AIDS--A Legal Emergency

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CURRENT ISSUES

AIDS—A LEGAL EMERGENCY

The current outbreak of the disease known as acquired immune deficiency syndrome ("AIDS")\(^1\) is considered the most significant epidemic since the emergence of polio and smallpox.\(^8\) Currently it is estimated that over twelve thousand people have the AIDS virus, and it is feared that this number could double in the next two years.\(^8\) Understandably, the AIDS crisis has caused a great deal of hysteria in our society\(^4\) because of its potential for being "much

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1. "Acquired” indicates that its victims did not inherit the condition. See Update on Acquired Immune Deficiency Syndrome (AIDS)-United States, 31 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 507 (Sept. 24, 1982). "Immune Deficiency” reflects the fact that its victims have one thing in common; they all have a severe breakdown of their immune system. Id. at 507. The term “syndrome” covers the area of rare, fatal diseases that take advantage of the human body's collapsed defenses. Id. at 507.

2. The AIDS virus crept up on the world in a surreptitious manner. See Clark, AIDS: Once Dismissed as the Gay Plague, The Disease Has Become the No. 1 Health Menace, 56 NEWSWEEK 20, 21 (Aug. 12,1985).

3. In 1980, Dr. Michael Gottlieb of the University of California at Los Angeles identified several men with pneumocystis carinii pneumonia (PCP), a rare type of pneumonia usually only found in persons whose immune systems are failing, such as with kidney transplant patients. Id. at 21. Meanwhile, Dr. Alvin Friedman-Kien of the New York University Medical Center saw one young man with Kaposi's sarcoma, an uncommon, slow developing cancer usually found in elderly men of Mediterranean extraction. Id. at 22. These doctors were the first to treat persons with what later became known as acquired immune deficiency syndrome. Id.


5. See Dentists Found at Small Risk to AIDS: LA Task Force, 16 A.DA. News, Sept. 2, 1985 at 14 [hereinafter cited as LA Task Force]; see also Bennett, Epidemiology Update, AM.J. OF NURSING, Sept. 1985, at 969; Clark, supra note 1, at 20. According to Dr. William A. Hazeltine of Boston's Dana Faber Cancer Institute, "once infected a person is infected for the rest of his life." Id.

6. See South Florida Blood Service, Inc. v. Rasmussen, 467 So.2d 798, 800 (Fla. Dist. Ct. App. 1985). In this case the court held the respondent was not entitled to the list of blood donors for discovery purposes in order to surmise which blood donor has AIDS. Id.

7. Reported accounts indicate that victims of AIDS have been faced with social censure, embarrassment and discrimination in nearly every phase of their lives. Id. According to Leonard Graff, the Legal Director of the National Gay Advocates in San Francisco, the current AIDS epidemic has caused a rash of hysterical, “irrational” behavior. See DeBenedictis, AIDS Presents Unique Challenges to Legal System, 112 N.J.L.J. 358 (1983). For example, one woman tried to cut-off her gay ex-husband's visitation rights for fear her
worse than anything mankind has seen before." As well as being a medical and public health emergency, this epidemic has spurred new legal issues, many of which have not yet been fully explored by the judiciary and legal commentators. This article will briefly discuss the medical background of AIDS and then analyze, from a constitutional perspective, proposed measures to quarantine known AIDS victims and to bar AIDS-afflicted schoolchildren from regular classes. Finally, this article will explore the conflict between the state reporting statutes and the confidential relationship between the doctor and patient, as it relates to AIDS.

I. HISTORICAL AND MEDICAL BACKGROUND

The medical community first identified the AIDS virus in 1981. The prevailing theory is that the virus originated with monkeys in Central Africa. AIDS spread from Africa to the Caribbean and was acquired by the American tourist. Although the search for a cure has accelerated in the past few years, no cure has yet been recognized. Children would get AIDS. Id. at 358. At a trucking company, a healthy, gay staff member was made to use the bathroom outside on the loading dock. Id. In California, a healthy man was fired from his job, when his medical records were leaked and they incorrectly stated he had AIDS. See Comment, AIDS-A Legal Epidemic, 17 AKRON L. REV. 717, 735 (1984). As a result, his house was burned down by vandals. Id. at 735. In New York, parents of a dying teenager refused a blood transfusion, for fear the patient might contract AIDS. Newsday, Nov. 21, 1985, at 40, col. i.

5. Clark, supra note 1, at 20.
6. See Reaves, AIDS and the Law, 69 A.B.A.J. 1014 (1983). For instance, human rights agencies in California and New York have received numerous complaints from homosexuals alleging employment discrimination as a result of their fear of AIDS. See Comment, supra note 4, at 755. In Shuttleworth v. Broward County, a former analyst for the county budget office was fired after it was revealed the plaintiff had AIDS. See Tarr, AIDS Victims Face Bias Too, 7 NAT'L L.J. 30 (1985). Another legal issue yet to be resolved is whether insurance companies may refuse to pay for AIDS medical treatment since it is still considered experimental. See Reaves, supra, at 1014. In California, AIDS victims have brought suit against the state for refusing to meet Medi-Cal payments for AIDS treatment. See Comment, supra note 4, at 753. The American Civil Liberties Union's attorneys came within one day of suing the Air Force for discharging an enlisted man afflicted with AIDS. See DeBenedictis, supra note 4, at 358. Upon review by a superior review board the airman was granted temporary retirement with full medical benefits. Id.
7. See Clark, supra note 1, at 20.
8. See id. at 20.
9. See id. at 23.
10. See id. at 26. The search for drugs to treat AIDS is accelerating rapidly; in the last year more than one hundred potential compounds have been screened. Id. Researchers are
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The AIDS virus, medically labeled human T-cells lymphotropic virus III (HTLV-III), attacks a subgroup of white blood cells, known as the T-4 lymphocytes, which play a major role in defending the body against infections. A gene in the virus creates a protein which takes over the infected T-cell, and new viruses are produced at an accelerated pace. This creates a cellular immunodeficiency, rendering the body defenseless to a vast array of secondary illnesses.

