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## Quarantine for AIDS: Is It Constitutionality Permissible

Craig G. Miller

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## STUDENT ESSAY

# QUARANTINE FOR AIDS: IS IT CONSTITUTIONALLY PERMISSIBLE?

### I. INTRODUCTION

This paper discusses the constitutionality of an AIDS quarantine program. Many ancillary issues could legitimately be discussed in conjunction with this topic, such as the requirement of procedural due process in a constitutional quarantine program, the constitutional validity of a mass AIDS testing program (which would be necessary to carry out an effective quarantine program), and the effectiveness of an education program in lieu of a quarantine statute. The confines of time and space do not permit treatment of these and other related issues. The author hopes that as a consequence of this discussion the individual reader will be motivated toward a deeper study of ancillary issues.

#### *A. The Background of Quarantine*

Numerous calls for quarantine have been proposed as the number of AIDS cases multiplies.<sup>1</sup> Though AIDS is a relatively new disease, the concept and practice of quarantine is well established. In fact, it has been said that “[t]he history of pestilence is the history of quarantine.”<sup>2</sup> The detention in quarantine of persons infected with communicable diseases has long been recognized by the medical profession and the public at large as one of the most effective measures that may be taken to prevent their spread. The Bible’s book of *Leviticus* gives one of the earliest descriptions of quarantine when it tells of Moses’ separation of the lepers from the “clean.”<sup>3</sup> Lepers were separated from healthy citizens in ancient Rome and Greece, and quarantine was instituted to stop the progress of the bubonic plague which once ravaged the city of London.<sup>4</sup> Quarantine was used in North America as early as 1622 to combat small pox on Long Island.<sup>5</sup> United States history reveals the use of quarantine to control diseases such as venereal disease, tuberculosis, small pox, scarlet fever, lepro-

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1. See Pagano, *Quarantine Considered for AIDS Victims*, CAL. LAW. MARCH 1984, at 17; Parry, *AIDS as a Handicapping Condition*, 9 MENTAL AND PHYSICAL DISABILITY L. REP. 402, 403 (1985); Comment, *AIDS—A New Reason to Regulate Homosexuality?*, 11 J. CONTEMP. L. 315, 316 (1984).

2. Pettaway, *Compulsory Quarantine and the Treatment of Persons Infected with Venereal Disease*, 18 FLA. L. J. 13, 13 (1944).

3. *Id.* at 13; see *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.”).

4. Pettaway, *supra* note 2, at 13.

5. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53, 56 (1985).

sy, cholera, and the plague.<sup>6</sup> All of the aforementioned diseases were either casually transmitted or believed to be so, most were fatal or extremely debilitating, and many, if not all, were incurable at the time of quarantine. None of the diseases were completely understood at the time quarantine was employed, and it was obvious that in those diseases which are in fact transmitted by casual contact, such as small pox and tuberculosis, many deaths were prevented by the measure. For diseases such as venereal disease and scarlet fever, which are transmitted by intimate contact, and leprosy, which is communicable by physical contact, quarantine undoubtedly protected many individuals from contracting disease from both knowing and unknowing carriers.

### *B. The Constitutional Basis of Quarantine*

A state's right to enact public health laws is universally conceded.<sup>7</sup> By the time the federal constitution was drafted in 1787, quarantine had become a well established form of public health regulation. Although the Constitution does not mention quarantine, article 1, section 10 does grant to the states the right to promulgate and enforce inspection laws.<sup>8</sup> Chief Justice Marshall in *Gibbons v. Ogden* recognized the breadth of these state inspection laws in noting that

[state inspection laws] form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the central government . . . inspection laws. Quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state . . . are components of this mass.<sup>9</sup>

Prior to the 1970s, the courts, using a "rational basis" test, generally held that they would not substitute their own judgment for that of the state legislatures and that the manner and mode of public health regulatory efforts was wholly within the ambit of the states' police powers.<sup>10</sup> The courts would strike down

