as the nature of the individual interests affected, the risk of an erroneous

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public in such peril).

162. 66 Me. at 74. *See, e.g.*, People *ex rel* Baker v. Strautz, 386 Ill. 360, 54 N.E.2d 441 (1944); People *ex rel.* Barmore v. Robertson, 302 Ill. 422, 134 N.E. 815 (1922). *But cf.* Noland v. Gardner, 156 Kan. 697, 699, 136 P.2d 233, 234 (1943)(quarantined individual must appeal to board of health prior to seeking habeas corpus).

163. *See supra* text accompanying notes 60-68.

164. 66 Me. at 73. *But see* Kirk v. Wyman, 83 S.C. 372, 379, 65 S.E. 387, 390 (1909)(notice and hearing required prior to deprivation of liberty unless emergency circumstances preclude such procedural opportunities).

165. *See, e.g.*, N.Y. PUB. HEALTH LAW § 2301 (McKinney 1985)(application to judge or magistrate for isolation order in case of venereal disease); PA. STAT. ANN. tit. 35, § 521.11 (Purdon 1977)(petition to court for commitment for tuberculosis and venereal disease); W. VA. CODE § 26-5A-5 (1980)(petition to court to commit for tuberculosis). *But see* CAL. HEALTH & SAFETY CODE § 3195 (West 1979)(quarantine—no procedures provided other than those created by regulation).

166. 230 Ark. 746, 324 S.W.2d 532 (1959).

167. *Id.* at 748, 324 S.W.2d at 533.

168. *Contra* Kirk v. Wyman, 83 S.C. 372, 65 S.E. 387, (1909) (requiring notice and hearing before person may be quarantined); Greene v. Edwards, 263 S.E.2d 661 (W.Va. 1980)(requiring notice and hearing with right to counsel before confinement for tuberculosis).

169. *See generally* L. TRIBE, *supra* note 28, at 514-22 (procedural due process in the last quarter century has been given an expansive reading in areas involving "liberty" and "property").

170. *See* Mathews v. Eldridge, 424 U.S. 319 (1976)(fifth amendment); Board of Regents v. Roth, 408 U.S. 564 (1972)(fourteenth amendment).

deprivation of an individual's rights, the probable value, if any, of additional safeguards, and the administrative burdens that additional procedures would entail.[171]

While it is difficult to predict precisely how courts will weigh the due process considerations with respect to quarantine, it is clear that the liberty interest at stake, i.e., freedom from forced isolation that, in the case of AIDS, could last a lifetime,[172] is extremely important.[173] Moreover, courts must consider the adverse social consequences and stigma of quarantine, consequences which will be even harsher if a quarantine applies only to those who refuse to, or are thought incapable of, conforming their behavior to suggested guidelines.[174]

Given the magnitude of the liberty deprivation inherent in an AIDS quarantine, individuals quarantined will likely be entitled to significant procedural protections. Civil commitment for mental illness provides an interesting analogy.[175] The state invokes its police powers for the safety of society when it detains and isolates those individuals suffering from serious mental disease.[176] The individual has the right to notice and a judicial hearing with counsel, who will be appointed if the individual is indigent.[177] The state must prove by more than a preponderance of the evidence that commitment is justi-

171. Mathews v. Eldridge, 424 U.S. at 335-47. *See also* Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1494 (1985)(competing interests between governmental employer and employee lead to conclusion that some form of predetermination hearing is necessary before employee is discharged).

172. Krim, *supra* note 1, at 5. *See supra* note 131 and accompanying text.

173. *Cf.* Addington v. Texas, 441 U.S. 418, 425 (1979)("civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"); Jackson v. Indiana, 406 U.S. 715, 731-39 (1972)(indefinite commitment based solely on a criminal defendant's incompetency to stand trial constitutes a violation of due process; such a person can be held on that basis for a reasonable time to determine whether a substantial probability exists that capacity will be attained in the foreseeable future).

174. *See* Vitek v. Jones, 445 U.S. 480, 492 (1980); Addington v. Texas, 441 U.S. 418, 426-27 (1979). The stigmatizing effect of quarantine does not, of itself, trigger the due process clause. Paul v. Davis, 424 U.S. 693, 701 (1976). Stigma is merely one factor, in addition to the loss of liberty associated with the confinement, which the court will consider.