At present, AIDS is known to be transmitted through sexual activity which involves the exchange of bodily fluids, infusions of contaminated blood and by injections with infected hypodermic needles. The pathogenesis of the AIDS disease remains a mystery. Testing new drugs such as suramin, ribavirin and HPA 23 with the hope that they suppress the virus that causes AIDS. See LA Task Force, supra note 3, at 14.

HPA 23 was the drug used to treat Rock Hudson at the Pasteur Institute in Paris. See Clark, supra note 1, at 26. This drug has been rejected because of its toxic nature. Id. Suramin, which is currently being tested by American researchers, is designed to prevent the AIDS virus from entering healthy cells. Id.

A vaccine would be the ideal way to overcome the AIDS epidemic, but it probably will not be available in the near future. Id. Vaccinations against viruses are generally made from the protein antigens on the surface of the organism and it is these antigens that set off production of antibodies. Id. at 27. The problem with the AIDS virus is that unlike most viruses it is prone to mutation, hence its antigens keep changing. Id. The mutability of this virus renders conventional vaccinations useless. Id.

11. See Clark, supra note 1, at 22.
12. Id.
13. Id.
14. See Comment, supra note 4, at 723. As a result of this dysfunction the body becomes a defenseless host to an array of infections or rare cancers, notably a previously exotic malignancy known as Kaposi sarcoma. See LaRocca v. Dalsheim, 120 Misc. 2d 697, 700, 467 N.Y.S.2d 502, 505 (Sup. Ct. Dutchess County 1983). Kaposi sarcoma has surfaced in thirty percent of all AIDS cases. Id. Meanwhile, a variety of pneumonias have appeared in fifty percent of all AIDS cases. Id.

AIDS has a broad range of symptoms such as: swollen glands, fatigue, malaise, fever, night sweats, diarrhea and a gradual loss of weight. See Clark, supra note 1, at 24. In addition, the virus sometimes invades brain cells, causing some victims to suffer from mental and neurological problems such as forgetfulness, impaired speech, tremors and seizures, progressing to dementia. Id. at 24.

15. See Comment, supra note 4, at 724. The cause of AIDS is essentially unknown, but the established forms of transmission are through sexual contact (especially anal intercourse), contaminated needles and by the percutaneous inoculation of infected blood or blood products. Id. The virus can be transmitted through semen. See Clark, supra note 1, at 24. According to Walter Bond, M.S., a microbiologist with the CDC's Hospital Infections Program, AIDS can be "vertically transmitted from an infected mother to a child in utero." See LA Task Force, supra note 3, at 15. Finally, the virus has been found in saliva, but there is no proof yet that links saliva exchange with transmission. Id.
tery to the medical community, causing speculation and fear with every new case.16

Since 1979, over 12,000 cases of AIDS have been reported to the Center for Disease Control (CDC) in Atlanta, Georgia.17 According to CDC figures, approximately 6,170 people have died from AIDS thus far, and it is estimated that AIDS-related deaths will double in the next twelve to fourteen months.18 Nearly seventy-five percent of AIDS victims are homosexual or bisexual, five percent are hemophiliacs, seventeen percent are intravenous drug users, and the remainder of the victims have no known cause of origin.19

The known modes of transmission are substantiated by the category of people suffering from AIDS. See Comment, supra note 4, at 724. AIDS transmissibility by sexual intercourse accounts for the high incidence of AIDS amongst homosexuals. Id. Its pathogenesis through contaminated needles answers for the high rate of AIDS amongst drug users. Id. Finally, its transmission through contaminated blood accounts for the high incidence of AIDS in hemophiliacs and recipients of blood transfusions. Id.


18. Id.

19. See LaRocca v. Dalsheim, 120 Misc. 2d 697, 701, 467 N.Y.S.2d 302, 306 (Sup. Ct. Dutchess County 1983). In addition, European countries have also been afflicted. See Clark, supra note 1, at 23. Thus far, approximately three hundred cases have been reported in France, one hundred sixty-two in West Germany, and one hundred eighty-four in Great Britain. Id. Also, over five hundred case have been reported in Haiti. Id. According to CDC figures since 1979, the following chart represents the impact of AIDS by states:

<table>
<thead>
<tr>
<th>STATE</th>
<th>CASES</th>
<th>DEATHS</th>
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<tbody>
<tr>
<td>New York</td>
<td>4,388</td>
<td>2,274</td>
</tr>
<tr>
<td>California</td>
<td>2,799</td>
<td>1,205</td>
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<tr>
<td>Florida</td>
<td>866</td>
<td>437</td>
</tr>
<tr>
<td>New Jersey</td>
<td>751</td>
<td>465</td>
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<tr>
<td>Texas</td>
<td>622</td>
<td>350</td>
</tr>
<tr>
<td>Illinois</td>
<td>255</td>
<td>137</td>
</tr>
</tbody>
</table>

Id. at 14. Ninety percent of AIDS victims are between the ages of twenty and forty-nine, and the majority of the victims are residents of large cities such as New York, San Francisco and Los Angeles. Comment, supra note 4, at 720. Over forty-five percent of all AIDS victims reside in New York, four times greater than San Francisco, the city with the next highest amount. LaRocca v. Dalsheim, 120 Misc. 2d 697, 701, 467 N.Y.S.2d 302, 306 (Sup. Ct. Dutchess County 1983).
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II. QUARANTINE OF KNOWN AIDS VICTIMS—A PUBLIC HEALTH MEASURE