6. See generally *Jew v. Williamson*, 103 P. 10 (N.D. Cal. 1900); *Ex parte Martin*, 83 Cal. App. 2d 164, 188 P.2d 287 (1948); *In re Hallico*, 246 Cal. App. 2d 553, 54 Cal. Rptr. 661 (Cal. Dist. Ct. App. 1966); *Jones v. Czupkay*, 182 Cal. App. 2d 192, 6 Cal. Rptr. 182 (W. Dist. Ct. App. 1960); *Stute v. Rackowski*, 86 Conn. 627, 86 A. 606 (1913); *Varholy v. Sweat*, 153 Fla. 571, 15 So. 2d 267 (1943); *People v. Tait*, 261 Ill. 197, 103 N.E. 750 (1913); *Allison v. Cash*, 143 Ky. 679, 137 S.W. 245 (1911); *Hengehold v. City of Covington*, 108 Ky. 752, 57 S.W. 495 (1900); *Rudolphe v. City of New Orleans*, 11 La. Ann. 242 (1854); *Ex parte Caselli*, 62 Mont. 201, 204 P. 364 (1922); *Crayton v. Larrabee*, 220 N.Y. 493, 116 N.E. 355 (1917); *Kirk v. Wyman*, 83 S.C. 372, 65 S.E. 387 (1909); *State ex rel. Kennedy v. Head*, 182 Tenn. 249, 185 S.W. 2d 530 (1945); *White v. Seattle Local Union No. 81*, 53 Wash. 2d 802, 337 P. 2d 289 (1959).

7. Pettaway, *supra* note 2, at 15.

8. Parmet, *supra* note 5, at 56-57.

9. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 205 (1824).

10. See generally *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905); *Mugler v. Kansas*, 123 U.S. 623 (1887); *State v. Rackowski*, 86 Conn. 677, 86 A. 606, 608 (1913); *Varholy v. Sweat*, 153 Fla. 571, 15 So. 2d 267, 269-70 (1943); *People ex rel. Barmore v. Robinson*, 302 Ill. 422, 134 N.E. 815 (1922); *Allison v. Cash*, 143 Ky. 679, 137 S.W. 245 (1911); *Highland v. Schulte*, 123 Mich. 360, 82 N.W. 62, 64 (1900); *Kirk v. Wyman*, 83 S.C. 372, 65 S.E. 387, 392 (1909).

a state quarantine statute only if there were no reasonable relationship to a legitimate state interest or if the statute were arbitrary and capricious.<sup>11</sup> Under this test, a quarantine for AIDS carriers would likely be upheld. However, the past quarter century produced a series of cases which enhanced and expanded individual rights and liberties.<sup>12</sup> These cases resulted in a new "strict scrutiny" test, which would undoubtedly be applied to an AIDS quarantine.

## II. MODERN CONSTITUTIONAL STANDARDS REGULATING QUARANTINE

### A. *Strict Scrutiny Standards*

It is doubtful that the courts will continue to apply a rational basis test to the quarantine of AIDS victims or victims of any other disease. Since the major decisions upon which public health actions were founded in the 1800s and the early 1900s, the American judiciary has become more sophisticated in its analysis of matters affecting individual liberties: "more rights have been recognized—ranging from privacy in contraception to attendance at non-segregated schools—and protection of all rights has been enhanced."<sup>13</sup>

Contemporary analysis begins with the recognition that quarantine deprives an individual of a fundamental liberty interest. Where such interests are infringed upon, courts will impose a heightened level of scrutiny and will place substantive limits upon the state's power.<sup>14</sup> This idea of engaging in a heightened level of review, commonly called strict scrutiny, comes from a line of cases in which the Supreme Court conferred a "fundamental status" upon several select liberties.<sup>15</sup> The Constitution does not allow the abridgement of these liberties which have attained the status of "fundamental" or preferred unless the proponent of the abridgement can demonstrate an extraordinary justification.<sup>16</sup>

11. Under the rational basis test of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), a statute is valid if it has a reasonable relationship to a legitimate state interest and is neither arbitrary nor capricious.

12. See *Mahrer v. Roe*, 432 U.S. 464 (1977); *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), *summarily affg.*, 403 F. Supp. 1199 (E.D. Va. 1975); *Roe v. Wade*, 410 U.S. 113 (1973); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

13. Gostin, *Traditional Public Health Strategies*, in *AIDS AND THE LAW: A GUIDE FOR THE PUBLIC* 48 (H. Dalton, S. Burris eds. 1987).

14. Parmet, *supra* note 5, at 82.

15. See *Roe v. Wade*, 410 U.S. 113 (1973) (striking down a state statute making all abortions criminal); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (striking down state statute making criminal the distribution of contraceptives to minors); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (held the right to travel fundamental, and, as such, state requirement of one-year residence as a condition of welfare benefits, was unconstitutional); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down state law making criminal the use of contraceptives); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (striking down state statute authorizing sterilization of felons with multiple convictions involving moral turpitude). See generally Lupo, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1029-30 (1979).