175. Although the analogy between quarantine and mental illness is a close one, there are significant differences. First, an involuntary commitment for mental illness can be justified on the ground that it is in the patient's own interest. Addington v. Texas, 441 U.S. 418, 426 (1979). An AIDS quarantine, however, would be undertaken for the benefit of society, not for the benefit of the isolated individual. Second, the need for procedural protections for individuals committed for mental illness reflects, in part, the recognition of the subjectivity of psychiatric diagnosis. *Id.* at 426-29. The diagnosis of HTLV-III infection can be confirmed through the objective analysis of blood tests. *See supra* notes 131-39 and accompanying text.

176. Addington v. Texas, 441 U.S. 418, 480 (1979).

177. Vitek v. Jones, 445 U.S. 480 (1980).

fied.[178] These procedural protections should also apply in the case of quarantine, as the West Virginia Supreme Court of Appeals held in *Greene v. Edwards*.[179] Recognizing that there is little difference if a person is committed because he or she is dangerous to others because of mental illness or physical illness, the *Greene* court held that all the procedural protections granted to individuals in a civil commitment proceeding should apply to a quarantine.[180] These procedures include adequate written notice detailing the grounds for commitment, the right to counsel, to appointed counsel if the individual is indigent,[181] the right to present and cross-examine witnesses, the right to a transcript for use on appeal, and the right to proof by the state by "clear, cogent and convincing evidence."[182]

The court in *Greene* did not consider whether the constitution requires a hearing prior to instituting a quarantine,[183] but case law suggests that the state could avoid a prior hearing in an emergency.[184] This exception to the requirement for a pre-enforcement hearing should not negate the state's obligation to seek a judicial order as soon as possible.[185] The critical teaching of the new due process cases is that the state must provide the hearing; the burden should not be on the individual to learn of the availability of habeas

178. *See* Addington v. Texas, 441 U.S. 418, 431-33 (1979). *But see* Parham v. J.R., 442 U.S. 584 (1979)(full procedural protections not required where parents commit their children).

179. 263 S.E.2d 661 (W. Va. 1980).

180. *Id.* at 663.

181. Counsel must be appointed to indigent prisoners transferred to mental hospitals because of the curtailment of liberty and the prisoners' inability to help themselves. Vitek v. Jones, 445 U.S. 480, 497 (1980). Many AIDS patients will be better educated than prisoners, but their physical condition will make self-defense a significant burden. In addition, the disease can cause neurological problems, impeding the individual's ability to defend him or herself. *See* Black, *HTLV-III, AIDS, and the Brain*, 313 NEW. ENG. J. MED. 1538 (1985)(discussing the neurological effects of HTLV-III infection).

182. *Greene*, 263 S.E.2d at 663.

183. The statute at issue in *Greene*, W. VA. CODE § 26-5A-5 (1980), provided for a judicial hearing prior to commitment. *Greene*, 263 S.E.2d at 662.

184. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523, 539 (1967)(a prompt inspection could be instituted without a warrant in an emergency); North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306, 315 (1908)(state has the right to seize and destroy spoiled and unwholesome food even though no notice and opportunity to be heard are given).

185. In the case of civil commitment for mental health, for example, the state can detain someone in an emergency prior to a judicial hearing, but must petition the court for a long-term commitment order within several days. E. REIS, MENTAL HEALTH AND THE LAW 119-24 (1984). Under the criminal law, the state can seize someone without a warrant when it has probable cause, but must establish probable cause at a hearing before a magistrate in order to continue the detention. Gerstein v. Pugh, 420 U.S. 103, 113-14 (1975).

corpus.[186]

The application of current notions of procedural due process to quarantine will do much to reduce the dangers of an unfettered exercise of discretion by health officials, but its significance should not be overstated. While the notion of procedural due process is deeply rooted in our legal history, it serves primarily to ensure that the regulation at issue is properly applied to particular individuals.[187] While a fact-finding hearing addresses a major concern,[188] it would be of little value if an AIDS quarantine is imposed by statute on everyone who had a positive result on the tests to determine the presence of HTLV- III.[189] If, however, the state imposed a behavior-linked quarantine,[190] then the difficult question of how to predict an individual's future behavior would become an issue.[191] A hearing would serve the essential function of ensuring that the evidence was evaluated and judged by a neutral fact-finder, as in the civil commitment procedure.[192] Even under these circumstances, procedural protections satisfy only some of the constitutional issues raised by a quarantine. They do not resolve the ultimate issue of whether the quarantine policy itself is appropriate. Substantive review would be required to provide the necessary answers.