In the United States, public health measures have been assumed by both the federal and state governments. Although the United States Constitution makes no mention of health care jurisdiction, states traditionally have handled these matters under the auspices of their police powers. Under the states’ police power the gov-

20. See G. McKray & J. McKray, Federal Health Laws in the United States in Legal Aspects of Health Policy-Issues and Trends 33 (R. Roemer & G. McKray 1980). The United States Government has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. As a response to the augmented demands of an increasingly complex society, the federal government has taken a far more active role in the field of public health. See K. Wing, The Law and the Public Health 17 (1976). The federal government has increased Commerce Clause power to regulate goods after they have passed through interstate commerce, as well as activities that are only indirectly related to people or goods that have previously passed through state borders. Id.

For example, Congress has often used the Commerce Clause as a basis for passing direct regulations in the field of public health. See Morgenstern, The Role of the Federal Government in Protecting Citizens from Communicable Disease, 47 U. Cin. L. Rev. 537, 545 n.61 (1978). Federal regulation of foods, drugs, meat, poultry, and biologic products have all been based on the powers deriving from the Commerce Clause. Id. at 545 n.61.

The Constitution reads: "[t]he Congress shall have the power to lay and collect Taxes." U.S. Const. art. I, § 8, cl. 1. The courts have interpreted the federal constitutional power to lay and collect taxes as including the power to control and regulate whatever federal tax revenues are spent for. See Morgenstern, supra at 545. Congress uses the states to effectuate federal policies. Id. The federal government provides funds for a state program, and as a condition to obtain the federal funds, the state must adopt the federal standards. Id. For example, the CDC issues standards for the establishment of vaccination programs. Id. at 545 n.62. If the state adheres to the federal standards, the CDC will then administer the funds to the state. Id. at 545 n.62.

21. See Jacobsen v. Massachusetts, 197 U.S. 11 (1905) (quarantine valid exercise of police power); Railroad Co. v. Husen, 95 U.S. 465, 470-71 (1877) (police powers extend to promotion of health and safety); Barsky v. State Univ. of New York Bd. of Regents, 347 U.S. 442 (1953) (power of a state to establish and enforce standards of conduct relative to health is a vital part of police power); see also K. Wing, supra note 20, at 17. The tenth amendment of the U.S. Constitution states: "[t]he powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States
ernment may interfere whenever public interest demands. It is within the states’ domain to determine what measures are necessary to protect the public; and it is inevitable that individual rights will be infringed upon for the sake of the general welfare. In

respectively, or to the people.” U.S. Const. amend. X.

Since the federal government may only act where they have explicit powers, the state governments have broad inherent powers to act in areas where the federal government may not. See K. Wng, supra note 20, at 17. Under the American legal system the state governments may exercise all powers traditionally inherent in government itself. Id. The major constraints on the states’ sweeping powers are: “(1) the powers explicitly delegated to the federal government or prohibited to the states and (2) individual rights enumerated in state and federal constitutions.” Id. at 17-18.

One state power implied in our legal system is known as police powers, a term defined by courts as reasonable regulations which are necessary to preserve the public order, health, safety and welfare. Id. at 18. The Supreme Court has defined police power as:

[t]he authority of a state to enact quarantine laws and ‘health laws of every description’; indeed, all laws that relate to matters completely within its territory . . . According to settled principles the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.(citation omitted).


The states’ police power was the basis for: (1) the passage of water fluoridation laws; see Note, Constitutional Law—Due Process—Flouridation of Water, 38 Notre Dame Law. 71, 71 (1962); (2) the regulation of the medical profession; see Erlanger v. Regents of the Univ. of the State of New York, 256 App. Div. 444, 10 N.Y.S.2d 1015 (3rd Dep’t 1939); (3) restricting the use of municipal disposal sites; see Leimpeter’s Disposal Service, Inc. v. Mayor Council of the Borough of Carteret, 121 N.J. Super. 18, 21, 295 A.2d 411, 414 (N.J. Super. Ct. 1979); and (4) the regulation of massage parlors. Cianciolo v. Members of City Council, 376 F. Supp. 719, 720 (E.D. Tenn. 1974).

22. See Lawton v. Steele, 152 U.S. 133, 136 (1894). Courts have stressed the greatest asset our society possesses is our vast human resource. See People ex rel Barmore v. Robertson, 302 Ill. 422, 134 N.E. 815, 817 (1922). Justice Brown succinctly stated in the Lawton opinion:

[The] State may interfere whenever the public interest demands it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.(citations omitted). To justify the state in thus interposing its authority in behalf of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.


23. See Varholy v. Sweat, 153 Fla. 571, 15 So.2d 267, 269-70 (1943). Health measures may infringe upon constitutional rights when deemed reasonable. For example, such regulations may place limitations on the right to privacy where the individual and public health is involved. See Roe v. Wade, 410 U.S. 115, 150 (1973). Police powers in the sphere of public health measures may even infringe upon first amendments rights. See In re Gregory, 85 Misc. 2d 846, 580 N.Y.S.2d 620 (Family Ct. Kings County 1976). In this case, the respondent’s child suffered from several medical ailments which could easily be relieved. Id. at 846, 580 N.Y.S.2d at 621. The respondent contended that she was a member of the Church of God and Christ, and it is her religious belief God and Jesus will help her chil-

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order to justify such an infringement, any health measure must bear at least a rational relationship to its intended purpose or the courts will declare such measure unconstitutional. The AIDS crisis has created a whirlwind of proposed health measures, the constitutional validity of which has not yet been decided by the judiciary. In California, the State Department of Health outlined a policy whereby a local health department may quarantine

dren and accordingly refused to take her child for medical treatment. See id. at 847-48, 380 N.Y.S.2d at 621. The court held that freedom of religion does not justify practices which are inconsistent with the peace and safety of the state. See id. at 847-48, 380 N.Y.S.2d at 621-22.