16. See *supra* note 15.

The evolution of the Court's application of the strict scrutiny standard appears in cases involving these fundamental rights.<sup>17</sup> The principles of these cases will have to be applied by analogy to quarantine because no quarantine case judicially reported in the last fifteen years has considered the impact of modern substantive due process or equal protection limitations on the quarantine power.<sup>18</sup> Emerging from the cases comes an idea of what is and what is not a compelling state interest. Preventing criminals from reproducing is not a compelling state interest when measured against the fundamental right of procreation;<sup>19</sup> preventing sexual promiscuity is not a compelling state interest when measured against the fundamental privacy interest in family relationships;<sup>20</sup> the maintenance of state fiscal funds and provisions for efficient administrative operation of a state's welfare system cannot contravene the right to travel;<sup>21</sup> a state's goal in deterring premarital sex and preventing defective or dangerous contraceptives from entering a public market are not compelling interests when weighed against the sexual privacy rights of single individuals;<sup>22</sup> and the protection of the fetus does not justify restriction of a woman's right to decide whether or not to beget a child, at least up to the point of fetal viability.<sup>23</sup> In contrast to these state interests which are not compelling when measured against fundamental rights, the Court found compelling state interests in protecting the fetus after viability<sup>24</sup> and sustained a state's use of Medicaid funds to assist in the cost of childbirth while excluding reimbursement for nontherapeutic first trimester abortions.<sup>25</sup> The Court has found that a state may encourage childbirth in this manner as long as it does not restrict access to abortions. Also compelling is a state's interest in prohibiting homosexual acts, even when performed in privacy.<sup>26</sup> The principle which emerges from these cases is that the courts will balance the significance of the government's objective and the importance of the individual's infringed rights in adopting a level of review for analyzing the relationship between the end sought and the means used to achieve the goal.<sup>27</sup> While there is no guarantee that the courts would apply such a balancing test if called upon to rule on the issue of quarantine, it seems logical that they would do so.

### *B. Application of the Strict Scrutiny Standards to Quarantine*

As the Court reiterated in *Roe v. Wade*,<sup>28</sup> the state has a legitimate interest

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17. *Id.*

18. See Parmet, *supra* note 5, at 82 n.195.

19. 316 U.S. 535 (1942).

20. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

21. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

22. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

23. *Roe v. Wade*, 410 U.S. 113 (1973).

24. *Id.* at 163.

25. *Maher v. Roe*, 432 U.S. 464 (1977).

26. *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976).

27. Parmet, *supra* note 5, at 83.

28. *Roe v. Wade*, 410 U.S. 113 (1973).

in protecting the public health. This interest is especially strong in the case of AIDS, a fatal, infectious disease which, according to some experts, threatens to kill one million Americans within five to ten years and has already cost the nation an estimated 6.2 billion dollars.<sup>29</sup> But is this interest in protecting the public health so compelling and strong as to permit the infringement of the liberty and privacy interests of AIDS-infected individuals? The degree of the state's interest must ultimately be decided on the strength of the arguments concerning issues such as how many lives are actually in danger from AIDS, how infectious the disease is, the extent to which personal liberties will be trampled, and whether effective alternatives to quarantine exist. The state's interest in preventing the further spread of the deadly AIDS epidemic is unquestionably strong and legitimate. Those who advocate quarantine for AIDS carriers certainly have the terrifying statistics on their side to show the compelling nature of the state's interest. With an estimated 1.5 million people already infected, with an expected doubling of that number in 1988,<sup>30</sup> and with the extreme risk of death, the states not only have a right, but also have a duty to find methods to stop the spread of AIDS.<sup>31</sup> In addition to the state's interest in preventing a deadly epidemic and preserving life, the states have an interest in preventing the astronomical health costs associated with treating AIDS victims. One estimate of such treatment costs is eight billion dollars in 1991.<sup>32</sup>

Conceding the state's interest in preventing an epidemic and preserving life, critics of quarantine for AIDS victims may maintain at least five arguments against its institution. First, they may argue that quarantine is unnecessary and would prove ineffective because AIDS is not transmitted by casual contact.<sup>33</sup> They therefore differentiate between AIDS and other diseases such as tuberculosis, small pox, and leprosy. Since AIDS is not transmitted by casual contact, infected individuals are only health threats to those with whom they have sexual relations, exchange body fluids, or share intravenous needles and are not a threat to the general public.<sup>34</sup>

In response, those in favor of quarantine show skepticism that AIDS is communicable only by the exchange of blood or body fluids.<sup>35</sup> These advocates claim that medical science does not yet conclusively know that AIDS cannot be transmitted by casual contact.<sup>36</sup> They further argue that even if at this point

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29. Parmet, *supra* note 5, at 83.