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186. In Parrat v. Taylor, 451 U.S. 527 (1981), the Supreme Court held that in some situations a post-deprivation state damage remedy might be all the process required by the fourteenth amendment. *Id.* at 538, 543-44. Although *Parrat*'s scope is the source of considerable controversy, the Court has stated that it does not apply to established state procedures such as quarantine, but only to injuries caused by unauthorized random actions. Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36 (1982).

187. *See* Addington v. Texas, 441 U.S. 418, 431 (1979)(procedural due process does not diminish right of states to develop a variety of solutions to problems). *See also* Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975)(considering other purposes served by procedural protections).

188. A hearing is especially important in the case of civil commitment because the question of an individual's dangerousness cannot be determined by objective means. Addington v. Texas, 441 U.S. 418, 427, 429-30 (1979).

189. Although individuals could claim that the test yielded imprecise results, *see supra* note 137 and accompanying text, an AIDS quarantine imposed on those who test positive would generally have less disputed and subjective evidence at issue than other forms of quarantine. For a discussion of possible forms of an AIDS quarantine, see *supra* text accompanying notes 132-44.

190. *See supra* text accompanying notes 143-44.

191. *See, e.g.*, Ennis & Litwack, *Psychiatry and the Presumption of Expertise—Flipping Coins in the Courtroom*, 62 CAL. L. REV. 711 (1974). *But see* Barefoot v. Estelle, 463 U.S. 880 (1983)(allowing psychiatrist to answer hypothetical questions about future behavior of the defendant not barred by the Constitution).

192. *See supra* text accompanying note 177. *See also* Rogers v. Commissioner of the Dep't of Mental Health, 390 Mass. 489, 500-05, 458 N.E.2d 308, 316-18 (1983) (stressing need for judicial order before treating incompetent patients with antipsychotic drugs).

D. Substantive Constitutional Limitations

Although the law has long upheld the power to quarantine and has granted wide discretion to health officials, some substantive restraints on that power are well established. In the early years of this century, courts held that quarantine regulations had to be "reasonably necessary for the accomplishment of the purpose to be attained."[193] As quarantine began to be used in connection with the criminal law, courts placed further limits on health officials, limiting the type of presumptions they could make.[194]

It is likely that courts will continue to insist upon substantive limitations on the quarantine power, although they will not analyze the issue in the same way they once did.[195] Contemporary constitutional analysis would begin with the recognition that quarantine deprives an individual of important liberty interests. Where such interests are infringed upon, courts will engage in a heightened level of review and place substantive limits upon the state's power.[196]

Today, in determining the scope of scrutiny or deference to be given to a type of government regulation, courts usually balance the interests of the community versus the individual liberty interest at

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193. Kirk v. Wyman, 83 S.C. 372, 380, 65 S.E. 387, 390 (1909). *See also* Crayton v. Larabee, 220 N.Y. 493, 503, 116 N.E. 355, 358 (1917); *In re* Smith, 146 N.Y. 68, 75-77, 40 N.E. 497, 498-99 (1895).

194. *See supra* text accompanying notes 92-97.