24. See Schuringa v. City of Chicago, 50 Ill. 2d 504, 198 N.E.2d 326, 329 (1964), cert. denied, 379 U.S. 964 (1965). It is a settled concept of law that a police measure, to be beyond the pale of constitutional infirmity, must bear a rational relation to the public health. 198 N.E. 2d at 329. "Reasonable" regulation under a state's police power implies the regulation rests on adequate reason, and thus may not be arbitrary. Note, Health Care Regulations in California: CONstitutional? 11 PAC. L.J. 845, 854 (1980). If a health regulation's objective is within the state's regulatory power, its provisions then must have a real and substantial relation to that objective. Id. at 854. The constitutionality of police measures are determined by: (1) analyzing the regulation's purposes and; (2) ascertaining whether the regulation is related in a reasonable fashion to those purposes. Id. at 854.

25. See Lawton v. Steele, 197 U.S. 133, 136 (1894). For example, a statute which prohibited the transport of certain cattle into Missouri between specified dates in each year was held to be in violation of the Commerce Clause, and not a legitimate exercise of the state's police powers, even though the law was designed to prevent the spread of contagious diseases. See Railroad Company v. Husen, 95 U.S. 465, 468 (1877). Also, a health statute in New York which authorized the seizure and sale of all trespassing animals was held to be a deprivation of an individual's property without due process of law. See Rockwell v. Nearing, 35 N.Y. 302, 309-10 (1866).


27. A state legislature very often does not directly exercise all public health measures themselves. See Fleisher, THE LAW OF BASIC PUBLIC HEALTH ACTIVITIES: POLICE POWER AND CONSTITUTIONAL LIMITATIONS in LEGAL ASPECTS OF HEALTH POLICY-ISSUES AND TRENDS 9 (R. Roemer & C. McKray ed. 1980). Usually, a state legislature delegates its authority to an administrative agency, as in the case in California, and a local government. Id. The most common delegation in the public health area is when a state legislature authorizes a local board of health to implement a law that it passes. Id. For example, a legislature may pass a law, then grant local authorities certain powers in order to implement the law. Id. A common example of this is the inspection of restaurants. Id.

This delegation of power by the states to local authorities does have certain limitations. Id. First, these laws generally or specifically outline limits within which the designee can act, hence any delegation in excess thereof is invalid. Id. Furthermore, regulations must be enacted in a proper manner. Id.

All reasonable presumptions should be made in favor of a public health measure by the court. See Varholy v. Sweat, 153 Fla. 571, 15 So.2d 267, 269 (1943). Notwithstanding the court's strict construction of quarantine statutes, courts must allow latitude for the reasonable discretion of the authorities upon the facts of the case. See Comment, infra note 28, at 356. Broad discretion is given to the legislature in developing a suitable response to an epidemic. See id.
known AIDS victims. This proposed quarantine would only be a last resort after a four-prong approach has been exhausted.

A. The California Approach

When the California Health Department conclusively determines an individual has AIDS, he is personally contacted by a local health department staff member who requests that he follow certain recommendations to reduce risk of transfer. If the patient denies he has AIDS, the local health department may refer the patient to an AIDS support group. If the patient refuses to adhere to these recommendations, then the local health department will issue orders for modified isolation. These orders will outline quarantine procedures which will be taken if he or she is

28. Pagano, *Quarantine Considered for AIDS Victims*, 4 CAL. LAW. 17, 17 (1984). The California Department of Health Services, Infectious Disease Section, has proposed the following measures in response to a documented recalcitrant AIDS patient:

If it can be documented that failure on the part of the AIDS patient to follow recommendations given to him by the health department will result in significant exposure of sexual contacts (who are not aware he has AIDS) to AIDS, then we recommend the following action be taken:

1. Personal contact by local health department staff be carried out to specifically inform the patient in word and print of the need to adhere to public health recommendations such as abstaining from sexual activities which could transmit a possible AIDS agent to sexual contacts who are unaware that he had AIDS.

2. If the patient either denies that he has AIDS or is openly hostile and refuses to adhere to medical recommendations, the local health department may refer the patient to an AIDS support group and request the support group to contact and counsel the patient.

3. If the patient still denies that he has AIDS and/or refuses to adhere to recommendations, then the local health department will issue orders for his modified isolation. Such orders will detail the need to adhere to public health recommendations and also outline quarantine procedures which will be taken if he is found to be in violation of the orders.

4. If the patient ignores the modified isolation orders, then the local health department will quarantine the patient’s residence by posting a placard at his residence which indicates that a person with a communicable disease which can be transmitted by intimate contact resides in the household.


29. See supra note 28 and accompanying text.

30. See id.

31. See id.

32. See id.
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found to be in violation of the orders. Finally, if the modified isolation orders are ignored, then local health officials will quarantine the patient in his residence by posting a sign there which indicates that "a person with a communicable disease which can be transmitted by intimate contact resides in the household." It is suggested that the California quarantine proposal is a proper exercise of the state's police power, and does not violate the victim's due process or equal protection rights under the fourteenth amendment.

The fourteenth amendment affords an individual two types of due process: (1) substantive due process, and (2) procedural due process. Substantive due process requires that the state action have a rational relationship to a legitimate government end or the legislation will be struck down as an unconstitutional deprivation of an individual's right to liberty.