30. Gostin, *supra* note 13, at 47.

31. See Frosner, *What Can Be Done Against the Further Spread of AIDS?*, 15 *INFECTION* 1 (1987); Peura, *AIDS: The Scope of the Problem and the Problem of the Scope*, 33 *GASTROINTESTINAL ENDOSCOPY* 122-23 (1987).

32. Frosner, *supra* note 31, at 1.

33. See T. HAMMETT, *AIDS IN CORRECTIONAL FACILITIES: ISSUES AND OPTIONS* 3-15 (NATIONAL INSTITUTE OF JUSTICE May, 1987).

34. Parmet, *supra* note 5, at 85.

35. *Id.*

36. *Id.*

AIDS cannot be transmitted by casual contact medical science has identified AIDS as a virus and viruses are known for their propensity to change form.<sup>37</sup> Thus, AIDS may become communicable by casual contact even if it is not now transmitted in such a way. Also, courts have in the past allowed quarantine for diseases which were not transmitted by casual contact, such as venereal disease, scarlet fever, cholera, and the bubonic plague.<sup>38</sup> While we now know that quarantine for these diseases was not necessary, it was justified on the basis that the medical community did not at the time know how these diseases were transmitted. AIDS quarantine advocates maintain that we do not yet know enough about AIDS to definitely say that it is not a threat to the general public.<sup>39</sup> Their position is that should the medical community conclude that AIDS can be transmitted by casual contact it may be too late to help many people.<sup>40</sup>

The argument regarding the transmission mode of AIDS is the most critical and important issue in determining whether quarantine is justified. As courts consider the weight of the state's interest, the outcome will most likely depend on the level of credibility the courts accord current scientific opinions concerning AIDS transmission.

A second argument against the institution of quarantine is that, unlike many previous diseases which were subject to quarantine, quarantine for AIDS patients possibly means quarantine for life because they will remain infectious for life. The result could be that the individual's suffering would be far greater than the corresponding benefit to the public.<sup>41</sup>

A third articulated concern of those opposed to quarantine is that if an infected individual is quarantined he will probably be alienated from normal society for the remainder of his or her life. As Gleason states, "[a]lthough ultimately it may be proven that the individual was not infected, the stigma of quarantine would remain."<sup>42</sup> It is indeed true that existing tests for AIDS do not actually detect the presence of the AIDS virus; a positive result only means that the individual has been infected in the past. It is possible that the individual testing positive is no longer infected but has only been exposed to the AIDS virus.<sup>43</sup> Thus, if existing tests are made the basis for quarantine, some uninfected persons will doubtlessly be quarantined.

Fourth, opponents of quarantine believe that a quarantine statute cannot be tailored so narrowly as to pass the constitutional strict scrutiny test.<sup>44</sup> A

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37. *Id.*

38. See *Rudolphe v. City of New Orleans*, 11 La. Ann. 242, 243 (1854); *Kirk v. Wyman*, 83 S.C. 372, 65 S.E. 387, 389 (1909).

39. Gleason, *Quarantine: An Unreasonable Solution to the AIDS Dilemma*, 55 U. CIN. L. REV. 217, 221 (1986).

40. *Id.* at 233.

41. *Id.* at 232.

42. *Id.*

43. T. HAMMETT, *supra* note 33, at 3.

44. Parmet, *supra* note 5, at 85.

quarantine for all people who test positive to the AIDS virus is too broad, they argue, because not all who test positive are infectious and others who have end-stage AIDS are too ill to infect anyone by intimate contact.<sup>45</sup> On the other hand, a quarantine limited to those with clinical AIDS is too narrow, or under-inclusive, in that it will not reach all the dangerous carriers. This is so because people in the seropositive stage, infection stage, or ARC stage may be highly infectious while not having end-stage AIDS.<sup>46</sup> It is therefore argued that it is impossible to have an effective and constitutional quarantine statute because it will tend to be either over-inclusive or under-inclusive.<sup>47</sup>

Finally, those opposed to quarantine believe it fails the strict scrutiny test because the state has other reasonable alternatives available for combatting the spread of AIDS. The alternative most advocated is education.<sup>48</sup> By informing people that sexual activity can lead to infection and by offering them safe alternatives, the spread of AIDS can be controlled. A countervailing argument can be made, however, which asserts that education will not prove to be a fast, effective method for slowing the spread of AIDS and that even if education causes some individuals to alter their behavior many others will either be unable or unwilling to alter their lifestyles.