195. No quarantine case judicially reported in the last 15 years has considered the impact of modern substantive due process or equal protection limitations on the quarantine power. Greene v. Edwards, 263 S.E.2d 661 (W. Va. 1980)(per curiam) was decided on procedural grounds. Reynolds v. McNichols, 488 F.2d 1378, 1382-83 (10th Cir. 1973), affirmed the right to "hold and treat" a prostitute, citing with approval Jacobson v. Massachusetts, 197 U.S. 11 (1905)(compulsory smallpox vaccination case), and Compagnie Francaise De Navigation A Vapeur v. Louisiana State Bd. of Health, 186 U.S. 380 (1902)(quarantining those with infectious disease and excluding all healthy noninfected persons from entering the infected place). The *Reynolds* court also considered but rejected the applicability of Camara v. Municipal Court, 387 U.S. 523 (1967), which applied the fourth amendment to housing code inspections, thereby rejecting warrantless inspections. The *Reynolds* court found *Camara* to be inapplicable to warrantless inspections in emergency situations. *Reynolds*, 488 F.2d at 1382-83. But the court failed to consider substantive issues raised by other modern cases. In *In re* Halko, 246 Cal. App. 2d 553, 54 Cal. Rptr. 661 (1966), the court upheld the quarantine of an individual where the state had reasonable grounds to believe he was ill. *Id.* at 558, 54 Cal. Rptr. at 664-65. The absence of any further consideration of substantive issues in *Halko*, however, is not surprising since the case was decided before most of the critical fourteenth amendment cases.

196. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307 (1982)(involuntarily commitment of mentally retarded); Roe v. Wade, 410 U.S. 113 (1973)(state regulation of abortion); Shapiro v. Thompson, 394 U.S. 618 (1969)(Stevens, J., concurring)(durational residency requirement).

stake.[197] Neither the justification for such a balance, the weight to be given to different interests, nor the ultimate scope of judicial review has been consistently analyzed. Sometimes such analysis has been done under the rubric of the due process clause of the fourteenth amendment, sometimes under the authority of the equal protection clause.[198] It is not the purpose of this Article to unravel the doctrinal inconsistencies. What is essential is that courts will balance the significance of the government's objective and the importance of the individuals' infringed rights[199] in adopting a level of review for analyzing the relationship between the ends sought by the state and the means used to achieve the goal.[200] This balance certainly cannot determine any definitive answer as to the limits of the quarantine power, but it does suggest an approach to the question.

The application of a balancing approach to an AIDS quarantine will not be easy. The state clearly has a legitimate interest in protecting the public health.[201] This interest is especially strong in the case of AIDS, a fatal, infectious disease which, according to some experts, threatens to kill a million Americans within five to ten years,[202] and has already cost the nation an estimated 6.2 billion dollars.[203] On the other hand, quarantine always represents a significant

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197. This balancing test refers to the analysis usually undertaken by courts when they are initially determining the type of review to be given to a class of regulations. *See* cases cited *supra* note 196.

198. *Compare* Boddie v. Connecticut, 401 U.S. 371, 380-81 (1971)(balancing the right to divorce as protected by the due process clause against the state interest in imposing court fees) *and* Roe v. Wade, 410 U.S. 113, 167 (1973)(Stewart, J., concurring)(balancing personal liberty rights protected by the due process clause against state interests, advanced to justify infringing these rights) *with* Harper v. Virginia Bd. of Elections, 385 U.S. 663 (1966)(equal protection violation found when state imposes poll tax, thereby conditioning the right to vote). In the case of civil commitment, the Court has relied upon the due process clause to establish substantive limits on the state's power, *see* Youngberg v. Romeo, 457 U.S. 307, 320-22, 324 (1982).

199. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 320, 321, 324 (1982); Roe v. Wade, 410 U.S. 113, 153-54 (1973).

200. *See, e.g.*, City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 430 (1983)(state's interest in health must be balanced against mother's right to privacy); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974)(state's interest in maintaining the fiscal integrity of its free medical care program balanced against the individual's right to interstate travel); Shapiro v. Thompson, 394 U.S. 318 (1969)(balancing the state's need to preserve the fiscal integrity of state public assistance programs against the fundamental right of interstate movement).

201. Roe v. Wade, 410 U.S. 113, 154, 162-64 (1973)(state has proper interest in protecting maternal health and maintaining medical standards).