B. Substantive Due Process

In light of the high fatality rate of AIDS victims and medical uncertainty as to its pathogenesis, it is suggested, a quarantine

33. See id.
34. See id.

The Supreme Court has refused to state a rigid definition of due process of law, but it clearly encompasses all of the procedural and substantive legal protections traditionally enjoyed in this country. Id. at 31; see Rochin v. California, 342 U.S. 165, 169 (1952). Due process is a vague notion, but would probably include any state action that is a clear abuse or arbitrary exercise of power. Rochin, 342 U.S. at 169.

The Due Process Clause focuses on the treatment accorded to an individual person. Grad, supra note 20, at 30. This clause insures that no person shall be deprived of those rights which are implicit in the concept of ordered liberty, and guarantees decent and fair treatment under the law. See Rochin 342 U.S. at 169. Justice Frankfurter in Rochin stated:

The vague contours of the Due Process Clause do not leave the judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial processes. These are considerations deeply rooted in reason and in the compelling tradition of the legal profession.

See Rochin, 342 U.S. at 169-70 (citation omitted).
38. See J. Nowak, R. Rotunda & J. Young, supra note 35, at 443.

See Jew Ho v. Williamson, 165 F. 10, 22-23 (9th Cir. 1900) (court struck down quarantine since it was overbroad); In re Smith, 146 N.Y. 68, 40 N.E. 497 (1885) (court invalidated the quarantine of the petitioner who was afflicted with smallpox).
would have a rational relationship to the legitimate government concern of protecting the public's health. It is well established that public health is a prime concern of the state, and an individual's personal liberties may validly be infringed upon for the public good. Indeed the quarantines of individuals with dangerous diseases such as venereal disease and smallpox have been premised on this line of reasoning. Moreover, the state need not wait for a widespread outbreak of the disease before acting; public health measures may be preventative by design. Although the state may infringe upon personal liberties, in such a situation a quarantine must be reasonable in light of the risk involved. Currently, medical evidence indicates that AIDS can only be spread through intimate sexual contact, and the use of infected hypodermic needles, and not casual contact. However, it should be noted that at this

38. See infra note 57 and accompanying text.
39. Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905) (compulsory vaccination for smallpox is a valid health measure); see also, Barmore v. Robertson, 502 Ill. 422, 154 N.E. 815, 817 (1922) (a carrier of typhoid may be quarantined); Ex parte Caselli, 62 Mont. 201, 204 P. 364 (1922) (quarantine of a person suspected of having venereal disease upheld).
40. See Sierra Club v. Adams, 578 F.2d 389, 395 (D.C. Cir. 1977) (quarantine is a preventive measure); Board of Educ. of Mountain Lakes v. Maas, 56 N.J. Super. 245, 261, 152 A.2d 394, 405 (N.J. Super. Ct. App. Div. 1969) (school may require vaccines as a means of preventing spread of disease). In Maas, the Board of Education required smallpox vaccinations of all schoolchildren, notwithstanding the fact that there had been no local cases of smallpox for nearly a decade. 56 N.J. Super. at 267, 152 A.2d at 405. The court stated:

The absence of an existing emergency does not warrant a denial to the regulative agency of the exercise of preventive means. A local board of education need not await an epidemic, or even a single sickness or death, before it decides upon action to protect the public. To hold otherwise would be to destroy prevention as means of combatting the spread of disease.

Id. at 405.
41. Barmore v. Robertson, 134 N.E. at 819. The Barmore court stated:

One of the most important elements in the administration of health and quarantine regulations is a full measure of common sense. It is not necessary for the health authorities to wait until the person affected with a contagious disease has actually caused others to become sick by contact with him, before he is placed under quarantine.

Id. at 820.
42. See, e.g., Swift and Co. v. United States, 316 U.S. 216 (1942) (commissioner may prescribe reasonable quarantine measures in light of the factual circumstances); Clasin v. Indiana, 306 U.S. 439, 443 (1939) (statute held unreasonable quarantine, since risk did not warrant such measures); see also Damme, Controlling Genetic Diseases Through Law, 15 U.C.D. L. Rev. 801, 810 (1982). Courts must look closely at the factual circumstances surrounding the epidemic, such as investigating who has the disease, who is a carrier and what geographic area is susceptible to the disease in question. Id. at 810.
43. See supra note 28 and accompanying text.
time over five percent of AIDS victims have no known cause of origin, and the fatality rate of AIDS victims is a staggering fifty percent. Therefore, it is submitted, that any attempt to halt the spread of this deadly disease is reasonable.

C. Procedural Due Process

Procedural due process simply guarantees that the decision making process is fair, i.e., the individual is given adequate notice and an opportunity to be heard, before the state infringes upon a person’s right to life, liberty or property. It is submitted that the California proposal would afford an individual procedural due process. The proposed quarantine is only triggered after it is established that the individual has AIDS. Thereafter, the individual is given oral and written notice of recommendations, an opportunity for counseling, and a notice of modified isolation. In addition, it is evident that the victim is given the opportunity to legally contest the threatened quarantine early on.