One proposed alternative to mandatory mass quarantine is a modified quarantine based on behavior rather than on disease status.<sup>49</sup> Such a quarantine would apply only to those AIDS-infected individuals who are not willing or able to abstain from dangerous behavior. Some commentators believe that such a modified quarantine would satisfy the strict scrutiny test, first, because of its focus on behavior rather than health status; second, because of its narrow numerical focus; and third, because its most likely targets would be persons engaged in activities that in and of themselves are criminal, such as prostitution and the intravenous use of illegal drugs.<sup>50</sup>

Quarantine of AIDS victims has already been permitted by two cases concerning prisoners. It is important to remember, however, that the individual rights of prisoners are subject to the rational actions of a penitentiary system.<sup>51</sup> *Cordero* thus sanctions the quarantine of persons who have "only a narrow range of protected liberty interests."<sup>52</sup> The second case, *LaRocca v. Dalsheim*, rejected a claim by prisoners that the prison was creating an AIDS colony and thereby infringing the rights of healthy prisoners.<sup>53</sup> The court stated that the prison may take precautions against the AIDS infection by implementing isola-

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45. *Id.*

46. T. HAMMETT, *supra* note 33, at 4-5.

47. Parmet, *supra* note 5, at 85.

48. Gleason, *supra* note 39, at 232.

49. Gostin, *supra* note 13, at 60.

50. Vaid, *Prisons*, in AIDS AND THE LAW: A GUIDE FOR THE PUBLIC 242 (H. Dalton, S. Burriss eds. 1987).

51. *Id.* at 10.

52. *Id.* (quoting *Hewitt v. Helms*, 459 U.S. 460, 467 (1983)).

53. *LaRocca v. Dalsheim*, 467 N.Y.S.2d 302 (1983).



tion, special procedures, and precautionary measures such as those used for hepatitis-B infection because of inmate fear and due to the dangers and unknown aspects of the disease.<sup>54</sup> While *LaRocca*, like *Cordero*, must be narrowly construed, the case demonstrates that quarantine is not per se unconstitutional and will be upheld by the courts in some circumstances.

### III. CONCLUSION

In determining whether a quarantine system should be instituted to contain the spread of AIDS, the courts must consider the compelling nature of the state's interest in protecting the lives of its citizens and must balance that interest against the infringement of individual rights. The state certainly has a compelling interest in containing the spread of AIDS, saving lives, and keeping the medical costs of the treatment of AIDS to a minimum. A mandatory quarantine program coupled with an obligatory testing program would significantly contain the spread of AIDS and would help in quelling the fear of the American public. However, since it would be necessary to isolate all individuals who test positive for AIDS if the quarantine program were to achieve its intended goal, individual rights and liberties would automatically be subordinated to public interest; and some uninfected individuals would very likely fall within the broad sweep of such a quarantine program. Thus, it is unlikely that the courts would affirm the imposition of such a quarantine program unless they were convinced by medical evidence that the AIDS virus is transmitted by casual contact. A program of quarantine for incorrigibles coupled with an education program would have a greater chance of being upheld based on the current state of medical knowledge concerning AIDS and its transmission.

This author supports such a modified quarantine based on behavior. Such a quarantine program would be defensible given the state's compelling interest in protecting its citizens from those infected persons who willingly and knowingly engage in dangerous conduct. While a mass quarantine of all AIDS-infected individuals would probably not meet strict scrutiny standards at this time, it would meet such a standard if, in the future, mutation causes the AIDS virus to become communicable by casual contact. Presently, a behavior-based quarantine program is a valid and reasonable exercise of state police power, especially in light of the exponential growth in the number of AIDS cases, the recognized effectiveness of quarantine in stemming the spread of communicable diseases, and the potential suffering and loss in human life which history has shown to result from permitting such pestilence to continue unchecked.

*Craig G. Miller*

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54. *Id.* at 311.