202. Boffey, *supra* note 138, at C1, col. 4.

203. Hardy, Rauch, Echenberg, Morgan & Curran, *supra* note 140, at 210. Researchers estimate that the first 10,000 cases of AIDS will result in $1.4 billion in hospital costs and

infringement on individual liberties. This infringement will be enhanced in the case of AIDS, since individuals infected with the HTLV-III virus are thought to remain infectious throughout their lives,[204] and might therefore be quarantined for life. Moreover, the stigma attached to an individual quarantined for AIDS will undoubtedly be severe, as evidenced by the discrimination already encountered by victims of the disease, and by homosexuals and other members of "high-risk" groups who are merely suspected by the public of having the disease.[205] In addition, the association of AIDS with groups that are socially disfavored, such as drug addicts and homosexuals, suggests that there is a serious danger that quarantine will be used as a tool of prejudice.[206]

When weighing these factors, courts may refer to the mental health commitment[207] and the abortion cases[208] for guidance. These

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$4.8 billion in lost wages. *Id.* at 209, 210.

204. *See supra* note 172 and accompanying text.

205. *See* D. ALTMAN, *supra* note 2, at 58-81; A. BRANDT, *supra* note 85, at 182-85. *But see Attitudes to Homosexuals Little Changed by AIDS, Poll Says*, N.Y. Times, Dec. 15, 1985, at 41, col. 1 (59% of those surveyed indicated that their attitudes toward homosexuals were unchanged by AIDS).

206. *Cf.* Korematsu v. United States, 323 U.S. 214 (1944)(internment of Japanese-Americans during World War II); Compagnie Francaise De Navigation A Vapeur v. Louisiana State Bd. of Health, 186 U.S. 380, 399 (1902)(quarantine against immigrants). The fact that the Court once tolerated measures based on such fear and prejudice should serve as an example of the dangers of blind deference to cries for public safety.

207. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 324 (1982)(state cannot restrain residents of mental institutions except when necessary to assure such safety or to provide needed training). The Court in *Youngberg*, however, left the determination of when restraint is "necessary" to "professional judgment." *Id.* This deference appears to result from the Court's fear of judicial interference in the administration of large institutions. *Id.* at 322-23, 324-25.

The Court has never articulated the full extent of substantive limitations on the state's power to commit. However, the mere fact that an individual is ill, or "physically unattractive or socially eccentric" does not justify commitment. O'Connor v. Donaldson, 422 U.S. 563, 575 (1975). The individual must pose a threat to the community or be unable to care for himself. Addington v. Texas, 441 U.S. 418 (1979). The fourteenth amendment also requires that the state provide the individual with care and minimally adequate training to ensure safety and to avoid undue restraint. Youngberg v. Romeo, 457 U.S. 307, 319, 324 (1982). This raises the possibility that a state would be required to provide a quarantined individual with medical care. *Cf.* Estelle v. Gamble, 429 U.S. 97, 103 (1976)(state has an obligation to provide medical care for prisoners; failure to do so constitutes cruel and unusual punishment). Nineteenth century quarantine statutes routinely required health officers to provide care and necessities to individuals quarantined and made cities and towns liable for the costs when the individual was indigent. *See, e.g.*, Aaron v. Broiles, 64 Tex. 316 (1885). The cost of providing care and treatment to an AIDS patient would be high. Hospital costs are approximated at $140,000 per patient. *See* Hardy, Rauch, Echenberg, Morgan & Curran, *supra* note 140, at 210.

208. *See e.g.*, City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983).

cases suggest that such a severe restraint on liberty as quarantine can only be justified if it is narrowly tailored to effectuate its stated purpose and is necessary to achieve the state's goal of stopping the spread of the disease.[209] Applying this form of review should lead courts to recognize that any quarantine regulation that applies to all individuals with AIDS or all individuals who test positive on an antibody test will be unconstitutional. Because casual contact cannot spread the disease,[210] infected individuals present no health hazard to anyone with whom they do not have sexual relations, exchange blood or other body fluids, or share intravenous needles.[211] A quarantine of all people infected with HTLV-III, unlike a smallpox quarantine, would be similar to isolating people merely because they are ill, which is plainly unconstitutional.[212] A quarantine limited only to individuals with clinical AIDS would, in addition, be defective because it would not reach most individuals capable of spreading the disease.