D. Equal Protection

The Equal Protection Clause of the fourteenth amendment limits state actions when they classify certain individuals to shoulder more of a burden than others. If the state action affects a suspect classification or infringes upon a fundamental personal  

44. See Bennett, supra note 3, at 969 n.2.  
45. See supra note 28 and accompanying text.  
46. See Board of Curators v. Horowitz, 435 U.S. 78, 84-85 (1978); see also J. Nowak, R. Rotunda & J. Young, supra note 55, at 527.  
47. See supra note 28 and accompanying text.  
48. See supra note 28 and accompanying text. Courts have held that deprivation of liberty in the realm of public health measures may only be made after due inquiry and such inquiry must include notice and an opportunity to be heard. See Kirk v. Wyman, 83 S.C. 972, 65 S.E. 387, 390 (1909). In the case of an emergency, however, the state may act without a hearing in order to remedy the peril as rapidly as possible. See Lowe v. Conroy, 120 Wis. 151, 97 N.W. 942, 944 (1904). In addition, in public health, a formal hearing is not always required when it is apparent that the individual has not tendered any evidence questioning the validity of the measure. See Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 620-21 (1972).  
49. See supra note 28 and accompanying text.  
51. See City of New Orleans v. Dukes, 427 U.S. 297, 299 (1976) (inherently suspect classifications include race, religion or alienage); Maresca v. Cuomo, 64 N.Y.2d 242, 250,
right the action will be subject to "strict scrutiny" by the judiciary. Under the strict scrutiny test, the state must prove that the classification promotes a compelling state interest. On the other hand, if the action does not affect a fundamental right or include a suspect class, the state need only prove that the measure is rationally related to a legitimate government purpose. Since the California proposal would infringe upon the personal liberties of certain individuals, it must be analyzed from a strict scrutiny perspective. It is suggested that under a strict judicial review the proposed quarantine would be upheld. The compelling state interest is the promotion of public health. The state has an interest in

475 N.E. 2d 95, 98 (1984) (age is not a suspect classification); see also J. Nowak, R. Rotunda & J. Young, supra note 35, at 448 (suspect classification is one that is based on the traits of race, national origin, or status as a resident alien).

52. Fundamental rights are those which courts recognize as having a value which is essential to individual liberty. See J. Nowak, R. Rotunda & J. Young, supra note 35, at 457. This right has no textual basis in the Constitution. Id. For example, in Griswold v. Connecticut, 381 U.S. 479, 484 (1965), the majority opinion found a "fundamental right to privacy" in the penumbras of the Bill of Rights. The right to vote is fundamental. Dunn v. Blumstein, 405 U.S. 330, 336 (1972). Right to travel is a fundamental right. McCoy-Elkhorn Coal v. E.P.A., 622 F.2d 260, 266 (6th Cir. 1980).

53. Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas, 448 U.S. 1327, 1329 (1980). The Supreme Court held that a statute is violative of the Equal Protection Clause if it infringes upon a fundamental right, but is not justified by a compelling state interest. Id.

54. See, e.g., Lalli v. Lalli, 459 U.S. 259 (1978) (statute allowing illegitimate distributee estate assets strictly scrutinized); Jones v. Helms, 452 U.S. 412, 415 (1981) (if a court may construe a less restrictive means to serve same legitimate government purpose, overbroad statute is invalid); see also Comment, supra note 28, at 323-24.

55. See San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973) (right to education held not fundamental, so state must show a rational relationship to a legitimate state purpose); Madden v. Kentucky, 309 U.S. 83, 87-88 (1940) (states discretion to levy taxes not subject to strict judicial scrutiny unless oppressive or discriminatory); Richardson v. Secretary of Labor, 699 F.2d 632, 633 (6th Cir.), cert. denied, 461 U.S. 928 (1982) (unless a classification trammels fundamental rights or suspect classifications, the state measure need only be rationally related to a legitimate government interest).

56. See Bates v. Little Rock, 361 U.S. 516, 524 (1959) (where there is an infringement on personal liberty, state may prevail only upon a showing of a compelling interest); Seide v. Prevost, 556 F. Supp. 1121, 1136 (S.D.N.Y. 1982) (where personal liberty is involved, strict scrutiny is required by the Equal Protection Clause); McCoy-Elkhorn Coal v. E.P.A., 622 F.2d 260, 266 (6th Cir. 1980) (strict scrutiny not appropriate for the right to travel even though it is a personal liberty interest); Comment, supra note 28, at 323-24.

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reducing the spread of AIDS to protect the public, and any preventive measure promoting this goal is necessary and valid.58

III. BARRING SCHOOLCHILDREN WITH AIDS FROM REGULAR CLASSES

Currently, a great controversy is stirring throughout the country concerning the presence of AIDS infected children in regular classes.59 As a response, the National Education Association (NEA) issued a policy statement urging school districts to bar AIDS-afflicted schoolchildren from regular classes.60 The NEA recommends that this decision should be made on a case by case basis, by a team that includes the child's parents, medical and school personnel.61 "Every reasonable effort" would be made to provide alternative instruction for AIDS-infected children barred from regular classes.62 This arrangement strikes a balance between the right of the AIDS victim to an education63 and the right of healthy teachers and students to be free from exposure to this fatal disease.64

An individual is only afforded the protection of the fourteenth

58. See, e.g., Ex parte McGee, 105 Kan. 574, 185 P. 14, 15 (1919) (state interest in reducing spread of venereal disease rendered a quarantine valid); Board of Health of Covington v. Kollman, 156 Ky. 351, 160 S.W. 1052, 1054 (1913) (state has power to pass bottling ordinances to prevent spread of disease from milk); Birchard v. Board of Health, 204 Mich. 284, 169 N.W. 901, 902 (1918) (state has power to take measures to prevent the entrance of pestilential disease into a city).

59. See N.Y. Times, Sept. 13, 1985, at B3, col. 6. A case is being heard in the New York State Supreme Court, Queens County, before Justice Harold Hyman. Id. In this suit, School District 27 of Ozone Park sued to bar a second grade pupil with AIDS from regular classes until the child's identity was disclosed. Id. In New Jersey, a five-year old girl in Plainfield, who suffers from AIDS is being kept out of kindergarten, and in Washington Borough, N.J., a boy with AIDS and his exposed sister have been banned from school. See N.Y. Times, Sept. 10, 1985, at B5, col. 1.


61. Id.

62. Id.

63. See, e.g., Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (where a state has undertaken to provide education, it must be made available to all on equal terms); New York State Ass'n v. Carey, 466 F. Supp. 487, 503 (E.D.N.Y. 1979) (free appropriate education must be offered to all children within its geographic boundaries); Kruse v. Campbell, 451 F. Supp. 180, 188 (E.i. Va. 1977) (exclusion of a class of persons from public supported education is a violation of the Equal Protection Clause).

64. Cf. Hagler v. Larner, 284 Ill. 547, 120 N.E. 575, 578 (1918) (the right to enjoy school and other privileges may be exercised in an environment free of exposure to deadly diseases).
amendment when he is deprived of life, liberty or property at the hand of the state. It is suggested that any state action modeled after the NEA proposal would be constitutional since alternative means of education would be provided. Even under a constitutional analysis, this proposal does not violate the student's right to equal protection, procedural due process or substantive due process.

As in the case of quarantine, this measure would not constitute an equal protection violation because it promotes the state's compelling interest in public health. Both the parents of the victims and professionals are actively involved in the decision-making process and only known AIDS victims are affected. In light of the extensive opportunity to be heard and ample notice to the parents, it is suggested procedural due process requirements are met. Finally, the NEA recommendations do not violate substantive due process rights, since this measure is reasonable under the circumstances, and it could prevent further spread of the AIDS virus.


66. See, e.g., In re Handicapped Child, 20 N.Y. Dep't Ed. R. 69, 70 (1980) (school district obliged to provide suitable educational opportunities for handicapped students who cannot attend ordinary classes); In re Handicapped Child, 20 N.Y. Dep't Ed. R. 172, 174 (1980) (responsible to provide suitable opportunities, not the best possible program); In re Handicapped Child, 20 N.Y. Dep't Ed. R. 694, 696 (1981) (school district responsible to provide handicapped child with an appropriate educational program).

67. See supra note 57 and accompanying text.

68. See N.Y. Times, Oct. 10, 1985, at 28, col. 1. The NEA proposal closely resembles the procedures used when a handicapped child is placed in special classes. See N.Y. EDUC. LAW § 4402 (Consol. 1976). Under this statutory scheme, the decision as to placement of the child is made by a committee consisting of a school psychologist, physician, administrator and a parent of the child. N.Y. EDUC. LAW § 4402 (b)(1) (Consol. 1976).

69. See, e.g., Board of Curators v. Horowitz, 435 U.S. 78, 84-85 (1978) (respondents' dismissal from medical school comported with due process requirements since she was given notice and had an opportunity to be heard); Mahavongsan v. Hall, 529 F.2d 448, 450 (5th Cir. 1976) (school's dismissal of student on academic grounds without a hearing did not violate due process); Gaspar v. Bruton, 513 F.2d 843, 850-51 (10th Cir. 1975) (student's expulsion did not violate due process because she was aware of the failure to meet school standards). See GEE, SPERRY, supra note 65, at D-51. Procedural due process requires every student receive notice and an opportunity to be heard before being denied enrollment in regular classes. Id. at D-52. It provides a safeguard to protect students from arbitrary and capricious acts by school authorities or other government authorities. Id.

70. Cf. Hagler v. Larner, 284 Ill. 547, 120 N.E. 575, 578 (1918); see also GEE, SPERRY, supra note 65, at D-51. Substantive due process, in relation to public schools, requires the school's administration to demonstrate the denial to the student of their right to life, lib-
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stated that schoolchildren may be barred from regular classes when they contract a disease that is both "dangerous and contagious."71 AIDS, which has a fifty percent fatality rate, no known cure, and a minimal chance of recovery, can certainly be deemed "dangerous."72 Furthermore, the Viemeister court's use of the word "contagious" is apparently based on the fear of possible transmission of the disease.73 Since the medical community has not yet uncovered all of the methods by which AIDS may be transferred, the AIDS virus could possibly be transmitted in the school environment and therefore would fall into the Viemeister
notion of "contagious". Therefore, it is suggested, that in light of the Viemeister decision, the NEA proposal would be upheld by the courts as a reasonable measure in light of the risks involved.

IV. CONFIDENTIALITY AND THE STATE REPORTING STATUTES

While state dealings with the AIDS epidemic may be effectuated through quarantine measures and special AIDS classrooms, such measures hinge on the state’s ability to identify those afflicted with AIDS. Therefore, state reporting statutes which impose a duty on doctors and other health care professionals to report AIDS victims to the appropriate health officials should be effectuated, even though this would effectively vitiate the doctor/patient confidential relationship. Doctors and other medical professionals who come into personal contact with the most intimate personal information about their patients have a legal duty not to reveal this information. The theory is that confidentiality allows the medical professional to procure facts which aid in the treatment of the patient. Since the patient is often in a vulnerable position if this

74. See Bennett, supra note 3, at 689. AIDS can be spread in a manner similar to hepatitis B. Id. In New York City, an administrative agency recommended that retarded schoolchildren with hepatitis B be placed in separate classes due to fear of the spread of this disease. See New York State Ass’n for the Retarded v. Carey, 466 F. Supp. 487, 493 (E.D.N.Y. 1979).