Serious constitutional problems also exist with a limited quarantine applicable only to those who refuse, or are unable, to conform to medical and behavorial guidelines. This form of quarantine depends upon predicting future behavior, which cannot be done reliably[213] and, therefore, forms a very uncertain basis for a quarantine that could last a lifetime.[214] Moreover, like the quarantines once applied to prostitutes, a behavior-linked quarantine would stigmatize individuals affected, and necessarily carry with it criminal overtones. Indeed, the inevitable close relationship between a behavior-linked quarantine and the criminal law suggests that the latter would be a more appropriate way of deterring dangerous acts than quarantine would be. The criminal law would punish only those individuals who were found, after a full trial, to have committed clearly proscribed

209. *See* Note, *supra* note 4, at 1282.

210. Krim, *supra* note 1, at 4.

211. *Id.* at 3-5. *See supra* note 124 and accompanying text.

212. *Cf.* Addington v. Texas, 441 U.S. 418, 427 (1979)(idiosyncratic behavior is no basis for confinement); O'Connor v. Donaldson, 422 U.S. 563, 575 (1975)(citations omitted)(finding of "mental illness" is not enough to justify confinement; "Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.").

213. *See supra* note 191. Predictions of future dangerousness are considered by some states as a factor in sentencing, Barefoot v. Estelle, 463 U.S. 880 (1983), and in other post-conviction decisions. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 123A, § 5 (West 1983). In these cases, however, the individual was first convicted of committing a prohibited act.

214. An AIDS quarantine would differ drastically from the brief periods of isolation imposed on prostitutes who were considered likely to spread venereal disease. *See supra* notes 85-89. For a discussion of the similarities and differences between AIDS and syphilis, see A. BRANDT, *supra* note 85, at 182-86.

acts.[215] A criminal statute would not rely, as might a quarantine, on uncertain predictions of future behavior and less than full procedural protections.[216]

Cases that are difficult to resolve may arise nonetheless. For example, in some communities, prostitutes with AIDS have openly declared that they will continue to practice prostitution.[217] Even in such cases, however, quarantine should not be permitted unless the state attempts to utilize alternatives, such as educating the individual to the dangers and providing assistance to enable the individual to subsist without prostitution.[218] If a regulation is applied only after such alternatives are exhausted, and provides full procedural protections, courts might be reluctant to find that the regulation is not closely tailored to standards of necessity.[219] However, because such cases will be rare, a quarantine would have little or no impact on the spread of the epidemic. The underinclusiveness of the regulation, as

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215. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)(vagrancy statute void for vagueness because it allowed for arbitrary arrest without cause and did not give fair notice of the offending conduct).

216. The constitutionality of criminal statutes aimed at stopping the spread of AIDS is beyond the scope of this Article. *See* Robinson, *AIDS and the Criminal Law: Traditional Approaches and a New Statutory Proposal*, 14 HOFSTRA L. REV. 91 (1985). However, intravenous recreational drug use is obviously already illegal and the constitutionality of sodomy laws in general has recently been upheld by the Supreme Court. Bowers v. Hardwick, 106 S. Ct. 2841 (1986). For a discussion of whether the AIDS problem provides a sufficient justification for criminalizing sodomy, see generally Comment, *supra* note 3 (examining the future of criminalizing homosexual conduct).

217. In Texas, reports of a male prostitute with AIDS who intended to continue having sexual relations were cited as reasons for the Board of Health's consideration of a quarantine. Connor, *Community Gears Up: Texas Health Officials Seek Quarantine*, Gay Community News, Jan. 18, 1986, at 1, col. 1.

218. When courts review policies to determine if the means selected are closely tailored to their goal, they consider whether the state could have achieved its goal by a less restrictive alternative. Shapiro v. Thompson, 394 U.S. 618, 637-38 (1969); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972).