75. Cf. Gellman, Prescribing Policy: The Uncertain Role of the Physician in the Protection of Patient Privacy, 62 N.C.L. REV. 255, 274 (1984); see N.Y. ADMIN. CODE tit. 10, § 24.1 (1983); According to the New York State Sanitary Code: "[a]ll cases or suspected cases of Acquired Immune Deficiency Syndrome shall be reported to the Commissioner of Health, by city, county and district health officers, physicians, hospital administrators, laboratories or persons in charge of State institutions." Id. This measure was passed as an emergency measure in June 1983, and was made permanent in October 1983. See N.Y. ADMIN. CODE tit.10 § 24.1 (1983).


77. See Horne v. Patton, 291 Ala. 701, 287 So.2d 824, 829-30 (1974) (medical doctor under general duty to disclose patient data); Cannell v. Medical & Surgical Clinic, 315 N.E.2d 278, 280 (Ill. 1974) (physician's responsibility to protect the patients medical records results from the confidential nature of this relationship); Smith v. Driscoll, 62 P. 572, 572 (Wash. 1917) (physician breach of the doctor/patient confidential relationship provides patient with a remedy at law); see also Gellman supra note 75 at 271. In addition, a doctor when taking the Hippocratic oath ethically binds himself or herself to keep patients' records confidential. Id. at 267.

78. See In re Grand Jury Proceedings [Doe], 56 N.Y.2d 348, 352, 437 N.E.2d 1118, 1123 (1983), 452 N.Y.S.2d 361, 366; see also Winslade, Confidentiality of Medical Records-An Overview of Concepts and Legal Policies, 9 J. LEGAL MED. 497, 503 (1982) (purpose of confidentiality to promote patient trust and to facilitate truthful and complete disclosure of
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sensitive information is transferred, he is more likely to speak openly if the transfer is confidential. Therefore, in general, the data on a patient’s chart is confidential and cannot be disclosed without the patient’s permission.

Although confidentiality is essential to the doctor/patient relationship, there are legitimate reasons for restricting the scope of confidentiality. Since general public safety is considered more important than confidentiality of health records, the protection of confidentiality ends where the public peril begins. The importance of public safety not only eliminates confidentiality, but in certain situations puts an affirmative duty on the treating medical professional to report the patient’s condition to the appropriate authority.

For example, doctors are required to report any information necessary for good health care. Confidentiality may shield the patient against harm to reputation, employment, and personal relationships. See Winslade, supra note 78, at 505.

79. See Winslade, supra note 78, at 503.

80. Anker v. Brodnitz, 98 Misc. 2d 148, 154, 413 N.Y.S. 2d 582, 586 (Sup. Ct. Queens County 1979) (cause of action may be maintained against a doctor who discloses patient’s confidential information without authority); Doe v. Roe, 93 Misc. 2d 201, 210, 400 N.Y.S. 2d 668, 674 (Sup. Ct. N.Y. County 1977) (physician who enters into agreement with patient impliedly covenants to keep all disclosures in confidence); Felis v. Greenberg, 51 Misc. 2d 441, 443, 275 N.Y.S. 2d 288, 290 (Sup. Ct. Kings County 1966) (physician’s furnishing of information to insurance company without patient authority violates confidential relationship).


In general, medical information is viewed as a rich depository of valuable data by third parties. See Gellman, supra note 75, at 261. The vast number of organizations that use medical information illustrates its tremendous value. Id. Among the recipients of this information are: (1) public health agencies for surveillance of diseases; (2) medical and social researchers for investigation of disease patterns; (3) employers for employer-related health insurance and employment suitability; (4) insurance companies in order to determine risks and liability; and (5) law enforcement agencies in criminal investigations. Id. at 261-62.

82. See Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 446, 551 P.2d 334, 337, 131 Cal. Rptr. 14, 20, (1976) (protective privilege ends where public peril begins); Simonson v. Swenson, 104 Neb. 224, 177 N.W. 851, 852 (1920) (disclosure of information by physician not betrayal of confidence if made in order to prevent spread of disease); Berry v. Moench, 8 Utah 2d 191, 351 P.2d 814, 817-18 (1958) (where life, safety and well-being are in jeopardy there is a conditional privilege to reveal information). See Winslade, supra note 78, at 515. This threshold is discretionary in nature and must be made by professionals and public officials who have made a careful assessment of the facts of the case. Id. at 515. See POZGAR, LEGAL ASPECTS OF HEALTH CARE ADMINISTRATION 17 (2d ed. 1983).

83. See Damme, supra note 42, at 806-07. For example, New York requires the report-
stances of gunshot wounds or child abuse even though under other circumstances this information would be confidential.\footnote{See supra note 81, and accompanying text.} Legislatures have acknowledged that the public welfare does supersede the individual's right to confidentiality with the implementation of reporting statutes.\footnote{Id.} The objectives of a reporting statute are to protect the health of the public through identification of infected persons and to gather epidemiological data in order to identify the severity of the epidemic.\footnote{Cf supra note 25 and accompanying text.} This information is then used to justify escalation of more restrictive control measures.\footnote{Id.}

Any successful treatment of the AIDS epidemic relies on the identification of those infected and it is imperative that treating physicians make this information available to local health agencies, so they may then take appropriate measures.\footnote{Id.}

\section*{V. Conclusion}

The AIDS crisis is probably the greatest health emergency to confront our nation in this half of the century. At this time there is no known cure for this deadly disease, and the medical community is still inconclusive as to its modes of transmission. Although all are guaranteed personal liberties in our Constitution, these liberties must sometimes be infringed upon in the face of a serious health emergency such as the AIDS crisis. Accordingly, under the guise of the state's compelling interest to insure the public health, the proposed quarantine and exclusion of known AIDS victims from schools would be constitutionally valid and proper. In addition, it is imperative that the confidential relationship between the doctor and patient be infringed upon to ensure prompt reporting of known AIDS victims, so that its escalation can be controlled.

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