219. It is unclear whether a state attempting to establish necessity must show that it is doing all it can to combat a disease in ways that do not infringe on individual rights, or must merely establish that less restrictive alternatives will not prevent the particular individual involved from engaging in activities that may spread the disease. Does the Constitution require the state to reallocate its fiscal priorities and dedicate more money to medical research and public health education before it attempts to quarantine individuals? Courts rarely accept such arguments as a constitutional matter, although community mental health centers have been established as an alternative to institutional commitment. *See, e.g.*, Brewster v. Dukakis, 520 F. Supp. 882 (D. Mass. 1981). There is no theoretical reason why the Constitution cannot be read to require that a state alter its fiscal policies prior to severely infringing upon individual rights, especially when alternative policies are more likely to be effective. *See supra* note 218.

the court realized in *Jew Ho v. Williamson*,[220] raises questions both about the purpose of the regulation and the possibility that it will be used to discriminate or harass particular individuals (particularly those such as homosexuals who are frequent targets of discrimination) rather than to protect the public health.[221] These are concerns that the courts may not be able to address directly because the groups at high risk of contracting AIDS are not suspect classes for the purposes of equal protection law.[222] Nevertheless, the potential for abuse of the quarantine power should influence the court to scrutinize closely the need for any quarantine. A broad quarantine would isolate people who are not dangerous while a narrow behavior-linked one would do little more than scapegoat particular individuals.

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220. 103 F. 10 (N.D. Cal. 1900).

221. *See supra* notes 59, 88-89, 103-23, 205 and accompanying text.

222. Contemporary equal protection doctrine will do little towards reducing those dangers because it generally protects groups recognized as a "suspect" or "semi-suspect" class. *See* L. TRIBE, *supra* note 28, at 1012-82. If a class is not in a protected category, a regulation will be upheld unless it lacks any rational relationship to a valid state interest. City of Clebourne v. Clebourne Living Center, 105 S. Ct. 3249, 3254-55 (1985)(ordinance requiring special permit to operate a group home for the mentally retarded is based on irrational prejudice, bears no rational relationship to a valid state goal, and therefore violates the equal protection clause). While the Court has, in one recent case, invalidated an ordinance under that standard because it was based on prejudice, *see id.* at 3260, generally, state regulations are affirmed when reviewed under the rational relationship test. *See* L. TRIBE, *supra* note 28, at 994-96. Therefore, the equal protection clause will probably not protect the groups associated with AIDS from discriminatory regulations, unless courts find these groups to be protected classes.

Although some commentators have argued that homosexuals should be considered a suspect class, *e.g.*, Friedman, *Constitutional and Statutory Challenges to Discrimination in Employment Based on Sexual Orientation*, 64 IOWA L. REV. 527 (1979), courts have not been very sympathetic to that argument. *See, e.g.*, Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984)("A classification based on one's choice of sexual partners is not suspect."); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 333 (9th Cir. 1979)(homosexuals are not a class within the meaning of the civil rights statute). The Supreme Court's recent decision upholding the criminalization of sodomy by homosexuals suggests that the Court is very unlikely to accept the argument that homosexuals are a protected class in the near future. Bowers v. Hardwick, 106 S. Ct. 2841 (1986). Moreover, it is not plausible to believe that courts will find intravenous drug users to be a suspect class. Among groups associated in the public's view with AIDS, only Haitians are likely to be considered a suspect class. *See* L. TRIBE, *supra* note 28, at 1052-56. However, even if a high-risk group was a suspect or semi-suspect class, it would make little difference. Unless a quarantine regulation discriminated on its face, a challenger would have to show that it was motivated by discriminatory intent. Washington v. Davis, 426 U.S. 229 (1976). Such a showing would be difficult to make, and ultimately unnecessary, because quarantine would be subject to strict review anyway, because it infringes on important interests. *See supra* text accompanying notes 207-12.

E. Regulatory Review

Even if a quarantine passed constitutional muster, courts must remember what the nineteenth century courts knew: quarantines are usually implemented by regulatory officials, and courts must review administrative actions to ensure that they are properly authorized by the governing statutes.[223] When public health regulations were rare, and quarantine was one of the few universally accepted regulations, courts vested broad discretion in quarantine officials.[224] But today, health and safety regulations are commonplace. In fact, many such regulations have the potential of saving thousands of lives—perhaps more lives than could be saved by any AIDS quarantine.[225]

As judicial review of administrative decisions has become more common, it has also become more rigorous.[226] Courts today routinely give such regulations a "hard look" to ensure that the administrative agency properly compiled the record, carefully reviewed alternatives, and based its decision on a valid justification.[227] The Court of Appeals for the District of Columbia has stated it will require

> that assumptions be stated, that process be revealed, that the rejection of alternate theories or abandonment of alternate courses of action be explained and that the rationale for the ultimate decision be set forth in a manner which permits the public to exercise its statutory prerogative of comment and the courts to exercise their statutory responsibility upon review.[228]

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223. *See supra* text accompanying notes 55-58.

224. *See supra* text accompanying notes 69-74.

225. For example, the motor vehicle safety regulation at issue in Motor Vehicle Mfr's Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983), was estimated by the government as having the potential to save 12,000 lives and prevent over 100,000 serious injuries each year. *Id.* at 35. *See supra* note 140.

226. For a discussion of the growth of a more rigorous form of judicial review of administrative actions, see Stewart, *supra* note 149, at 1679-81.

227. *See* Motor Vehicle Mfr's Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40-44 (1983)(courts will review agency action to insure that it was based on an examination of relevant data and that agency can offer a satisfactory explanation of its choice); National Lime Ass'n v. EPA, 627 F.2d 416, 426, 451-53 (D.C. Cir. 1980)("hard look" standard described and applied to EPA decision); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 647-50 (D.C. Cir. 1973)(close court scrutiny of a decision EPA denying application for the suspension of motor vehicles emission standards; applicable statute provided that the judiciary would review suspension decisions). State courts tend to give even less deference to the decisions of administrative agencies. B. SCHWARTZ, ADMINISTRATIVE LAW 606-07 (2d ed. 1984).

228. National Lime Ass'n v. EPA, 627 F.2d 416, 453 (D.C. Cir. 1980)(citations and footnotes omitted). A "hard look" review is both procedural and substantive. It focuses on the methodology used by the agency and also examines the adequacy of the agency's reasoning. This approach comes close to a review of the reasonableness of an agency's decision. *See* Gar-

There is no justification for using a more lenient standard of review for quarantine than for other health and safety regulations. Indeed, since quarantine impinges upon rights more fundamental than those affected in most other regulatory cases, a strong argument can be made for applying the "hard look" doctrine with particular care in the case of quarantine.[229]

The application of a stricter standard of review to quarantine would not necessarily mean that a health agency could not use a quarantine against AIDS. Such a standard of review, however, would require that agencies give careful consideration to quarantine and its alternatives, and that they choose to implement restrictive policies only when they have fully considered and concluded that less restrictive policies will not be satisfactory. Furthermore, this standard might encourage agencies to consider alternatives suggested by interested parties. Such alternatives could include public education programs aimed at retarding the spread of the disease. In short, the standard, while far from ideal, would be a step toward ensuring "reasoned decision-making"[230] regarding the quarantine issue, and would, hopefully, reduce the susceptibility of quarantine to pressures posed by public hysteria and bigotry.

CONCLUSION

The law of quarantine is, in many ways, anachronistic. It evolved in an era when the citizen's relationship with the state was quite different than it is today. It was used frequently in a time when contagious disease was a common threat to a community that had few other tools with which to fight. Although the case reports are filled with quarantine cases that stress the state's broad power to quarantine, and the wide scope of discretion afforded to health officers, these cases must be considered in the context of their times. Moreover, even these early cases recognized that some limits must be placed on the quarantine power.

If quarantine is to be applied to AIDS, courts must consider the precedent in the light of other, more recent, developments in the law. In particular, courts must recognize that quarantine cannot be con-

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land, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507, 526-27, 532-34 (1985).

229. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597-98 (D.C. Cir. 1971)(to protect fundamental interests in life, health and liberty from administrative arbitrariness, courts must strictly review administrative decisions).

230. National Lime Ass'n v. EPA, 627 F.2d 416, 453 (D.C. Cir. 1980)(footnote omitted).

stitutionally justified today unless the state can show that the particular method chosen is carefully tailored to meet its goal—public health protection. In addition, states must provide full procedural protections and courts must also carefully scrutinize administrative actions. Finally, courts must remain vigilant to the possibilities that prejudice and fear may combine to turn the quarantine power from an instrument of public health to one of public bigotry and hatred.